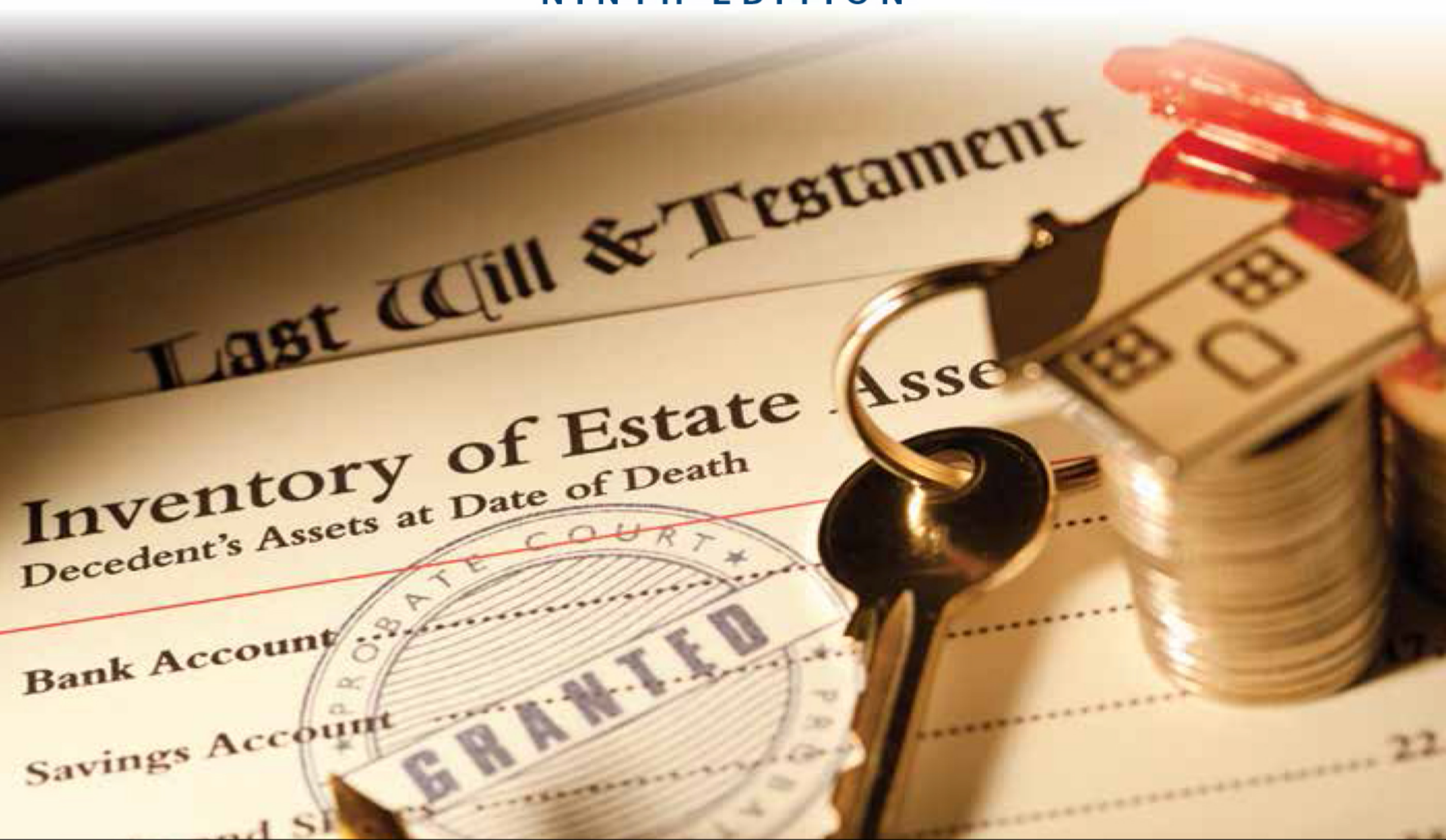
Jeffrey A. Helewitz

Basic Wills, Trusts, and Estates for Paralegals

NINTH EDITION



ASPEN PUBLISHING

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Ninth Edition

Hon. Jeffrey A. Helewitz
Special Referee, New York State Supreme Court (Ret.)

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Cover image: iStock.com/stocknshares

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Aspen Publishing
Attn: Order Department
PO Box 990
Frederick, MD 21705

eISBN 978-1-5438-4765-9

Library of Congress Cataloging-in-Publication Data

Names: Helewitz, Jeffrey A., author.
Title: Basic wills, trusts, and estates for paralegals / Hon. Jeffrey A. Helewitz, Special Referee, New York State Supreme Court (Ret.).
Description: Ninth Edition. | Frederick : Aspen Publishing, 2022. | Includes bibliographical references and index. | Summary: "Basic Wills, Trusts, and Estates for Paralegals provides a comprehensive guide to all aspects of the laws governing wills, trusts, and estates in a concise format to help paralegal students understand and execute wills, trusts, and estates" — Provided by publisher.
Identifiers: LCCN 2022021603 (print) | LCCN 2022021604 (ebook) | ISBN 9781543847642 (paperback) | ISBN 9781543847659 (ebook)

Subjects: LCSH: Estate planning — United States. | Executors and administrators — United States. | Wills — United States. | Trusts and trustees — United States. | Legal assistants — United States — Handbooks, manuals, etc.
Classification: LCC KF750.Z9 H45 2022 (print) | LCC KF750.Z9 (ebook) | DDC 346.7305/2—dc23
LC record available at https://lccn.loc.gov/2022021603
LC ebook record available at https://lccn.loc.gov/2022021604

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This is dedicated to all my wealthy friends and relations
whom I trust will remember me generously in their wills.

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Preface

Basic Wills, Trusts, and Estates for Paralegals is designed as an introductory text for students in paralegal programs. Its purpose is to provide a basic understanding of the legal principles involved in estate work. This book will provide all the information that a legal assistant will need to know in order to assist in the preparation and completion of all documents incident to an estate practice. It is not intended to be a seminal thesis.

Because estate law is primarily state statute oriented, a comparison study of all the state statutes has been included as the final chapter of this book. Throughout the work, specific reference is made to particular jurisdictions to highlight important or interesting aspects of particular state law. However, reference should always be made to the law of the jurisdiction in which the parties reside or own property.

Jeffrey A.
Helewitz
March 2022

Acknowledgments

I have been extremely fortunate to have had the kind assistance of several people in the preparation of this project. I would like to pay particular thanks to two former students, Wendy Shomer and Regina Norman, who generously provided succinct and helpful criticism of the work in progress. Words cannot express my gratitude to these two intelligent women. I would also like to thank two legal interns, Gulsun Turkmenogullari and Chidera Atuegbu, for their assistance in updating Chapter 9 of the sixth edition of this text.

I wish to thank all of the people at Little, Brown and Company who were involved in the production of the first edition and the team at Aspen Publishing. All of them have been unflaggingly cheerful, humorous, and encouraging.

One final thank you goes to the reviewers. Their careful efforts in reviewing the manuscript, and the many thoughtful comments and suggestions that resulted, are greatly appreciated.

Introduction or A Fable of Four Families

Once upon a time in the not too distant past, there lived four families of diverse ethnic, cultural, racial, and economic backgrounds who, by circumstances too strange to tell, all wound up at the same law firm for advice with respect to their estates. This book relates the odyssey of these four families as they tread the rocky path of estate planning and administration.

Who are these families?

First, there is the **Jones** family. Loretta Jones is a 23-year-old single mother who lives in the city in a one-bedroom apartment that she shares with Evan, her five-year-old son. Ms. Jones is a secretary who is going to school part-time in the evenings, studying to become a paralegal to make a better life for herself and her son. Evan is in kindergarten every weekday morning, and after school, Ms. Jones' mother, Aida, looks after him until Loretta comes home from work or school. Evan's father, Jason Leroy, lives in another city and occasionally sends Loretta some money for his son. Loretta's main concern is that, should anything happen to her, Evan would be looked after and his education would be provided for.

The **Bush** family lives in the same city as Loretta and Evan, but their circumstances are entirely different. Oscar and Hyacinth Bush have been married for almost 24 years and have one child, Byron, who is away at the state university. Oscar works for the city government, and Hyacinth takes care of their two-bedroom apartment. Oscar's parents are deceased and he has no siblings. Hyacinth has two sisters: Fern, married to Barney Potts, and Fleur Laplante, who is single. Hyacinth's aged and slightly senile father, David, lives with Fern and Barney in a nearby city. Fern and Barney have one child, a married daughter named Rose, and one grandchild, Rose's daughter Davida. Oscar and Hyacinth want to make sure that

there is enough money to see that Byron can complete his education and that they can enjoy a comfortable retirement.

The **Lears** are an elderly couple living in the suburbs. Dr. Kingston Lear is a partner in a small medical practice in the city. Donna Lear is a homemaker, active in several charities. The Lears have three grown daughters. The first, Regina, was divorced and has two children from her first marriage, Matthew and Mark Hahn. She also has two children from her current marriage to Leonard Doger, named Mary and Margaret. The Lears' second daughter, Grace, is unmarried and works overseas with the U.S. State Department. Her legal residence is still with her parents. Cornelia, the third daughter, is married to a doctor in partnership with her father and has one son, Anthony. Cornelia also has custody of Regina's two sons. Their father, Joseph Hahn, will have nothing to do with them and rarely pays the child support he is supposed to pay pursuant to the divorce decree between him and Regina. Regina's second husband, Leonard, doesn't like Matthew and Mark and physically abused them. Cornelia went to court and was awarded guardianship of the two boys. At the present time, Regina and Leonard are suing Kingston and Donna for title to the house in which Regina and Leonard live. The house was originally purchased by Kingston and Donna as an investment, but after her divorce the Lears let Regina live in the house. When Regina remarried, she and Leonard stayed in the house, claiming that the house was theirs, and the family is now involved in a bitter lawsuit over title.

The Lears have a much more complicated situation than the Joneses or the Bushes. The Lears have many valuable assets, have children and grandchildren to look after, and are in the middle of litigation with one of their children. They want to make sure that their grandchildren, Matthew and Mark, are protected and cared for, that Regina and Leonard do not wind up with the house, and that the other children and grandchildren are treated fairly when the Lears die.

Finally, there is **Tom Poole**. Tom is in his mid-thirties, is unmarried, and owns a cooperative apartment in the city. Tom, like Oscar, works for the city, and has managed, by extreme frugality, to acquire a sizable amount of cash and blue-chip stocks. Both of Tom's parents, Lottie and Simon, are living, and Tom has an older brother, Ken, who is also unmarried. Tom's brother makes a good living, and his parents, although retired, are fairly affluent. Tom wants to increase the size of his assets so that he will have a comfortable retirement and also wants to see that, in case of death, his estate goes to his friends rather than to his family members, who do not need his money.

These four families — Loretta Jones and her son Evan, Oscar and Hyacinth Bush, Dr. and Mrs. Lear, and Tom Poole — will be the ships we will guide through the murky waters of estate planning and administration to the golden shore of property distribution.

Instructor Resources

The product page for ***Basic Wills, Trusts, and Estates for Paralegals*** by Jeffrey Helewitz includes additional resources for instructors, including a comprehensive instructor's manual, test bank, and PowerPoint slides. All of these materials are available for download from the product page, which can be found by searching for the author's name at www.AspenPublishing.com.

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General Overview of Estate Planning and Estate Administration

LEARNING OBJECTIVES

After studying this chapter you will be able to:

- Differentiate between estate planning and estate administration
- Distinguish between short-term, mid-term, and long-term financial goals
- Discuss various types of estate planning strategies
- Analyze different types of life insurance policies
- Create an effective estate plan
- Discuss the functions of a personal representative
- Explain the standard of care required of a fiduciary
- Understand the role of a legal assistant in the estate administration process
- Differentiate between letters of administration and letters testamentary

- Create a family tree ticker

CHAPTER OVERVIEW

The purpose of this chapter is to provide a general overview and introduction to the concepts of estate planning and estate administration. For most people the word “estate” conjures up visions of mourners in black, bleak cemeteries and, sometimes, wicked stepparents who have control over all the family money. Few, if any, of these visions are true or accurate.

Estate planning is essentially a branch of financial planning. Its purpose is to help the individual acquire and accumulate assets so that all of his or her financial needs and desires during life can be met. The appropriate distribution of these assets on the person’s death is merely one aspect of overall estate planning. Rather than being concerned with a person’s demise, the estate planner is actually involved with a person’s life. If a person has no assets, there is nothing to distribute after death. The estate planner attempts to help the client to have assets sufficiently substantial so that there is a need to plan the distribution of these assets on death.

Estate administration, on the other hand, concerns the distribution of a person’s assets after death. One who administers an estate will be involved with passing title to property from the deceased to his or her heirs, according to the wishes of the decedent or the provisions of the state statutes; seeing that all taxes are paid; and ensuring the orderly conclusion to the person’s legal life. In other words, estate planning helps a person acquire assets during life, and estate administration helps distribute those assets upon the person’s death.

This chapter will discuss the various approaches that can be used for the proper planning and administration of an estate, the courts and statutes that are involved in both the planning and administration of the estate, and the role of the legal assistant with respect to the foregoing.

Estate Planning

Estate planning can be defined as the method whereby a person accumulates, manages, and disposes of real and personal property during his life and after his death. The primary function of effective estate planning is to meet the short-and long-term financial needs of the client and to see that the client's particular concerns can be met after his death. Although all estate planning is concerned with the acquisition of property with the least possible negative tax consequences, each person's financial plan will of necessity be different because of each person's unique financial needs.

Lawyers and financial planners are involved in creating an estate. The financial planner, usually certified, is conversant with all types of potential investments that can provide either capital growth or income. In order to see that the investment objectives designed by the financial planner are

met, the attorney is involved in the preparation of all legal documents pertaining to these investments. In each case, the legal assistant aids in gathering the information necessary to create the estate plan.

The first questions to be answered with respect to estate planning are: What are the client's current assets? Family situation? Financial goals? In order to be effective and appropriate, the estate plan must take into consideration all of these factors.

If a client has few assets, the first objective is to devise a method whereby he or she can accumulate some property. This requires a detailed analysis of all of his or her income and expenses and a determination of how much of that income is disposable. **Disposable income** is that income a person has after paying all taxes and expenses for a given period (a week, a month, etc.). It is only this money that can be used to acquire assets; the rest of the income is being used to support his or her current life. If a person has no disposable income, it becomes necessary to create a budget so that some income, however little, can be saved. Conversely, if a person has a great deal of disposable income, it is necessary to see that the income is appropriately invested so as to meet the future financial needs of the client.

EXAMPLES:

1. Loretta Jones has a very modest salary. At the end of the month, after paying rent, utilities, food, tuition, and so forth, she has very little left as disposable income. Loretta needs to find out whether there is some way she could better manage her money so as to accumulate some savings.
2. Tom Poole spends very little of his actual income. At the end of the month he has several thousand dollars left. Tom needs to find appropriate investments for his disposable income to make it productive: that is, to produce more income or growth.

Each person's family situation helps determine his or her financial needs. The financial needs of a couple who is retired with grown children are entirely different from those of a single mother with a young child. Estate and financial planning is concerned with assuring that the financial needs of the client's family can be met:

providing for the education of a young child, purchasing a first home for a young couple, and ensuring a worry-free retirement.

Finally, the financial wishes of the client must be taken into consideration. It may be well to provide for needs, but most people would like to see their hard work result in more than just basic necessities. Vacations, buying a first or second home, purchasing a car or boat, and so on, are all worthwhile and psychologically necessary ingredients of each person's estate plan. These financial dreams or desires can be grouped into short-term goals, mid-term goals, and long-range plans. A trip at the end of the year is a short-term goal; buying a first home within five years is a mid-term goal;

and paying for a child's education is a long-term goal. All of these goals must be identified before an effective estate plan can be created.

EXAMPLE:

> Oscar and Hyacinth want to buy a vacation home that they can also use for their retirement. They would like to buy the home when Byron graduates from college. This is a mid-term goal, because Byron is already at university and will probably complete his education in the next few years.

It is beyond the scope of this book to discuss in detail all of the potential investment strategies that are available. That would be more appropriate to a treatise directly concerned with finance and investment. However, several financial strategies that are of particular concern with respect to estate planning should be noted.

When a long-term strategy has been devised for the client, it is necessary to see that this plan can still go forward even if the client dies. This is why the family situation is important. Most peoples' financial plans involve persons other than themselves — spouses, children, other relations, and friends — and as a part of financial planning the professional must make sure that a person's financial wishes for others can continue even after his or her death.

This end point of financial planning — what to do on death — raises two problems: (1) keeping the person's assets intact without having them diminished by taxes, and (2) identifying the most effective method of ensuring that the decedent's wishes are carried out with respect to transferring his or her property after death.

Many tax considerations are involved in planning an estate. The taxing authorities get involved during life (by taxing income and transfers of large amounts of property as gifts) and after death (by taxing the estate of a decedent). Good estate planning keeps the tax consequences to a minimum. Income taxation and state estate taxation are beyond the scope of this text, but a few words must be mentioned at this point with respect to federal estate and gift taxation. (A more detailed discussion appears where appropriate throughout the text and specifically in Chapters 3, 6, and 9.)

Only property that the decedent owns at the time of death is taxable (plus some property transferred within three years of death, under certain circumstances discussed in Chapter 8). This property is divided into two broad categories: **nonprobate assets**, which is property that passes directly from the decedent to another person without court authorization but by operation of law, and **probate assets**, which is property that must be transferred by order of the court. Both nonprobate and probate assets may be taxed, but if the decedent's assets have been properly managed prior to death, the estate may be able to reduce its tax burden. Certain strategies can be employed, depending on the client's particular circumstances, to divest the client of some of his or her property during life.

EXAMPLE:

Five years before his death, Kingston and Donna gave their home to their daughter Grace as a gift, even though they continued to reside in the home. On Kingston's death, because title belongs to Grace, the house is not part of Kingston's probate assets — he did not own the home when he died. However, the estate may still owe taxes on the value of the house. See Chapter 8.

Estate Planning Strategies

Gifts

The most common method whereby a person transfers property during life is as a **gift**, which is a transfer of property by a **donor** (giver) to **a donee** (recipient) without **consideration**. In other words, it is a transfer in which the donor gives, but does not receive, something of value. All property transferred by outright gift (in which the donor does not retain any interest) is owned by the donee and is not part of the donor's estate. However, the Internal Revenue Service imposes a tax on property transferred by gift. A donor may transfer, tax free, up to $16,000 (as of 2018) worth of property per donee per year. Gifts above this amount, except for gifts to spouses, to charities, or for tuition or medical care, must be reported to the IRS on Form 709. No tax is due on these gifts until the total amount exceeds the maximum size of an estate that may pass tax free because of the Unified Tax Credit (Chapter 8). Currently, the Unified Tax Credit is $12,060,000 and is adjusted periodically. Significantly, under these provisions, a surviving spouse is entitled to use any portion of the $12.06 million exemption that his or her deceased spouse failed to use in addition to his or her own $12.06 million exemption. This is referred to as portability, but to take advantage of this portability, the first spouse to die must elect such portability on his or her estate tax return. In other words, if the first spouse to pass away did not use any of the permissible credit and elected to allow the surviving spouse to use such exemption, the surviving spouse may have a total tax credit of $22.4 million. This amount continues until January 1, 2026, when it reverts back to $5 million. When the donor dies, the gifts reported on Form 709 are deducted from the dollar exemption permitted for the year of death. This tax exclusion means that a person may transfer much of his estate while he is alive and be able to see the recipients enjoy the property. (The amount of the gift exclusion is doubled if the gifts are made jointly by married couples.) Many states impose a gift tax; for information regarding state taxation, see Chapter 9.

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EXAMPLE:

When Kingston and Donna transferred title to the house to Grace, they paid a gift tax on the transfer. In this manner Grace received the house "tax free."

Title Transfers

Another strategy that can be employed to minimize estate taxation is to hold title to property in multiple ownership, such as a **tenancy by the entirety** or a **joint tenancy**. The specifics of these types of ownership will be discussed in detail in the next chapter, but for the moment its import is that, with certain types of multiple ownership, upon death the property passes immediately to the surviving owner. If certain legal steps are taken when title to the property is created, a portion of this property may be excluded from the client's taxable estate, and the surviving owner acquires the property immediately upon the client's death.

EXAMPLE:

Cornelia and her husband hold title to their house as tenants by the entirety. When her husband dies, as the surviving tenant, title to the house immediately passes to Cornelia. See Chapter 2.

Trusts

Establishing a trust has become a fairly common method of transferring property while alive so as to avoid estate taxation on death. Trusts will be fully discussed in Chapter 4, but for now be aware that, if properly drafted, a person can transfer his or her property while he or she is alive to a trust that is considered a separate legal entity, and so, upon death, the property is owned by the trust and not the decedent. Recently, the **living trust** (a trust established by a person that takes effect during his or her life) has become a popular strategy for estate planning. Be alert to the fact that creating a trust may have its own tax consequences, and, depending upon how the trust is created, it may still be considered part of the decedent's taxable estate, especially if the decedent continued to benefit from and/ or control the property in the trust.

Living trusts may only be beneficial for persons with a comparatively large estate. Note also that there are drawbacks to a person divesting himself or herself of property during lifetime, most notably the lack of control of the assets.

EXAMPLE:

In order to provide an income for their grandchildren, Kingston and Donna put a large sum of money into a trust, using the income from the trust to support Matthew and Mark. The trust stipulates that when Matthew and Mark become adults they will receive the money that remains in the trust.

Life Insurance

One of the most effective methods of leaving a fairly large amount of nonfederally taxable property is by the purchase of life insurance. Provided that the insured names a specific **beneficiary** of the policy (the person who is to receive the proceeds on death of the insured), the proceeds of the policy pass immediately to the beneficiary upon proof of the insured's demise and are not considered part of the decedent's assets. If, however, the insured retained **incidents of ownership** (that is, the right to change the beneficiary, pledge, borrow, or assign the policy), then the proceeds of the policy are considered part of the insured's estate and are fully taxable. See Chapter 8. Life insurance remains an excellent method for a person with few assets to leave his heirs well provided for.

Several different types of life insurance policies are available on the market today. **Term life insurance** is life insurance that is purchased at a relatively small premium but has no cash value (meaning that it cannot be surrendered for money), and the premium is increased every five or ten years as the insured ages. **Whole life insurance** policies have a cash surrender value representing the amount of premiums the insured has already paid and may be borrowed against. A **cash surrender value** means that the insured can cancel the policy and receive money at any time specified in the policy. The premiums for whole life are very high, but never increase as the insured ages.

Two other types of insurance policies are also fairly popular. **Limited payment life insurance** is a policy that has very high premiums, but the insurance is fully paid up in a relatively short period of time. With this type of policy the insured does not have to make life-long payments and has property rights in the policy when the premiums are paid. **Endowment policies** are insurance policies that are paid up in a set period of time (usually 25 years), at the end of which time the proceeds are paid to the insured, if alive, or to the named beneficiary if the insured is deceased. Both of these types of insurance policies carry very high premiums and are therefore most appropriate for persons with considerable disposable income.

Wills

Last, but definitely not least, estate taxation can be avoided or minimized and the person's wishes can be carried out by having a properly drafted will. A **will** is a written document that, if certain statutory

requirements are met, disposes of a person's property upon his or her death according to the wishes stated in the will. One of the greatest tax advantages that can be effected by a will is a **marital deduction**. Under current law, all property left by a deceased to a surviving spouse is considered to be a marital deduction that passes to the spouse tax free, regardless of the size of the estate. This tax advantage is only available to legally married couples, heterosexual or same-sex, and does not necessarily avoid taxation of that property upon the eventual death of the surviving spouse, depending on the financial size of the estate.

To qualify as a marital deduction, the property does not have to be transferred outright to the spouse. For example, favorable federal tax treatment is conferred on **Qualified Terminable Interest Property trusts (QTIPs)**, in which the spouse has the income of the property for life, but on the death of the spouse the property passes to other persons named in the trust. For a full discussion of this topic, see Chapter 5.

EXAMPLE:

> Barney, in his will, leaves all of his property to his wife Fern as a marital deduction. When Barney dies, all of his property goes to Fern, tax free.

In addition to the marital deduction, estates valued up to the lifetime exemption pass free of federal tax, even if there is no will. Does this mean that a person who has an estate of less than that amount does not need estate planning or a will? No. Even though the property may pass tax free, it is still important to see that the property goes to the people chosen by the client to receive the property, with as little legal confusion as possible. To this end, estate planning is always recommended.

How to Make an Effective Estate Plan

Estate and financial planning are merely methods of taking control of one's finances, so that present and anticipated financial needs and desires may be met and that property acquired during life can pass to those persons and institutions the decedent wishes to benefit on his or her death. Although estate planning is typically arranged by a financial planner or an attorney, the legal assistant plays a crucial role in gathering all of the important family and financial data the professionals will need to consider when drawing up a plan. Much of this information is the same information that will be needed in drafting a will.

The primary area of concern is the family situation of the client. As demonstrated by the four families of our situational analysis (below), each person's situation is different. Loretta Jones is young and has a small child

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to support and educate, whereas Tom Poole is single with no current or presumptive dependents. Loretta must plan for the future of her son in terms of basic needs, but Tom is free to indulge in personal desires. Every paralegal working in the estate field, as a first step, should determine the family situation of each client.

The second category of information that must be gathered is the present financial status of each client. This means ascertaining a person's income and its source (salary, interest, dividends, etc.) and all of his or her current assets. An **asset** is property that has a monetary value that is owned by an individual. Examples of assets are jewelry, savings accounts, cars, homes, and the like. Each asset should be categorized as **real property** (buildings, land, fixtures, and air and ground rights) or **personal property** (all non-real property, such as jewelry and cash). This financial itemization is not only important for estate planning, it is crucial in the drafting of a person's will and eventually in administering the estate. Also, one cannot decide where one is going until the starting point is known, and this determination of current assets establishes that starting point.

The next step involves planning for the accumulation of money and assets for the future. This is the work of the lawyer or financial planner, but the legal assistant may become involved in the drafting of legal documents associated with the accumulation of these assets, such as drawing up a contract for the purchase of a home or an employment contract for a client who accepts a better paying job. How these assets are accumulated depends on the risk aversion of the client. **Risk aversion** means the degree of risk a person is willing to endure in order to secure a return on his or her investment. For example, a **certificate of deposit** (a long-term interest bearing bank account) is government insured, and so has almost no risk, and consequently a small interest rate; a publicly traded corporate stock may have a greater rate of return, but the company may go bankrupt, leaving the investor with nothing. Therefore, the appropriate investment for each person is dependent upon the degree of risk of losing that investment he or she is willing to take.

The accumulation of assets must have some purpose, namely to meet the client's current and long-term financial needs. For example, Loretta Jones has a short-term need to be able to move to a larger apartment in a better neighborhood, or perhaps buy a house, and a mid-term need to pay for her son's education and medical expenses. In the long term, she would like to travel and have a comfortable retirement. The Bush family is older and their son is almost grown. Their immediate goal is to see that Byron can complete his education, and they would like to purchase a vacation home. Eventually, they would like to ensure a comfortable retirement that includes several trips each year. However, since each family is in a different financial situation and time of life, the appropriate method of accumulating assets to meet these goals will vary.

Finally, as the culmination of this plan, it is necessary to see that, should something happen to the client, the client's survivors could continue to live in the manner the deceased would wish. To this end, it may become necessary to draft various legal documents to ensure the continuation of the client's general financial plan, such as a will, a trust, guardianship papers, and so forth.

SITUATIONAL ANALYSIS

How would the foregoing discussion of estate planning affect our four families?

Loretta Jones

Ms. Jones, at the present time, has very little disposable income. As previously stated, disposable income is that income a person has after meeting all current expenses; it is also referred to as **discretionary income**. Loretta is not well paid and is going to school at night. She is responsible for a five-year-old son. In these circumstances, probably the best plan for Loretta would be to purchase term life insurance. With term life insurance the premiums are low, especially because of Loretta's age, but the proceeds of the policy can be large enough to ensure that Evan can be taken care of financially should something happen to Loretta. Provided that Loretta does not name her own estate as the beneficiary of the policy and she relinquishes all rights of ownership, the proceeds of the policy will pass directly to Evan and not be considered part of Loretta's taxable estate. This means that the entire proceeds will go to Evan tax free. In this fashion Loretta can leave Evan several hundred thousand dollars upon her death tax free, far more than she could accumulate at the present time with even the most severe of savings plans.

However, Evan is only five years old. A five-year-old is incapable of handling hundreds of thousands of dollars. Therefore, Loretta should create a trust into which the insurance proceeds are placed for Evan's benefit. Someone with more maturity will manage the funds in order to produce an income to support Evan until he is an adult. A full discussion of trusts will appear in Chapter 4.

Finally, because Evan is a minor, he will need someone to be his legal guardian to raise and be legally responsible for him if Loretta dies. Although Evan's father is alive, he lives in another city and has little contact with Evan. Loretta's mother, Aida, currently takes care of Evan, and it would seem likely that Loretta would wish her mother to be Evan's guardian. Therefore, Loretta will need, at the very least, to draw up guardianship papers or perhaps a will that includes a guardianship provision. Because Evan's father may complain that guardianship of his son is being given to someone else, it would be best to try to work out this problem as soon as possible.

Oscar and Hyacinth Bush

The Bushes are older than Loretta and are in better financial shape. Their son is already at university and is no longer a minor. Their financial goals are to buy a vacation/ retirement home and to have a comfortable

retirement. Also, as a government employee, Oscar has a substantial pension and retirement plan, and the government provides him with a life insurance policy. Under these circumstances, the Bushes can assume some risk in their investments in order to achieve their goals. In their case it must be determined first how Oscar's pension plan works. Are the payments sufficient to support a retirement they would enjoy? Would Hyacinth still receive benefits as Oscar's widow? Once Byron finishes school, the money the Bushes spend on tuition can be used to purchase their vacation home, but how should they hold title? If they are tenants by the entirety, each spouse will automatically acquire the property on the other's death, but when the survivor dies it will be taxable. Might it make sense to put title in

Byron's name, or in the name of all three of them as joint tenants, so that the house will eventually pass to Byron with the least amount of negative tax consequences? This question with respect to title will be discussed in the next chapter.

Hyacinth has an elderly father. If anything happens to her, she may want to make sure that some property is used to help support him so that the entire burden does not fall on Fern. Hyacinth may want to establish a living trust now, providing a small income to her father for his life, and then have the money either revert to her or go to her son when her father dies.

Finally, to minimize estate taxes and to provide gifts for Fern, Barney, Fleur, Rose, David, and Davida, the Bushes need to create a will.

Kingston and Donna Lear

The Lears have a quite complicated family situation. Financially, the Lears are very well off, and because they are elderly, their financial desires are primarily concerned with providing for their children and grandchildren. Because of the current problem with Regina and Joseph, not only do the Lears need to settle the title to the house the Hahns are living in, but they also want to make sure that Regina and Joseph do not benefit from the Lears' deaths. However, the Lears do want to provide for their grandchildren and also see that their unmarried daughter has some financial security. This is a multidimensional problem that must be addressed from several different angles.

Because the grandchildren are minors, the Lears should establish some trusts for the grandchildren's benefit, keeping the capital out of the grandchildren's hands until they are adults. By proper draftsmanship, the Lears can make sure that the grandchildren are provided for, and that the grandchildren eventually receive the capital.

To provide for Grace, the Lears may want to transfer title to their house to her, or to put it into a joint tenancy. In this manner, when they die, the house will not be part of their probate assets, and consequently out of the reach of Regina. (See the section on will contests in Chapter 7.)

The Lears' main concern is that Regina and her husband will attempt to get as much of their estate as possible. Even if they have a will, and omit Regina, as their child, Regina may be able to challenge the will. Even if she doesn't win, the court costs will diminish the Lears' estate. By transferring

as much property as possible while they are alive, when they die there will be little left as probate assets. To achieve this end the Lears will have to take several different steps that will be discussed later in the text.

Tom Poole

Tom is probably in the most enviable financial situation. As a government employee he is guaranteed a decent salary and pension, and because his family is well off he does not have to worry about providing for anyone but himself. Therefore, Tom is in a perfect position to take advantage of some riskier investments in order to accumulate assets. Nonetheless, because Tom wants selected friends to inherit his property, it is necessary for Tom to execute a will that will distribute his assets to those friends and family according to his wishes. If Tom does not have a will his parents will most probably inherit his property, which is not Tom's wishes. In the context of estate planning, Tom is in the most straightforward situation.

Estate Administration

Eventually, no matter how careful, good, religious, and charitable a person is, he or she will die. Whereas estate planning is concerned with the acquisition of property when a person is alive, estate administration is concerned with the distribution of that acquired property once the person is dead.

Estate administration is governed by state statutes. Every jurisdiction has its own statute to cover the orderly administration and disposition of a person's estate. For a comparison of the different statutes, see Chapter 9. Each state has created a special court that has jurisdiction over a decedent's assets. These courts have what is referred to as **probate** authority, meaning that they are empowered to probate, or prove, a document to be a person's last will and testament, and to oversee the administration of a decedent's estate. A decedent's assets must be administered under the auspices of this court, regardless of whether the person died with a will. The paralegal's function will be to assist the attorney to see that a person's estate is properly administered according to the state statute and the dictates of the appropriate court.

During the estate planning phase, the client is alive and directly responsible for all of the decisions made with respect to his or her property. Once a client dies, the function of continuing the client's wishes is handled by a person, or persons, known generically as the **personal representative**, who is the person designated by the court to see that the decedent's property is distributed either according to the provisions of the will or according to the provision of state statute if there is no will.

A person who dies with a valid will is considered to have died **testate** (with a will or testament). The person designated in the will to be his or her personal representative is known as the **executor** (masculine) or **executrix** (feminine). If the will fails to name a personal representative, or the person so named cannot, for any reason, fulfill the functions of a personal representative, the court will appoint someone to be the personal representative. This court-appointed personal representative of a testator is known as an **administrator cum testamento annexo** ("with a will attached").

EXAMPLE:

In his will Tom appoints his brother Ken to be his executor. At Tom's death, Ken has moved to Europe and is not available to administer the estate. The court then appoints Tom's father, Simon, to be the administrator CTA to replace Ken, who cannot fulfill the functions of a personal representative.

A person who dies without a valid will is considered to have died **intestate** (without a will). In these circumstances, the court will appoint a personal representative known as the **general administrator** (masculine) or **general administratrix** (feminine). Should the general administrator fail, for any reason, to complete the administration of the estate, the court will appoint a successor administrator known as an **administrator de bonis non**.

EXAMPLE:

David Laplante dies without a will. Hyacinth, as his eldest daughter, asks the court to be his administratrix. Because Hyacinth is David's next of kin, the court appoints her to be the general administratrix.

Whether called an executor or administrator, the person is a personal representative, meaning that he or she is representing the interests of the decedent. The personal representative stands in the place of the decedent for seeing that the decedent's wishes are carried out, either by will or by statute, and as such is considered to be a **fiduciary**. A fiduciary is a person who is in a position of trust, and consequently is held to a ***higher standard of care*** than that of "ordinary" care. The personal representative has three main functions to fulfill with respect to the administration of an estate:

1. Collect, preserve, and manage the assets in the estate
2. Settle and pay all claims against the estate
3. Distribute the remaining assets to the heirs of the estate according to the will or the state statute

Generally, personal representatives hire lawyers to help them perform their functions, and the attorney delegates many of these responsibilities to the legal assistant. In this manner many paralegals act as the assistant to the personal representative under the supervision of the attorney.

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In order for a person to have the legal authority to act as a decedent's personal representative, he or she must be given the authority by the appropriate court.

All estate administration starts with a petition to the appropriate state court. In this petition a prospective personal representative requests the court to grant him or her the authority to act as the executor or administrator. The petition must be filed in the state in which the deceased was **domiciled** — the decedent's legal home and permanent residence. A person may have many residences but only one domicile. A decedent's domiciliary state has the primary jurisdiction over his estate, and each state determines whether a person is domiciled within its borders. All other states in which the decedent owned property have **ancillary**, or secondary, jurisdiction, limited only to assets located in that state.

EXAMPLE:

> Oscar and Hyacinth buy their vacation home in a neighboring state. When they die, that state has ancillary jurisdiction over the vacation home and its contents. The state in which they primarily reside has domiciliary jurisdiction.

There have been problems in determining a person's domicile in situations in which a deceased owned several homes and lived in each one several months each year. It is important during the estate planning stage to determine and substantiate a person's domicile. Such planning will avoid problems later.

The appropriate **venue** for filing the petition is in the court located in the county in which the decedent was domiciled. "Venue" refers to the physical location of the courthouse; even though the court is a state court, it has locations in every county, and the petition must be filed in the correct county.

Accompanying the petition must be a copy of the **death certificate**. Court officials are a cautious group and will not believe a person is dead even if you throw the body on the desk. The only proof they accept is a certified death certificate from the government that constitutes the official statement of death.

If the deceased died testate, the petition must also include the ***original*** of the will. Copies will not be accepted except in very limited and unusual circumstances. If the decedent died intestate, the petition must affirmatively state that no will exists. The details of the petition and its accompanying documents will be discussed in