2012

Inside Wills and Trusts: What Matters and Why

William P. LaPiana
New York Law School, william.lapiana@nyls.edu

Inside Wills and Trusts

What Matters and Why

William P. LaPiana
Rita and Joseph Solomon Professor of Wills, Trusts, and Estates
New York Law School

Wolters Kluwer
Law & Business

Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-8426-6

Library of Congress Cataloging-in-Publication Data

LaPiana, William P.
Inside wills and trusts : what matters and why / William P. LaPiana.
p. cm.
ISBN 978-0-7355-8426-6
1. Trusts and trustees — United States. 2. Wills — United States. I. Title.

KF730.L35 2012
346.7305'6 — dc23

2011052973

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, Best Case, ftwilliam.com and MediRegs family of products.

CCH products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleafs, books, and electronic products for comprehensive information in many areas of international legal practice.

Loislaw is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Best Case Solutions is the leading bankruptcy software product to the bankruptcy industry. It provides software and workflow tools to flawlessly streamline petition preparation and the electronic filing process, while timely incorporating ever-changing court requirements.

ftwilliam.com offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

MediRegs products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

Summary of Contents

Contents

understand. Writing this book has been a labor love. I offer it to all who read it in the humble hope that it will help them understand this interesting, dynamic, and very human area of the law.

William P. LaPiana
January 2012

1 Introduction

OVERVIEW

This chapter introduces the concepts that underlie the law governing how property is distributed after death. Few things are as personal as making sure our wishes regarding our property are carried out after we die. To understand the legal principles and rationales behind wills and trusts law, you must first grasp its most basic concepts: the distinction between property that is distributed through wills versus that distributed through intestacy statutes, non-will arrangements used to distribute property, the cast of characters involved, the procedural mechanisms that are involved in making gifts at death, and the general structure of the entire body of law. In other words, read this chapter carefully first!

D. PROCEDURES

1. Probate
2. Administering the Estate
3. The Cost

E. TAXES

Most of you, I'm betting, are law students currently enrolled in a course in wills and trusts, decedents' estates and trusts, or a course that has at least one of those words in its title. A few of you may be reviewing for the bar exam, and a few more might be general readers who simply want to explore the topic. Needless to say, you are all welcome. If you are a law student enrolled in your school's course in this topic, you should congratulate yourself because, unless you intend to follow a life of crime, you are taking the law school course that is most relevant to your life. Why? It's simple. We're all going to die, and we can't take anything with us: clothes, electronics, books, household items, cars, homes, and financial assets. All these things stay when we leave through the exit marked "death."

In a sense, however, we do not abandon our property when we die because we can leave instructions for what is to happen to it after we're gone. That's what this book is about—the law that provides the structures we use to make sure that our plans for what happens to our property after death are carried out. In other words, the law you will read about here governs how a person makes a gift at death. So let's get going!

A. Making a Gift at Death—Probate and Nonprobate Property

You probably remember the rules governing lifetime gifts from your course in property, rules that can be summed up in three words: intent, delivery, and acceptance. Let's discuss these in reverse order. Acceptance is something that the donee does, and the donee of a gift made at death, usually called a "beneficiary," has the choice whether to accept the gift or not. (There are statutes that govern a refusal of the gift, and we'll deal with those a bit later.) Delivery, of course, cannot be made by the donor who is, well, dead. (That's why the most general term referring to the person making a gift at death is **decedent**.) Some living person must be given the authority to carry out the donor's wishes. As for intent, a living donor can express intent in many different ways, but a decedent has to leave written instructions. For centuries, that writing has been the will. If a person does not give instructions by writing a will, the state provides a ready-made, one-size-fits-all set of instructions in its intestacy statute. You must understand the difference between property governed by a will or by the intestacy statute and property that is given away at death through other means, and so it is time to talk about probate property (sometimes called the probate estate) and nonprobate property.

When the owner of property dies, some of the property will be orphaned. That is, no living person will have the authority to transfer it. (Table 1.1 gives some concrete examples.) This property is literally stuck in place. Someone has to succeed to the decedent's authority over it, or, as we described earlier, someone has to acquire

the authority to deliver the property in accordance with either the decedent's will or the provisions of the intestacy statute.

TABLE 1.1 Why It's Probate Property

Property	What the Decedent Cannot Do
Checking account	Sign a check
Savings account	Sign a withdrawal slip
Stock certificate	Sign a stock power giving a broker authority to transfer the stock
Brokerage account	Give instructions to a broker
Motor vehicle	Sign the certificate of transfer
Real property	Sign a deed

This property is called "probate property" or the "probate estate." Why? **Probate** is the term applied to the legal procedures necessary to confirm the authority of the personal representative who deals with the decedent's property. If the decedent was **testate**, that is, left behind a valid will, the will must be admitted to probate as the true will of the decedent before the personal representative can act. Probate is described at greater length below, but for now you need to understand only that when probate is complete, a legal institution (usually but not always a court) issues a document to the appropriate personal representative that gives him the authority to distribute the decedent's property. Therefore, **probate property** is the decedent's property that can be disposed of after death only though the probate process.

It is possible to make arrangements during life so that one's property is not probate property. In the modern world, **nonprobate property** is usually subject to a contract between the property owner and some entity, which includes an agreement that the entity will deliver the property to a beneficiary selected by the property owner. One example you are almost certainly familiar with is a life insurance contract. As part of the contract, the insurance company agrees to deliver the death benefit to the beneficiary selected by the insured. Other examples include various sorts of retirement savings vehicles like IRAs and Keogh plans, which are managed for the plan owner by, for example, a bank or brokerage house under a contract that allows the owner to name a beneficiary who will receive any remainder of the property not exhausted at the time of the owner's death. For all arrangements like this, when the owner dies, the named beneficiary need provide only proof of death to the other party to the contract, usually in the form of a death certificate, and the property is delivered to the beneficiary.

Nonprobate property is not a completely new idea. In studying property, you no doubt came across two ancient forms of nonprobate property: the joint tenancy with right of survivorship and the legal life estate and remainder in real property. (Both are discussed in more detail in Chapter 6.) Until relatively recently in the history of Anglo-American law, the only way I could keep complete control of my

property and designate who would have the property after my death was to write a will. A non-will instrument such as a deed that purported to convey real property to my child at my death would be an invalid will substitute. The only way such an arrangement would be valid is if some interest passed to the beneficiary during my life. That was the case, at least, until what one eminent scholar has described as "the nonprobate revolution." In Chapter 6, we'll discuss this revolution in detail, but for now all you have to know is that through a combination of court decisions and statutes, all sorts of arrangements that were once invalid will substitutes now are valid methods of creating nonprobate property. In fact, every one of the types of property listed in Table 1.1 can be turned into nonprobate property, although not in every state.

There is another way to create nonprobate property, and it involves the use of **trusts**. The trust is one of the superstars of Anglo-American law, the legal systems descended from the English common law. It has a long, complex, and interesting history, the unraveling of which has presented challenges to generations of scholars. Today the trust is an important device for the management of property. Businesses, retirement schemes, mutual funds, and securitization vehicles can all be organized as trusts. Most people, however, think of trusts as things that are used to manage private wealth, and that is the sort of trust that is one of the subjects of this book. In other words, trusts are another way of making a gift, including a gift at death. There is much to learn about trusts in general, and revocable lifetime trusts in particular, and we will discuss them in great detail in Chapters 8, 9, and 11. For now, you should realize that a well-drafted trust can take the place of a will and is the ultimate device for avoiding the probate system.

Figure 1.1 sums up the basics of making gifts at death.

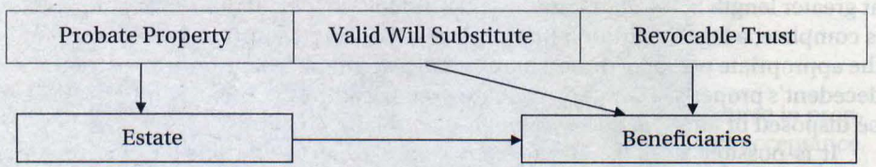

FIGURE 1.1 ROUTES FROM THE DECEDENT TO THE BENEFICIARIES OF GIFTS AT DEATH

B. Where Does the Law Come From?

Does this question's answer seem hopelessly obvious to you? After all, law comes from legislatures and courts, and is written in statute books and case opinions. That's an accurate answer, of course, but it does not come anywhere near doing justice to the complexity of the law of wills and trusts.

One complicating factor is the antiquity of the law. Human beings probably have been concerned about the disposition of their property after death for as long as the concept of "mine" has been part of human society, and that's a very long time. For our purposes, however, the story begins with the Norman conquest of England in 1066, when the Duke of Normandy, William the Bastard (yes, he was a nonmarital child; and yes, when you win, you get to write history and call yourself the

"Conqueror"), brought with him a new way to govern. **Feudalism** was founded on the idea that the king was the owner of all the land in the kingdom, which he parceled out to his major supporters in return for their promise to supply him with an army. Theoretically, the king controlled the disposition of the land on the death of its holder. Very quickly, however, land became heritable, passing from the decedent to his eldest son. It took a long time, but eventually statutes were passed allowing the making of wills of land. The story of personal property is somewhat different, but the important point is that the law of wills is statutory and that today in the United States, in theory at least, the legislatures of the various states are in complete control of the passing of property at death. In addition, many of the statutes are the descendants of much older statutes and decisional law so that there are a lot of fossils embedded in the modern law.

The law of trusts, on the other hand, was created by courts and, until the twentieth century in many states, was barely represented in the statute books. Indeed, some states had very little trust law of any kind. Many courts found themselves relying on decisional law from other jurisdictions, including England; and just as in the law of wills, there are lots of fossils embedded in the modern structure. At the beginning of the twenty-first century, however, the law of wills and trusts has entered a new era.

This new era began with the promulgation of the Uniform Probate Code (UPC) in 1969. Like the Uniform Commercial Code (UCC), the UPC was the work of the National Conference of Commissioners on Uniform State Laws (now known as the Uniform Law Commission (ULC)). Although the UPC has not been anywhere near as widely adopted as the UCC, it has been extremely influential, and parts of the code—sometimes individual sections, sometimes much larger portions—have been adopted in many states. The UPC from the beginning was inspired by the desire to simplify and modernize the substantive law of wills and probate procedure. Beginning in the 1990s, development of the UPC became closely linked to the creation of Restatement (Third) of Property: Wills and Other Donative Transfers. The spirit of Restatement (Third) is unabashedly reformist, and today the UPC proclaims in statutory form what the Restatement suggests should be the law applied by courts.

Sidebar

INHERITANCE AND THE CONSTITUTION

While it is absolutely true that the legislature is in control of passing of property at death and could theoretically abolish inheritance, it seems that public opinion is otherwise. In addition, there are two U.S. Supreme Court opinions that can be read as equating the abolition of the "right" to inherit and the "right" to make a gift at death with a taking, which is unconstitutional unless just compensation is provided. The cases, *Hodel v. Irving*, 481 U.S. 704 (1987), and *Babbitt v. Youpee*, 519 U.S. 234 (1997), invalidated federal statutes aimed at preventing further fractionalization of ownership interests in Native American lands by requiring that small interests pass to the tribe of which the decedent was a member rather than by intestacy or under the decedent's will.

Sidebar

FOSSILS

Among the fossils in the law of wills and trusts are lots and lots of vocabulary. Traditionally, a gift of land in a will is a "devise" to a "devisee," and a gift of personal property is a "bequest" to a "legatee." The corresponding verbs were used in wills: I devise Blackacre to my daughter, Jane. I bequeath my gold watch to my son, John. Today the noun "gift" and the verb "give" are perfectly acceptable, and everyone who takes under a will can be called a "beneficiary." It was also traditional to call a female testator a "testratrix," a female administrator an "administratrix," and a female executor an "executrix." Today these words are truly obsolete and we'll try to avoid them (although you will certainly see them even in relatively recent cases). Note too that the UPC calls every gift in a will a "devise."

The recent history of the law of trusts has had a similar development. The ULC promulgated the Uniform Trust Code (UTC) in 2000. Like the UPC, its development has been closely linked to a Restatement, in this case Restatement (Third) of Trusts. The UTC has been controversial to some degree, but on the whole it has been well received and more widely adopted than the UPC.

Both the UPC and the UTC are almost always extensively discussed in and sometimes are the very foundation of casebooks and teaching materials for courses in wills and trusts. Not only have both codes greatly influenced current statutes, but, taken together, they come closest to providing a national law of the subject. Nevertheless, state laws vary widely and often are at odds with many of the provisions of the UPC and UTC. In this book, I discuss the UPC and the UTC as well as other approaches to the legal questions the codes address.

The long history of the law that governs wills and trusts is responsible for another important characteristic of the law discussed in this book. There is a large body of case law dealing with most of the topics we will consider. Even when a statute is directly applicable to the question at hand, the statute may very well have been the subject of many decisions, and its meaning cannot be understood apart from those decisions. When you are seeking the answer to a question raised by a client's plan for disposition of her property at death or by possible litigation, remember that research must include both statutes and cases.

C. Persons

Understanding the cast of characters involved in the production and carrying out of plans to dispose of property at death, usually called **estate plans**, is an important first step in mastering the law.

(1) The Personal Representative

Personal representative is the most general term for the person who has the authority to deal with a decedent's probate property. If the decedent died intestate, the personal representative is designated by statute and called an **administrator**. A typical statute governing appointment of an administrator creates a hierarchy under which a surviving spouse has priority above all others. If the decedent had no spouse or the spouse cannot or does not wish to serve, an adult child is next in line. Under UPC § 2-302(a), any heir of the decedent may qualify if the surviving spouse does not; if 45 days pass after the decedent's death without anyone qualifying, a creditor of the decedent may seek to be appointed personal representative if the decedent died without a will (the UPC uses the term "personal representative" for both intestate and testate administration). In any event, the universe of persons who may be administrator is not unlimited. The significance of allowing a creditor of the decedent to be administrator will be clear in a bit.

If no one mentioned in the relevant statute becomes administrator, the state may provide someone either by appointing a lawyer or by providing a public official to undertake the task. In New York, for example, this official is accurately but unimaginatively called the "public administrator."

You no doubt have already concluded that one of the reasons to write a will is to make a gift at death different from what the intestacy statute provides. Even if the disposition of your probate property under the intestacy statute is exactly what you want, however, you may still want to write a will so that you can select the person you want to be personal representative. When named in a will, the personal representative is usually called an **executor**, although as noted above, the UPC uses the more general term "personal representative."

Although many (perhaps most) **testators** (persons who have a will) select an individual to be executor, under some circumstances the testator might name a bank. Most large commercial banks as well as many smaller (often local) banks have the legal authority to act as personal representatives or trustees. You might choose a bank to be executor if administration of the estate will be especially complicated because of the nature of the assets (think of closely held business interests or interests in complex investments vehicles) or because relationships among the beneficiaries are equally complex (think of descendants from multiple marriages). Of course, an individual executor can always hire appropriate expert help so that it is often not really necessary to make a bank executor to get the advantages of professional management of estate administration.

F A Q

Q: Can anyone act as executor?

A: The short answer is no. Every state sets a minimum age, and the drafters of the UPC suggest a minimum age of 21 (UPC § 3-204(f)(1)). In addition, the UPC in § 3-204(f)(2) also disqualifies "a person whom the Court finds unsuitable in formal proceedings." Other statutes may be more specific, disqualifying, for example, a convicted felon. Some states impose a residency requirement that prevents nonresident individuals from serving as personal representatives.

F A Q

Q: Can a partnership be a personal representative or trustee?

A: Because the duties of the fiduciary are enforced in equity and equity can enforce its decrees only by acting on the person (i.e., holding a person in contempt), only natural persons and specially qualified banks can be any sort of fiduciary. Therefore a law firm organized as a partnership, a professional corporation (PC), or a limited liability corporation (LLC) usually cannot be a personal representative or trustee (there are exceptions).

(2) The Trustee

Much of what the previous section has to say about personal representatives also applies to trustees of trusts created in wills or during life, including trustees of revocable lifetime trusts other than the settlor of the trust. Like personal representatives, trustees are **fiduciaries** (parties who are obligated to behave toward certain other persons in ways that further those other persons' interests rather than the fiduciaries') and can be either natural persons or banks with the appropriate legal authority. While many of the considerations in selecting a corporate executor apply to selecting

a corporate trustee, there is an additional consideration applicable only to trustees. Because even under the traditional rule against perpetuities a trust may last longer than the lifetime of an individual named as trustee, it may be especially wise to nominate a bank as trustee of a long-term trust.

(3) Beneficiaries

Because Anglo-American law generally gives a testator wide latitude in deciding the terms of a gift made at death, there are few constraints on selecting the persons or organizations to benefit from those gifts. As we will see in Chapter 13, there is law requiring that some family members, especially a surviving spouse, are not left out entirely, but on the whole almost anything goes. There are also broad restraints related to public policy. For example, a bequest to finance the overthrow of the Constitution would certainly be barred by public policy. The parameters set by public policy change over time, and what is unthinkable at one time might be unexceptional decades later.

(4) The Lawyer

Because wills and trusts law is so complex, many people seek the assistance of a lawyer in making their estate plans. But not all do; the number of reported cases concerning "homemade" wills and trusts indicate that many people, wisely or not, engage in do-it-yourself estate planning, and with advice and forms just a click away, the number of homemade documents is likely to increase.

Estate planning attorneys, like all lawyers, are governed by professional responsibility rules. Some aspects of that law are especially applicable to estate planning because a lawyer often has as the client not an individual but a couple, married or not. Even when the two persons involved have perfectly compatible ideas about making gifts at death — creating, for example, reciprocal wills in which both partners leave everything to the surviving partner or, if that partner dies first, to their descendants — one or both may want to keep certain facts hidden from their partner (e.g., the existence of a child by someone other than the current partner). If so, a lawyer's duties of loyalty and client confidentiality may conflict.

The universal suggestion for coping with this sort of problem is to have the couple sign a representation agreement in which they agree to one of two ways of handling the loyalty and confidentiality problems. The first is the option of transparency. By signing such an agreement, the clients consent to have all information shared with the lawyer communicated to both clients. The other, apparently less frequently used, option is to promise to keep each client's secrets from the other. Of course, having been entrusted with a secret, the lawyer may have to withdraw from representing the couple.

Example 1.1: Husband and Wife hire a lawyer to create reciprocal wills. Husband tells their lawyer, however, that he wants to make a provision in the estate plan for a nonmarital child that Wife doesn't know about. Based on their reciprocal wills, Wife is expecting the probate property of both clients to pass to their descendants. If she dies first, however, Husband may very well make a gift to the child, diminishing what passes to the descendants of both clients. Wife, then, is relying on a falsehood in making her will. If the lawyer has promised not to share secrets, then the lawyer's only option is to withdraw.

A related problem involves these same professional duties of loyalty and keeping confidences, but with regard to an entire family. It is common for one lawyer, perhaps with the help of the lawyer's partners and associates, to represent an entire family, handling tax matters, dealing with issues related to a family-owned business, and doing estate planning for the parents and adult children. The often close relationship between clients and their lawyer and the lawyer's position as trusted family counselor is much admired, but problems may arise if the lawyer does not make the limits of her representation clear at the outset.

Example 1.2: Husband and Wife have built up a business and have three children, who have varying degrees of interest in and aptitude for running the business after their parents' deaths. For years, one lawyer has handled all of the family's legal needs. When the time comes to plan what is going to happen after both parents die — called **succession planning** — the lawyer follows the parents' wishes, making all three children co-executors and equal beneficiaries of the will of the last parent to die, but also turning the parents' interest in the business into nonprobate property, perhaps by transferring it to a revocable lifetime trust. The favored child is successor trustee after the parents are dead, and the other children know nothing of the trust. The disfavored children all see the will and believe that the family business is to belong to all the children equally. When both parents are dead, the disfavored children are outraged to learn that, in effect, they have been disinherited.

Do the unhappy children have a claim against the lawyer? They may, if they can prove that they were clients of the lawyer as well and that he breached his duty of loyalty to them by not fully explaining the parents' estate plan. The attorney could have avoided this whole problem by initially informing the children that they are not his clients and that they should seek their own lawyers.

Another aspect of professional responsibility law that concerns estate planning lawyers is the extent of lawyers' potential liability for committing malpractice. When malpractice comes to light after the testator's death, beneficiaries traditionally have no cause of action against the lawyer because of lack of privity. They were not the lawyer's clients, and therefore the lawyer owes them no duty. The testator's estate might be able to recover the fees paid to the lawyer, but that will be cold comfort for the disappointed beneficiaries.

Beginning with a 1961 decision of the California Supreme Court, the privity barrier to recovery began to collapse,[1] and a good many state high courts followed California's lead by holding that disappointed beneficiaries could sue the lawyer who had prepared the will or created the estate plan for the decedent. Not every court jumped on the bandwagon, and beginning in the mid-1990s, several state supreme courts reaffirmed the privity barrier to suits by disappointed beneficiaries.[2] This rebuilding of the privity barrier may be an expression of disillusionment with malpractice litigation in general; but in any event, in the second decade of the twenty-first century, privity is not the dead issue many once assumed it would be.

A few states that have eliminated the privity barrier have nonetheless severely limited the effects of the change by requiring that the lawyer's error appear on the face of the will.

---

[1] Lucas v. Hamm, 364 P.2d 685 (Cal. 1961).
[2] For one of the first examples, see Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996).

Example 1.3: Husband's will states that he gives his estate to Wife if she survives him by 30 days, but if he and Wife die "in a common disaster," his estate is to be divided equally between two of his nephews. Husband then dies unexpectedly, and Wife dies 15 days later after a long illness. The nephews sue the lawyer who drafted the will, alleging that their uncle wanted his estate to pass to his nephews if Wife did not survive him by 30 days, and not only if he and Wife died in a common disaster. A court with a constrained approach to the matter would hold that the will is not negligently drafted on its face. It simply provides that the estate pass in intestacy if Wife dies within 30 days of Husband but not as a result of a common disaster. That might seem to be a ridiculous conclusion, but in some instances, it is what courts have held.[3]

D. Procedures

(1) Probate

The word "probate" has already appeared many times in this first chapter. The time has come to say more about it and to learn more about how probate works. We'll begin at the beginning, which involves opening intestate administration if there is no will or having the will admitted to probate if the decedent died testate. The procedure followed in intestacy parallels testate procedure closely enough that we'll limit this discussion almost exclusively to probating wills.

The person seeking to have the will admitted to probate is almost always the executor named in the will, and that person must first bring the will to the right place. In most states, the right place is a court, although in some states the official who deals with at least some probate proceedings is an official known as the registrar of wills or similar title. Some states have specialized courts that deal with probate of wills and the administration of estates. The nature and powers of these courts vary. In some states, they handle only uncontested probates and are staffed by judges who need not be lawyers and who often are elected. In others, these courts may have a wider jurisdiction dealing not only with admitting wills to probate but with will contests, actions seeking interpretation of wills, actions by beneficiaries alleging misbehavior by executors and trustees, and formal procedures for closing administration of estates and winding up trusts. Almost always the court or official is located in the county where the decedent was domiciled at death.

Once the person who wants to have the will admitted to probate (the **proponent** of the will) gets to the right place, the next step is to begin procedures for admission of the will to probate. If the proponent is fortunate, the venue for probate will be in a jurisdiction where these procedures are quite simple. This type of probate, which the UPC calls informal probate, is an ex parte proceeding that requires only that the proponent prove the testator's signature, usually through the sworn statements of the witnesses or the named executor. The will is admitted to probate immediately, and the executor receives **letters testamentary**, which are the official evidence of the executor's authority to proceed with administration of the estate. (An administrator receives **letters of administration**.) If the will creates a trust, the trustee named in the will receives **letters of trusteeship**.

[3]This example is taken from Ogle v. Fuiten, 466 N.E.2d 224 (Ill. 1984), in which the court rejected the reasoning discussed and allowed the nephews to pursue their suit.

Notice of the will's admission is given through publication or perhaps by mailed notice to those interested in the will and those intestate heirs who are disinherited. Anyone challenging the will has a certain period of time, usually a year or less, to file a **caveat** or formal objection to probate. Once the caveat is filed, procedures for a will contest begin.

States that have simple ex parte probate usually also have procedures for formal or solemn form probate. (The UPC provides for both.) In some states, most notably New York, this more elaborate procedure is the *only* procedure. **Solemn form probate** is a noticed proceeding like any lawsuit and begins with formal notice to anyone who has an interest in opposing the admission of the will to probate. At the very least, these persons are the intestate heirs. The heirs may very well be the beneficiaries of the will, but that is not always the case. The notice tells those receiving it that they have the right to oppose the admission of the will. If they do, procedures for a will contest begin. If they do not or if they waive the notice and consent to admission of the will, the letters testamentary and letters of trusteeship issue to the appropriate persons and administration of the estate can begin.

Sidebar

UNIVERSAL SUCCESSION

UPC §§ 3-312 to 3-322 authorize and provide detailed procedures for a system of succession without administration, which is modeled on the civil law concept of universal succession. The statute allows the decedent's heirs or the residuary beneficiaries of the decedent's will to take on the task of paying taxes, the decedent's debts and claims against the estate, and distributing assets to others entitled to property in the probate estate. By assuming this task, the "universal successors" assume personal liability for these various payments and distributions.

(2) Administering the Estate

(a) Supervision of Administration

Once the executor receives letters testamentary, administration of the estate simply goes forward until it is complete. In some states, however, an executor is subject to supervision by the appropriate court. Under UPC § 3-501, supervised administration is an option that the testator can select or that the court can order "upon a finding that it is necessary for protection of persons interested in the estate" or if the court finds it "is necessary under the circumstances." Once supervised administration is in place, UPC § 3-504 prohibits the personal representative from making a distribution without prior approval of the court, and § 3-501 makes the personal representative "subject to direction concerning the estate made by the Court on its own motion or on the motion of any interested party."

(b) Collecting Assets and Paying Debts

Once the personal representative receives letters, the collection of the decedent's probate assets can begin. Sometimes the collection is literal: the personal representative may present the letters testamentary (letters of administration in an intestate administration), or more usually a certificate from the court evidencing the grant of letters, to a bank where the decedent had an account, withdraw the funds, and add them to an account opened in the name of the personal representative as personal representative. As we will see in Chapter 16, one of the duties of the personal representative as a fiduciary is to keep the estate's property separate from her own.