

Instructor's Manual and Test Bank to Accompany

Wills, Trusts, and Estate Administration

Eighth Edition

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PREFACE

This instructor's manual is designed to be used with *Wills, Trusts, and Estate Administration*, Eighth Edition, by Dennis Hower, Janis Walter, and Emma Wright. The audience includes beginning and more advanced paralegal students. The manual provides detailed lecture outlines for each text chapter. The outline also includes teaching suggestions interspersed throughout the textual materials. Each chapter includes review questions, practice problems, and practical assignments. Many of the questions point the student to state-specific materials.

The test bank provides multiple-choice and essay questions for each chapter. You may want to supplement the test bank questions with state-specific questions. The test bank is available in the instructor's manual and in an online system via Cognero on the Instructor Companion Site.

Remember to take advantage of local Internal Revenue Service offices and state revenue offices. Additionally, many probate courts have their own websites. These provide a wealth of information including forms and publications. They are also a source for guest speakers. Other guest speaker resources may include an estate tax or elder law attorney, a paralegal from your own jurisdiction, a local bank trust officer, or someone versed in life insurance.

Arranging for guest speakers requires time, but it is invariably worth the effort. Field trips also bring "the law to life." Guest speakers and information learned on field trips will emphasize and highlight facts you have already taught, but with real-life applicability and verifiability.

Basic language review is important whether you have beginning or advanced students. The law of estates is term specific and all persons need this review. Take the time to cover terminology in each chapter.

Encourage class discussion. Our students are paralegals of tomorrow. They will be hired (or at least retained) because they can think independently and use independent judgment. Class debate encourages this type of thinking and fosters legal maturity in our students.

Treat this course as an opportunity to learn as much as your student; and your zest for learning will be contagious!

SAMPLE SYLLABUS

WILLS, TRUSTS, & ESTATE ADMINISTRATION

Course Number including Section Number

Semester Offered:

Number of Credits:

Prerequisite(s) for course:

INSTRUCTOR: [NAME}

OFFICE: Building & Room No.

OFFICE HOURS:

OFFICE PHONE:

HOME PHONE: [optional]

E-MAIL ADDRESS:

INSTRUCTOR'S WEB PAGE: [If applicable]

COURSE PAGE: [If applicable]

CLASS HOURS:

COURSE DESCRIPTION: An introduction to basic wills and trusts concepts and an examination of the law and procedure of preparing wills, administration of estates, and general probate procedure. There will be a discussion and practical exercises in the areas of wills, living trusts, testamentary trusts, and tax planning topics involving the marital deduction and the annual exclusion. The drafting of wills and trusts, preparation of probate documents, filing procedures, asset collection, estate management, and closing procedures will be covered. In addition, the course will introduce the student to patients' rights in health-care decision making, entitlement programs, managed care and long-term care insurance, living facilities for the elderly, financial planning, social security, and elder abuse.

COURSE OBJECTIVES:

Upon the successful completion of this course, students will demonstrate the following competencies:

- Discuss the basic concepts and purpose of estate planning.
- List the different estate planning tools available.
- Differentiate between probate property and nonprobate property.
- Identify and explain the state statute of descent and distribution, and the concept and consequences of intestacy.
- Draft a simple will.
- Draft a revocable living trust agreement.
- Compare/Contrast the types of protections afforded family members.
- Discuss trust agreements and identify the parties needed to form a trust.
- Explain the jurisdiction of probate court.
- Choose proper forms used in estate administration.
- Describe tax implications associated with estate administration.
- Complete forms necessary to administer an estate in a probate court.
- Identify and explain various legal issues relating to the elderly.
- Describe the bounds of ethical behavior for a paralegal when dealing with estate and probate issues.

TEXT AND REQUIRED SUPPLIES/COURSE MATERIALS

Wills, Trusts, and Estate Administration, Eighth Edition, by Hower/Walter/Wright, plus online materials to be identified in class

ATTENDANCE POLICY: [Insert policy]

IMPORTANT DATES: For important dates for the academic year, students should consult the institutional website: [insert website]. This includes all important dates for students regarding registering, dropping of classes, refunds, holidays, etc. These deadlines will be followed strictly.

CLASS CANCELLATIONS: [The syllabus should specify the amount of time that you expect students to wait for you past the scheduled meeting time in the case of your unscheduled absence due to illness or emergency. It should also specify what students should do about assignments in such cases. Note: Student complaints are received about faculty who regularly arrive late or fail to appear at all. Clearly, such performance violates faculty members' duties under their contracts.]

GRADING PLAN: [Identify your basis of grading. The syllabus should include explicit indications of your grading system and the weight of each assignment in the final grade. Grievances sometimes claim that an instructor's grading was capricious, and without an explicit policy the student's claim carries greater credibility. Extra credit is the option of the instructor, but you must clearly identify such opportunities and make them available to all students in the class.]

[If class participation is included as part of your grading plan, make sure you identify the quantity and quality of participation.]

[In addition to the specific assignments and point value, you should include your grading scale.]

LATE ASSIGNMENTS: [Include your policy on whether you accept late assignments and under what conditions. If there is a specific time period, i.e., up to one week after the due date, or consequences for late assignments, i.e., deduct two points for every day late, make sure you are explicit in the syllabus. If there are acceptable reasons for late assignments, identify those terms, verification required, and consequences.]

ACADEMIC DISHONESTY: [Insert policy identified in Student Code of Conduct along with consequences for such behavior.]

FINAL EXAM: [Identify the time and place of the final examination.]

CLASSROOM RULES OF CONDUCT: [Identify prohibited behavior and the consequences.]

DISABILITY POLICY: [For students who have learning, physical, or other disabilities, a statement of accommodation will make them more comfortable approaching you and informing you of problems early in the semester.]

TENTATIVE SCHEDULE AND READINGS

WEEK 1—The Concept of Property Related to Wills, Trusts, and Estate Administration

WEEK 2—The Estate Plan and Purpose of Wills

WEEK 3—The Law of Succession: Testate and Intestate

WEEK 4—Requirements for a Will, Modifications, Revocation, and Contests

WEEK 5—Preparation of a Will—Client Conferences and Checklists

WEEK 6—Drafting and Executing of a Will
WEEK 7—The Participants and Proper Court
WEEK 8—Personal Representatives; Types, Pre-Probate Duties, and Appointment
WEEK 9—Probate and Estate Administration
WEEK 10—Informal Probate Administration
WEEK 11—Tax Considerations in the Administration of Estates
WEEK 12—Introduction to Trusts
WEEK 13—Classification of Trusts, Living Trusts, and Other Special Trusts
WEEK 14—Estate Planning
WEEK 15—Long-Term Care

SUGGESTED PRACTICAL ASSIGNMENTS: [See assignments in text but you should include the following]

- 1) Draft Will
- 2) Draft Living Trust
- 3) Draft Advanced Directives
- 4) Draft Financial Power of Attorney
- 5) Draft Digital Estate Plan
- 6) Draft Living Will
- 7) Draft Court Documents (using software and applicable court website)
- 8) Prepare Tax Forms

CHAPTER 1 THE CONCEPT OF PROPERTY RELATED TO WILLS, TRUSTS, AND ESTATE ADMINISTRATION

LEARNING OBJECTIVES

Students should be able to do the following:

- Identify, explain, and classify the various kinds of property, such as real and personal property or probate and nonprobate property.
- Recognize and understand the terminology associated with property law.
- Distinguish the various forms of ownership of real and personal property and explain the requirements for their creation and function.
- Understand and explain why courts do not favor the creation of joint tenancies between parties other than spouses.
- Identify the community property states and differentiate between community and separate property.
- Explain the kinds, methods of creation, and characteristics of estates in real property.

LECTURE OUTLINE

I. Scope of the Chapter

- A. Property (real and personal) is the essential component that establishes the need for and purpose of wills and trusts.
- B. Everyone owns some type of property.
- C. Property can be transferred by its owner during the life of the owner by gift, by sale, or by creating a trust.
- D. After the owner dies, property can be transferred in a will, by provisions of a testamentary trust, or by intestate succession laws.
- E. Understanding the law of property and its terminology is required before paralegals can draft wills and trusts and assist clients with estate administration. Such understanding includes the following:
 1. Terminology of the law of property
 2. The law of property's association with wills, trusts, and estate administration
 3. Related statutes and court decisions
 4. Forms in which property can be owned
 5. Estates in real property, including freeholds and leaseholds

II. Property: Terminology and Classification

- A. Property is anything subject to ownership.
 1. Property can be classified as real property.
 2. Property can be classified as personal property.
- B. Real property is immovable, fixed, or permanent.
 1. Real property is also called realty or real estate.
 2. Real property includes land; structures affixed to land such as houses, apartment buildings, condominiums, and office buildings; objects attached to land and buildings called fixtures; and things grown on land except those for the purpose of sale.
 3. Real property owners also have rights to airspace above their land and to the earth below it, including any minerals in the earth.
- C. A fixture is real property that once may have been personal property but now is permanently attached to land or buildings.
 1. Examples of fixtures: a tree; carpeting nailed to a floor; a built-in dishwasher.
 2. Not fixtures: crops that are annually cultivated such as corn, wheat, and vegetables.

3. State courts apply three tests—annexation, adaptation, and intention—to determine if personal property has been converted into a fixture.
 - a. Annexation means that the personal property has been affixed or annexed to the real property.
 - b. Adaptation means that the personal property has been adapted to the use or purpose of the real estate.
 - (1) Is the property necessary to the function or enjoyment of the real estate?
 - (2) Is the property beneficial to the function or enjoyment of the real estate?
 - c. Intention refers to the intention of the person who annexed the personal property to the real property. In most states, this has been the controlling test that determines the existence of a fixture.
 - d. There is substantial variation among courts throughout the country on what constitutes a fixture.
 - (1) Generally, examples of fixtures are doors, fences, windows, stoves, wall-to-wall carpeting, refrigerators, and electric lights.
 - (2) Compare: *Mortgage Bond Co. v. Stephens*, 181 Okl. 419, 74 P.2d 361 (1937), in which a refrigerator was a fixture, and *Elliott v. Tallmadge*, 207 Or. 428, 297 P.2d 310 (1956), in which a refrigerator was held to be personal property.

—**TEACHING SUGGESTION:** If students can perform legal research, ask them each to locate one case in your state jurisdiction where the court either determined personal property to be a fixture or determined it not to be a fixture. Ask the students to identify which test applies in your jurisdiction and to explain the court’s reasoning and holding.

If students cannot perform legal research, provide copies of various cases from your jurisdiction for this exercise.

As a classroom exercise, students can present their findings to expand their appreciation of what is considered a fixture and why.

4. Tenants who install fixtures on property they rent may remove that property if it falls under one of three exceptions known as tenant’s fixtures.
 - a. Trade fixtures are property placed on the land or in a building to help the tenant carry on a trade or business.
 - b. Agricultural fixtures are property annexed by the tenant for farming purposes.
 - c. Domestic fixtures are property attached by the tenant to make an apartment more comfortable or convenient.
- D.** When real property is transferred by gift or sale, the title or ownership is conveyed to the donee or buyer by a formal written document called a deed.
1. Transfer is an act by which the title to property is conveyed from one party to another, whether the party is a person, corporation, or the government.
 2. Conveyance is any transfer by deed or will of legal or equitable title to real property from one person to another.
 3. Disposition is the parting with, transfer, or conveyance of property.
 4. Grant is a transfer of title to real or personal property by deed or other instrument.
 5. Grantor is the person who conveys or transfers real or personal property to another.
 6. Grantee is the person to whom real or personal property is transferred or conveyed.
 7. Deed is a written, signed, and delivered legal document that transfers title or ownership of real property such as land or buildings.
 8. Title is the right to and evidence of ownership of real or personal property.
 9. Legal title is a title that is complete, perfect, and enforceable in a court of law, granting the holder the right of ownership and possession of property.
 10. Equitable title is title held by a party that gives the party the right to have the legal title transferred to him/her. For example, a person who purchases a house through a mortgage

has equitable title and is in possession of the house while paying off the installments on the mortgage to the bank that holds legal title until the mortgage is paid off and legal title is transferred to the possessor by delivery of a deed.

11. Interest in property entitles a person to some right in the property, but that right may be less than title or ownership. For example, a renter has an interest in the apartment that is leased but does not have title, which is held by the owner of the property, who is usually the landlord.
 12. To vest means to deliver possession of land.
 - a. At death, state law automatically vests title to a decedent's real property in the beneficiaries of the will or in heirs if a decedent dies without a will.
 - b. Title to the real property is vested "subject to" the right of the personal representative to divest or divest or take away the property to pay claims of the decedent's creditors.
 13. To divest or divest means to withdraw or take away title from the possessor.
- E.** Personal property is movable property and encompasses everything subject to ownership that is not real property. It is sometimes referred to as chattel.
1. Title to a decedent's personal property passes to the personal representative (administrator or executor) appointed by the probate court to administer the decedent's estate. If creditors must be paid, generally, the decedent's personal property is used first to obtain the necessary funds.
 2. There are two categories of personal property.
 - a. Tangible personal property has a physical existence; it can be touched and is movable.
 - b. Intangible personal property has no physical existence; it cannot be touched.
 - (1) It establishes and represents the right to receive something of value.
 - (2) Ownership is established by documents such as bank statements, stock or bond certificates, and written contracts for life insurance and annuities.
 - (3) It includes a chose in action, a right to personal property that the owner does not possess but does have a right of action for, e.g., a right to receive payment of a debt or to sue for damages for another's negligence.
- TEACHING SUGGESTION:** Because students may not be familiar with various types of financial or business documents and terminology, it is a good idea to review the examples of intangible personal property items such as annuities, pension plans, profit-sharing plans, stocks, bonds, and so forth.
3. Paralegals play a major role in helping the personal representative find, collect, preserve, value, and liquidate or distribute the decedent's personal assets.
 - a. Paralegals list and classify all the decedent's assets as real property or personal property, whether tangible or intangible.
 - b. Accurate classification is essential in administering an estate; therefore, the paralegal must learn to distinguish the different types of property and verify the classifications with the supervising attorney.
- F.** Probate property or a probate estate differs from the gross estate of a decedent.
1. An estate or gross estate is all the property, real and personal, owned by a living person or all the assets owned by a decedent at the time of death.
 2. The only type of property owned by a decedent that can be passed by will is probate property, also called the probate assets, the probate estate, or the estate of the decedent.
 3. Probate property is all real or personal property that the decedent owned either individually as a single or sole owner, called ownership in severalty, or as a co-owner with another person or persons in the form of ownership called tenancy in common.
 4. Probate property is subject to estate administration by the personal representative according to the terms of the will or, if the decedent died intestate, according to the appropriate state intestate succession statute.
 5. The following probate property is subject to creditors' claims and federal and state death taxes: real property owned in severalty or in a tenancy in common; personal property owned in severalty or in a tenancy in common; life insurance proceeds payable to the estate

or a policy in which the decedent retained the incidents of ownership; debts owed the decedent for mortgages, promissory notes, contracts for deed, loans, rents, interest, stock dividends, income tax refunds, royalties, and copyrights; gain from the sale of a business; Social Security, Railroad Retirement, and Veterans Administration benefits; civil lawsuits for money damages; and testamentary trusts.

- G.** Nonprobate property is real or personal property that is not part of the decedent's probate estate except for figuring the decedent's gross estate for federal and state death tax purposes.
1. Nonprobate property is not distributed according to the decedent's will.
 2. Nonprobate property is not distributed according to intestate succession statutes.
 3. Nonprobate property is not subject to estate administration (probate) of the decedent's estate.
 4. Nonprobate property is not subject to a spouse's claims.
 5. Nonprobate property is not subject to the claims of the decedent's creditors.
 6. Nonprobate property includes property that has been converted into nonprobate assets such as the following:
 - a. Real and personal property owned and held in joint tenancy or tenancy by the entirety, both with the right of survivorship and real property subject to transfer under a transfer on death deed or beneficiary deed
 - b. Real and personal property transferred to living (*inter vivos*) trusts prior to the settler's death
 - c. Money placed in a bank account as a Totten trust or pay-on-death (POD) account
 - d. Proceeds of a life insurance policy payable to a named beneficiary and not to the decedent's estate as long as the decedent relinquishes the incidents of ownership
 - e. Employment contract benefits, such as profit-sharing plans, pension plans, group life insurance, 401(k) plans, employee stock ownership plans (ESOPs), and self-employment plans, that name a specific beneficiary
 - f. Annuity contracts with a named beneficiary
 - g. Individual retirement accounts (IRAs) with a named beneficiary
 - h. U.S. savings bonds payable on death to a beneficiary other than the decedent's estate
 - i. Tenancy in partnership property
 7. Nonprobate property goes directly to the named beneficiary or the surviving joint tenant(s) by operation of law.
 8. Even though nonprobate property avoids the probate process, paralegals must identify and keep accurate records of each item for the preparation of federal and state estate, death, or inheritance tax returns.

III. Statutes That Govern the Passage of Property

- A.** Property law is mostly statutory law.
1. States have the power to enact statutes that govern the passage of property.
 2. States derive the power to legislate in this area from the U.S. Constitution, which gives states the right to levy and collect taxes, and from their duty to protect the citizenry.
 - a. Owners of property have the right to distribute their property as they wish, so long as it does not conflict with the rights of others.
 - (1) Generally, a spouse cannot be disinherited.
 - (2) Generally, minor children are entitled to support.
 - (3) Creditors have the right to be compensated for their valid claims, and states establish statutory procedures for creditors to make claims against estates.
- B.** All activity during the administration of a decedent's estate must be carefully and accurately recorded.
1. This accuracy is required so that the state can fairly and accurately calculate the amount of tax that may be due from the estate of the decedent.
 2. The state becomes a creditor of the estate.

- C. The state protects the decedent's rights by statute.
 - 1. Statutes provide for the right to make a will.
 - 2. Descent and distribution or intestate succession statutes provide that if someone dies without a will, the property of the decedent will be distributed to those whom the decedent would probably have chosen if the decedent had made a will.
—**TEACHING SUGGESTION:** To accompany Assignment 1.3, students should research, locate, and read their state statute dealing with descent and distribution. Any words or phrases that are different from those identified in the New York statute should be identified and defined.

IV. Forms of Property Ownership

- A. Tenancy in severalty means that one person is the sole owner of real property or personal property.
 - 1. The individual owner has absolute ownership with exclusive rights, privileges, and interests.
 - 2. The owner may voluntarily dispose of the property while living, either by gift or sale, or may voluntarily dispose of it at death through a will.
 - 3. If the owner has not made a disposition of the property by the time of death by gift, sale, or through a will, the property remains in the owner's estate and passes to certain specified takers under intestate succession statutes.
- B. There are various forms of concurrent ownership, ownership shared by two or more persons, of real or personal property.
 - 1. Joint tenancy is the ownership of real or personal property by two or more persons, joint tenants, who obtain an equal and individual interest in the property by gift, purchase, will, or inheritance.
 - a. On the death of one joint tenant, the right of survivorship passes the decedent's interest in the property automatically to the surviving joint tenant(s) by operation of law without the need for probate and with the last surviving joint tenant entitled to the whole property in severalty.
 - b. To create a joint tenancy, common law requires "four unities": unity of time, unity of title, unity of interest, and unity of possession.
 - (1) Unity of time requires that joint tenants take their interests in the property at the same time, meaning that they must receive their interest in the property together.
 - (2) Unity of title requires that the tenancy be created and the tenants receive their title from a single source such as the same will or deed.
 - (3) Unity of interest requires that each tenant have an interest in the property that is identical to that of the other tenants.
 - (a) The interest must be of the same quantity.
 - (b) The interest must be of the same duration.
 - (4) Unity of possession requires that each joint tenant own and hold the same undivided possession of the whole property held in joint tenancy.
 - (a) Each joint tenant has an equal right to possess the entire property.
 - (b) Each joint tenant has an equal right to share in the profits derived from the property.
 - c. When a joint tenant dies, the surviving joint tenants receive the interest of the deceased with nothing passing to the beneficiaries' heirs or devisees of the decedent, under the right of survivorship.
 - (1) Joint tenants cannot transfer joint property by will.
 - (2) If all joint tenants die except one, the joint tenancy is destroyed and the lone survivor owns the property solely, in severalty.
 - d. Joint tenants are entitled to the equal use, enjoyment, control, and possession of the property since they have an equal and undivided identical interest in the same property, meaning that no joint tenant owns a specific or individual part of the property.

- e. While alive, each joint tenant has the right of severance, the act of severing, separating, or partitioning real property.
 - (1) A joint tenant can convey his/her equal interest in the property during his/her lifetime, thereby destroying one of the four essential unities and terminating the joint tenancy.
 - (2) This *inter vivos* conveyance is the only way a joint tenancy can be severed.
 - (3) Severance of real property is accomplished by transferring a deed.
 - (4) When a joint tenancy is severed, the remaining joint tenants and the new tenant are tenants in common, with the new tenant having no right of survivorship.
 - f. State statutes determine whether a joint tenancy is legally created.
 - (1) The required wording and the intent of the creator determine whether a binding joint tenancy is established.
 - (2) States vary in the express language required to create a joint tenancy.
 - (3) States vary in their preference for certain forms of co-ownership of property.
 - (4) Generally, if the intent of the parties is not clear, tenancy in common is presumed and preferred over joint tenancy since legislatures believe the decedent's property should pass to beneficiaries, heirs, or devisees and not to surviving joint tenants.
 - g. Advantages of a joint tenancy are the following:
 - On the death of a joint tenant, title passes automatically to the survivor(s).
 - No probate proceedings are necessary or required for the survivor(s) to acquire title, thus avoiding expense and delay.
 - Title passes to the surviving joint tenant(s) free of the claims of the decedent's creditors unless the joint tenancy was created to defraud creditors. The decedent's real estate is subject to certain unpaid debts such as mortgages, taxes, and liens.
 - If the joint tenants are husband and wife, no federal gift tax is owed because of the unlimited marital gift tax deduction.
 - If property located in other (foreign) states is in a joint tenancy, ancillary administration is avoided.
 - Joint tenancy of bank accounts, Totten trusts, and POD accounts can provide immediate cash for family needs on the death of a spouse or parent. For such accounts, care must be taken to ensure that all state statutory requirements are met.
 - Creating a joint tenancy is fast and inexpensive, avoiding probate and the expense of creating a trust and paying its continuing trustee's fees.
 - h. Disadvantages of a joint tenancy are the following:
 - The person who creates the joint tenancy no longer has complete control of the property.
 - Any joint tenant can terminate the joint tenancy without the agreement of the other joint tenant(s).
 - The surviving joint tenant may not have been the intended beneficiary.
 - The stepped-up basis for full value of the proceeds is lost.
 - There is a risk of exposure to liability for the negligence of other joint owners.
 - Married couples who hold all their assets as joint tenants may still need to have wills or other estate planning to deal with situations such as simultaneous death cases.
2. Tenancy in common is a form of concurrent ownership of real or personal property by two or more persons called tenants in common.
 - a. Each tenant owns separate undivided interests in the property with "unity" of possession.
 - b. Unity of possession means that each tenant has the right to take and possess the whole property with the other co-tenants, and each is entitled to share proportionately in the profits derived from the property.
 - c. Interests may be equal or unequal.

- d. Tenancy in common differs from joint tenancy.
 - The undivided interest of joint tenants must be equal; for tenants in common it may be equal or unequal.
 - Joint tenancy requires four unities; tenancy in common requires only unity of possession.
 - Joint tenancy property is nonprobate property; property held in tenancy in common is probate property.
 - Joint tenancy has the right of survivorship; when a tenant in common dies, the decedent's interest goes to an heir or as directed in a will.
 - e. Tenancy in common may be expressly created or created when a grantor fails to use the terminology required to establish joint tenancy.
 - f. Tenants in common may transfer an interest by gift, will, or sale or may pledge it as security for a loan.
 - (1) When a tenant in common disposes of an interest by gift, sale, or will, the new owner is also a tenant in common with the remaining co-tenants.
 - (2) Tenancy in common is destroyed by merger or by severance when the property is partitioned.
 - (a) Partition occurs by voluntary agreement of the parties or by the court.
 - (b) Partition can be the division of real property into distinct and separate portions to be held in severalty or by a sale of the property.
3. Tenancy by the entirety is an estate available only to a husband and wife.
- a. This is a special form of joint tenancy modified by the common law theory that husband and wife are one person and, thus, the additional "unity of person."
 - b. Unlike joint tenancy, neither husband nor wife can mortgage, sell, or give the property to another or sever the tenancy without the written and signed consent of the other spouse.
 - c. Because it restricts the transfer of property, some states have abolished tenancy by the entirety as against public policy.
 - d. Check individual states for the specific language required to establish this tenancy.
 - e. There is a right of survivorship as with joint tenancy.
 - f. A creditor of one spouse cannot foreclose on property held in tenancy by the entirety or enforce a judgment against it, and a judgment against one spouse is not a claim against the property; however, a judgment against both spouses can become a lien, and a creditor can foreclose.
 - g. In most states, unity of person is terminated by divorce and the divorced couple become tenants in common of the property with each former spouse owning a one-half interest in the property.
4. Community property ownership is based on the theory that a husband and wife should share equally in the property acquired by their joint efforts during the marriage.
- a. Separate property is property that the wife or husband owned prior to their marriage or acquired during marriage by inheritance, will, or gift.
 - b. Community property law is set entirely by state statute.
 - c. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are community property states; Wisconsin is the only state that has adopted provisions of the Uniform Marital Property Act, which is essentially the same as the community property system.
 - d. All property acquired during the marriage is presumed to be community property, unless the presumption is rebutted by valid evidence that proves the property is separate. Some factors to be considered are the following:
 - Whether the property was acquired by either spouse before or after their marriage
 - The language and date of the conveyance
 - The intent of the grantor

- Whether the property was given as a gift to one or both spouses
 - Whether separate property of a spouse was sold or exchanged for the property, or whether the purpose of the sale was to use the proceeds for community purposes
 - Whether the property was inherited by one or both spouses
 - The purpose and use of the property acquired by the married couple
- e. Statutes require the signatures of both spouses for any transfer or mortgage of community property.
 - f. In the majority of community property states, the surviving spouse is entitled to his/her one-half of the property and the decedent's will, if one exists, or statute determines the disposition of the decedent's remaining half.
 - g. In intestacy situations, the surviving spouse's intestate share depends on the length of the marriage.
 - h. Division of community property in a divorce varies among the states.
 - i. A community property agreement is a separate signed document called a community or marital property agreement that allows spouses to create a right of survivorship in community property in Alaska, Idaho, Texas, Washington, and Wisconsin.
 - j. Creditors' rights in community property states vary.
 - k. When extensive commingling of separate and community property occurs, the presumption is that the commingled property is community property; therefore, accurate records of how property was obtained, its purpose, and use are needed to maintain it as separate property.
 - l. Quasi-community property is acquired in a common law state and then moved into a community property state.
 - (1) If the newcomer dies domiciled in the community property state, then the presumption is that all the property of the decedent that is not separate is community.
 - (2) If the newcomer's domicile is still the former noncommunity property state, the presumption can be rebutted and reversed.
 - (3) If spouses move from a community property state to a common law state, the community property obtained in the community property state is not automatically converted into separate property by the change of domicile.
 - (4) It is very important to inquire about clients' state residences throughout their marriage to properly determine property rights.
 - m. Community property states have abolished tenancy by the entirety but usually allow joint tenancy between spouses.

—**TEACHING SUGGESTION:** Review the forms of concurrent ownership with the students (Exhibit 1.6).

V. Estates in Real Property

- A. The two categories of rights of ownership in real property are freehold estates and leasehold estates.
- B. Freehold estates include fee simple estates and life estates.
 1. A fee simple estate, also called fee simple absolute, is the largest, best, and most extensive estate possible with the owner holding an absolute, unqualified, and unlimited interest in the real property.
 - a. The fee estate is not subject to any restrictions and the owner is entitled to all rights and privileges associated with the property.
 - b. There is no limit on the estate's duration or on the owner's method of disposition.
 - c. The characteristics of a fee simple estate are as follows.
 - It is transferable during life by deed.
 - It is transferable after death by will.
 - It descends to heirs if not transferred by will.

- It is subject to the rights of the owner's surviving spouse.
 - It is subject to claims of creditors of the fee owner both before and after the owner's death.
- d. Under common law, a fee simple estate was created by using the words "to A and his heirs"; however, today, any words that indicate an intent to convey absolute ownership are used.
 - e. Fee simple estates are subject to any restrictions that may be imposed by the requirements of tenancy by the entirety and joint tenancy.
2. A life estate is a freehold estate in which a life tenant holds an interest in the property that lasts either for the lifetime of that person or for the lifetime of another person, known as an estate *pur autre vie*.
- a. Characteristics of a life estate are the following:
 - It may last for the lifetime of the original owner.
 - It may last for the lifetime of the person enjoying the estate.
 - It may last for the lifetime of a third person, called an estate *pur autre vie*.
 - It can be created by deed or will.
 - Unlike a fee simple estate, it cannot be transferred by will.
 - Life tenants, while living, may convey their interests in the property by sale or gift to a third person.
 - On the death of the life tenant, the life estate terminates, and no interest remains to be passed to heirs or by will; nor can it be probated or be subject to creditors' claims.
 - b. When a life estate is created, one of two results occurs: Either the grantor retains a reversionary interest in the property or a future remainder interest is created.
 - c. A reversionary interest is the interest or right a grantor alone has to the return of real property, at present in the possession of another, on the termination of the grantee's preceding estate, which was less than the entire fee simple absolute.
 - (1) The grantor is the only person entitled to a reversion.
 - (2) The grantor is entitled to reversion when the grantee's estate terminates.
 - (3) The grantor, while alive, can transfer the reversion by deed or will.
 - (4) If the grantor dies before the grantee, the reversion is not lost because the right to the reversion can be transferred by the grantor's will; or if the grantor dies intestate, the right to reversion can be inherited by the grantor's heirs.
 - (5) The real property that reverts does not go through the probate process of the life tenant's estate and is not subject to tax or creditors' claims.
 - d. A remainder is a future estate in real property that will take effect on the termination of a prior estate created by the same instrument at the same time.

—**TEACHING SUGGESTION:** Explain the difference between reversion and remainder interests (Exhibits 1.8 and 1.9).
3. Dower and curtesy rights are the rights of spouses in each other's real but not personal property.
- a. Under common law, at the time of marriage, and to protect her from disinheritance, a dower was a widow's right to a life estate in one-third of all the real property her husband owned during the marriage.
 - b. Under common law, curtesy was the widower's right to a life estate in all of his wife's real property owned during the marriage, but only if the married couple had a child born alive.
 - c. Under common law, the wife's dower right terminated if she was divorced from her husband when he died or if the husband held his real property in joint tenancy with another.

- d. Most states have abolished or materially altered dower and curtesy and replaced them with elective or forced share statutes.
—**TEACHING SUGGESTION:** Students should research the law in their state jurisdiction on dower/curtesy and forced share to see how it differs from common law and the norms mentioned in the text.
- 4. Most states, except community property states, give a surviving spouse a statutory right to avoid being disinherited by the will of a decedent spouse.
 - a. The right of election allows a surviving spouse to choose between the provision made by a deceased spouse's will or the prescribed share set by statute, also called an elective or forced share statute.
 - b. The choice of the will or elective share is only applicable to cases in which the decedent spouse dies with a will.
- 5. Waste is a legal term that refers to "any act or omission that does permanent damage to the real property or unreasonably changes its character or value."
 - a. While in possession of real property, a life tenant has the absolute right to possess and use the property; however, because of future reversion and remainder interests, the tenant is under a duty to exercise reasonable and prudent care to protect and preserve the property and required by law not to cause or commit waste.
 - b. If guilty of waste, the life tenant may be responsible for damages, an injunction from an equity court, or forfeiture.
- C. Various types of leasehold estates are tenancy at will, tenancy at sufferance, and tenancy from month to month; however, the most common is a tenancy or estate for years.
 - 1. A tenancy or estate for years creates an interest in real property that will last for a fixed period.
 - 2. A tenancy for years is created and terminates according to its own terms and no notice to terminate is required.
 - 3. The standard landlord-tenant relationship is a leasehold.

ANSWERS TO THE REVIEW QUESTIONS

1. How does real property differ from personal property?
Real property is immovable, fixed, or permanent such as land or structures affixed to the land such as buildings. Personal property is movable. It is everything that can be owned that is not real property and includes items such as clothing, furniture, money, stocks, and life insurance.
2. In whom and when does the real and personal property of the decedent vest (pass)?
State law automatically passes or vests title to a decedent's real property to the beneficiaries of the will or to the heirs if the decedent dies without a will; however, title to the real property is vested subject to the right of the personal representative to divest or take away the property in order to pay claims of the decedent's creditors.
Unlike real property, which passes directly to the decedent's beneficiaries or heirs, under state law, title to the decedent's personal property passes to the personal representative appointed to handle the administration of the decedent's estate.
3. What are the three tests state courts use to determine if property is a fixture?
State courts apply three tests—annexation, adaptation, and intention—to determine if personal property has been converted into a fixture. Annexation means that the personal property has been affixed or annexed to the real property. Adaptation means that the personal property has been adapted to the use or purpose of the real estate. With this test, the court asks whether the property is necessary or beneficial to the function or enjoyment of the real estate. The third test is to examine the intention of the person who annexed the personal property to the real property. In most states this has been the controlling test for determining the existence of a fixture.

4. What are trade fixtures? List three examples.
Trade fixtures are property that has been placed on the land or in a building to help the tenant carry on a trade or business. Examples of trade fixtures (three required) are a smokehouse, machinery, barber chairs, a greenhouse, and a pipe organ.
5. Write out your own definition of each key term in this chapter. Are your definitions essentially the same as those in the text?
The instructor should compare the student's definitions with those in the glossary to determine whether the essential requirements of the definitions are included in the student's version.
6. How do tangible and intangible personal property differ?
Tangible personal property is property that has a physical existence. It can be touched and is movable. Intangible personal property is property that has no physical existence. It cannot be touched. Rather, it establishes and represents the right to receive something of value.
7. What items of property are classified as probate property and what items are nonprobate property?
Probate property is owned by a decedent that can be passed by a will. It includes all real or personal property that the decedent owned individually as a single or sole owner, in severalty, or as co-owner with another person or persons as tenants in common.
Nonprobate property is any real or personal property that is not part of the decedent's estate and cannot be distributed according to the decedent's will or be distributed according to intestate succession statutes if there is no will. It usually includes property that is held as co-owner with another person or persons as joint tenants.
8. What is the significance of property being classified as probate or nonprobate property in terms of the need for probate, creditors' claims, and payment of federal estate and state estate and inheritance taxes?
Probate property is subject to estate administration by the personal representative according to the terms of the decedent's will or, if the decedent died intestate, according to the appropriate state intestate succession statute. In addition, probate property is subject to creditors' claims.
Nonprobate property is not subject to probate or the administration of the decedent's estate because it is not distributed according to the decedent's will or according to intestate succession statutes if there is no will. It is not subject to a spouse's claims or to the claims of the decedent's creditors.
However, nonprobate property is part of the decedent's gross estate for federal and state death tax purposes. Therefore, even though nonprobate property avoids the probate process, the property must be identified and accurate records maintained of each item for the preparation of the federal and state estate taxes and state death or inheritance taxes.
9. What are the four common law "unities" required for the creation of a joint tenancy?
In order for a joint tenancy to be created, common law requires "four unities": unity of time, which means the joint tenant owners must take their interests in the property at the same time, receiving their interests in the property together; unity of title, which means the tenancy must be created and the tenants must receive their title from a single source such as the same will or deed; unity of interest, which means that each tenant must have an interest in the property identical with that of the other tenants and the interests must be of the same quantity and duration; and unity of possession, which means that each joint tenant must own and hold the same undivided possession of the whole property with each joint tenant having an equal right to possess the entire property and share equally in the profits derived from the property.
10. How does a joint tenancy differ from both a tenancy in common and a tenancy by the entirety?
A joint tenancy differs from a tenancy in common in several important ways. The undivided interest of joint tenants must be equal; for tenants in common, it may be equal or unequal. The creation of a joint tenancy must include the "four unities" of time, title, interest, and possession; a tenancy in common requires only "unity of possession." Property held in joint tenancy is not subject to probate proceedings when a joint tenant dies; property held as a tenant in common is subject to probate proceedings whether it passes by will or by intestate laws of succession. Joint tenancy has a right of

survivorship; tenants in common have no such right when a tenant in common dies. Not only may tenants in common own different interests in terms of quantity and duration, but they may also receive their interests from different parties and through different instruments of conveyance at different times; joint tenants must own equal interests and receive their interests from the same party through the same instrument and at the same time.

Tenancy by the entirety is essentially a special form of joint tenancy that has been modified by the common law theory that husband and wife are one person. Therefore, while tenancy by the entirety must have the same four unities as joint tenancy, it has the additional unity of person, husband and wife. Unlike an ordinary joint tenancy, neither husband nor wife in a tenancy by the entirety can mortgage, sell, or give the property to another or sever the tenancy without the written and signed consent of the other spouse. Both joint tenancy and tenancy by the entirety are distinguished by the right of survivorship; however, while a joint tenant can terminate the joint tenancy during life by selling or giving away his/her joint interest without the approval of the other joint tenants, with tenancy by the entirety, neither spouse can take such action without the agreement of the other spouse.

11. How many states are community property states? List them.

Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington have statutorily adopted the form of ownership known as community property. Wisconsin, the only state to adopt provisions of the Uniform Marital Property Act, which is essentially the same as the community property system, joined the other eight states in 1986.

12. In a community property state, what property is separate property and what is community property?

Community property states recognize two kinds of property: separate property and community property. Separate property is property that the husband or wife owned prior to their marriage or acquired during marriage by inheritance, will, or gift. It is entirely under the management and control of the spouse to whom it belongs no matter how it was acquired, and it is completely free from all interest and claim on the part of the other spouse. Community property is all other property acquired during the marriage even though one spouse may have earned considerably less than the other or even nothing at all.

13. What is a fee simple estate and what are its characteristics?

A fee simple estate—also known as a fee simple absolute, an estate in fee, or a fee—is the largest, best, and most extensive estate possible. An individual holding a fee estate has an absolute, unqualified, and unlimited interest in the real property; it is not subject to any restrictions and the owner is entitled to all rights and privileges associated with the property. There is no limit on the estate's duration or on the owner's method of disposition. The owner has the unconditional power to dispose of the property during his/her lifetime by deed and after death by will; if the owner dies intestate, the property descends to his/her heirs. The following are characteristics of a fee simple estate.

- A fee simple is transferable during life.
- A fee simple is transferable by will.
- A fee simple estate descends to heirs if not transferred through a will.
- A fee simple estate is subject to the rights of the owner's surviving spouse.
- A fee simple estate is subject to claims from creditors of the fee owner both before and after the owner's death.

14. Concerning future interests in real property, what are the differences between a reversion and a remainder?

A reversion or reversionary interest is the interest or right a grantor alone has to the return of real property, at present in the possession of another, the grantee, upon the termination of the grantee's preceding estate. A reversion exists only when the grantor holding a fee simple estate conveys an interest in property by deed or will that is less than the entire fee simple estate, such as a life estate. A remainder is a future estate in real property that will take effect on the termination of a prior estate created by the same instrument at the same time. A grantor who owns a fee simple estate in real property can create a life estate for one person and, in the same conveyance and at the same time,

transfer the future fee simple estate to another person by deed. When the life tenant dies, the property passes to the future fee owner who is called the remainderman.

15. How does dower differ from curtesy and why have most states replaced them with a spouse's right to elect "against a will"?

Dower was the surviving wife's right to a life estate in one-third of all the real property her husband owned during the marriage. Curtesy was the right of the surviving husband to a life estate in all of his wife's real property owned during the marriage, but only if the married couple had a child born alive. Most states have replaced dower and curtesy with a spouse's right to elect "against a will" because of the inadequate support they provide a surviving spouse under the common law rules; the complications that occur in transferring or clearing title to real property; and the fact that they transfer only real property, and many estates contain only personal property, such as stocks and life insurance. Allowing a spouse to elect against a will also provides a statutory right to avoid being disinherited by the will.

16. What responsibilities does a life tenant have concerning the problem of "waste"? Give an example of waste.

The life tenant is under a duty to exercise reasonable and prudent care to protect and preserve the property and is required not to cause or commit "waste," which is any act or omission that does permanent damage to the real property or unreasonably changes its character or value. Examples of waste (one required) are: failure to make necessary repairs in a building; cutting and selling all trees on timberland; strip-mining, removing and selling minerals from the land; neglecting to heat a house in winter, thereby causing major damage to the plumbing.

ANSWERS TO THE CASE PROBLEMS

Problem 1

This answer will vary depending on the state.

Problem 2

- A. This case problem requires students to apply the three rules of determining whether personal property has become a fixture. Students should apply each of the three rules to each item to determine whether the items are fixtures. The students' critical thinking abilities should be assessed in reading their responses.
- B. This response requires students to compare the reasoning of the court in the cited case to their application of the three rules for determining fixtures. Students should be able to identify why the court ruled as it did, on what rule/criteria the court based its conclusion, and why the students agree or disagree with the decision.

ANSWERS TO THE ASSIGNMENTS

Assignment 1.1

The following answers are suggested as the correct responses; however, depending on how the student applies the tests of annexation, adaptation, and intention, the instructor may determine that variance from the suggested responses is warranted.

Seats in the auditorium—Fixtures

Computers in the office—Not fixtures

Carpeting in the theater—Fixture

Popcorn machine—Not fixture

Movie projector—Not fixture

Movie film—Not fixture

Furnace in the building—Fixture

Framed movie posters—Not fixture

Mirrors in the restrooms—Fixtures

Assignment 1.2

Item	Real Property	Tangible Personal Property	Intangible Personal Property
Car		X	
Cash in checking account			X
Right to renew apartment lease			X
Hotel loyalty points			X
House	X		
Life insurance proceeds			X
Furniture		X	
EBay account (for sale of your property)			X
Stocks and bonds			X
Furnace		X	
Personal injury lawsuit			X
Clothing		X	
Dishwasher (built-in)		X	
Dishwasher (portable)		X	
Mobile home on wheels		X	
Houseboat		X	
Tax refund check			X
Television roof antenna		X	
Bookcase		X	
Trees on land	X		
Gun collection		X	
Corn growing on farm		X	
Online blog			X

Assignment 1.3

1. Refer to the glossary for the definitions.
2. Accept seven of the following:
 - Real and personal property owned and held in joint tenancy with the right of survivorship
 - Real and personal property transferred to living trusts that are registered as owned by the trustee
 - Money placed in a bank account as a Totten trust or POD Account
 - Proceeds of a life insurance policy payable to a named beneficiary and not to the decedent's estate
 - Employment benefit contracts that contain a named beneficiary such as profit-sharing plans, pension plans, group life insurance, 401(k) plans, ESOPs, and self-employment plans
 - Annuity contracts with a named beneficiary
 - IRAs with a named beneficiary
 - U.S. savings bonds payable on death to a beneficiary other than the decedent's estate
 - Annual gifts of less than \$13,000 per donee

Assignment 1.4

The answer will vary depending on the state.

Assignment 1.5

The answer will vary depending on the state.

Assignment 1.6

1. The answer will vary depending on the state.
2. The answer will vary depending on the state.
3. Tenancy in common.

Assignment 1.7

The answer and forms will vary depending on the state.

Assignment 1.8

1. Technically, all the items, with the exception of the online gambling debt, can be owned in a joint tenancy. Some, such as stocks, bonds, car, house, cottage, and condominium, are the more usual items owned jointly. Although joint ownership of art, jewelry, bitcoins and the contents of a safe deposit box is more of a practical problem, it is possible.
2. If the items were truly held as joint tenants, with all four unities in place, then Emilio's creditors would have no claim against the property. If these items were truly held in joint tenancy, then Emilio cannot will any of the property to his spouse and family because of the right of survivorship. When Emilio dies, Conchita owns the property in severalty.

Assignment 1.9

Case 1: After Able dies, Blackacre is owned by Baker and Charlie, as joint tenants to each other, and by Agnes who is a tenant in common with respect to Baker and Charlie.

Case 2: Blackacre is owned by Baker, Dolan, and Elaine. They are all tenants in common with respect to each other. Because the joint tenancy has been severed with all prior joint tenants, Baker's interest is now as a tenant in common; therefore, when he dies, his interest will either pass according to his will or according to the laws of intestate succession. Able's wife will not have any interest in Blackacre if Able sold and deeded his interest during his lifetime.

Assignment 1.10

The answer will vary depending on the state.

Assignment 1.11

The answer will vary depending on the state.

Assignment 1.12

1. A tenancy in common would be created according to New York law.
2. According to N.Y. Estates Powers & Trusts Law § 6-2.2(d) (McKinney, 1967), if the property was transferred to the nephews as executors, then it would be as joint tenants; however, if the property was transferred to the nephews as beneficiaries who also happen to be the executors, § 6-2.2(e) would seem to say that they would hold the property as tenants in common.

Assignment 1.13

The form of ownership that exists after the transfer is a tenancy in common. Blackacre is now owned by Boswell, who owns a two-thirds interest, and Ruth, who owns a one-third interest. If Boswell dies testate, his interest will pass to whomever is named in the will as a beneficiary. If Boswell dies intestate, his interest will pass according to the laws of intestate succession.

Assignment 1.14

1. The answer will vary depending on the state.
2. The five unities necessary to establish a tenancy by the entirety are the following:
 - Unity of time: The husband and wife must take their interests in the property at the same time.
 - Unity of title: The husband and wife must receive their title from a single source, e.g., the same will or deed.
 - Unity of interest: The husband and wife must have an interest in the property identical with each other and be of the same quantity and duration.
 - Unity of possession: The husband and wife must each own and hold the same undivided possession of the whole property.
 - Unity of person: The two joint tenants must be husband and wife.
3. Unity of person.
4. The answer will vary depending on the state.

Assignment 1.15

1. Adam can transfer his half interest in the two cars, provided they are not held as joint tenants; his entire interest in the camper unless Casey can argue commingling; his half interest in the savings and checking accounts provided they are not held as joint tenants; his half interest in the furniture and household goods, the stereo, and the television sets purchased during their marriage.

Assignment 1.16

The answer will vary depending on the individual student.

Assignment 1.17

Ian's claim would appear to be incorrect. The land was given to Grace in severalty. It does not appear that the land was given to Ian. The fact that the land was given to Grace in fee simple "when she becomes engaged to Ian" set a condition for title to pass but conferred no joint tenancy with right of survivorship in Frank, unless the laws of Montana provide otherwise.

Assignment 1.18

Yes, Brent is a life tenant. When he dies, the property passes to Sue who has a life interest in the property. At the time of the conveyance, Sue has a future interest in the property in the form of a life estate. When Sue dies, the interest in the property will revert to the estate of Jane Smallwood. Sue and Brent have life interests in the property. No remainderman was named in the deed; therefore, Jane's estate has a reversionary interest, which will pass either according to her will or according to the laws of intestate succession if she has no will.

Assignment 1.19

The answer will vary depending on the state.

Assignment 1.20

1. Clare has a life estate.
2. When Clare dies, the property will pass to Maxine for 20 years.
3. This is a complex question and the answer will vary depending on whether it is answered according to common law or state statutory law. Students may answer that the property passes directly to Elizabeth and her heirs, assuming that a deceased person cannot take the property. Students may also assume that, since the text specifically states that the tenancy is created and terminates according to its own terms, Maxine's heirs might inherit her interest, unless she passed her interest in a will.
4. Amy does not have any reversionary interest in the property as she conveyed her entire interest in the property by providing for a life estate, a tenancy for years, and a fee simple remainder.
5. Elizabeth holds a future interest as the remainderman. She will receive the property in fee simple upon the expiration of Maxine's tenancy for years.
6. The two remaindermen involved in the conveyance are Maxine, who will receive a future estate as a tenancy for years at the expiration of Clare's life estate, and Elizabeth, who has a future interest in fee simple that will take effect on the termination of Maxine's interest.
7. If Elizabeth transfers her rights as the owner of the property in fee simple, then her "heirs" have no interest in the property; however, if Elizabeth does not sell, give, or will the property to anyone else, her heirs will inherit the property according to the laws of intestate succession. Otherwise, they have no rights to the property.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. Answers will vary.
2. Answers will vary.
3. Answers will vary.

CHAPTER 2 THE ESTATE PLAN AND THE PURPOSE AND NEED FOR A WILL

LEARNING OBJECTIVES

Students should be able to do the following:

- Explain the need for and purpose of an estate plan and the procedures and documents used to create a plan.
- Understand and explain the reasons why many Americans die without a will.
- Begin to identify and become familiar with the basic terminology of wills and trusts.
- Recognize and explain the function and purpose of wills.
- Begin to identify and contrast the procedures and outcomes when property is passed by testacy versus intestacy.
- Begin to recognize the terms used to identify the persons who make, manage, administer, or benefit from wills, trusts, and a deceased person's estate.
- Identify and understand the functions of fiduciaries including guardians, conservators, trustees, and personal representatives.
- Identify examples of instances where a person may not need a will.

LECTURE OUTLINE

I. Scope of the Chapter

- A. It is important to master the terms and legal concepts essential to the practice of law in the area of wills, trusts, and estates.
- B. It is important to understand the purpose, use, and necessity of having an estate plan.
- C. It is important to understand why many people die without having written a will.
- D. There will be a discussion on the purpose, use, and necessity of having a will.

II. The Estate Plan

- A. An estate plan is the arrangement of a person's estate using various disciplines to gain maximum financial benefits of tax laws for the disposition of assets.
- B. An estate plan is a way for those with assets to minimize taxes during life and at death.
- C. The purpose of an estate plan is the proper disposition of those assets with the least tax expense.
- D. Paralegals assist in gathering client data, maintaining records, and keeping clients informed and up-to-date.
- E. Estate plans use legal documents such as wills and trusts.

III. An Introduction to Wills

- A. A will is a written declaration of a person's intended distribution of property after death.
- B. Because many people do not write wills, they die having no say in how the property they have accumulated over a lifetime will be distributed.
- C. There are many reasons why people do not make wills.
 - 1. Some do not want to discuss or confront mortality.
 - 2. Others avoid discussing their property and finances with strangers.
 - 3. Some procrastinate, then die unexpectedly.
 - 4. Some fear that writing a will is too expensive.
 - 5. Many know that each state has a statute that determines passage of property if they die without a will.
- D. State statutes regulate the areas of wills, trusts, and estates.
 - 1. Statutes determine the testamentary capacity requirements, such as age and soundness of mind, for a person to write a will.

2. Statutes establish formal requirements for the execution of a valid will, such as requiring it to be written, signed, and dated by the testator, and attested to and signed by two or three witnesses.
 - a. Laws differ on the method of writing that may be used, on the placement of the testator's signature, etc.
 - b. Familiarity with the laws of a particular state is important to avoid mistakes or omissions resulting in an unintended, undesirable, or invalid will.
 - c. Familiarity with the laws, terminology, and procedures is important to help clients execute valid wills.
 - d. Online legal documents are readily available. They are not substitutes for sound individual estate planning from a practicing attorney.
- E. An understanding of basic terminology is important.**
1. Terms relating to the actual making of a will are the following:
 - Execute means to perform or complete.
 - Attest means to bear witness; to affirm or verify as genuine.
 - Subscribe means to sign one's name generally at the end of a will.
 - Witnesses are two or more persons who attest and subscribe the will.
 2. Terms relating to the administration of the decedent's estate are the following:
 - Estate, also called gross estate, is the property accumulated during a person's lifetime and owned at the time of death.
 - Property is anything subject to ownership; property is classified as real or personal property.
 - Real property is land, buildings, and things permanently attached to them.
 - Personal property is any property that is not real property.
 - Estate administration is the process of appointing a personal representative (executor or administrator) to collect, preserve, manage, and inventory the decedent's estate; notifying creditors; paying the decedent's debts and death taxes due; and distributing the remaining estate property to beneficiaries named in the will or heirs according to state intestate statutes.
 - Probate is the court procedure by which a will is proved to be valid or invalid.
 - Formal probate is the court-supervised administration of a decedent's estate.
 - Informal probate is a court proceeding of a decedent's estate with limited or no court supervision.
 - Probate court is the general name of the court that has jurisdiction over the administration of estates and distribution of property.
 - Personal representative is a person appointed by the probate court to manage the estate and distribute the assets according to the will or intestate statutes.
 - Executor/executrix is a personal representative named in the will to administer the estate.
 - Administrator/administratrix is a personal representative appointed by the probate court to administer the estate when there is no will.
 3. Terms used to refer to recipients of a decedent's property are the following:
 - Beneficiary is a person who is entitled to receive or who has already received property under a will. Traditionally, a beneficiary received personal property, but today the term describes a person entitled to any property. A beneficiary may be a legatee or devisee.
 - Devisee is someone who receives real property under a will. The Uniform Probate Code (UPC) uses the term for a recipient of real or personal property.
 - Legatee is someone who receives personal property under a will.
 - Heir is someone who is entitled by intestate statute to receive real or personal property. Traditionally, this term applied to real property only. Popular use of the term today has expanded to include persons who receive any gift through a decedent's will. Note: In this text, heir refers to intestate situations only.
 - Distributee is a person entitled to share in the distribution of an estate of a decedent who has died intestate, or, according to the UPC, any person receiving property from the personal representative other than a creditor or a purchaser.
 - Next of kin is the nearest blood relatives of the decedent, or those who would inherit from an intestate decedent regardless of blood relationship.

IV. The Purpose of Wills

- A.** The primary function of a will is to allow people to distribute their property any way they choose.
1. No word or sentence in the will should create a contradiction, ambiguity, or mistaken interpretation that could cause confusion and change the testator's plan or invalidate the will.
 2. Without a will, the law of a decedent's domicile determines to whom the decedent's property will be distributed, except that real property will be distributed according to the law of the state where the property is located.
 3. Paralegals prepare drafts of wills and review them carefully with the client to ensure that the final draft contains complete, accurate, and clearly understandable language to enable readers, especially the probate court, to agree on the meaning of the will and the client's intent.
 4. A will takes effect only when the testator dies because wills are ambulatory, meaning they can be revoked or changed by a codicil or new will any time before death.
 5. A will can be used as an opportunity to preplan one's funeral and burial; otherwise, state statute provides for who has priority in making these decisions. The best method for communicating preplanned funeral and burial arrangements is to include the plan in a letter of instructions, not in the will or codicil.
 - a. The reasonable cost of funeral and burial arrangements is paid as a priority debt of the estate according to state law.
 - b. Paralegals are often involved in keeping accurate records of the costs and reminding the personal representative that the expenses must remain reasonable because the personal representative is liable to the estate if he/she is negligent and allows the costs to become excessive.
 - c. A will can provide an opportunity for organ donations, although the best place is in a letter of instructions and/or on a donor card.
 6. The testator can determine the source from which death taxes and other debts will be paid by adding an apportionment clause to the will; otherwise, it may be determined by state statute.
 - a. If a will does not make the apportionment decision, it may have the unintended result of placing the surviving spouse and children in a position of hardship and, thus, paralegals should recognize this situation and bring it to the attention of the supervising attorney, who will then explain its significance to the client and obtain the client's permission for the paralegal to redraft the provision.
 - b. Some states have adopted the Uniform Estate Tax Apportionment Act of 1958 (Revised 1964, 1982, and 2003) and it is incorporated in the UPC.
 7. A will allows a testator to avoid ill-advised and awkward property distributions.
 8. A will allows a testator to appropriately provide for a surviving spouse and children.
 - a. Appropriate planning can reduce death taxes, especially federal and state estate taxes, thereby maximizing the estate available to those intended to receive the estate.
 - b. A will can avoid awkward and cumbersome forms of property ownership, especially with minors when guardians may be required.
 - c. The only person a testator cannot disinherit is a surviving spouse, who would have a statutory right, called a spouse's statutory, forced or elective share, to share in the decedent's estate.
 9. Testators can appoint guardians for wards.
 - a. A guardian is a fiduciary, a person in a position of trust who controls and manages property exclusively for the benefit of others and who owes the highest duty of obedience, diligence, and good faith to those the person represents.
 - b. Godparents are not legal guardians.

- c. Guardians can be either personal guardians or property guardians.
 - (1) A personal guardian is an adult who has custody, control, and responsibility for the care and supervision of a minor child.
 - (a) A personal guardian is usually the surviving natural or adoptive parent.
 - (b) Attempts to appoint some other person as a minor's guardian may not be valid.
 - (2) When a parent dies without a will, or fails to appoint a guardian in a will, the probate court must select both a personal and property guardian based on what is "in the best interest of the child."
 - (3) The property guardian can be a natural person or a legal person such as a bank, corporation, or trust department, and the responsibility of the property guardian is to take exclusive control of and manage the property inherited by the ward in order to preserve and increase its value in accordance with strict standards set by law and the courts.
 - (4) Conservators are property guardians for incompetent persons whom the probate court has found to be incapable of managing property.
- 10. Testamentary trusts can be established in wills.
 - a. A trust is a legal agreement in which the settlor transfers legal title to one or more trustees who hold and manage the property for one or more beneficiaries who receive the equitable title that gives them the benefits of the trust.
 - (1) The settlor gives up possession, control, and ownership of the property to the trustee, who is specifically instructed by the trust terms how it is to be managed and invested so that income (profits) produced can be distributed to the beneficiaries.
 - (2) The three positions of settlor, trustee, and beneficiary can be held by the same person, but the fundamental characteristic of a trust—that title is split into legal and equitable title—requires that no one person can be the sole trustee and the sole beneficiary. The solution is to create co-trustees or co-beneficiaries.
 - b. Trusts can be created either during the life of the settlor (an *inter vivos* or living trust) or as part of the testator/settlor's will as a testamentary trust, which takes effect only on death.
 - (1) A common use of a testamentary trust is the bypass trust, also called Trust B of an A-B trust, credit shelter trust, exemption equivalent trust, or residuary trust.
 - (a) This trust is for the benefit of a surviving spouse.
 - (b) Because it limits the surviving spouse's right to a life estate in the principal of the trust, the property is not included in the estate of the surviving spouse when he/she dies, thus avoiding federal estate tax.
 - (2) Trusts avoid the rigid control and cost of guardianship.
 - (3) Trusts are used to provide professional management of trust property for beneficiaries who do not have the time, inclination, or skill to manage the property themselves or who are no longer able to do so.
 - (4) Trusts allow settlors to maintain control of trust property throughout life and even after death.
 - (a) The duration of private trusts is limited by the Rule Against Perpetuities.
 - (b) Public or charitable trusts are not limited in duration.
 - (5) Trusts can prevent spendthrift beneficiaries from recklessly depleting the trust fund and prevent their creditors from obtaining trust principal on demand for the payment of debts.
 - (6) Trusts can save taxes and avoid probate expenses if properly executed.
- 11. With a will, the testator can name a personal representative (executor/executrix) to administer the estate and carry out the terms of the will.
 - a. The personal representative is a fiduciary who owes a fiduciary duty of trust, loyalty, and good faith to the recipients of the testator's estate. A personal representative includes an executor/executrix who is selected by the testator or an administrator/administratrix who is appointed by the court to administer the estate of a decedent who dies without a will.

- b. While named in the will, the executor/executrix must be appointed by the probate court to acquire the authority and powers of the position.
- c. Statutes determine who is and who is not qualified to be named executor/executrix.
- d. Personal representatives have the right to select an attorney of their choice to handle the estate even if the will names an attorney to handle the legal work. It is a violation of the Code of Ethics for the attorney or paralegal to suggest that they be named in the will for such purpose.

V. Will Substitutes

- A. Wills are not necessary in all cases, but that decision requires careful and thorough consultation with an attorney.
- B. Especially with small estates, “will substitutes” such as joint tenancy, life insurance, *inter vivos* trusts, and *inter vivos* gifts may be possible.

VI. Checklist to Determine the Need for a Will

- A. The following questions help to determine the need for a will.
 1. What property does the client own?
 2. Where is the property located?
 3. In what form of ownership is the property held?
 4. Is the client aware of the intestate succession statute that determines who would take the property if the client died without a will?
 5. Are specific items of property, real or personal, to be left to certain beneficiaries or devisees?
 6. Does the client have any special instructions for funeral and burial arrangements or for the donation of organs or the client’s body for medical or educational reasons?
 7. Does the client wish to establish a testamentary trust for the purpose of maintaining an income for a surviving spouse, an elderly parent, a minor child, or a spendthrift relative?
 8. Is there a need for a guardian over property or the person of minor children or incompetent persons?
 9. Does the client want to appoint an executor/executrix to handle the administration of the estate?
 10. Has the client considered the possible tax consequences to the estate, beneficiaries, devisees, or heirs with or without a will?
 11. Does the client want any taxes owed, including state inheritance taxes, to be paid out of estate assets?
 12. What powers and authority does the client wish to bestow on the executor, guardian, or trustee?
 13. If the client is married and the client and spouse were to die in a common accident, have the consequences to their respective estates been considered?
 14. Does the client want to avoid the probate process and its expenses and delays?
 15. Is the client aware that probate files are open to the public?

VII. Basic Requirements for a Legal Will—A Review

- A. The testator must have the following:
 1. Legal capacity—generally age 18 or older
 2. Testamentary capacity—be of sound mind (sanity)
- B. The will must
 1. be written, i.e., typewritten, printed on a computer printer (today’s method), or handwritten (allowed in some states).
 2. be signed by the testator, usually in the presence of witnesses.
 3. be dated (in most states).
 4. be attested and signed by at least two witnesses.
 5. select a personal representative (executor or executrix) to administer the decedent’s estate.

VIII. The Need for a Will—A Conclusion

- A. There are numerous reasons why many Americans die without a will.
1. By statute, some people cannot make a valid will.
 2. Persons with limited or no property, with no heirs, and who are satisfied with the resulting distribution provided by intestate succession statutes may not need a will.
 3. Some people attempt to create a will, but the probate court may declare it invalid due to improper execution.
 4. Some people procrastinate or are not interested in making a will.
 5. Some people use “will substitutes” to distribute decedents’ estates.

ANSWERS TO THE REVIEW QUESTIONS

1. Explain the reasons why many Americans die without wills.
 - Some do not want to discuss or face their mortality.
 - Some are reluctant to discuss their property and finances with strangers.
 - Some procrastinate.
 - Some cite cost as a reason to avoid writing a will.
 - Some people are prohibited by statute from writing wills (e.g., minors and incompetent persons).
 - Some people do not need a will because they have limited or no property.
 - Some have no heirs and feel they have no need for a will.
 - Some are satisfied with the distribution provided by the intestate succession statutes of their state.
 - Some attempt to create a will, but it is declared invalid by the probate court due to improper execution.
 - Some use “will substitutes” such as joint tenancy, trusts, *inter vivos* gifts, transfer-on-death deeds, and life insurance.
2. What does it mean to say the maker of a will has testamentary capacity? How does it differ from legal capacity?
 Testamentary capacity means that the maker or testator must be old enough to write a will and be of “sound mind” at the time the will is made. It refers to the requirements of state statutes for a person to make a will. Legal capacity does not necessarily hinge upon age.
3. List your state’s statutory requirements for the execution of a will. How do your state’s requirements for a valid will differ from those of other states?
 The answer will vary by state.
4. Since the terminology included in this chapter is essential to your understanding of legal concepts and procedures presented in future chapters and your practice in the fields of wills, trusts, and estates, write out your own definition of each key term in this chapter. Are your definitions essentially the same as those in the text?
 The instructor should compare the student’s definitions with those in the glossary to determine whether the essential requirements of the definitions are included in the student’s version.
5. Can a will be changed or revoked? Explain.
 Wills take effect only when the testator dies. Until then, wills are considered ambulatory, able to be revoked and subject to change any time before death. The testator can review and modify the will as often as he/she wishes and at any time by adding, deleting, or changing gifts, beneficiaries, clauses of the will, or fiduciaries. Also, the testator can sell or dispose of any property listed in the will before death. If the modification is a simple one, a codicil or amendment to the will is sufficient; however, if the changes are numerous or major, a new will should be executed.
6. List and explain the various reasons or purposes for making a will.
 - The primary function of a will is to allow the testator the opportunity to accurately describe the property owned at death and to designate to whom that property is to be distributed. Another reason is it allows a testator to preplan his/her funeral and burial, which takes a burden off the grieving family. Although a will allows a testator to express his/her personal wishes in this area,

the reality is that such preplanning may be futile either because the will is not found in time or because the family simply disobeys or ignores the instructions.

- Wills allow a testator to provide for organ donations. It is also advisable that the testator execute an organ donor identification card.
 - Wills allow a testator to donate his/her body for medical research.
 - Wills allow a testator to consider appropriate apportionment clauses to the will to determine the source from which death or estate taxes will be paid. This allows the testator to take advantage of any tax benefits and to ensure that the estate goes to those persons that he/she intended. It may prevent the unintentional result of placing family members in a hardship situation.
 - The testator can plan for and avoid ill-advised and awkward property distributions such as serious personality conflicts that might occur between/among the resulting co-owners of the testator's property.
 - Wills allow the testator to appropriately provide for a surviving spouse and the individual needs of children.
 - Wills allow the testator to appoint property and personal guardians for any minor children according to the law and for any incompetent persons.
 - Wills allow a testator to create a testamentary trust, which may reduce death and estate taxes and avoid the difficulties to property guardianship, such as control, delay, and expense.
 - Wills allow the testator the authority to choose the personal representative who will administer his/her estate.
7. Identify six examples of “will substitutes” and discuss how each might possibly be used to eliminate the need for a will.

A joint tenancy is a will substitute because of the right of survivorship that is characteristic of the ownership.

Persons might rely on life insurance, naming a specific beneficiary as the recipient of the proceeds, which are not declared as income or as a gift to the beneficiary, resulting in no tax being owed.

An *inter vivos* trust that takes effect during the testator's life is an option to avoid a will. This allows the settlor of the trust to determine the controlling provisions of the trust.

Inter vivos gifts are another mechanism used as a substitute for a will. Individuals are allowed to give, free of gift tax, up to \$ \$14,000 per year/per donee or \$ \$28,000 per year/per donee (for 2015—these amounts are periodically increased) if the gift is from both spouses. This reduces the estate of the testator and places the estate assets in the hands of those persons whom the testator chooses.

A community property agreement acts as a will substitute. The community estate passes to the surviving spouse without probate.

Transfer-on-death or beneficiary deed is a will substitute. It is a revocable transfer of real estate and does not transfer ownership until death of the owner.

ANSWERS TO THE CASE PROBLEMS

Problem 1

The answers will vary by state.

Problem 2

- A. The answer will vary by state.
- B. This answer will vary depending on the student; however, the instructor should look for critical thinking elements of the answer and depending on the student's response, determine whether the student correctly applies the cited case.

ANSWERS TO THE ASSIGNMENTS

Assignment 2.1

Answers will vary by state.

Assignment 2.2

This assignment has several possible responses. Much will depend on the individual student and the scenarios chosen. Some possible plans for Jacob Weizman's will to transfer the three farms and the \$100,000 to his five daughters in equal shares are the following:

- He can establish a trust to hold and manage the three farms with the \$100,000 being used as start-up or operating capital. The five daughters can be named as equal beneficiaries.
- He can transfer each of the farms to the five daughters equally as joint tenants with rights of survivorship. The \$100,000 can be split equally among the five daughters.
- He can transfer title to the farms to the executor of his estate with the direction that the properties are to be sold and the proceeds, along with the \$100,000, divided equally among the five daughters.
- He can discuss the situation with his daughters to determine if any of them want the farms and, if so, devise each farm in equal shares to two daughters (approximate value \$100,000 each) as appropriate, sell the farms that the daughters do not want and distribute the proceeds, approximating the \$100,000 value of the real estate, among the remaining daughters, with any overage, shared by all five.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. Sample Clause for Organ Donation:

I, _____, of the city of _____ and state of _____ hereby give any and all of my needed organs, tissues, or parts to be used as authorized by law, without any limitations. This Anatomical Gift will take place upon the declaration of my death.

I revoke any previous document or writing regarding donation of my organs, tissues, or parts and declare that this document takes priority over any previous documents or writings, if any.

If any provision of this document is deemed to be invalid, such invalidity shall not affect the other provisions, which can be given effect without the invalid provision. To this end, the provisions and directions of this document are severable.

2. Answers will vary.

3. Elvis appointed his father, Vernon E. Presley, as the executor of his last will and testament. The named alternate was National Bank of Commerce, Memphis, Tennessee.

CHAPTER 3 THE LAW OF SUCCESSION:

DEATH TESTATE OR INTESTATE

LEARNING OBJECTIVES

Students should be able to do the following:

- Recognize, understand, and explain the basic terms, including the difference between orthodox (traditional) and UPC terminology, associated with testacy and intestacy.
- Read a will and identify the parties and gifts using both orthodox (traditional) and UPC terminology.
- Recognize and identify lineal and collateral relationships and determine who is entitled to receive a decedent's property under state intestate succession statutes.
- Understand the difference between the right of heirs of an intestate to take their share of the estate per capita or per stirpes.
- Explain the process of escheat.
- Explain the intestate succession statutory rights of family members versus the spouse's election rights when a decedent spouse dies with a will.
- Identify the advantages and disadvantages of a will.

LECTURE OUTLINE

I. Scope of the Chapter

- A. This chapter explains the terms associated with the individuals and proceedings involved in the laws of succession, which deal with how property of a decedent who dies testate or intestate is distributed and to whom.
- B. The terminology, traditional and as used in the UPC, of the laws of succession are identified, defined, and discussed in this chapter.

II. Death with a Will—Testacy

- A. It is necessary to determine whether a decedent died testate, with a valid will, or intestate, without a valid will, because there is a difference in how and to whom property is distributed and if there will be a will contest.
 1. If a will contest is successful, the will is declared invalid, and the state intestate succession statute or a previous will determines who receives the decedent's property.
 2. Recipients in an intestate distribution may be entirely different than those named in the contested will.
 3. Paralegals' training, experience, and investigatory skills are used to determine, with verification by the supervisory attorney, if the will was properly drafted and executed.
 4. In intestate situations, paralegals must analyze and accurately apply the state intestate succession statute to determine to whom the property will be distributed.
 5. Even when a will exists, if it does not contain a residuary clause then that excluded property passes instead according to the intestate succession statute.
- B. Two different types of terminology are used for wills.
 1. Traditional or orthodox terminology refers to the traditional words related to wills and probate matters, which were used universally before the adoption into law of the Uniform Probate Code (UPC).
 2. The purpose of the UPC is primarily to
 - a. simplify and clarify the law, terms, and procedures in estate administration.
 - b. lessen the expense and time of estate administration.
 - c. provide an alternative system, which, if adopted by the states, establishes uniform law.
 3. States are not required to adopt the Code, although they are free to adopt it individually through their legislatures.

4. The UPC presents for adoption an alternative plan for probate procedures and a new terminology for wills and estate administration.
 - a. Many states have either adopted or modified the UPC or use the terminology it recommends.
 - b. Most states use a combination of UPC and orthodox terminology.
5. Wills are divided into four basic types and a separate document called a living will.
 - a. A holographic (also called an olographic) will is a will written in the maker's own handwriting.
 - (1) About half of the states and the UPC allow holographic wills, and, generally, such wills do not require witnesses or that the will be dated for it to be valid.
 - (2) Most states require some or all of the following for a holographic will to be valid: The will must be "entirely" handwritten by the testator; the testator must have a clear intent to make a will; the testator's signature must be placed in a specific part of the will.
 - (3) Audiotape or audio videotape recordings and typewritten wills are generally not recognized as valid holographic wills.
 - b. A nuncupative or oral will is a will spoken in the presence of witnesses; the will is valid only under exceptional circumstances, such as the imminent death of the person "speaking" the will.
 - (1) The majority of states prohibit oral wills, but when they are allowed, they must be probated within a statutory time frame and can generally pass only a limited amount of personal property.
 - (2) Some states allow oral wills of soldiers and sailors made during military service in time of war, but a few states do not require formal hostilities.
 - (3) The UPC does not allow oral wills.
 - c. A statutory will fulfills all the state's mandatory formal requirements for a will: It must be written or typed, signed and dated by the testator, and attested to and signed by two or three witnesses.
 - (1) Some states have developed their own unique fill-in-the-blank statutory wills.
 - (2) Some states have adopted the Uniform Statutory Will Act.
 —**TEACHING SUGGESTION:** Illustrate a sample of the Wisconsin Basic Will (Exhibit 3.3).
 - d. A joint or mutual (reciprocal) will is one document that is the will of two persons, usually spouses, and is signed by them. A joint will is probated twice—on the death of each spouse.
 - e. Mutual wills are the separate wills of two persons who make identical reciprocal provisions in each will.
 - f. These wills are problematic and most attorneys do not recommend or use joint or mutual wills.
 - g. A living will is a separate legal document from the standard will in that it governs the withholding or withdrawal of life-sustaining treatment in the event of an incurable or irreversible condition that will cause death within a short time.
- C. Dispositions in a will, including bequests, legacies, and devises, are the various ways property is conveyed by the will.
 1. In traditional terminology, a bequest or legacy is a gift of personal property, and a devise is a gift of real property.
 - a. When the gifts are made by a will, they are called a specific legacy or a specific devise.
 - b. If the testator uses the wrong term for real or personal property, the courts have consistently upheld such gifts because of the unmistakable intent of the testator.
 - c. States that have adopted the UPC use one term, devise, to include all gifts of real or personal property by will.

2. A specific legacy, also called a specific bequest or a specific devise in states that have adopted the UPC, is a gift of a particular item or class of personal property in a will.
3. A specific devise is a gift of real property in a will; under the UPC the term includes gifts of real and personal property.
4. A demonstrative legacy is a gift of a specific monetary amount to be paid from the proceeds of the sale of a particular item of property or from some identifiable fund.
 - a. It is different from a specific legacy as follows: If the fund from which the demonstrative legacy is to be paid has diminished or is nonexistent when the testator dies, then the payment can come out of other estate funds the same as a general legacy.
 - b. It is different from a general legacy; it is not subject to unpaid debts as is a general legacy but instead is used to pay debts like a specific legacy.
 - c. Because demonstrative legacies are similar to specific and general legacies, drafters seldom include demonstrative legacies in wills.
5. A general legacy, also called a pecuniary bequest, is a gift of a fixed amount of money from the general assets of the estate or an amount of money derived from a source established in the estate by a calculated formula.
6. A gift of all the testator's personal property not otherwise effectively disposed of by a will is a residuary legacy, and a gift of all real property not otherwise disposed of is a residuary devise.
 - a. A residuary clause distributes the remaining assets, the residue, of the testator's estate after all other gifts in the will have been distributed.
 - b. A residuary clause is the most important clause in a will because it generally passes the bulk of the estate after the payment of debts, taxes, and costs of administration and the distribution of specific, demonstrative, and general legacies.
 - c. It is essential that every will include a residuary clause; otherwise all remaining assets will pass through intestate succession.
 - d. Another important function of the residuary clause is that after any intestate property of the decedent, it serves as the next, and generally the major, source of payment of the decedent's debts; death taxes; and funeral, burial, and administration expenses.
 - e. If the residue is insufficient to pay these debts and taxes, other gifts in the will are used to satisfy these obligations by abatement.
7. If any beneficiaries of the will, especially those named in the residuary clause predecease the testator, the will should be reviewed and new or successor beneficiaries added to avoid passage of property through intestate succession.

—**TEACHING SUGGESTION:** Demonstrate and review the differences between orthodox and UPC terminology (Exhibit 3.1).

- D.** The property distributed by a will can be affected by various situations.
1. Ademption is the intentional act of the testator to revoke, recall, or cancel a gift made through the will or to satisfy the beneficiary by executing or delivering the gift while living or substituting a different item for the gift.
 - a. The beneficiary or devisee does not receive the original gift, and other property of the estate passes to the beneficiary or devisee as a substitute for the adeemed gift, only if the testator so indicated in the will.
 - b. Only specific legacies or specific devises are subject to ademption.
 - c. Ademption can occur by extinction, which is when the property is either nonexistent at the time of the testator's death or is given or sold by the testator to someone other than the person named in the will.
 - d. Ademption by satisfaction occurs when the testator, while living, gives the gift to the named beneficiary in the will with the stated intent in writing that the gift will not be replaced with a substitute or additional gift.

2. A lapse is the failure to pass or distribute a gift in a will because the beneficiary or devisee dies before the testator. This causes the gift in the will to lapse or fail and fall into the residue unless the will designates for an alternative beneficiary or unless a statute provides for the gift's distribution.
 - a. Antilapse statutes pass the gift to the decedent beneficiary's children or heirs who survive the testator.
 - b. Antilapse statutes vary as to whom the gift will pass; however, no state includes the spouse of a beneficiary who dies prior to the testator.
 - c. If a testator wants to avoid the application of an antilapse statute, the words, "if he/she shall survive me," would accomplish this.
 - d. The testator can also appoint a successor to receive the gift if the beneficiary predeceases the testator.
3. Abatement determines the order in which gifts, including legacies and devises, made by the testator shall be applied to the payment of the testator's debts, taxes, and expenses.
 - a. If abatement is necessary, payments of the gifts may be reduced or eliminated.
 - b. Abatement statutes list the order in which the various assets and categories of gifts are used to pay the outstanding debts and taxes. Usually the order of abatement is as follows.
 - (1) Any intestate property not disposed of in the will
 - (2) Residuary assets
 - (3) General legacies and devises
 - (4) Demonstrative legacies
 - (5) Specific legacies and devises
 - c. The arrangement or ranking of testamentary gifts into a certain order to be used for payment of debts is called marshaling of the estate.
 - d. Generally, personal property is the source of the funds used to pay debts and taxes, but, if necessary, real property must be divested from devisees or heirs by the personal representative and sold to pay the decedent's creditors.
 - (1) Some states require that personal property in all categories be used first before any real property.
 - (2) Other states only require that all personal property in each category be used prior to the use of real property within the category.
 - (3) The prevailing trend is to use gifts of real and personal property within the same category equally on a prorated basis; see UPC § 3-902.

III. Use of Testate Terminology

—**TEACHING SUGGESTION:** Discuss and review testate terminology with the class using Evonne Bookins's estate as the example (Exhibit 3.4).

IV. Death without a Will—Intestacy

- A. A person who dies without a will is called the intestate and is said to die intestate.
 1. The distribution of an intestate's estate is determined by state law called the intestate succession statute.
 2. The distribution of the intestate's property is directed to the heirs of the intestate.
 3. Intestate succession statutes vary widely and the controlling statutes are those of the state in which the intestate was domiciled and the state where any real property is located.
 4. Paralegals must become knowledgeable of their state's intestate succession statute so that they can explain and apply its provisions accurately.
- B. The following terms are associated with the persons and proceedings involved in the law of intestate succession.
 1. Kindred refers to persons related to one another by blood; also referred to as kin or next of kin.

2. Consanguinity refers to persons who are related by blood through a common ancestor.
 3. Affinity refers to persons who are related by marriage, including stepchildren, father- or mother-in-law, and brother- or sister-in-law; no one related by affinity, except for the surviving spouse, can inherit from the intestate.
—**TEACHING SUGGESTION:** Discuss the terms describing the relationship with the decedent, such as affinity (Exhibit 3.6).
 4. An ascendant or ancestor is a claimant to an intestate's share who is related to the decedent in an ascending lineal or collateral bloodline.
 5. A descendant is a claimant to an intestate's share who is related to the decedent in a descending lineal or collateral bloodline.
 6. Lineal, when used as a noun, is related to an intestate decedent in a direct line either upward in an ascending bloodline or downward in a descending bloodline. Lineal consanguinity exists between persons when one is descended or ascended in a direct line from the other.
—**TEACHING SUGGESTION:** Demonstrate the above terms (Exhibits 3.6, 3.7, 3.8, and 3.10).
 7. Collateral, as a noun, is not in a direct line of lineal ascent or descent, who traces a kinship relationship to an intestate decedent through a common ancestor, forming a collateral line of relationship. Collateral consanguinity exists between persons who have the same ancestors but who do not descend or ascend from each other.
—**TEACHING SUGGESTION:** Demonstrate the concept of collateral heirs (Exhibits 3.7, 3.8, and 3.10).
 8. Half blood is the degree of relationship that exists between persons who have the same mother or the same father in common, but not both parents.
 - a. Most states, including the UPC § 2-107, allow half blood and whole blood kindred to receive an equal share of the intestate's estate.
 - b. Other states give the half blood kindred only half as much as a whole blood kin.
- C. Intestate succession statutes provide rules for descent and determine distribution of the probate property of the decedent.
1. An important distinction exists between real and personal property that involves the application of the intestate succession statute.
 - a. The law of the intestate's domiciliary determines the inheritance of personal property regardless of where the property is located.
 - b. Real estate passes according to the intestate laws of the state where the real property is located.
 - c. Nonprobate property, such as that held in joint tenancy or tenancy by the entirety, is not affected by intestate succession statutes or by a will.
 2. The term issue refers to all lineal descendants from a common ancestor.
 3. The two basic principles of the law of intestate succession are the following:
The intestate's property does not pass to all members of the class of persons defined as issue but only to persons closest in line to the intestate.
The heirs can only be persons who survive the intestate; they must be living at the time of the intestate's death.
 4. An intestate's estate is distributed by one of two statutory methods: per capita distribution or per stirpes distribution.
 - a. Per capita means equal to each person or "by the heads," and it is a method of dividing an intestate estate by giving an equal share to a number of persons all of whom are related to the decedent in the same degree of kinship.
 - b. Sometimes an heir takes his/her share of a decedent's estate by right of representation, which is the right of a child to receive the share of an intestate's property the child's parent would have received if the parent was still living.

- c. Per stirpes distribution means taking by right of representation; it is the method of dividing an intestate estate where a class or group of heirs takes the share to which their deceased parent would have been entitled had the parent lived.
- (1) The heirs take by their right of representing their ancestor and not as so many individuals.
 - (2) The heirs are related to the intestate in different degrees of relationship with some heirs having predeceased the intestate; the descendants of such persons receive their shares through the predeceased heir by representation.
 - (3) Using the per stirpes method, the intestate's estate is divided into as many equal shares as the decedent has children (1) who are living or (2) who are already dead but have living descendants; the living children of any deceased parent take their parent's share per stirpes, by right of representation.
 —**TEACHING SUGGESTION:** Explain the difference between per stirpes and per capita using the example in the text (Exhibit 3.9).
5. The degree of relationship is a method of determining which collateral relatives or heirs will inherit from an intestate.
- a. Most state statutes and the UPC pass the decedent's estate in the following order.
 - (1) To a surviving spouse and lineal descendants.
 - (2) To other lineal descendants such as grandchildren or great-grandchildren.
 - (3) To lineal ascendants such as parents or grandparents.
 - (4) To collateral relatives who are lineal descendants of the decedent's parents such as brothers and sisters and their children who come before aunts, uncles, and cousins, and whose degree of relationship determines their inheritance rights.
 —**TEACHING SUGGESTION:** Illustrate how one calculates the degree of relationship of kindred (Exhibit 3.10).
 - (5) To other next of kin, blood relatives of the decedent.
 - (6) If there is none of the above, the property of the decedent passes to the state by escheat, the right of the state to title of an intestate's estate when no spouse or kindred survive the intestate.
 - b. To determine which collateral heirs receive the intestate's property to the exclusion of other collateral heirs, it is often necessary to ascertain the degree of relationship between the decedent and the collateral heirs in question.
 - c. Civil law computation of the degree of relationship is determined by first counting up from the decedent to the closest common ancestor to both the decedent and the possible heir, and then counting down to the heir.
 - (1) Exclude the decedent when counting.
 - (2) Include the possible heir when counting.
 - (3) The collateral heir who is related in the lowest degree receives the property to the exclusion of the other collateral heirs.
 - (a) In some states, if several collateral heirs are related in the same degree, they share equally.
 - (b) In other states, if collateral heirs have the same degree of kinship, those related through the closest common ancestor take to the exclusion of the others.
 - d. Common law computation of the degree of relationship computes the degree by first counting up from the intestate to the closest common ancestor to the decedent and the possible heir and next starting a new count down to the heir. The greater or higher this second number is in comparison with other possible collateral heirs determines who receives the inheritance.
 - e. Most states give preference to descendants over ancestors.
 —**TEACHING SUGGESTION:** Demonstrate civil law and common law computation so that students can see the difference (Exhibit 3.10).

6. Escheat is the passage of property to the domiciliary state when an intestate leaves no surviving spouse or kindred entitled to inherit the estate. Real property of an intestate escheats to the state in which it is located.
7. Although intestate succession statutes vary from state to state, there are similar rules on which surviving relatives will inherit an intestate's estate.
 - a. If there is a surviving spouse and no blood relatives, the spouse receives the entire estate.
 - b. If there is a surviving spouse and children all born to the surviving spouse and the deceased, the spouse receives a lump sum of money, ranging from \$7,500 to \$100,000, and/or an additional portion (usually one-half) of the estate with the remainder of the estate to be distributed equally among the children.
 - c. If there is a surviving spouse and children, some or all of whom are not the children of the surviving spouse, the spouse receives a lump sum of money, ranging from \$7,500 to \$150,000, and/or a portion (usually one-half) of the estate; the children receive the remainder of the estate equally.
 - d. If there is a surviving spouse, no children, but surviving parents, most states give the entire estate to the surviving spouse; other states give the surviving spouse a lump sum ranging from \$7,500 to \$200,000 plus one-half of the remaining estate, and the parents receive the other half.
 - e. If there is a surviving spouse, no children, no parents, but brothers and sisters, in the majority of states, the surviving spouse receives everything; in other states, the spouse receives one-half of the remaining estate, and the brothers and sisters receive the other half equally.
 - f. If there is no surviving spouse and no children, the parents receive the property followed by brothers and sisters, then their children and other collateral heirs.
 - g. If there is no spouse or kindred, the state receives the property by escheat.

—**TEACHING SUGGESTION:** It is helpful to review your state intestate distribution statute with the students at this time so that they can compare their state statute with these general rules.

V. Rights of Family Members to a Decedent's Estate

- A. When a married person dies testate, the rights of the surviving spouse are usually determined by the will.
- B. When a decedent dies intestate, the rights of the surviving spouse are determined by state statute and by which family members outlive the intestate.
- C. To protect a surviving spouse from being disinherited, a married person is limited in disposing of property in that a surviving spouse cannot be completely excluded from a will.
 1. Most states offer a surviving spouse the choice or election of taking the benefits in the will or renouncing the provisions made in the will for the surviving spouse and electing a statutory share of a certain minimum portion of the deceased spouse's estate.
 2. Sometimes the elected share is the same as the amount the spouse would have received if the decedent spouse had died intestate.
 3. This elective right has replaced the common law provisions of dower and curtesy in many states.
 4. By statute, the spouse's election must be made within nine months of death.
 5. The election is made when the spouse gives written notice to the personal representative and files the notice with the probate court.
 6. The right of election does not apply if the surviving spouse had previously waived the right by signing an antenuptial agreement.
 7. Some states do not allow the election if the surviving spouse "abandoned" the deceased spouse prior to the latter's death or failed to provide required support for the deceased spouse for any period before death.

- D.** Over the years, several states have altered the legal meaning of surviving spouse. Some states recognize a properly entered civil union between same-sex couples and grant them nearly all the rights and responsibilities associated with legal marriage, including full inheritance rights. The following states, through statutory or judicial law, have extended surviving spouse testate and intestate inheritance rights to include, in addition to the surviving partner of a legal marital relationship, the surviving partner of a legally recognized same-sex conjugal relationship. All other states limit surviving spouse inheritance rights to the surviving partner of a legal marriage: California, Connecticut, Hawaii, Maine, Massachusetts, and Vermont.
- E.** If the testator obtains a divorce or annulment after executing a will, the effect on the will is determined by state law.
1. In most states, a divorce revokes only the provisions that benefit the former spouse.
 2. A testator's subsequent marriage after creating a will may revoke the entire will in some states.
 - a. Since the majority of states allow a statutory forced share to a surviving spouse who elects against the will, some of these states often have no "marriage revocation law" since the new spouse is covered by the election right.
 - b. Community property states automatically pass one-half of the decedent's community property to the surviving spouse. Numerous states and the UPC give the new spouse an amount equal to the intestate share of the decedent's estate unless it can be shown the omission was intentional or the testator provided for the surviving spouse by transfer outside the will and intended the transfer be in lieu of a testamentary provision.
- F.** Various methods allow persons contemplating a second marriage to transfer some of their assets to existing family members. Disclosure of such transfers and their value is essential to approval by state courts.
1. Before marriage methods
 - a. Joint tenancy.
 - b. Revocable living trust to benefit his or her children. Once the property is transferred, only the beneficiaries are entitled to it. The trust could be revoked any time during the settlor's life, but upon his/her death, the trust becomes irrevocable.
 - c. Antenuptial agreement (premarital or prenuptial agreement). Marital agreements created prior to marriage allow passage of separate property to existing children of prior marriages. Validity varies state to state.
 2. After marriage methods
 - a. Postnuptial agreement. Marital agreements made after marriage to determine the surviving spouse's property rights to the decedent's estate. This can be used to protect prior children's interests.

NOTE: Antenuptial and postnuptial agreements can be voided if the agreement is unconscionable and/or there was inadequate disclosure concerning the property waived and its fair value.
- G.** Issue is a broader term than children and, as it is normally used in wills, includes all blood descendants of the ancestor, not just lineal descendants, such as children, grandchildren, and great-grandchildren.
1. Formerly, the term included only legitimate issue, but the U.S. Supreme Court prohibited unjust discrimination against children born out of wedlock.
 2. Many states' intestacy statutes have established an adopted child as issue of the adoptive parents, which gives the child the same rights, including inheritance rights, as the adoptive parents' natural children.
 3. A natural child is a child by birth of a mother and the biological father, as distinguished from a child by adoption.
 - a. If a married woman gives birth to a child, her husband is presumed to be the father.

- b. Parents are not required to leave anything to their children; excluding children from sharing in an estate is accomplished by inserting a clause in the will to the effect that the testator has intentionally made no provision for a certain named child. If there is no specific exclusion, the child may ultimately receive a share as a result of an omitted child statute.
 - c. Divorce and remarriage often have a detrimental effect on the rights and opportunities of natural or adopted children to inherit by will or by law. In divorce decrees, the spouses may stipulate that the spouse who is obligated to pay child support will make a will leaving a portion of the estate to the children or name the children as beneficiaries of a life insurance policy. Such insurance policies and the survivor's benefits from Social Security may terminate the need for continuing child support after the death of the parent who is making support payments.
4. Adoption is a legal process whereby state statutes terminate legal rights and duties between children and their natural parents and substitute similar rights and duties between children and their adoptive parents.
- a. States are inconsistent in determining the inheritance rights of adopted children or adoptive parents.
 - (1) The modern trend is to treat the adopted child as a natural child of the adoptive parents and not as the child of the former natural parents for all legal purposes, including inheritance.
 - (2) States that have adopted the UPC have followed this trend.
 - (3) Several states allow adopted children to inherit from their biological kindred.
 - b. Since a testator can leave an estate to anyone, with the exception that a surviving spouse cannot be disinherited, the adoption rules apply only to intestacy cases.
 - c. When a testator wants an adopted child to be treated equally as a natural child, a clause asserting this should be added to the will to avoid confusion.
 - d. Adults can also be adopted.
 - (1) The purpose of this is generally to allow the adopted adult to inherit, or take by will, from the adopting person.
 - (2) Adult adoptions have been upheld to allow gay and lesbian inheritance rights.
 - (3) Adult adoptions generally only affect the inheritance rights of the immediate parties.
5. A nonmarital child is a child born to parents who are not married to each other; the child is said to be born out of lawful wedlock.
- a. Generally, states provide that the child has the right to inherit from and through the mother, but statutes vary about the rights of a child to inherit from the father.
 - b. Since the U.S. Supreme Court's decision in *Trimble v. Gordon*, 430 U.S.762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), established that a nonmarital child has a constitutional right to inherit from a father, most states have amended their statutes to avoid unjustified discrimination against nonmarital children.
 - c. Some states continue to control the right of inheritance from the biological parent by requiring either an acknowledgment by the man that he is the father or convincing evidence in a civil paternity lawsuit that the man is the father of the child; when either is met, the nonmarital child has the right to inherit from the father.
 - d. Most states allow parents and their relatives to inherit from their nonmarital children who die intestate without issue; however, the father must establish appropriate proof of paternity.
 - e. Some states have passed legislation preventing a parent from inheriting from a child whom the parent abandoned or failed to support during minority.
6. A pretermitted child is a child omitted in a will by a parent.
- a. If a parent unintentionally does not mention the child or make provision for a child in the will, and the child was either living at the date of the will's execution or was born thereafter, a statute may provide that the child, or the issue of a deceased child, shall receive a share in the estate as though the parent-testator had died intestate.

- b. The UPC only includes children who were born after the will was executed and limits the amount given to the omitted child to an equal amount that is given to the other children.
 - c. Some states cover children born before or after the testator's death.
 - d. For an adopted child, the date of the adoption rather than the date of birth is controlling.
 - e. Under a pretermitted statute, a testator, while living, must make some settlement or give an equal share of property to the omitted child by way of advancement; after death, name the child as a beneficiary in the will; or make it clear in the will that the omission of the child was intentional.
 - f. A parent can give a child little or nothing through a will but must do so expressly; if the child is not mentioned in the will, the assumption is that the omission was inadvertent and not intended.
7. A posthumous child is conceived before but born after the death of his/her father. Under most state statutes, the child is given an intestate share of the deceased father's estate.
8. All states have abolished the right of a convicted murderer, including a spouse or child(ren), to inherit by will or intestacy the property of the victim.
- a. These statutes are slayer or homicide statutes.
 - b. The killer is often treated as though he/she has predeceased the victim.
 - c. Some states have abolished the inheritance rights of a beneficiary of a will who is convicted of killing other beneficiaries.
 - d. Some states recognize mistreatment of a vulnerable or disabled testator or intestate by an heir as grounds for disinheriting the heir, if convicted of financial exploitation, abuse, or neglect of the person from whom the heir could inherit.
- H.** In addition to the specific rights of a surviving spouse and children, they may receive benefits from the decedent's estate that are not determined by the will or the intestate succession statute and they take priority not only over the decedent's will or intestacy laws, but also over creditors' claims against the estate.
1. In some states, statutes protect a family-owned house from eviction by creditors by allowing the householder or head of the family to designate a house and the land as the homestead; this is exempt from claims and execution by creditors and takes priority over the decedent's will or intestacy statutes.
- a. Homestead is defined as the house and adjoining land occupied by the owner as a home.
 - b. The amount of land comprising the homestead may be limited in acreage by statute.
 - c. If the spouses own their home as joint tenants and one of the spouses dies intestate, the transfer of the homestead is not affected.
 - d. If both spouses are living, most states provide that the homestead cannot be sold without the consent and signature of each spouse.
2. Instead of a homestead exemption, some states provide a cash award called a homestead allowance for the benefit of a surviving spouse or minor children. The homestead allowance is not subject to creditors' claims and is a priority payment made to the surviving spouse or children in addition to any property passing to them by will, by intestate succession, or by a surviving spouse's right to an elective share (see UPC § 2-402).
3. Many states and the UPC also exempt some of the decedent's personal property up to a specific dollar amount, which is given to the surviving spouse and/or children free from claims of creditors.
- a. Exempt property is often limited to household furniture, appliances, furnishings, automobiles, and personal effects.
 - b. The number of items in the various categories that constitute exempt property can be limited.
 - c. The UPC provides that the selected exempt property either goes to the surviving spouse or to the children equally if there is no surviving spouse.
 - d. In cases in which the decedent did not own any qualifying exempt personal property, statutes may provide for a cash allowance in place of the property.

4. During the administration of the decedent spouse's estate, most states give the probate court the power to award the surviving spouse and/or minor children the exempt property and a monthly cash allowance for their maintenance and support.
 - a. The amount of the award varies and is determined by the probate court based on the assets and liabilities of the estate and the family needs. The award may be terminated at the death of a recipient or remarriage of the surviving spouse.
 - b. The decedent's will cannot defeat this family allowance even if the decedent disinherited them.
 - c. The family or widow's allowance is exempt from creditors' claims.

VI. Use of Intestate Terminology

—**TEACHING SUGGESTION:** Review the use of intestate terminology and concepts by reviewing and discussing the fact pattern in the text concerning Toby Smith.

VII. Advantages and Disadvantages of a Will

- A. There are many advantages of a will. A will makes it possible for the testator to do the following:
 - Designate how much and to whom all property is to be distributed after death.
 - Leave property to family members equally or in varying amounts based on need, affection, or worthiness of the chosen recipients.
 - Leave property to someone who would not take under intestate succession.
 - Make gifts to the testator's church, or to charitable, educational, scientific, and health institutions or organizations.
 - Nominate a personal guardian to care for any minor or incompetent person and a property guardian to manage property inherited by the minor.
 - Appoint a trustee and create testamentary trusts.
 - Nominate a personal representative.
 - Avoid many legal problems that may accompany intestate administration.
- B. Disadvantages of a will include the following:
 - Probate of a will is often time consuming, expensive, and can cause inconvenience to the decedent's family.
 - Probating a will causes bureaucratic problems.
 - A will does not eliminate complicated procedures.
 - There is a loss of privacy and confidentiality because all wills are filed in county records and are open to the public and the news media.
 - If the will does not match individual circumstances, is outdated, or is inadequate, having no will might be more acceptable.

ANSWERS TO THE REVIEW QUESTIONS

1. What is a will contest? If the contestant of a will is successful and the will is declared invalid, what law determines how and to whom the intestate's in-state and out-of-state real and personal property is distributed?
 A will contest is litigation to overturn a decedent's will. If the challenge is successful and the will is declared invalid, the state intestate succession statute determines who receives the decedent's property. The law of the intestate's domicile determines how and to whom the intestate's personal property is distributed, wherever the personal property is situated. The law of the intestate's domicile determines how and to whom the in-state real property is distributed. The law of the state where the out-of-state real property is located determines how and to whom the property will be distributed.
2. Review the comparison of orthodox and UPC terminology in Exhibit 3.1. How do the meanings of the terms *heir* and *devisee* differ between the two sets of terminology?
 An heir in orthodox terminology is a person entitled by statute to receive real property of an intestate. According to the UPC, an heir is a person entitled by statute to receive real and/or personal property

of an intestate. According to orthodox terminology a devisee is a gift of real property by will. The UPC uses the term *devisee* for all gifts by will, including gifts of money, personal property, and real property.

3. What are four types of basic wills? Define and explain each one.

Four types of wills are holographic, nuncupative, statutory, and joint or mutual wills. Holographic or olographic wills are written in the maker's own handwriting. Many states require some or all of the following for a holographic will to be valid.

- The will must be dated.
- The will must be entirely handwritten by the testator.
- The testator must have a clear intent to make a will.
- The testator's signature must be placed in a specific part of the will.

Nuncupative wills are oral wills spoken in the presence of witnesses. Such wills are valid only under exceptional circumstances, such as the impending death of the person speaking the will. Often they can pass only a limited amount of personal property. Some states allow oral wills such as soldiers' and sailors' wills made during military service in time of war.

Statutory wills fulfill all the state's mandatory formal requirements for a will, including the following:

- The will must be written or typed.
- The will must be signed by the testator.
- The will must be formally attested to and signed by two or three witnesses.

It is a fill-in-the-blank type of will authorized by statute in the testator's domicile state.

A joint or mutual will is when one document is made the will of two persons and is jointly signed by them. The joint will is probated twice—on the death of each maker. Mutual wills are the separate wills of two persons who make identical provisions in each will. Because these wills create many problems, most attorneys do not recommend or use them.

4. Explain the differences between: (A) a bequest and a devise; (B) a specific legacy and a specific devise; (C) a demonstrative legacy and a general legacy; and (D) a residuary legacy and a residuary devise.

A. Traditionally, a bequest is a gift by will of personal property other than money and a devise is a gift of real property by will. Under the UPC both are called devises.

B. Traditionally, a specific legacy is a gift of a particular item of personal property or a gift of a class of property in a will; and a specific devise is a gift of real property in a will. Under the UPC, both are called specific devises.

C. Traditionally, a demonstrative legacy is a gift of a specific monetary amount to be paid from the proceeds of the sale of a particular item or property or from some identified fund. A general legacy, also called a pecuniary bequest, is a gift of a fixed amount of money from the general assets of the estate or an amount of money derived from a source established in the estate by a calculated formula.

D. A residuary legacy is a gift of all the testator's personal property not otherwise effectively disposed of by a will, and a residuary devise is a gift of all the real property not disposed of by a will.

5. What does it mean when a gift in a will is adeemed or lapses?

When a gift is adeemed, it has been the subject of an intentional act of the testator to revoke, recall, or cancel a gift made through the will or to satisfy the beneficiary by executing or delivering the gift while living or substituting a different item for the gift. A lapse is the failure to pass a gift in a will because the beneficiary or devisee dies before the testator.

6. When there are insufficient assets in the testator's estate to pay all debts, taxes, and expenses, what is the order of abatement of the decedent's assets including legacies and devises?
State statutes list the order in which the various assets and categories of gifts are used to pay the debts and taxes of the estate: (1) any intestate property not disposed of by the will; (2) residuary assets; (3) general legacies and devises; (4) demonstrative legacies; and (5) specific legacies and devises.
7. How does per capita distribution differ from per stirpes distribution in intestacy cases?
Per capita distribution means "equal to each person" or "by the heads." It is a method of dividing an intestate estate by giving an equal share to a number of persons, all of whom are related to the decedent in the same degree of relationship. Per stirpes distribution is by right of representation. It is a method of dividing an intestate estate where a class or group of heirs takes the share to which their deceased parent would have been entitled had he/she lived; thus the heirs take by their right of representing their ancestor and not as so many individuals. Per capita shares are equal; per stirpes shares may not be equal among the recipients. Per capita is shared on the individuals' rights; per stirpes is shared based on the rights of the parent/ancestor.
8. Which computation method, the civil law method or the common law method, do you prefer to determine the degree of relationship of collateral heirs? Explain.
This answer will vary depending on the preference of the student; however, the instructor should look for clear definitions of both methods, that the processes of both are explained, and that the reasons for each student's preference are clearly stated and supported by fact.
9. What does the term *escheat* mean? When does escheat occur?
Escheat is the passing of property to the state when an intestate decedent leaves no surviving spouse or blood (kindred) relatives entitled to inherit the intestate's estate.
10. Why is it generally impossible for a testator to disinherit his or her surviving spouse? Explain.
Even if a testator disinherits his/her surviving spouse by the provisions of the will, the state protects a surviving spouse from being disinherited by providing for a surviving spouse to elect to take the benefits in the will, if any, or renouncing the provisions made in the will, if any, for the surviving spouse and electing a statutory share of a certain minimum portion of the deceased spouse's estate. Therefore, even if the testator "disinherits" the surviving spouse by not providing for the spouse in the will, the state statutes allow the surviving spouse an election to take a minimum statutory amount of the estate.
11. What effect does a divorce or marriage have on a preexisting will?
If the testator obtains a divorce after executing a will, the effect on the will is determined by state law. In a few states, the divorce may revoke the will with the result that the testator's property passes by intestacy and the former spouse is excluded from any inheritance. In most states, a divorce revokes only the provisions that benefit the former spouse, not the will in its entirety. A testator's subsequent marriage after creating a will may have the effect of revoking the will in some states. Since the majority of states, excluding the community property states, allow a statutory share to a surviving spouse who elects against a decedent spouse's will, some of these states often have no "marriage revocation law" since the new spouse is covered by the election right.
12. What are the inheritance rights of an adopted child; a stepchild; a nonmarital child; and a pretermitted child?
An adopted child is generally treated as a natural child of the adoptive parents and not as the child of the former natural parents for purposes of inheritance. A stepchild could inherit from a stepparent if the stepparent named the stepchild in the will; otherwise, as a stepchild is not a natural child of the stepparent, he/she would have no intestate inheritance rights.
A nonmarital child's inheritance rights are governed by state statute. Generally, they hold that the child has the right to inherit from and through the child's mother, but statutes vary about the rights of the child to inherit from the father. Since the Supreme Court decision in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), nonmarital children have a constitutional right to not be unjustly discriminated against. Some states continue to control the right of inheritance from the

biological father by requiring either an acknowledgment by the man that he is the father or convincing evidence in a civil paternity lawsuit that the man is the father of the child.

A pretermitted child is omitted in a will by a parent. If a parent unintentionally does not mention a child or make provisions for a child in the will, and that child was either living at the date of the will's execution or born thereafter, a statute may provide that the child, or the issue of a deceased child, shall receive a share in the estate as though the testator had died intestate. Although a parent can give a child little or nothing by will, it must be done expressly, or the child will be determined to be pretermitted.

- 13.** How does a homestead exemption differ from a homestead allowance? How do family allowances differ from exempt property?

Homestead exemptions are allowed by statute to protect a family who owns and occupies a house and adjoining land by allowing the head of the household to designate the property as a homestead, which makes it exempt from claims and execution by creditors. A homestead allowance is when a statute provides a cash award for the benefit of a surviving spouse or minor children. This allowance is not subject to creditors' claims and is a priority payment made to the surviving spouse or children in addition to any property passing to them by a will, by intestate succession, or by a surviving spouse's election rights.

A family allowance is an award of some exempt personal property and a monthly cash allowance for the maintenance and support of the surviving spouse and/or minor children by the probate court. Exempt property is a certain amount of the decedent's personal property up to a specific dollar amount, which is given to the surviving spouse and/or children, and is often limited to household furniture, appliances, furnishings, automobiles, and personal effects. A portion of the exempt property is awarded as part of the family allowance.

- 14.** Review the provisions of Leona Helmsley's will as reported in the press. Which conditions, restrictions, or bequests do you find reasonable and appropriate? Which ones do you think are "quirky" and inappropriate? Explain why you reach those conclusions.

ANSWERS TO THE CASE PROBLEMS

Problem 1

- A.** Specific devises: a house valued at \$110,000 to his best friend, Roxanne Rudin. Specific legacies: furniture and household appliances worth \$8,000 to Roxanne; a television and stereo system worth \$2,500 to his nephew, Roland Tomas; a 2005 Toyota Camry worth \$15,000 to his only brother, William Tomas. Residuary legacy: all his remaining property, which is all personal property worth \$22,000 to the American Cancer Society. General legacy: a gift of \$5,000 to his church.

Demonstrative legacy: a gift of \$10,000 to his sister-in-law, Sally Tomas, to be paid out of his savings account in Metro State Bank in his hometown.

- B.** The exact abatement process will vary depending on each state statute, but using the general way property is abated, any property not disposed of by the will is treated as intestate property and will abate first; then property from the residuary clause will abate; then from general legacies and devises; then from demonstrative legacies; and, finally, from specific legacies and devises. Some states abate all personal property first, then real property. Other states abate real and personal property within each category on a prorated basis.
- C.** The gift lapses into the residuary clause. It is generally abated as residual property.
- D.** The instructor should carefully note how the student performs the prorating process with this question and how the student explains the reasoning behind which property abates first.

Basically, after the residuary, general legacies and devises, and demonstrative legacies are abated (a total of \$37,000), there is \$13,000 that still must be abated from the specific legacies. (Note that the question specified legacies and not devises.) There are three gifts in this category: the furniture and appliances valued at \$8,000; the television and stereo valued at \$2,500; and the car valued at \$15,000. If the abatement is prorated equally, then each gift must be reduced by approximately 50.98%. This

means that the gift of the television and stereo will be partially abated and Roland will receive approximately \$1,225.50. The gift of furniture and appliances will be partially abated and Roxanne will receive approximately \$3,921.50; and the gift of the car will be partially abated and William will receive approximately \$7,353.00. The instructor should note that the case problem specifies that Emmett Tomas is a bachelor; therefore, student comments about family allowances, homesteads, and exempt property should be addressed.

Problem 2

- A. Per stirpes.
- B. Because Debbie predeceased Howard and left no issue, the estate would be divided among the two children of Howard, Abel and Barb, who survived Howard, and the issue surviving of their brother Charles, who predeceased Howard. Therefore, the estate will be divided equally by Abel, Barb, and the issue of Charles by right of representation. Each will receive a one-third interest either as surviving children or a portion of the one-third interest by right of representation.
- C. Eli is the child of Abel who is still alive; Fred and Gary are issue of Barb who is still alive. Because Abel and Barb are living, they take their individual share from the estate. Their children would only take by right of representation if either was deceased.
- D. Because Kathy and Lee take their share by right of representation from Jack, they only share equally in the share to which Jack was entitled. Jack's share of one-ninth of the estate is divided equally between Kathy and Lee; therefore, each takes a one-eighth interest.
- E. No, because surviving spouses do not take by right of representation.

Problem 3

The answer will vary depending on the state.

ANSWERS TO THE ASSIGNMENTS

Assignment 3.1

1. Adrian Munez is the testator.
2. There is no testatrix because Adrian is male, not female.
3. Adrian Munez died testate if this will was validly executed.
4. No guardian or trustee is named.
5. The document is a will.
6. This is a specific devise according to the UPC.
7. Yes, according to UPC usage.
8. The beneficiaries named are Ignacio and Rosa Maria.
9. Richard Leon is the personal representative.
10. No, because the personal representative is male.
11. No testamentary trust is included in the will.
12. Not as it appears.
13. No, a nuncupative will is oral; generally a holographic will is handwritten.
14. The answer will vary depending on the state.

Assignment 3.2

1. Armond has no lineal descendants.
2. Armond's lineal ascendants are his mother, Lila, and his grandfather, Alonzo.
3. Armond's surviving blood relatives who are collaterals and their degrees of relationship, according to civil law computation, are as follows.
 - Brother: Niles, second degree
 - Sister: Lorraine, second degree
 - Niece: Francine, third degree
 - Nephew: Frank, third degree
 - Aunt: Rose, third degree
 - First cousin: Judy, fourth degree

4. The answer will vary depending on the state.
5. The answer will vary depending on the state. However, it seems likely that his mother, Lila, will take the entire estate. If, by some chance, the inheritance passes to the level of Armond's brother and sister, then Francine and Frank may share by right of representation the portion that would have been taken by their father, Harry, who is the predeceased brother of Armond. They would share his portion with Niles and Lorraine who would take their share as individuals per capita. However, this result appears unlikely.
6. The answer will vary depending on the state.

Assignment 3.3

The answer will vary depending on the state.

Assignment 3.4

The answer will vary depending on the state.

Assignment 3.5

The instructor will want to see how the students analyze the statute in finding the correct answers.

1. As exempt property under Minnesota law, Gianna can seek, in addition to the homestead and family allowance, property not exceeding \$10,000 in value in excess of any security interests from the \$20,000 that Lorenzo left as household furnishings, clothing, and the like, and the \$15,000 of personal property items, subject to an award of sentimental value property allowed under the law. She is entitled to the car owned by Lorenzo at the time of death. As a family allowance under Minnesota law, Gianna is allowed a reasonable family allowance in money out of the estate for their maintenance as follows.
 - For one year if the estate is inadequate to discharge allowed claims.
 - For 18 months if the estate is adequate to discharge allowed claims.
 - The amount of the family allowance may be determined by the personal representative in an amount not to exceed \$1,500 per month.

Therefore, if Gianna's estimate of \$1,400 per month is reasonable, it will be allowed for the period specified depending on the financial status of the estate. With assets of \$200,000 and liabilities of \$5,000, it appears that Gianna would be granted an allowance for 18 months.

2. The children will be entitled to receive the allowance only if Gianna is not living.
3. The car is considered exempt property. The fact pattern does not specify whether Lorenzo left an automobile.
4. It appears that the family will receive an allowance for up to 18 months as it appears that the assets of the estate are adequate to discharge allowed claims.
5. The answer will vary depending on the state.

Assignment 3.6

Conn. Gen. Stat. Ann. § 45-64(a) discusses the effects of a final decree of adoption and surviving rights. The answer according to the student's state statute will vary.

Assignment 3.7*

1. The intestate is Natalie Robinson.
2. Natalie Robinson died intestate; therefore, an administrator/trix will have to be appointed by the probate court.
3. The laws that govern the passage of her estate are the intestate succession statutes.
4. The answer will vary depending on the state.
5. Natalie Robinson's lineal ascendants are her mother, Simone, and her father, Ernie. Her lineal descendants are her adopted daughter, Lana; her grandson, David; and her granddaughter, Luella.
6. The collaterals related to Natalie Robinson are her sisters, Faith and Nadine; her brother, Thor; an aunt, Rose; an uncle, Oscar; two nephews, Donnie and Kevin; a niece, Diane.

7. The potential successors of the decedent will vary depending on which states the students chose to model and how the students define the term *potential*. Generally, the current surviving spouse (Len), her adopted daughter (Lana), her grandson, (David), and her granddaughter (Luella) will be the most likely successors.
8. Len is her surviving spouse. Lana is her adopted daughter and will take as a natural child. David and Luella are issue of her predeceased children and will take by right of representation.
9. Those relatives who might be excluded from receiving any of the decedent's property are her sisters, Faith and Nadine; brother, Thor; mother, Simone; father, Ernie; aunt, Rose; uncle, Oscar; two nephews, Donnie and Kevin; niece, Diane. Others listed who are not blood relatives will also be excluded including her foster son, Thomas; mother-in-law, Isla; Len's sister, Cynthia; and Manny, her husband by a prior marriage whom she divorced.
10. Faith and Nadine are her sisters; Thor is her brother; Simone is her mother; Ernie is her father; Rose is her aunt; Oscar is her uncle; Donnie and Kevin are her nephews and sons of her deceased brother, William; Diane is her niece and the daughter of her deceased sister, Sharon. They are all related by consanguinity. Those listed who are not blood relatives are Thomas, a foster son who is not really related; Isla is her mother-in-law and related by affinity; Len's sister, Cynthia, is related by affinity. Manny, her ex-husband is no longer related by affinity.
11. As Natalie Robinson's lineal descendants will most likely share the estate with her current husband, Len, the lineal descendant who will most likely share per capita is Lana.
12. As Natalie Robinson's lineal descendants will most likely share the estate with her current husband, Len, the lineal descendants who will most likely share per stirpes are her grandson, David, by right of representation will take the share of his deceased mother, Denise; and her granddaughter, Luella, by right of representation will take the share of her deceased mother, Nancy. Their shares are by right of representation but, in fact, will be equal to the per capita share of Lana.
13. If the decedent had no surviving relatives, her estate would escheat.
14. The layout of the diagram may vary. One suggestion that follows the diagram for the calculation of the degrees of kindred is shown below:

*** Note:**

Husband, Len, is not ascendant or descendant.

Sister-in-law, Cynthia, is not ascendant or descendant.

Mother-in-law, Isla, is not ascendant or descendant.

Foster son, Thomas, is not ascendant or descendant.

Assignment 3.8

1. The answer will vary depending on the state.
2. The answer will vary depending on the student.
3. The answer will vary depending on the student.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. Answers will vary.
2. Answers will vary.
3. Answers will vary.

CHAPTER 4 WILLS: VALIDITY REQUIREMENTS, MODIFICATION, REVOCATION, AND CONTESTS

LEARNING OBJECTIVES

Students should be able to do the following:

- Use the terminology associated with the validity, modification, and revocation of wills.
- Recognize the formal requirements for a valid will and verify that a client's will has satisfied all those requirements.
- Interpret statutes and statutory language so that you can apply the statutes to the problems presented by a client's will.
- Understand the legal requirements for modifying an existing will and know how to avoid errors in making modifications.
- Identify and describe the various methods of revoking a will.
- Explain the legitimate grounds for contesting a will.

LECTURE OUTLINE

I. Scope of the Chapter

- A. The terms relating to execution, modification, and revocation of wills are presented.
- B. There is a discussion of the basic requirements for the creation of a valid will.
- C. The ways an existing will can be changed or modified are covered, as are the procedures for demonstrating the intention of a testator/trix to revoke a will.
- D. The topic of will contests is discussed, including the proper persons to contest the legality of a will and the grounds for commencing a will contest.

II. Requirements for the Creation of a Valid Will

- A. A will is a legally enforceable, written declaration of a person's intended distribution of property after death.
 1. Because a will is ambulatory or subject to change, it is revocable during the testator's lifetime.
 2. A will is operative only upon death.
 3. Statutes and case law establish the procedure that must be followed to execute a valid will.
 - a. All states require the preparation and execution of wills to comply with certain formalities in order to prevent fraud and uncertainty.
 - b. Commonly, the following are required for a properly executed will.
 - (1) The maker must have testamentary intent and capacity.
 - (2) The will must satisfy certain formal requirements.
 - (3) The will must be written, signed, and dated.
 - (4) The will must be witnessed by at least two persons.
- B. The maker of the will must have testamentary intent; that is, the testator must establish that the written document operates as the last will.
 1. The will is valid only if the maker possesses the required *animus testandi*, the intention to make a will with the express purpose of disposing of property upon death—but not before.
 2. Intent is revealed from the form, general language, and particular words used in the will.
 3. Many courts look at the surrounding circumstances in determining testamentary intent.
 4. The absence of the ceremonial declaration “this is my last will” often creates doubts about intent; however, such words are not a requirement.
 5. With the exception of “statutory” wills, writing one's own will or using printed will forms to avoid the expense of an attorney may result in the creation of a document that fails to satisfy the statutory requirements regardless of the intent of the maker.

- C. Testamentary capacity is required.
1. A testator must be of majority age, usually 18, and sane.
 - a. In some states, a member of the armed forces or a married person can make a valid will even if under the age of majority.
 - b. Sanity is the “soundness of mind” that enables a person to have sufficient mental capacity to create a valid will.
 2. To be of sound mind and have testamentary capacity, the following test must be met.
 - The testator must remember and be aware of the persons who are the “natural objects of his or her bounty”—usually family members but also persons for whom the testator has affection.
 - The testator must know and be aware of the kind, extent, and nature of the property to be distributed.
 - The testator must formulate a plan for disposing of the property and understand the effect of the dispositions of the plan.
 - a. This test for “sound mind” was formed in case law.
 - b. The test relates to the testator’s ability, not to the testator’s actual knowledge of details.
 - c. Testamentary capacity is needed only at the time of the making and executing of the will.
 - d. Even a person of low-level intelligence or suffering from mental illness or senility can have testamentary capacity.
 - (1) A common question is whether someone suffering “delusions” lacks capacity; courts have decided these cases both ways.
 - (2) The testimony of witnesses to the will is often critical in court decisions on “delusions.”
 - e. In will contest cases, UPC § 3–407 places the burden of proof of the lack of the testator’s capacity on the contestant; some states, however, place the burden of proof of the testator’s capacity on the proponent of the will.
 - (1) The procedures generally followed to satisfy the burden of proof of soundness of mind include the filing of the will; the witnesses’ testimony or affidavits acknowledge the proper execution required for a valid will and the testator’s rational behavior and comments at the time of the execution; the order of the probate court admitting the probate of the will.
 - (2) During the contest of the will, others, in addition to the witnesses, may testify.
 - (3) Since the determination of testamentary capacity is a “fact issue,” the decision of capacity or lack thereof is generally left to a jury or the court as trier of fact.
 - (4) A paralegal, if asked to witness a will, must make a judgment of the testator’s capacity at the time of the execution of the will with the understanding that if the testator obviously lacks capacity, the paralegal should not sign the will.

—**TEACHING SUGGESTION:** Initiate discussion about what objective and subjective signs would a paralegal consider in deciding whether it appeared that the testator had or lacked sufficient testamentary capacity to execute a will.
- D. A will must be executed in accordance with certain formal requirements to be valid.
1. A majority of states require a will to be in writing.
 - a. Generally, a will must be either typed, printed, handwritten, or computer generated.
 - b. Nevada recognizes wills and the associated signatures that are written in a completely electronic form.
 - c. A holographic will is valid in many states, but it must meet the other formal requirements unless provided by statute.

2. A few states allow nuncupative or oral wills made during a terminal illness in the presence of witnesses or during military service in time of war. The UPC and the majority of states do not allow oral wills.
 - a. Oral wills generally can pass only personal property.
 - b. If a nuncupative will is reduced to a writing by the still living testator or by disinterested witnesses who can attest to the decedent's oral declaration within a statutory period after it was spoken, it may be probated in some states.
- E.** A will must ordinarily be signed by its maker.
1. Because of illness or illiteracy, the making of a mark or initial is permitted in some situations.
 2. In all states a person other than the testator may sign the maker's name to the will in his/her presence, but such signing must occur at the express and clear direction of the maker; such express direction must precede the signing.
 3. Courts have consistently held that subsequent ratification of a prior will signed by a substitute person is not sufficient to reinstate a prior will.
 4. At the testator's request, the hand of the testator may be guided by another to aid in the signing.
 5. All wills should be dated in the testator's handwriting, but this is not a common requirement.
 6. The placement of the testator's signature has created much controversy.
 - a. Most states do not require the maker's signature to be placed at the end of the will if it can be shown that the intention to authenticate the will was present.
 - b. Some states do insist that the testator's signature appear at the end of the will.
 - c. A lengthy will must be carefully drafted and typed using computer technology to prevent unscrupulous persons from inserting additional words, names, or even pages into the will.
 - (1) Each page should be numbered.
 - (2) No spaces on any page should be large enough for additions or modifications.
 - (3) The total number of pages should be specifically identified in an attestation clause.
 - (4) In some states, when a will consists of multiple pages, it might be wise for the maker to sign or initial each page; however, all states have validated wills that are signed only on the last page.
- F.** Signatures of witnesses are important to validate that the document declared to be a will was freely and intentionally signed by a competent testator.
1. Witnesses are not required to read the will or even to be told its contents, but they must be made aware what they are signing is the testator's will. Witnesses must perform two duties: attest and subscribe the will.
 2. The will must be signed in the maker's presence by two or three competent witnesses in most states.
 - a. UPC § 2-502 allows the testator to acknowledge to the witnesses that he/she signed the will.
 - b. A written will is not valid without witnesses unless it is holographic.
 - c. A written will may be self-proved, meaning the testator's and witnesses' signatures are acknowledged before a notary public or justice of the peace.
 - d. State statutes establish the required number of witnesses; currently, all states require two witnesses, except Vermont, which requires three.
 3. Witnesses must be competent, i.e., capable of testifying as to the facts of execution of the will and the mental capacity of the testator.
 - a. Age does not appear to be a factor, although a few states have a minimum age to be a witness set at the age of majority.
 - b. The following questions must be answered in order to assess competency and can be used to identify who is and is not an appropriate witness.
 - (1) Is the witness capable of testifying as to the facts of the execution of the will?

- (2) Is the witness able, by legal standards, to testify as to the mental capacity of the testator?
 - (3) When is the competency of the witness required?
 - (a) If the witness is incompetent at the execution of the will but later becomes competent to testify, the will is invalid.
 - (b) If the witness is competent at the time a will is attested, subsequent incompetency does not invalidate the will.
 - (4) Can the personal representative or trustee named in the will also act as a competent witness?
 - (a) The prevailing view is that an executor or trustee named in a will, if not a beneficiary or devisee of the will, is not disqualified from acting as a proper witness to a will.
 - (b) A personal representative does not have a direct interest in the will by virtue of the duty to see that the testator's wishes are carried out, even though the personal representative claims a fee from the estate.
 - (c) A personal representative's interest is not "pecuniary, legal and immediate," as is a beneficiary's, and that qualifies the personal representative to be a witness.
 - (d) It is preferable that a personal representative not be a witness.
 - (5) Is a person disqualified as a competent witness because the testator owes the witness a debt? Generally, a creditor is competent to act as a witness as long as no bequest or devise other than the debt owed is mentioned in the will.
 - (6) Is an "interested witness," i.e., a person who is both a witness and a beneficiary or devisee named in a will, a competent witness?
 - (a) The interested witness may be a competent witness, but under some statutory schemes and in some factual circumstances, the witness may void the gift.
 - (b) Good legal practice dictates that a beneficiary or devisee should never be a witness to the will from which he/she will benefit.
 - c. It is unwise for the attorney drafting a client's will, and a paralegal working on the client's will, to act as a witness.
 - (1) Although not forbidden by statute, an attorney will seldom witness the will, because any challenge to the will could require the attorney to cease representing the estate if he/she is likely to be called as a witness in a will contest.
 - (2) A paralegal acting as a witness could run into the same ethical problem.
 - d. It is best that a witness be both acquainted with the testator and a disinterested witness.
4. In most states, but not according to the UPC, the witnesses to the will must sign in the conscious presence of the testator.
 - a. In a few states, the witnesses are not required to sign in one another's presence as long as they both were present when the testator signed the will.
 - b. In common practice, subscribing by witnesses is accomplished in the presence of both the maker and each other.
 - c. The witnesses' signatures attest to the act of signing by the testator, his/her age and sound mind, and that they themselves signed in the testator's presence.
 - d. Some states require that the addresses of the witnesses be given.
 - e. Although witnesses do not need to know the contents of the will, they usually must be aware that what they have subscribed is a will.
 5. When choosing attesting witnesses, good practice would be to choose adult, mature, literate witnesses who are younger than the testator and acquainted with the testator; if not acquainted, the witnesses should engage in conversation with the testator prior to the execution of the will to establish some rapport and to reassure the attesting witnesses that the testator exhibits capacity and testamentary intent.

—**TEACHING SUGGESTION:** Show students a sample signature and attestation clauses in a will (Exhibit 4.2).

III. Modification of a Will—Codicil v. New Will

- A. A testator's wishes may change as time passes from the date a will is executed; therefore, it may become necessary to revise the original will.
1. Some changes may be the result of the birth, death, adoption, divorce, marriage, or legal separation of family members or by a change in financial standing or state of residency.
 2. Some changes may be required because the property of the testator may have additions, sales, gifts, losses, destruction, or a change in value.
 3. The most appropriate way to accomplish major and necessary changes in a will is to execute a new, updated will and revoke the original.
 4. In the past, the most common method of changing a will was a codicil, a separate amendment modifying parts of an existing will. Today, codicils are almost obsolete.

IV. Revocation and Rejection of a Will

- A. When the maker of a will changes the way estate property is to be distributed upon death, revocation results, and it terminates the existence of a will.
1. Revocation may be accomplished by a physical act.
 2. Revocation may be accomplished by operation of law.
 3. Revocation may be accomplished by a subsequent writing.
- B. A testator can revoke a will by a deliberate physical act such as burning, tearing, canceling, obliterating, or otherwise destroying a will, or directing and consenting to have another person do the same.
1. When destruction is by another person, the direction and consent of the testator and the fact of such destruction must comply with state statutes regulating the revocation of a will by a person other than the testator.
 - a. Some states require such destruction to be witnessed by two persons, neither of whom is the destroyer.
 - b. Other states require only that the destruction be at the direction and with the consent of the testator.
 2. If a will is lost, it is not necessarily considered to be a revoked will by a physical act.
 - a. Many states have statutes or allow case law to decide whether a lost will can be probated.
 - b. With or without a statute, courts require clear and convincing proof of a lost will.
 - c. The decision whether a lost will is revoked or admitted to probate is generally based on proof that the will was properly executed; proof that while the will was under the control of the testator, he/she did not expressly revoke it; and proof of the contents of the will.
 - (1) One method of satisfying the "proof of execution" requirement is to have the witnesses to the lost will testify that the lost will was published and signed by the testator.
 - (2) Depending on the circumstances, a true and complete copy of the will may or may not be admitted to probate.
 - d. Case law has generally held that in will contests involving lost or misplaced wills, the burden of proof is on the proponent of the lost will to prove that the testator did not intentionally revoke the will.
 - e. If a lost will is found after the administration of the estate is completed, if the will is offered for probate and a request to reopen the administration is made, the following factors apply.
 - The request may be barred by a statute of limitations.
 - Generally, creditors, banks, trustees or guardians of property, and "good faith" purchasers of estate property are exonerated and protected by the previous estate administration.
 - In some states, beneficiaries, devisees, or heirs are subject to the distribution provisions of the lost will.

- C. A will can be revoked wholly or partially by marriage or by divorce.
 1. When a statute automatically revokes or amends a will without the testator knowing of or agreeing to the revocation, it is said to be revoked or amended by operation of law.
 2. If the testator married after executing a will, it is revoked in some states by operation of law, and the testator's property passes by intestacy; under the UPC § 2–508 and a majority of states, a subsequent marriage does not revoke a will; instead, the surviving spouse receives an intestate share of the decedent spouse's estate and the rest of the estate passes under the will.
 3. If a testator is divorced after executing a will, all provisions in favor of the maker's former spouse are revoked by operation of law, leaving the rest of the will intact. This is especially appropriate because the divorce decree usually contains a property settlement between the spouses.
- D. A current will can be expressly revoked by a written document executed with the same formalities required for a will.
 1. A revoked will is usually destroyed, but it may be advisable to retain the former will when the testator's capacity is questionable or there is a possibility of a will contest.
 - a. One reason to keep the revoked will is that the revocation of the earlier will may turn out to be dependent on the validity of the later will; if the later will is held invalid, it may be possible and appropriate to probate the earlier will.
 - b. Another reason is that the testator may change his/her mind and prefer the terms of the earlier will.

V. Will Contests

- A. A will contest is a lawsuit commenced in probate court that challenges the validity of an existing will.
 1. The suit is brought by a person claiming an interest in a decedent's estate and is initiated when the contesting party files an affidavit of objection to the petition for probate, listing the grounds for the objection.
 2. Statutes vary regarding when a hearing on a will contest must occur; however, usually the hearing is prior to or shortly after a will is admitted to probate by the court.
- B. Only a person who has "standing" may make an objection to the probate court and request that a will offered for probate be rejected.
 1. A person with standing is someone who stands to lose a pecuniary interest if a will is allowed, such as a spouse, heir, or devisee of an earlier will.
 2. The person contesting the will has the burden of proving his/her objection by "clear and convincing evidence," a standard that is more than a mere preponderance of the evidence (the civil law standard) but less than beyond a reasonable doubt (the criminal law standard).
 3. Generally, creditors are not proper contestants since they can pursue their claims in a separate lawsuit in civil court.
 4. If probate is denied, then the decedent's estate passes according to intestate succession laws, and all property is distributed as if the decedent left no will; this rule is the reason why an heir who would inherit has standing to contest the will.
 5. Very few wills are contested, and most contests are unsuccessful.
 6. Most states have a statute of limitations during which the contestant must file the objection.
- C. Following are grounds for contesting a will.
 - The will is not properly executed.
 - No notice of the probate of a will is given to heirs or creditors.
 - The will or the testator's signature is forged.
 - The testator lacks testamentary capacity.
 - The will has been revoked.

- The testator is induced by fraud to write or change the will. The contestant must prove (1) that a beneficiary of the will actually led the testator into an erroneous belief concerning the disposition of the property, and (2) that the testator, believing the false statement to be true, relied on it and wrote the will accordingly.
 - The will contains material, contradictions, ambiguities, or mistakes. A material mistake is one that alters the substance or matter of the provision in which it appears. Although a probate court does not have the power to rewrite the will in its entirety, the court may strike down individual provisions on the ground that the testator's wishes concerning the bequests or devises therein cannot be determined; the remaining portions of the will would then be admitted. If the mistake is material, then the entire will is invalid.
 - The testator is forced by duress or persuaded by undue influence to sign the will. A will is invalid if obtained through physical or mental influence that destroys freedom of choice and the intent of its maker.
1. A will may be disallowed because of both fraud and undue influence.
 - a. There are many kinds of undue influences and the court must consider the testator, the person who allegedly exerted the undue influence, and the circumstance.
 - b. The court may infer undue influence if the testator ignores blood relatives and names as beneficiary a nonrelative who is a constant close contact with the testator and thus in a position to unduly influence the testator; however, undue influence must still be proven.
 - c. In some states, a presumption of undue influence is raised if a contestant of the will shows (1) that a confidential relationship, i.e., with a doctor, attorney, legal assistant, priest or minister, or fiduciary, allowed the alleged influencer an opportunity to control the testamentary act; (2) that the testator's weakened physical and mental condition easily permitted a subversion of free will; (3) that the influencer actively participated in preparing the will; or (4) that the influencer unduly profited as a beneficiary or devisee under the will.
 - d. In most states, not to mention the canons of professional ethics, a lawyer or paralegal who is intended to be a beneficiary or devisee under a will must refrain from drafting and designing the will. Rule 1.8(c) of the Model Rules of Professional Conduct specifically states: "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familiar relationship."
 - (1) Cases have held, however, where an attorney represented the testator for many years and the client's will left the attorney a substantial gift; even though the attorney did not advise the testator to consult another attorney, the attorney did not violate the Code of Professional Responsibility. See *In re Conduct of Tonkon*, 292 Or. 660, 642 P.2d 660 (1982).
 - (2) As an attorney or paralegal in a case where the testator wants to leave a substantial gift to said attorney or paralegal, some procedures that could and should be used to avoid the ethical problem are the following:
 - Refuse to draft the will.
 - Insist that another attorney of the client's choice draft the will but not an associate or partner from the same law firm.
 - Fully disclose the Code of Conduct to the client.
 - Make sure not to suggest or encourage the gift and that the client originated the bequest.
 - Make sure the gift is not the major asset of the estate.

2. Once the contestant has established a prima facie case of undue influence by producing clear and convincing evidence, the burden of establishing evidence to the contrary shifts to the proponent of the will, who now carries the primary responsibility for establishing the validity of the will.
- D.** In anticipation that an omitted family member or disgruntled heir may contest the will, to avoid costly litigation the testator may attempt to prevent a will contest by including in the will a “no contest” or in terrorem clause stating that if a beneficiary or heir disputes the validity of the will, objects to the probate of the will, or challenges the dispositions, that contestant forfeits all benefits of the will.
1. Some states hold in terrorem clauses unenforceable.
 2. Some states strictly enforce the in terrorem clause.
 3. Some disregard the clause if the contestant had “probable cause” to commence the will contest.

ANSWERS TO THE REVIEW QUESTIONS

1. Who may make a valid will?
Generally, anyone who has testamentary capacity can make a valid will. What constitutes this capacity may vary from state to state; however, most states allow anyone who is over the age of majority (usually 18 years of age) and of sound mind to make a will.
2. Can an attorney or a paralegal prepare and draft a will for a client who is of unsound mind? Explain.
This question should illicit a discussion of soundness of mind at the time the testator is preparing and executing the will. The student should discuss such issues as the testator’s capacity at the time of preparation and execution/drafting of the will. The issue of mental illness, senility, or delusions should be mentioned in the ideal answer. Basically, the student should conclude that if a testator lacks testamentary capacity at the time of preparing and executing the will, then the attorney and/or paralegal cannot prepare and draft the will.
3. What are the statutory or formal requirements for executing a will?
The requirements for testamentary capacity are: that wills must be in writing, unless covered by the state statute allowing nuncupative wills; that the will must be signed by the testator; that some states require the will to be dated; that the will must be attested to and subscribed by the required number of witnesses, generally, either two or three witnesses.
4. What are the signature requirements, e.g., types of signatures or placement of signatures, for testators and witnesses?
Students should discuss the various types of signatures allowed including full signatures, an “X” or other mark, an initial, and typewritten signatures. Students should discuss the controversy related to the placement of the testator’s signature and the requirements that vary depending on the state, such as those that require the testator’s signature to be at the end of the document and those that do not have such a requirement as long as the intent of the signature can be shown to have been intended to authenticate the will. Students should mention that the signature placement and timing of the witness’s signature is after that of the testator’s.
5. How is a witness determined to be competent?
Various factors help determine the competency of a witness. Age does not appear to be a major factor; the minimum age to be a witness is below the age of majority in some states. In addition, seven questions must be answered to assess competency.
 1. Is the witness capable of testifying as to the facts of the execution of the will?
 2. Is the witness able, by legal standards, to testify as to the mental capacity of the testator?
 3. When is the competency of the witness required?
 4. Is an “interested witness,” i.e., a beneficiary, devisee, or successor who is named in a will, a competent witness?

5. Can the personal representative or trustee named in the will also act as a competent witness?
 6. Is a person disqualified as a competent witness because the testator owes him/her a debt?
 7. Can an heir, who would be entitled to inherit if the decedent died intestate, named a beneficiary or devisee in a will, receive the gift from the decedent's estate if the heir witnesses the will? Students should discuss possible scenarios that can occur as responses to some of these questions, as appropriate.
6. Can an attorney or a paralegal be a competent witness to a will? Should they be witnesses?
It is unwise for the attorney drafting a client's will to act as a witness. Although no statute forbids an attorney from being a witness, this is seldom done since any challenge to the will could require the attorney to cease representing the estate if the attorney is likely to be called as a witness in the will contest. A paralegal acting as a witness could run into the same ethical problem. However, the Model Rules of Professional Conduct appear to allow an attorney who was also a witness to turn the will contest over to another member of the law firm and to resume acting as attorney for the estate after the will is proved. Even with this, it is not a good idea for the attorney or paralegal to witness the will.
7. Is an attestation clause required in every will? Explain.
Generally, some attestation by the witnesses is required but the form and exact requirements vary. Good practice is to include an attestation clause in every client's will. Students should discuss various attestation forms that are possible.
8. In what three ways can a will be revoked? Explain.
A will can be revoked by a physical act, by operation of law, and by a subsequent writing. Deliberate acts of the testator or another person acting at the direction and with the consent of the testator including the burning, tearing, canceling, obliterating, or destroying of a will are physical acts of revocation. Wills are revoked or otherwise altered by operation of law by marriage or divorce, depending on individual state statutes. A will can be revoked by a subsequent writing such as a codicil or new will as long as it is expressly revoked by a written document executed with the same formalities as a will.
9. Under what circumstances can a "lost will" be probated?
Individual state statutes determine under what circumstances a lost will can be probated; however, the courts make the decision based on the following:
- Proof that the will was properly executed.
 - Proof that while the will was under the control of the decedent-testator, he/she did not expressly revoke it.
 - Proof of the contents of the will.
- A lost will may be probated even after the administration of a decedent's estate is completed, if the will is offered for probate and a request to reopen the administration is made, as long as it is not barred by a statute of limitations. Also, creditors, banks, trustees or guardians of property, and "good faith" purchasers of estate property are generally exonerated and protected by the previous estate administration. In some states, beneficiaries, devisees, or heirs are subject to the distribution provisions of the new will.
10. Only a person with "standing" can contest a will. What does this mean?
A person with standing is someone who stands to lose a pecuniary interest, i.e., a share of the decedent's estate, if a will is allowed, such as a spouse, heir, or devisee of an earlier will.
11. What are the appropriate reasons or grounds for contesting a will? Explain.
The following are grounds for contesting a will.
- The will is not properly executed.
 - No notice of the probate of a will is given to heirs or creditors.
 - The will or testator's signature is forged.
 - The testator lacks testamentary capacity.
 - The will has been revoked.

- The testator is induced by fraud to write or change the will.
- The will contains material mistakes, contradictions, or ambiguities.
- The testator is forced by duress or persuaded by undue influence to sign the will.

Students should explain these grounds either by explaining the terms or paraphrasing various examples in the text.

12. Are in terrorem clauses in a will enforced in your state? Cite the appropriate statute or case law. This answer will vary depending on the state.

ANSWERS TO THE CASE PROBLEMS

Problem 1

The answer to this problem will vary depending on the state. The instructor will want to see how the students compared the law in their state with the *Cook* case.

Problem 2

- A. As no state statute is given nor is the student asked to find the answer in his/her own state, the student should discuss the various problems with the stated procedure according to the various situations described in the discussion of this in the text.
- B. The answer will vary depending on the state. The instructor will want to see how the students compare the law in their own state with the result in the case of *Matter of Jefferson's Will*, 349 So.2d 1032 (Miss. 1977).

ANSWERS TO THE ASSIGNMENTS

Assignment 4.1

The answers will vary depending on the state.

Assignment 4.2

1. The answer will vary depending on the state.
2. The answer will vary depending on the state.

Assignment 4.3

The answers will vary depending on the state.

Assignment 4.4

The answer to the question requiring students to research the response in their state law will vary depending on the state.

Chapter 4 does not specifically give the student the information to answer the question whether nuncupative wills on the deathbed of the speaker-decedent are valid in the majority of the states; however, Exhibit 3.2 can be used to respond because it lists the states and whether nuncupative wills and what types are allowed. Because 30 states prohibit nuncupative wills and it appears that only eight states allow them during a last illness, the answer would appear to be that most states do not allow nuncupative wills on the “deathbed” of the speaker-decedent.

Assignment 4.5

1. The answer will vary depending on the state.
2. The answer will vary depending on the state.
3. The answer will vary depending on the state.
4. The answer will vary depending on the state.
5. The answer will vary depending on the state.
6. The answer will vary depending on the student. The instructor should check if the students have correctly read and interpreted the cited cases. Also, the instructor should see how well the students have critically analyzed and compared/contrasted the two cases.

Assignment 4.6

1. The answer will vary depending on the state.
2. The answer will vary depending on the state.
3. The answer will vary depending on the state; however, according to the Tennessee statute, Linda is a competent witness but will forfeit so much of the provisions in the will made for her because the aggregate exceeds in value what she would have received had the testator died intestate.
4. The answer will vary depending on the state.
5. This answer will vary depending on the state, but, generally, age is not a factor except as it relates to competency. That being said, sometimes, depending on the age of the student, it is a good idea to choose a witness who is younger than the testator, assuming that if the witness is younger, he/she may outlive the testator. That way the witness would still be alive at the probate of the testator's will, should testimony be required.

Assignment 4.7

The answers will vary depending on the state.

Assignment 4.8

The answer will vary depending on the state.

Assignment 4.9

According to Oregon law, it would appear that Maude's will would be revoked by operation of law unless a provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation can be received. As Harold has been provided for in the will, Maude's will would fall within the exemptions and her will would not be revoked. The remainder of the answer will vary depending on the state.

Assignment 4.10

The answers will vary depending on the state.

Assignment 4.11

1. The answer will vary depending on the state.
2. The answer will vary depending on the state.

Assignment 4.12

The answers will vary depending on the state.

Assignment 4.13

The answers will vary depending on the state.

Assignment 4.14

1. The answer to this question will vary depending on the student. The instructor should determine the completeness of the students' responses by determining whether the students discussed the five alternative procedures mentioned in the text. The instructor should see how well the students critically analyzed each of the responses by discussing the pros and cons of each potential procedure. Finally, the student's determination of the best procedure should be defended clearly and logically. 2. The answer to this question will vary depending on the student; however, the student should critically analyze his/her position by addressing the various possible arguments to support or counter the position taken by the student.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. Suggested questions will vary but should center around the following four issues regarding the testator: (1) Did she know the nature of the act (of making a will), (2) Did she know the “natural objects of her bounty,” (3) Did she know the nature and extent of her property, and (4) Did she understand the disposition of the assets called for by the will.
2. Answers will vary depending on the state.
3. Answers will vary depending on the state, however, the student should focus on whether the state has an in terrorem or no contest clause.

CHAPTER 5 PREPARATION TO DRAFT A WILL: CHECKLISTS AND THE CONFERENCE WITH THE CLIENT

LEARNING OBJECTIVES

Students should be able to do the following:

- Collect and assimilate the relevant facts in preparation for the preliminary draft of a will.
- Identify, explain, and interpret the sources of law, e.g., common (case) law and statutes that determine the validity of a will.
- Develop and use checklists to elicit the information necessary for the preliminary draft of a will.
- Ensure that all necessary pertinent information obtained from appropriate checklists is accurate and complete.
- Recognize when additional information is needed.
- Identify and follow guidelines used to prepare wills.

LECTURE OUTLINE

I. Scope of the Chapter

- A.** A will must be prepared with care and be consistent with the standards prescribed by case law and state statute.
 - 1.** All necessary and proper information must be elicited from the client and rules of practice must be followed.
 - 2.** Procedures preliminary to making a will include the initial meeting with the client and the use of checklists for gathering facts that pertain to how and to whom the client's property is to be given, how tax burdens can be minimized, and how one can provide for miscellaneous problems that arise.
- B.** Definitions and an understanding of the terms contained in the checklists are important.
 - 1.** It is important to learn to develop checklists and questionnaires appropriate for client needs.
 - 2.** Care must be taken to avoid pitfalls in preparing the rough draft of a will. Guidelines for making the will a purposeful, legally enforceable, and unimpeachable testamentary disposition are presented in the chapter.

II. The Conference with the Client: Initial Interview, Checklists, and Other Matters

- A.** When the paralegal and the attorney meet with the client to discuss preliminary matters prior to drafting a will, they need information about the financial and family situation of the client; to obtain the necessary data, checklists are developed.
 - 1.** The paralegal must develop interviewing, data collecting, negotiating, drafting, and counseling skills to help clients overcome the normal reluctance that most have in discussing family relationships and financial matters.
 - 2.** By being positive, cooperative, reassuring, informative, and professional in appearance and demeanor, the paralegal can help the client overcome this reluctance and understand that his/her best interests will be served by an open and frank discussion of complete financial data and information.
 - 3.** Reassuring the client that strict confidentiality of all matters concerning family and finances will be maintained is important.
- B.** The development of a will begins with an initial and lengthy interview of the client by the attorney.
 - 1.** The paralegal will be asked to attend the interview once the client is comfortable with the process.
 - a.** The first task of the paralegal will be to help the client identify all facts, data, and information needed to create a draft of the will.

- b. The paralegal must develop checklists and questionnaires or expand, amend, or modify existing copies of these documents and thoroughly review them with the client to ensure that they elicit the information necessary for the draft.
—**TEACHING SUGGESTION:** Discuss the comprehensive nature of the types of information needed (Exhibits 5.1, 5.1, 5.3, 5.4, 5.5, 5.6, and 5.7). These same exhibits are used in more detail later in the chapter, but at least the students have an idea of what checklists look like.
2. The paralegal will need information concerning the client's financial affairs and family members.
 - a. Information such as the names, addresses, domicile, and marital status will be needed.
 - b. A chart showing the family tree should be drawn and should identify adopted and nonmarital children and the general health of all family members.
 - c. Assets and liabilities should be listed.
 - d. Beneficiaries should be named and the assets to be transferred to them should be identified and valued.
 - e. All fiduciaries such as personal representatives, trustees, guardians, or conservators should be named.
 - f. All known creditors and the amounts of the debts owed to them should be listed.
 - g. The specific wishes of the client for disposition of the estate should be determined and carefully considered to anticipate, counter, or prevent potential will contests by disgruntled family members who may receive nominal gifts of the estate or be completely disinherited.
3. The paralegal will review the completed checklist and answered questionnaires with the client to ensure accuracy before the attorney discusses how to achieve the client's specific objectives.
 - a. One important task of the attorney is to help the client reduce death taxes by familiarizing the client with the taxes imposed on a decedent's estate and give legal advice on how to minimize them; the paralegal must never give legal advice.
 - b. One way to reduce the death taxes is to reduce the decedent's gross estate through lifetime gifts and increase the potential deductions from the gross estate such as the marital and charitable deductions.
 - c. The client should be made aware of the importance of making decisions about the best way to achieve the type of distribution intended.
4. If the client lacks a sound mind and testamentary capacity, the attorney and paralegal cannot accept the case.
 - a. Yet, the lawyer and paralegal cannot be judgmental about a client's plans if they seem eccentric.
 - b. The paralegal should be helpful and encourage the client to decide what the true feelings are toward beneficiaries and the distributions planned for them.
 - c. The attorney and paralegal can help the client focus on how to distribute the estate based on deserving family members and/or family need.
 - d. To avoid ethical problems, the attorney and paralegal must not take an active role in suggesting or requesting what the client should do with the estate, even if the client requests it.
5. After the interview, the paralegal should prepare optional drafts of the will plans for the client to review.
 - a. The plans should include comparisons of the tax implication and expenses, including attorney's fees.
 - b. The drafts should be summarized and explained in plain language so that the client can modify the drafts appropriately.

- c. When the client is satisfied, the final will is prepared and executed.
 - d. It is important for the client to have the will periodically reviewed in the event there are law changes, or the client's marital status or domicile changes, or additional children are born or adopted.
- C. Checklists are used to compile basic information from the client and used for drafting purposes and for future reference.
1. The client should be given a copy of each checklist before the client interview so that he/she can gather the information requested, including gathering any information from family members and financial advisers, if appropriate.
 2. If the client has a previous will, a copy of it must be obtained if available.
 3. Checklists are used to ensure that accurate, complete, and requisite information is obtained.
 - a. Review the checklists to analyze and interpret the data.
 - b. If supplemental information is needed, the checklists will help indicate what is missing or inconsistent.
 4. Some checklists commonly used are for family data, family advisers, assets, liabilities, life insurance policies, and locations of important documents.
 5. Terminology relating to family data checklists is important to understand.
 - a. An advancement is money or property given by a parent to a child in anticipation of the share that child will inherit from the parent's estate and prior to the parent's death. It is intended to be from the share of the parent's estate that the child will eventually receive from the parent's estate.
 - b. Disinheritance by will is the act by which a testator specifically excludes another, who would otherwise be the testator's legal heir, from receiving the estate.
 - c. A life estate is an interest in real property for a lifetime, either the lifetime of the person holding the estate, called the life tenant, or of some other person.
 - d. A spendthrift is one who spends money unwisely and wastefully.
 6. A paralegal's investigative duties include collecting complete information concerning the client, the client's family, and the beneficiaries or devisees to be named in the will.
—**TEACHING SUGGESTION:** Discuss the types of family information that must be gathered from the client (Exhibit 5.1).
 7. Sometimes supplemental data will be required because the checklist may not be detailed enough for all cases.
 - a. The paralegal should note this and pursue these matters with the client after first bringing them to the attention of the supervising attorney and receiving direction.
 - b. The paralegal should not discuss with the client any circumstances or suggest resolutions to problems that may involve giving legal advice.
 8. Terminology relating to assets and liabilities is important to understand to prepare and complete the checklist.
 - a. A dividend is the share of profits or property to which the owners of a business are entitled.
 - b. The fair market value is the monetary amount an item of property would bring if sold on the open market; it is the price agreed to by a willing seller and a willing buyer, neither being compelled to offer a price above or below the average price for such an item.
 - c. A homestead is the family home and adjoining land where the head of the family lives; it is the family's fixed place of residence and most states allow the head of the family to exempt the homestead from claims and executions by creditors.
 - d. Copyright is a government grant to an author of an exclusive right to publish, reprint, and sell a manuscript for a period of the life of the author plus 70 years after the author's death for works written after January 1, 1978.

- e. A patent is a government grant to an inventor of an exclusive right to make, use, and sell an invention for a nonrenewable period of 20 years from the date of application.
 - f. A royalty is a payment paid to an author, composer, or inventor by a company that has been licensed to publish or manufacture the manuscript or invention of that author, composer, or inventor.
 - g. Receivables are debts established in the course of business that are currently due from others or due within a certain period.
 - h. A contract for deed is an agreement or contract to sell real property on an installment basis; on payment of the last installment, the title to the property is transferred by delivery of the deed to the purchaser.
 - i. An installment purchase is the purchase of goods on credit whereby the purchaser pays for them over time. The purchaser, in the case of a small-loan purchase, immediately obtains the title of the purchase and the seller retains a security interest until the purchaser has paid the full price.
 - j. A mortgage is a contract by which a person pledges property to another as security in order to obtain a loan.
 - (1) The mortgagor is the person who mortgages the property; the borrower, or debtor.
 - (2) The mortgagee is the person to whom the property is mortgaged; the lender.
 - k. A promissory note is a promise in writing to pay a certain sum of money at a future time to a specific person.
9. Lists of all assets and liabilities of the client should be developed and should include the form of ownership in which the assets are held.
- a. Real property should be listed, including the legal description and estimated fair market value, and the form of ownership. The location of the property should be checked to determine if ancillary administration might be needed.
 - b. Tangible personal property, including personal effects and clothing of considerable value, furniture and household goods, automobiles, boats, jewelry, antiques, art and stamp collections, etc., should be listed.
 - c. Personal property such as savings and checking accounts, safe deposit boxes, stocks and bonds, cash on hand, promissory notes receivable, mortgages, patents, and copyrights must be listed.
 - d. Insurance policies, including life, disability, health and accident, hospitalization, and annuities must be scrutinized to determine how and to whom payments are to be made on the client's death.
 - e. Employee benefits such as Social Security, veteran benefits, pension plans, profit-sharing plans, death benefits, stock options, and other claims to which the client's estate or successors may be entitled should be listed and valued, if possible.
 - f. Business interests in a corporation, partnership, or sole proprietorship with complete details about the client's interest, rights, and responsibilities therein are very important to detail.
 - g. All debts owed by the client, including outstanding mortgages, promissory notes payable, business debts, payments owed on contracts for deed, and accounts with a stockbroker are important to determine liabilities.
 - h. Interest and duties in trust assets or estates of others, including powers of appointment, which the decedent may hold by virtue of being given this power by another's will or trust are important.
 - (1) A power of appointment is a power to dispose of property not owned by the holder of the power.
 - (2) A general power of appointment held by the decedent is taxable to the decedent's estate.

- i. Depending on the various assets and liabilities of the client, additional or separate sheets/checklists may need to be added or developed.
 - j. Property may be difficult to value and appraisals may be in order.
—**TEACHING SUGGESTION:** Discuss how information is recorded on checklists (Exhibits 5.2, 5.3, and 5.4).
- 10.** To complete the life insurance policy checklist, it is necessary to be familiar with life insurance terminology.
- a. Life insurance is a contract by which the insurance company promises to pay the policyholder or designated beneficiary a certain sum of money if the policyholder sustains a specific loss, such as death or total disability, depending on the contract.
 - (1) The policyholder makes a payment, called a premium, on a regular basis to the insurance company for this protection.
 - (2) Life insurance includes term, ordinary (whole or straight), and universal life insurance.
 - b. An annuity is a fixed sum to be paid at regular intervals, such as annually, for either a certain or indefinite period as for a stated number of years or for life.
 - c. The primary beneficiary is a person who has a superior claim over all others to the benefits of a life insurance contract.
 - d. A secondary (contingent) beneficiary is a person selected by the policyholder as a successor to the benefits of a life insurance policy when the proceeds of the policy are not paid to the primary beneficiary.
 - e. In ordinary life insurance, the cash surrender value is the cash reserve that increases each year the policy remains in force as a minimum savings feature; after the policy has been in force for a period specified by the insurer, the policyholder may borrow an amount not to exceed the cash value.
 - f. The premium is the sum paid or agreed to be paid by the insured person to the insurer as the consideration for the insurance contract.
 - g. A settlement option is one of a number of alternatives that parties to an insurance contract agree to follow to discharge their agreement.
—**TEACHING SUGGESTION:** Discuss the information gathering necessary to complete the life insurance policy checklist (Exhibit 5.5).
- 11.** The paralegal should collect copies of all documents involving the client's property and business interests for review with the attorney, and a checklist for important documents should be completed to track where the documents are kept by the client to facilitate location after the client's death.
—**TEACHING SUGGESTION:** Discuss the types of documents about which the paralegal should collect information and record their locations on the checklist for important documents (Exhibit 5.6).

III. Preliminary Tax Advice and Other Matters

- A. Resolving tax problems under the supervision of an attorney is an important function of a paralegal.
- B. At the conference with the client, tax matters should be explained and discussed.
 - 1. For smaller estates, consideration of joint tenancy may avoid administration expenses; however, the paralegal should guard against overemphasizing this form of ownership, since transferring property into joint tenancy divides ownership and control of the property.
 - 2. It should be explained how the federal estate tax can be reduced by using the marital and charitable deductions to which a client's estate is entitled.
 - 3. It should be explained that the use of certain *inter vivos* gifts or trusts can be used to lower administration expenses and death taxes by reducing the gross estate.
 - 4. A consideration may be whether the client wants taxes on the estate paid from estate funds or whether the individual beneficiaries or devisees are to pay taxes on their shares.

- C. The client should be informed that a married person is limited in disposing of property since a surviving spouse may not be completely excluded because most states offer the spouse the right of election to receive a statutory share.
- D. The client should be informed that parents are not required to leave anything to their children.
 - 1. If children are to be excluded, it is best to insert a clause in the will clearly stating that the exclusion was intentional.
 - 2. If not specifically excluded, the child may receive a share under the state's Pretermitted (Omitted) Child Statute.
 - 3. Most parents have no intention of disinheriting children but may wish to give them unequal proportions.

IV. Guidelines for Preparation of a Will

- A. Guideline 1: Avoid the Use of Preprinted Will Forms
 - 1. Printed forms are seldom used because they may not fill the special needs of the testator and may cause problems such as a will contest based on forgery grounds due to altered sections.
 - 2. State statutory will forms are a major exception because they are printed forms with written instructions to the maker of the will, and they require choices that must be made on the form.
 - 3. Another problem is that words on preprinted forms are often crossed out or deleted by ink or type. Questions arise as to who made the changes and why; and thus, the validity of the will may be questioned.
 - 4. Another problem is that preprinted forms are general and may not address the specific problems or objectives of the testator. Property may be inadvertently omitted, intended devisees may be excluded, and tax advantages may be overlooked.
- B. Guideline 2: Use the Same Word-Processing Software and Computer Printer Typeface
 - 1. Use the same word processor and typeface for the entire document to avoid the appearance that someone other than the testator has inserted provisions.
 - 2. The typist should not leave blank spaces in the will, which might make possible the addition of words or names or an entire page.
 - 3. It is important to protect the decedent's heirs against persons who would change the will to benefit themselves.
 - 4. An advantage of typing the entire will is that uncertainties that arise from illegible handwriting can be avoided.
 - a. Computer-typed wills are easier to read and errors more readily identified and corrected.
 - b. Typed wills prove disadvantageous if the will is contested because of forgery or undue influence, or if a question arises concerning the testator's knowledge of the contents of the will.
- C. Guideline 3: Use Words That Avoid Ambiguity
 - 1. The will must be written so the testator's intent is clear.
 - 2. Immediate concerns are to avoid uncertainties, ambiguities, and alterations.
- D. Guideline 4: Use Simple Language
 - 1. Confusion between traditional terminology and current UPC terminology should be avoided.
 - 2. Today, many attorneys use simpler and more easily recognizable words such as *give* instead of *bequeath* or *devise*.
- E. Guideline 5: Place Small Estates in Joint Tenancy
 - 1. Placing small estates in joint tenancy can avoid probate and dim administrative procedures and expenses.
- F. Guideline 6: Sign the Will According to State Statutes, but Do Not Sign Copies
 - 1. The original will must be signed and should be dated.
 - 2. If the will consists of multiple pages, all pages of the original should be signed or initialed, except in states such as New York, which require the signature to be only at the end of the will.
 - 3. Copies of the will should not be signed.
 - a. More than one original executed will increase the possibility of a will contest.

- b. All executed copies must be presented in court, or the law presumes that the will was revoked.
- 4. Make copies of the will before it is signed.
- G. Guideline 7: Include a Residuary Clause**
 - 1. The testator's entire estate must be transferred.
 - 2. To avoid having any part of the testator's estate pass according to the intestate succession statutes because property was omitted from the will, a residuary clause should be included.
- H. Guideline 8: Choose Witnesses Carefully**
 - 1. It is good practice to have the will witnessed by individuals who are younger than the testator and who live in the same county to improve the probability that the witnesses will be available when the will is probated.
 - 2. Witnesses should be disinterested in the estate.
 - 3. If the testator's mental capacity might be questioned, then the testator's physician should be one of the witnesses.
 - 4. Some states provide for self-proved wills to eliminate the need for witnesses to testify when the will is admitted to probate.
- I. Guideline 9: Tell Witnesses What Might Be Expected of Them**
 - 1. The witnesses should know they are witnessing the testator's will and they may be called on to testify to that fact in court.
 - 2. They do not need to read the will, nor be informed of its contents.
- J. Guideline 10: Do Not Make Additions after Execution**
 - 1. No words should be added to the will after it is executed.
 - 2. Words added below the testator's signature after execution generally do not revoke or affect the validity of the entire will; however, words added after execution, whether above or below the testator's signature, may be denied execution since technically they are not part of the properly executed will, unless the testator and two witnesses sign the will a second time.
 - 3. A new will revoking all previous wills and codicils should be executed to include the additions.
- K. Guideline 11: Use Computer Technology for All Changes**
 - 1. A new will should be drafted for all will modifications, including minor changes. This is faster and more efficient than a codicil.
- L. Guideline 12: Avoid Erasures and Corrections**
 - 1. When an error is found, the entire page should be retyped.
 - 2. If it is necessary to use an altered page because of time and circumstances, the testator should approve it by dating, signing, or initialing the alteration in the margin of the page.
 - a. The witnesses should also sign in the margin to indicate that the alteration was made prior to the execution of the will.
 - b. It is a good idea to identify the corrections in the attestation clause.
- M. Guideline 13: Word Conditions to Avoid Ambiguity**
 - 1. Correct wording is important when attaching a condition to a devise to avoid changing the effect of the intended gift.
 - 2. A conditional devise takes effect, or continues in effect, according to the happening of some future event.
 - 3. Courts generally refuse probating a will "if it is clear that the will is no longer operative due to the failure of occurrence of a specified event upon which the effectiveness of the will is conditioned," *Johnson v. Hewitt*, 539 S.W. 2d 239 (1976).
 - a. A condition precedent is one in which a specified event must occur before the interest vests in the named devisee.
 - (1) Title does not vest until the stated condition occurs.
 - (2) Vague conditions must be avoided.
 - (3) Condition precedent may fail if it is regarded as socially unacceptable.

- b. A condition subsequent is one in which an estate that is already vested in a named devisee will not continue unless a specified event occurs.
 - (1) An estate will vest in the devisee when the will becomes operative but is subject to being divested on the future happening or nonhappening of the condition stated.
 - (2) The devisee will be divested of ownership by “operation of law”; also called defeasance.
 - (3) In theory, defeasance occurs by operation of law; in practice, it occurs after a court action has been brought.
 - (4) If the divested owner has actual physical possession of the property, it is usually necessary for the new rightful owner to retake or recover the property by exercising a right of reentry and by bringing an action in ejectment to regain possession.
 - c. The determination of whether a condition is precedent or subsequent will depend on the intention of the testator as interpreted from the language of the will in light of the circumstances.
 - (1) The law prefers a vested estate because it is more marketable, so usually courts will favor a condition subsequent.
 - (2) Ambiguous testamentary language will be construed by the court as a condition subsequent, rather than a condition precedent.
- N. Guideline 14: Include Full Data on Beneficiaries and Devisees**
- 1. The full names, addresses, and relationship to the testator of the beneficiaries and devisees must be correctly written to avoid uncertainty as to whom the assets are to be transferred.
 - 2. When the devisee is a charitable corporation, the corporate name and address should be given.
- O. Guideline 15: Give the Client a Rough Draft**
- 1. This allows the client to make deletions and additions to the will. Clearly mark the document as a rough draft so the client does not sign it.
 - TEACHING SUGGESTION:** Interviewing skills are extremely important for paralegal students to develop. Mock interviews or role plays can be helpful by providing students with a safe place and situation in which to practice. Depending on the nature and size of the class, the interviews could be conducted in different ways: (1) Students can pair up with each other, preparing for an interview, both as client and as paralegal. The student, as paralegal, should write a memorandum to the faculty/supervising attorney summarizing the interview. (2) A mock interview can be conducted by the faculty member and someone from outside the class, demonstrating some good and not-so-good interviewing skills. (3) The faculty member can be the client, and the class collectively can be the paralegal, with each student in turn building questions on the previous student’s question. This works well with small classes in which students can prepare, as a group, for the interview. (4) Have each student prepare to interview one client.
- Invite one or several outside persons to play the role of the client who will be interviewed by each student.
- If possible, have these interviews videotaped and discuss and critique each tape with the entire class. In this way, the students see a variety of styles and approaches.

ANSWERS TO THE REVIEW QUESTIONS

1. What procedures would you recommend to put a new client at ease and overcome his or her reluctance when you need to elicit confidential family and financial information for the preparation of legal documents such as wills?
By being positive, cooperative, reassuring, informative, and professional in appearance and demeanor, you can help a client overcome the reluctance. You should assure the client that strict confidentiality will be maintained.

2. Are there additional checklists you recommend to obtain the necessary information for drafting wills?
This answer will vary depending on the student. Some possibilities are additional checklists will be needed depending on the client's assets and liabilities. If a client has many stocks, bonds, mutual funds, and other investments, more detail may be required and checklists developed.
3. What would you add to the checklists in the text to make them more comprehensive and useful?
This answer will vary depending on the student.
4. Diagram your family tree beginning with your grandparents and including all their descendants.
This will vary depending on the student.
5. What are some of the tax issues and rights of the surviving spouse and children that the attorney and paralegal must discuss at the family conference?
The response to this question may vary with the student's interpretation of "family conference."
Technically, the family conference, if held, is after the testator dies. This was discussed earlier in the text, and typical topics include maximizing the marital deduction, the attorney discussing election rights of the surviving spouse, the testator's right to disinherit children, the issue of pretermitted or omitted children, homestead, and the valuation of property.
If the student determines, correctly or incorrectly, that this question is asking for a response using the material from this chapter, the student may interpret "family conference" to mean the client interview where preliminary tax advice and matters such as the spouse's right of election and the issue of a child's right to inherit are discussed with the client. Therefore, the student may respond by listing the following as matters to be discussed: the option of using joint tenancy ownership to avoid probate; ways of reducing federal estate taxes by using marital and charitable deductions; the use of *inter vivos* gifts or trust to lower administration expenses and death taxes; how the client wants the transfer and estate taxes paid; that a married person is limited in disposing of property since a surviving spouse may not be completely excluded due to the elective share statutes; and that a testator is not required to leave anything to his/her children.
6. Which states have statutory wills? What are statutory wills?
Statutory wills are printed forms with written instructions to the maker of the will, and they require choices that must be made on the will form itself. The forms are set by statute to meet the statutory requirements for the execution of wills. Exhibit 3.2 lists the states that accept statutory will forms. These states are California, Louisiana, Maine, Michigan, and Wisconsin.
7. What is the distinction between a condition precedent and a condition subsequent?
A condition precedent is one in which a specified event must occur before the interest vests in the named devisee. A condition subsequent is one in which an estate that is already vested in a named devisee will not continue to be vested in that devisee unless a specified event occurs, and if it does occur, the devisee will be divested of the estate. Courts favor conditions subsequent.
8. What are the guidelines recommended for the preparation of wills?
 - Avoid using printed forms.
 - Use one word-processing software and typeface.
 - Use clear wording.
 - Use simple language.
 - Consider placing small estates in joint tenancy.
 - Sign the will according to state statutes, but do not sign copies.
 - Include a residuary clause.
 - Choose witnesses with care.
 - Tell witnesses what might be expected of them.
 - Do not make additions after execution.
 - Use computer technology for all changes.
 - Avoid erasures and corrections.
 - Word conditions carefully to avoid ambiguity.
 - Include full data on devisees.
 - Give the client a rough draft.

9. Are there any other guidelines for preparing wills you would add to those in the text?
This answer will vary depending on the student.
10. What are the advantages of a typewritten or computer-printed will versus a holographic will?
With a holographic will, uncertainties can arise due to the illegible handwriting of the testator. Typed wills are easier to read and errors are more readily identified than in handwritten wills.

ANSWERS TO THE CASE PROBLEMS

Problem 1

- A. If Liza dies without any living heirs and does not leave a will, according to the laws of Maine, her domestic partner is entitled to full inheritance rights as long as they were registered as a domestic partnership, and in New York her domestic partner would not be entitled to full inheritance rights even if they are domestic partners.
- B. This answer will vary depending on the student.
Three possible suggestions for Liza that would enable her to ensure that her property will go to Alecia would be to leave a will with Alecia as the sole beneficiary/devisee; put all her property in trust with Alecia as the beneficiary; or, if adult adoptions are legal in her state, she could adopt Alecia so that she could inherit. A paralegal, however, could not make these suggestions unless under the supervision of the attorney and, in this case, in the presence of the attorney; and they would be best made by the attorney.
- C. This answer will vary depending on the student.
Based on the response in section B, if Liza had a brother who survived her, the best alternative for Liza would be to write a carefully drafted will leaving all her property to Alecia. She should be careful to specifically exclude her brother from the will. Care must be taken to avoid the appearance of any undue influence or coercion by Alecia; perhaps the wording of the will could reflect this. A trust might be equally successful, but it would have to be carefully worded and care must be taken to avoid the appearance of any undue influence or coercion by Alecia. Adoption of adults is not allowed in all states; therefore, Liza would have to check the laws applicable to her. There may be some problems with adoption in cases of lovers, because technically this becomes a parent-child relationship. Liza and Alecia would not want to expose themselves to charges of incest, especially if the relationship is not accepted by the family members surviving.

Problem 2

The will violates many of the guidelines.

- It appears that more than one word processor and typeface were used to type the document; the type overs are in a different script than the rest of the will.
- The gifts listed are not clear and are conflicting; e.g., Curtis is given all other personal property, but in the next gift, Althea is also given personal property; clause 2 directs debts to be paid out of the estate but does not specify from where it should be deemed first; clause 4 states all the money (cash) in savings and checking at the local bank—what else could it be? NOW accounts are not included?
- The will was not dated, not attested to, or subscribed by any witnesses; therefore, it would not be valid.
- It seems as though the will was not signed, but Colin Furthmiller's name typed on the signature line.
- There is no residuary clause.
- It appears that additions/corrections/changes were made after execution of the will.
- The testator attempts to pass joint property by will.
- The condition in clause 4 is not worded clearly and is ambiguous. It may also be contrary to public policy depending on the court's interpretation of the remarriage condition.
- Full data on the testator, devisees, and personal representatives are not included.
- There is no named executor. Because this will is so ambiguous, students may feel that even more of the will is contrary to the guidelines.

ANSWERS TO THE ASSIGNMENTS

Assignment 5.1

This will vary depending on the student and that student's sophistication and knowledge of stocks, bonds, and mutual funds.

Assignment 5.2

Depending on the provisions of the cash value repayment clause in the policy, the amount may vary. However, it is reasonable for the student to deduct the \$1,200 balance owed on the loan from the \$50,000 face value of the policy and conclude that the amount that the beneficiary will receive is \$48,800. The primary beneficiary, Shelley Whaley, if living, will receive the money from the policy.

Assignment 5.3

The answer will vary depending on the student.

Assignment 5.4

The answer will vary depending on the state.

Assignment 5.5

These answers will vary depending on the state.

Assignment 5.6

These answers will vary depending on the state.

Assignment 5.7

The answer will vary depending on the state.

Assignment 5.8

The answer will vary depending on the state. The instructor should note whether the students correctly read and analyzed the cited case and made appropriate comparisons/contrasts to the provisions of the appropriate state law.

Assignment 5.9

The answer will vary depending on the state.

Assignment 5.10

The answer will vary depending on the state. The instructor should note whether the students correctly read and analyzed the cited case and made appropriate comparisons/contrasts to the provisions of the appropriate state law.

Assignment 5.11

The answer will vary depending on the state. The instructor should note whether the students correctly read and analyzed the cited case and made appropriate comparisons/contrasts to the provisions of the appropriate state law.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. Answers will vary depending on the student.
2. Answers will vary depending on the student.
3. Answers will vary depending on the student.

CHAPTER 6 FINAL DRAFT AND EXECUTION OF A VALID WILL

LEARNING OBJECTIVES

Students should be able to do the following:

- Analyze the collected data and make sure that the information conforms to the client's objectives when preparing a draft of the will.
- Identify and include the appropriate clauses for the client's will.
- Verify that the will's construction and execution have followed the relevant state statutes.
- Draft a preliminary will, for the supervising attorney's review, that is free from errors of construction that might invalidate the will or lead to a will contest.
- Explain the purpose and function of a self-proving affidavit, living will, health care proxy, and durable power of attorney.

LECTURE OUTLINE

I. Scope of the Chapter

- A. An important task of the paralegal is to draft a will for the client.
—**TEACHING SUGGESTION:** Discuss the various procedures involved in this task (Exhibit 6.1).
- B. The contents of a standard will are discussed, and a formal will is provided.
- C. Sample clauses used in drafting a will and pertinent statutes are important to examine.
- D. Documents related to a standard will, but not part thereof, are introduced, including a self-proving affidavit, letter of instructions, and right-to-die advance directives such as a living will, health care proxy, and durable power of attorney.

II. Contents of a Standard Will

- A. Introductory or Exordium and Publication Clause
 1. The exordium clause identifies the maker of the will and declares the intention that the provisions in the document be followed after death.
 - a. The document must appear to be a will or testamentary in nature to be valid and enforceable.
 - b. The introductory clause should include the address, city, county, and state of its maker; any alias or other name by which the maker is known so that all property owned can be identified, located, and properly transferred or eventually distributed; and a statement of the maker's capacity and freedom from undue influence.
 2. The purpose of the exordium clause is to declare to the public the following: the identity of the testator, that the testator has the intent and capacity to create a will, that the document is the testator's last will, and the location of the testator's principal residence or domicile, which enables the personal representative to determine which state has the proper authority to tax the testator's property and which court has jurisdiction over the administration of the testator's estate.
- B. General Revocation Clause
 1. A new will generally revokes an earlier will and state statutes vary on the requirements necessary for a new will to revoke a prior will.
 - a. Some require a specific statement saying that the new will revokes the prior will.
 - b. In most states, a prior will is automatically revoked when the maker writes, dates, and signs a new will; the document last in time also supersedes existing codicils attached to previous wills.
 2. The safest way to ensure revocation is to include a revocation clause as part of the exordium clause.

- C. Provision for Payment of Debts and Funeral Expenses**
1. The testator often directs the personal representative to pay all debts, administration expenses, and expenses for the last illness, funeral, and burial out of estate funds before the decedent's property is distributed.
 - a. These duties are automatic responsibilities of the personal representative and do not need to be stated formally in the will.
 - b. The phrasing of the debt payment clause can present a danger such as seeming to require the payment of debts that are not ordinarily the responsibility of the estate.
 - c. Many states have statutes that deal with the payment of debts, unless the will specifically states otherwise.
 - d. Including a debt payment clause can lead to a deduction from federal estate or income taxes for those payments.
 2. Many people prearrange and pay for their funeral and burial prior to death.
 - a. Often this is done to avoid placing this burden on bereaved family members.
 - b. The option of prearrangement and methods of accomplishing it should be discussed with the client.
 - c. Some state statutes establish monetary limits for the funeral and burial expenses.
 - d. If the personal representative overspends the reasonable limit and the testator left many creditors, the personal representative is liable for breach of fiduciary duty and can be ordered to pay damages to the estate.
- D. Instructions for Funeral and Burial**
1. A letter of instructions is the most appropriate way to convey the testator's wishes for funeral and burial arrangements. However, many persons still wish to have such information in his/ her will. Therefore, a simple clause informing the testator's family of the prearranged plan or instructions for the funeral can be inserted into the will.
 2. Including funeral and burial instructions in a will may be futile.
 - a. The will may not be found in time.
 - b. In many states, the desires of the decedent's surviving spouse or next of kin legally supersede any such instructions of the decedent.
 - c. Conflicts often arise when the testator desires to be cremated.
 3. A challenge to burial instructions can arise because of a testator's desire to donate his/her body for educational or medical purposes, but the nearest relatives object. Conflict with anatomical gifts may be resolved by the Uniform Anatomical Gift Act, adopted in all 50 states, which provides that the testator may legally determine in a will the disposition of all or any part of the body for organ transplant, medical research, or educational purposes.
- E. Specific Testamentary Gifts**
1. One of the most important functions of a will is to determine "what goes to whom."
 2. The maker may have many reasons for leaving specific property to certain individuals. It is imperative to make these specific gifts before effecting the residuary clause.
 3. Marital deduction provisions must also be shared before the residue is transferred.
 4. Remember that a maker is free, before death, to destroy the will, give away or sell property constituting a specific gift of a will. The beneficiary or devisee does not receive the property or a substitute unless specifically mentioned in a will.
 5. Most states have established procedures for the disposition of tangible personal property (other than money). The testator is allowed to write a separate memorandum. The memorandum describes the property item by item and the beneficiary or devisee.
 6. The item(s) and beneficiary(ies) or devisee(s) must be described with "reasonable certainty." This memorandum can easily be modified.
 7. Provisions must be carefully written to satisfy the purposes and intentions of the client and to comply with any applicable statutes to avoid the many complications that arise because of family situations such as divorce, remarriage, and blended families.

8. When preparing a draft of the will, one must be careful not to use ambiguous or potentially misleading terms such as *issue*, *heirs*, *descendants*, *child*, or *children*, especially if the testator's intent is to include or exclude some or any of these persons.
 9. If a testator wishes to provide for stepchildren, that intention must be expressly stated.
- F. Provision for Residue of Estate**
1. The residuary clause allows the testator to transfer the remaining property that has not been specifically given in the will.
 2. The residue includes any additional property that may come into the estate after the will has been executed or after the testator's death.
 3. Generally, the bulk of an estate falls within the residue, which is usually the source for paying all taxes, debts, and expenses of the decedent.
 4. An alternate or successor residuary beneficiary should always be named.
 - a. The testator must remember that if the named residuary devisee should predecease the testator, no one would receive the residue, so all or part of it will be distributed according to intestate succession.
 - b. Care must be taken in drafting to cover potential problems to avoid the residue passing according to intestate succession.
 5. When the residue is insufficient to meet priority obligations of the estate, payment must come from devises made in the will through the abatement process, which determines the order in which property will be applied to the debts.
 6. Without a residuary clause or where the residue passes according to intestate succession, the estate's net assets or income are divided among the heirs on a pro rata basis.
- G. Appointment of Personal Representative**
1. To acquire the powers and authority of a personal representative, a person must be appointed or approved by the court.
 - a. Generally, unless the person named in the will is unqualified, the court approves and appoints the person named by the testator.
 - b. Personal representatives are fiduciaries and must be intelligent, organized, honest, and loyal to the devisees of the estate.
 - c. Personal representatives must be able to perform all estate administration tasks. If the estate contains digital assets, verify that the personal representative is competent to handle them. If not, consider appointing a personal representative solely for digital assets.
 - d. They must be capable of engaging in business transactions or making contracts.
 - e. They cannot be minors, incompetent persons, felons, or persons who have or may have a conflict of interest, e.g., an attorney or paralegal who drafts a will and who influences a client to also name him/her as the personal representative.
 2. Statutes often list the powers granted a personal representative or trustee; however, the testator may want to list specific powers and duties to help the personal representative facilitate the administration of the estate.
 - a. The testator must give the personal representative the power to sell property; otherwise, the probate court must grant such "license to sell."
 - b. When the estate requires detailed handling, the testator should direct the personal representative's course of action by providing certain powers.
 3. A contingent or alternate personal representative should always be named in the event the named personal representative is unable or unwilling to serve.
 4. The personal representative is responsible for collecting and preserving the estate assets, paying all allowed debts, as well as estate expenses and taxes, and distributing the balance to devisees named in the will.
 5. Once appointed by the court, the powers of the executor "relate back in time," meaning that although the executor does not have authority to handle the administration until qualified, the executory does possess limited authority to take such actions as preserving assets and rights of claim.

6. Formal qualification requires a hearing before a probate judge, registrar, or clerk of the court; an order signed by the judge; and issuance of documents called Letters Testamentary or Letters of Administration, which officially authorize the executor to commence administration.
 7. The cost of selecting and utilizing fiduciaries and attorneys handling an estate is governed by state law.
 - a. In some states, personal representatives are paid commissions according to a sliding scale based on the monetary value of the estate or trust.
 - b. Formerly, state bar associations established minimum attorney fee schedules based on the size of the estate; however, the Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), ruled that this was prohibited by antitrust laws as a method of price fixing.
 - c. Currently, the trend is to use “reasonable compensation” rather than estate size.
 - d. Reasonable compensation is determined by custom and local practice, but the court makes the final decision and must approve fee payment.
- H. Appointment of Personal and/or Property Guardian**
1. A parent has a statutory obligation to support children until they reach majority.
 2. There are two types of guardianships: personal guardian and property guardian.
 - a. A personal guardian should be named in the will to properly care for the testator’s minor or incompetent children if the other parent is deceased or unable to care for them; otherwise the court must determine custody and/or guardianship of the person.
 - b. A property guardian or conservator to manage property left to minor or incompetent children should be appointed by the testator; otherwise the court will.
 - c. The property guardian should be empowered to hold, accumulate, and manage the funds and property under a trust for the duration of their minority or incapacity.
 - d. The personal guardian and the property guardian may or may not be the same person.
 3. Some states establish a statutory order of preference for the appointment of guardians.
 4. A controversial and stressful situation arises when a single parent attempts to appoint a guardian for a child in a will and specifically excludes the appointment of the other natural parent; the surviving natural parent, without regard to marital status, has the right to custody of the child and to be the guardian, unless the parent is found to be unfit.
- I. Simultaneous Death Clause**
1. Because of the frequent occurrence of situations where there is insufficient evidence to determine if a beneficiary survived the testator, e.g., in common disasters, causing inheritance and distribution problems, the Uniform Simultaneous Death Act has been adopted by nearly all states.
 - a. The act provides where the inheritance depends on the priority of death, and there is no sufficient evidence that the decedents have died other than simultaneously, the property of each decedent shall be distributed as if he/she had survived the other.
 - b. This provision can be added to the will.
 2. If two people owning property in joint tenancy die simultaneously and priority of death cannot be determined, the property is divided equally and distributed to the beneficiaries named in the residuary clause of their respective wills.
 3. There can be significant financial loss to surviving beneficiaries and devisees, because the act implies that if there is adequate proof of the sequence of deaths, the surviving beneficiary will be entitled to the property passed by will from the first decedent’s estate.
 - a. This could result in double estate taxation.
 - b. Most states, including the UPC, have added a “delay clause” that requires the surviving beneficiary to survive the first decedent in the common accident by at least 120 hours; if he/she does not survive for the stated time, the beneficiary does not receive the property through the will.
 - c. CAUTION: A delay clause in a will that exceeds 180 days will disqualify a bequest to the spouse for the marital deduction.
 4. A different presumption of death can be included in the will by an appropriate provision.

- J. Testamentary Trust Clause**
 - 1. A trust is used to transfer ownership to another without giving the recipient full power over the property.
- K. Testimonium Clause**
 - 1. This clause contains a statement by the testator that it has been freely signed and that a request has been made of the proper number of witnesses to do the same.
 - 2. No state statute prescribes a form for the testimonium clause.
 - 3. The use of a seal to indicate the identity of the testator or the substitution of L.S. (lieu of seal, in place of a seal) is disregarded by most will drafters.
- L. Testator's Signature**
 - 1. The testator must sign, mark, or direct another to sign the will in order for it to be valid.
 - 2. In most states, the signature must be witnessed by two or more persons acting as attesting witnesses.
 - 3. The date, whether in the beginning, within, or at the end of the will, is essential. Without it, it may be impossible to prove the will is the last made by the testator.
- M. Attestation Clause of Witnesses**
 - 1. Witnesses must state and sign a clause that they have attested the testator's signature.
 - 2. While each state requires attestation and subscription by witnesses, none prescribes the words or form to be used to accomplish this.
- N. Witnesses' Signatures and Addresses**
 - 1. Only the original copy of the will is signed.
 - 2. Copies should be made before the original is signed.
 - 3. All states require at least two witnesses sign the will, except Vermont, which requires three witnesses' signatures.

III. Sample Preliminary Will

—**TEACHING SUGGESTION:** Review the sample worksheet for preparing to draft a client's will (Exhibit 6.2). The will drawn from the information on the worksheet is included in Exhibit 6.3. Time should be spent reviewing the worksheet and the resulting will in class.

IV. Additional Nontestamentary Documents

- A. Self-Proving Affidavit Clause That Creates a Self-Proved Will**
 - 1. Some states provide an option for "self-proving" a will that is accomplished by an acknowledgment of the testator and with affidavits of the witnesses to the will.
 - a. This acknowledgment and the affidavits are made before a notary public or other person authorized to administer oaths and can be signed either at the time of the execution of the will or at any subsequent date during the lifetime of the testator and witnesses.
 - b. The document recites that the testator is of sound mind and that the testator and subscribing witnesses followed the required formalities for the proper and legal execution of the will.
 - c. The testator and witnesses sign the document in the presence of the notary public.
 - 2. The self-proving provision or affidavit is not required to validate the will.
 - 3. The execution supplies the requisite evidence to admit the will to probate; it does not waive the formal requirements for a valid will.
 - 4. The affidavit does not prevent a will contest on legitimate grounds such as duress, fraud, undue influence, revocation, or lack of testamentary capacity.
 - TEACHING SUGGESTION:** Use Exhibit 6.4 to review a sample self-proving affidavit, or distribute a copy of the affidavit used in your state to your students, unless making an exhibit is possible and more practical.
- B. Letter of Instructions**
 - 1. This letter is not part of the will and has no legal effect.

2. The letter is to the personal representative and family and explains where the will and important assets and records are located; lists current market values of assets or recommends appraisers; and makes management suggestions and investment recommendations to the personal representative.
 3. This letter can also be used to identify digital assets, their monetary or sentimental value, and how to access these assets. Discuss cautionary procedures that should be taken with digital assets.
 4. The letter should be updated each year.
- C. Power of Attorney
1. Legal instrument where a principal designates another, the agent or attorney-in-fact, to have authority to make legal decisions for and otherwise act on behalf of the principal.
 - a. May be limited in scope: Covering a few specific situations.
 - b. May be general: Covering a broad, large variety of situations.
 - c. Care should be taken in selecting the individual who will assume the responsibility.
 2. When a principal is incapable of making decisions regarding property, financial, insurance, business, tax, health care, investment, inheritance, or other legal matters, the agent makes decisions for the principal.
 3. Must be capable of entering into a valid contract to execute a power of attorney.
 4. Types of Powers of Attorney.
 - a. Nondurable: Starts when signed by the principal and lasts until a specified event occurs, e.g., the principal becomes mentally incapacitated, dies, or revokes the document.
 - b. Durable: Starts when signed by the principal and continues even if he/she becomes mentally incapacitated. It lasts until the principal dies or revokes the document.
 - c. Springing: This is tied to specified situations (typically the principal's incapacitation). When the anticipated event occurs, the authority of the attorney-in-fact to act is triggered and lasts until the principal dies, cancels the instrument, or the power expires upon the occurrence of a stated event or specified date being reached.
 5. There are risks associated with powers of attorney since the agent may not act in the "best interest" of the principal. An agent could be dishonest and engage in self-dealing.
 6. To avoid such risks, the document may provide for information to be transmitted to a trusted third party who would oversee the agent's activities and have authority to intervene if suspicions of mismanagement or dishonesty arise.
- D. Right-to-Die Laws and Related Advance Medical Directive Documents
1. Statutes and case law have established and recognized the right of a dying person to refuse extraordinary medical treatment to prolong life or the right of a person's guardian or proxy to make such a request.
 - a. Right-to-die laws began with *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), which involved the removal of a respirator from a patient in a coma; the court ordered the respirator removed.
 - b. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990), was a Supreme Court decision confirming the constitutional "right to die" as long as the wishes of the person are known and "clear and convincing evidence" of those wishes is established; competent and incompetent persons have the same rights, but a surrogate or agent must be named to exercise the rights for the incapacitated person.
 - c. *In re Guardianship of Theresa Marie Schiavo*, Cir. Ct., Pinellas Cnty., Prob. Div., File No. 90-2908GD-003 (2000), and *In re Guardianship of Theresa Marie Schiavo*, FLA. App. Ct. 2d Dist., No. 2D00-1269 (2001), was a multi-year battle between the spouse and parents of Theresa Marie Schiavo due to the fact that there was no advance medical directives. Not planning for the type and extent of desired medical care can leave wrenching, emotionally charged, end-of-life decisions to family and loved ones already burdened with grief.

2. States have established several forms of right-to-die advance directives that allow a competent person to determine, in advance and in writing, the kind of future medical care and treatment the person wished to have in case he/she becomes incapacitated or terminally ill, or to appoint a surrogate, agent, or proxy to exercise the person's wishes to continue or discontinue future medical treatment.
 - a. A living will can be executed.
 - b. A medical power of attorney can be executed.
3. In an effort to provide greater consistency, stability, and certainty in making end-of-life medical decisions, the National Conference of Commissioners on Uniform State Laws has submitted for states' approval the Uniform Rights of the Terminally Ill Act.
 - a. The act has been adopted in 11 states.
 - b. It designates alternative approaches to declaring preferences concerning end-of-life medical treatment in situations where an incurable, irreversible, and terminal physical condition exists.
4. The Patient Self-Determination Act of 1991 brought the existence of directives to the attention of the public and promoted their use.
 - a. The law requires health care providers who work with the Medicaid and Medicare programs to provide each patient, or the authorized surrogate, with written information about the patient's right to do the following:
 - Make health care and medical treatment decisions, including the use of life-support systems.
 - Be informed on admission by the health care facility of its policies concerning the patient's rights.
 - Sign any of the previously mentioned advance directives for health and medical care decisions.
5. Living Will: Death with Dignity
 - a. Any adult has the right to refuse medical treatment, including life-sustaining treatment.
 - b. An incompetent may be unable to communicate his/her wishes to exercise that right, and the decision to withhold or withdraw medical care and treatment must be made on the patient's behalf by someone else.
 - c. Guidelines for the execution and implementation of an advance written directive such as a living will have been established.
 - d. A living will states that if a person becomes incompetent with no reasonable expectation or hope for recovery, and because of the disability is unable to take part in decisions, the person can request that he or she not be kept alive by artificial life-support treatment.
 - e. The purpose of the request is to relieve family members from the responsibility of making the decision, to alleviate guilt on their part, and to protect the physician and health care institution from liability if they refrain, as requested, from using certain medical treatment.
 - f. The living will can be revoked at any time by spoken or written directions by the patient in the presence of witnesses.
 - g. Michigan incorporates the language of a living will into its medical power of attorney in the form of a health care proxy or agent.
 - h. Massachusetts and New York title their advance health care directives a "health care proxy."
 - i. A living will is a document that is separate and distinct from the testator's will.
 - j. To be valid in most states, it must either be signed by the testator and two witnesses in the presence of one another or signed by the testator and notarized.
 - (1) Neither of the witnesses may be related to the testator, beneficiaries of the testator's estate, the attending physician, or employees of the attending physician, hospital, or health care facility.

- (2) Copies of the living will should be placed in the testator's medical record file and given to family members and the testator's personal representative.
- (3) A copy should be placed with the testator's will and a notation of its location should be included in the letter of instructions.
- k. Another relatively new type of advance medical directive is the Provider Order for Life Sustaining Treatment, which spells out precisely the kind of care an individual wants at end-of-life situations and directs family and medical professionals to follow the dying person's wishes.

—**TEACHING SUGGESTION:** Review the sample living will with the students (Exhibit 6.6). If your state uses a different form, you might want to distribute a copy to the students, unless making an exhibit is possible and more practical.

- 6. A medical power of attorney (durable power of attorney for health care, health care proxy, or appointment of health care agent) is another advance directive sometimes used in place of a living will.
 - a. A power of attorney is a written document that grants to an agent or "attorney in fact," the power and right to act legally on behalf of the principal, who authorizes and grants the power.
 - (1) The agent does not have to be an attorney at law.
 - (2) This general power of attorney is often granted for specific periods or for a specific purpose or for a specific circumstance.
 - (3) A power of attorney granted during the principal's life terminates at the moment of the principal's death.
 - b. The durable power of attorney for health care is a written document that gives an agent, as a substitute for the principal, the power and authority to make all decisions relating to the performance of medical and health care treatment.
 - (1) This agent can direct the withholding or withdrawal of health care and life-sustaining treatment.
 - (2) The decisions are based on current medically known facts and the wishes of the patient.
 - (3) The agent has the right to: employ and discharge health care personnel; obtain and disclose the principal's medical records; and select the health care facility for the principal based on his or her level of need for medical care and assistance.
 - (4) Unlike the living will, the durable power of attorney for health care is not limited to situations where the patient has a terminal condition due to illness or injury and death is imminent.
 - (a) The durable power of attorney for health care has a broader grant of authority.
 - (b) The patient has a wider range to exercise self-determination.

V. Where to Keep the Will

- A. It is good practice to include the location of the will in the letter of instructions. The will is often kept in one of four places.
 - In the lawyer's office vault
 - With the client
 - 1. This is the most frequently used location today because it is readily available for review.
 - 2. Good storage choices include a fireproof metal box or family safe at the client's home or office.
 - In a personal safe deposit box in a bank
 - Filed with the clerk of the appropriate probate court, as is allowed in some states
 - 1. If the will is filed in the probate court, anyone holding the receipt issued for the filed will and signed by the testator may obtain the original will while the testator is living.
 - 2. After the testator's death, the probate court retains the original will and gives copies to the personal representative.

- B.** Keeping a will in a personal safe deposit box in a bank is less desirable because the will is less accessible.
1. Probate proceedings may be delayed.
 2. A person must usually have permission from the state tax commission or county treasurer to open the safe deposit box belonging to another.
 3. If the box is rented in the decedent's name only, the box may be sealed when the bank is notified of the death; the procedures involved with sealing and opening the box are cumbersome and vary by state.
 - a. If the testator lives in a state in which the county treasurer or state tax representative does not have to be present when the box is opened, the box should be rented in the names of the testator and the testator's spouse or other person as joint tenants.
 - (1) Whenever either spouse dies, the other may open the box.
 - (2) Widows, widowers, or single parents may want to name themselves and an adult child as joint tenants.
 - b. If the testator lives in a state in which the county treasurer or state tax representative must be present, the testator should put the will in a safe deposit box rented in the name of the testator's spouse so that upon the testator's death, the testator's will is accessible.
- C.** Leaving the will with the testator's lawyer makes for easy access and convenient periodic review of the will whenever the testator wishes. The request for review must be initialed by the testator and not be solicited by the attorney or paralegal.

ANSWERS TO THE REVIEW QUESTIONS

1. What is the purpose of the following clauses of a will: Exordium, Revocation, Residuary, Simultaneous death, Testimonium, and Attestation?
- The exordium clause is to declare the following:
- (1) The identity of the testator, (2) that the testator has the intent and capacity to create a will, (3) that the document is the testator's last will, and (4) the location of the testator's principal residence or domicile.
- The revocatory clause is to revoke earlier wills and codicils.
- The residuary clause is to allow the maker to transfer the remaining property of an estate that has not been specifically given to devisees. It prevents any property of the estate not specifically given from passing according to the intestate succession statutes.
- The simultaneous death clause is to govern the distribution of a decedent-testator's property when there is insufficient evidence to determine if a beneficiary survived the testator. This type of clause, whether the same as the Simultaneous Death Act or different, deals with the situation that arises frequently whenever two people, such as a married couple or a parent and child, die at the same time in a common accident and it cannot be determined who outlived the other for inheritance purposes.
- The purpose of a testimonium clause is to declare that the testator has freely signed the will and that a request has been made of the proper number of witnesses to do the same.
- The purpose of the attestation clause is for the witnesses to state that they have attested the testator's signature on the will and that they have subscribed a clause in the will to this effect.
2. If a testator uses more than one name or alias when signing written statements or documents, is it necessary to include all such names in the will? Explain.
- Yes, the exordium clause should identify the maker of the will by his/her name and any alias or other name by which the maker is known, "a/k/a," so that all property owned by the maker can be identified, located, and properly transferred, or distributed.

3. How does any person who wishes to donate body organs accomplish that purpose both within a will and using other nontestamentary documents?

The Uniform Anatomical Gift Act, which has been adopted in all 50 states, provides that the maker may legally determine in a will the disposition of all or any part of the body for organ transplant, medical research, or educational purposes. In addition to a provision in a will, any person may donate organs by a donor card or other document that becomes legally enforceable once the signatures of the donor and two attesting and subscribing witnesses are obtained. It is advisable to use the donor card because by the time the will is located and read, the body may already have been cremated or buried, or the organs may not be useful for transplant.

4. According to your state statute, if any, who may make an anatomical gift in addition to the testator-decedent?

The answer will vary depending on the state.

5. When a testator has numerous items of tangible personal property to leave to an equal number of beneficiaries, how can this be accomplished and ensure that they are distributed to the desired recipients without writing them directly into the will?

In most states, statutes allow a testator to write a separate “memorandum” or letter of instruction “in the handwriting of the testator or signed by the testator” describing the property, item by item, with reasonable certainty and naming the beneficiary who is to receive it. These statutes allow the testator to identify and list the property and beneficiaries on a separate memorandum or letter so that the testator can easily add to or modify this without having to revoke the will and draft a new one.

6. Confusion exists in the law of wills concerning the use of the *words issue, child, heirs, descendants, and adopted, natural, nonmarital, and stepchildren*. How would you avoid this confusion when drafting a client’s will?

Because these words are often ambiguous or misleading, a clause could be used to explain the client’s wishes by defining who belongs to each classification. Another way to deal with this is to name the specific individuals.

7. If there is no residuary clause in a will and not all the testator’s estate is distributed to named beneficiaries, how and to whom would such property be distributed?

Any property not specifically devised in the will passes by intestate distribution statute and is divided among the heirs on a pro rata basis.

8. How are personal representatives appointed (authorized to act)? In general, what are the powers granted to them?

To acquire the powers and authority of a personal representative, a person must be appointed by a court. The court approves and appoints the person named in the will unless the person is unqualified. Generally, the powers granted are to collect and preserve the estate assets, pay all allowed debts of the decedent as well as estate expenses and taxes, and distribute the balance to devisees named in the will.

9. What is the difference between a property guardian and a conservator?

Often the terms are used interchangeably; however, a property guardian is appointed to hold and manage the property of a minor or incompetent person, whereas a conservator holds and manages the property of an incompetent person.

10. Does your state have any requirements for the placement of the testator’s signature on the will? Are initials, a nickname, or simply an “X” valid signatures in your state?

The answer will vary depending on the state.

11. Which of the statutory requirements of a will is eliminated by the self-proving affidavit or the self-proved will?

The affidavit or self-proved will does not waive the formal requirements for a valid will. It only makes it unnecessary to produce witnesses to testify when probating the will.

12. What are the purposes of the two kinds of advance medical directives, i.e., the living will and the medical power of attorney? How do these directives differ?

The purposes of the two kinds of advance directives are to alleviate an individual's concern and anxiety about becoming incompetent due to aging, illness, or accident. They allow a competent person to determine, in advance and in writing, the kind of future medical care and treatment the person wishes to have in case he or she becomes incompetent or to appoint a surrogate, agent, or proxy to exercise his or her wishes to continue or discontinue future medical treatment. A living will relieves family members from the responsibility of making the decision to alleviate guilt feelings on their part, and to protect the physician and health care institution from liability if they refrain, as requested, from using certain medical treatment. A living will states that in the event a person becomes incompetent due to a physical or mental disability with no reasonable expectation or hope for recovery, and because of the disability is unable to take part in decisions, the person can request that he or she not be kept alive by artificial means. The durable power of attorney for health care is a written document that gives another person, as a substitute for the patient, the power and authority to make all decisions relating to the performance of medical and health care treatment by health care providers. This person does more than simply act as an agent for another. Instead, the durable power of attorney allows the authorized designated agent not only to make health care and medical decisions in place of the patient when the patient is disabled and unable to make such decisions, but also to direct the withholding or withdrawal of such care and life-sustaining treatment. This is the broadest advance directive. Unlike the living will, which is limited to situations where the patient has a terminal condition and death is imminent, the durable power of attorney has no such limitation, makes a broader grant of authority, and gives the patient a wider range to exercise self-determination.

13. Where is the best place to keep your will?

It is good practice to leave it in one of four places: (1) in the lawyer's office vault; (2) in the bank named as corporate personal representative in the will; (3) with the client if it can be stored in a fireproof metal box or family safe at the client's home or office; or (4) filed with the clerk of the appropriate probate court as is allowed in some states. Leaving the will with the testator's lawyer with whom the testator is familiar and has a relationship based on confidence and trust makes for easy access and convenient periodic review of the will whenever the testator wishes.

ANSWERS TO THE CASE PROBLEMS

Problem 1

- A. Through the intestate succession statute, any property not specifically distributed will pass to his/her heirs. Depending on the state, the intestate property will be distributed to any surviving spouse and his/her two children, even though he/she attempted to disinherit the two children by his/her will.
- B. Generally, the will provision has no effect on the intestate succession statutory distribution. The instructor should review the students' responses to this case based on the general rule and the students' interpretation of the *Ferguson v. Croom* case to determine if the students have correctly read the case.

Problem 2

- A. The life insurance proceeds would probably be paid to the surviving two children in equal proportions. Because the insured is presumed to have survived the beneficiary, Patricia's estate would receive nothing from the policy. As the two minor children are presumed to have predeceased the insured, their estates would receive nothing. If either of the two minor children had left issue surviving, their issue would probably take by right of representation; however, the problem fact pattern seems to imply that they left no issue surviving. Therefore, unless Stewart's will provided otherwise, the two surviving children would split the life insurance policy proceeds.

- B.** Unless the will of Stewart Kincaid or the terms of the life insurance policy provided otherwise, the life insurance proceeds are distributed as if the insured has survived the beneficiary. As the primary and secondary beneficiaries are presumed to have predeceased Stewart, the proceeds would probably fall into the residue of the will. If the residual takers predeceased Stewart, the proceeds will pass according to the intestate succession statute.
The instructor should determine whether the students have correctly interpreted *Keegan v. Keegan's Estate*, as cited.
- C.** The property held as joint tenants is divided equally and distributed to the beneficiaries named in the residuary clause of their respective wills.

ANSWERS TO THE ASSIGNMENTS

Assignment 6.1

1.
 - a. While this clause may be adequate, it is definitely not ideal. The full name of the testator and any names a/k/a should be clearly included. The county and state should be stated. There should be a reference that the will is made free from undue influence.
 - b. Students could argue this either way. The instructor should judge how clearly articulated the position of the student is and whether it is argued in the alternative.
 - c. This answer can vary. Students should include the full name and any a/k/a, the county and state of domicile, and the reference that the will is made free from undue influence. The new clause should clearly state that it is a last will and testament and that it is published and declared as such.
2. A sample exordium clause would be as follows.
Last Will and Testament of Thomas William Hardy, also known as Tom W. Hardy and Tom Hardy, of 0 Anystreet, City of Anytown, County of Anycounty, and State of Anywhere, being of sound mind and not acting under undue influence of any person whomsoever, do make, publish, and declare this document to be my last will and testament.

Students should explain that because legal documents such as the deed and bank accounts are in names other than Tom Hardy, the a/k/a listing is important to eliminate confusion concerning ownership, and so all property owned by Hardy can be identified, located, and properly transferred or eventually distributed. This is especially true if ancillary administration is necessary as it appears to be for the Wisconsin property.

Assignment 6.2

1. The answer will vary depending on the state.
2. This response may vary depending on the student; however, a sample debt payment clause is as follows. "I direct my personal representative, hereinafter named, to pay the debts, administration expenses, and expenses for my last illness, funeral, and burial out of the residue of my estate." The reasons this may cause hardship for the surviving spouse and children depends on whether the clause is properly phrased. If the clause is phrased too broadly, it may make the estate liable for debts that would not otherwise be the responsibility of the estate, such as mortgages on property. Also, if the residue is not enough to pay the debts, the gifts to the surviving spouse and children will be abated first. Students may think of other reasons.
3. This response may vary depending on the student; however, a sample clause is as follows. "I direct my personal representative to pay out of my residuary estate all estate, income, and inheritance taxes assessed against my taxable estate or the recipients thereof, whether passing by this will or by other means, without contribution or reimbursement from any person."

Assignment 6.3

1. In Florida, absent any actual notice of contrary indications by Iris, the order of priority of persons who may make an anatomical gift of Iris's organs are her spouse, her adult children, and her parents; therefore, Iris's spouse has the right to make the final decision. Student responses for the law in their state will vary.

2. The answer will vary depending on the student; however, a sample clause is as follows.
“I hereby direct my personal representative to arrange with the State Society for the Prevention of Blindness, address, to donate my eyes to the eye bank.”
3. It would be better for Deasia to carry an organ donor card because by the time the will is located, it may be too late to donate her eyes.

Assignment 6.4

1. Traditionally, Tomas’s gift of the stock would be a specific bequest; however, under the UPC it is a specific devise. Gabriela would probably not be entitled to the fair market value of 25 shares because those 25 shares were adeemed by Tomas.
2. This answer will vary depending on the student; however, the instructor should examine how clearly the bequest is worded to accomplish the intended gift and how it deals with the potential for conflict in splitting up the furniture.
3. The redrafted provision should include a statement to the effect that if Daisy and Lilly cannot agree on dividing the furniture, the personal representative has the final decision.
4. This is a specific devise. It does not seem to be defeasible because it seems to be a fee simple absolute. This does not seem to have a condition subsequent attached to it, so it is not defeasible on its face. If a student believes it to be defeasible, he/she should back up the opinion with valid argument based on a condition subsequent aspect of the gift and draft a provision that has no condition attached to it.

Assignment 6.5

1. Several important points should be brought up in this answer including that the provisions for his first wife, Thelma, in all probability are void by operation of law since they divorced, and that Harold can disinherit his children except that his estate may be liable, in some states, for child support if the children are minors.
The clause drafted by the students will vary, but the instructor should see that the language is clear and accurately reflects the intent of the testator to exclude the persons named.
2. The answer will vary depending on the state.
The clause drafted by the students will vary, but the instructor should see that the language is clear and accurately reflects the intent of the testator to exclude/include the proper persons.
3. The answer will vary depending on the state.
If such a provision is allowed, the clause drafted by the students will vary, but the instructor should see that the language is clear, accurately reflects the intent of the testator, and accomplishes the testator’s wishes.
4.
 - a. The answer will vary depending on the state.
 - b. The answer will vary depending on the state; but it would be a good idea to specifically exclude Jeb to avoid any doubt.
 - c. The answer will vary depending on the state; however, Jeb may be able to claim under the Omitted Child Statute.
 - d. The answer will vary depending on the state; however, children (natural and adopted) can probably claim under the Omitted Child Statute. Laws vary as to when nonmarital children can make claims. Stepchildren have no rights to inherit; therefore, if a stepparent wishes to leave anything to a stepchild, the intent must be specifically stated in the will.
 - e. The answer will vary depending on the state; but, generally, yes, a testator can disinherit some but not all children.
The clause drafted by the students will vary, but the instructor should see that the language is clear, accurately reflects the intent of the testator, and accomplishes the testator’s wishes by excluding Wilbur and Maude and including Veronica, Dennis, and Marjory.

5. Harold could draft a testamentary trust or he could leave a life estate to Edwina with the remainder going to Wilbur and Maude. The clauses drafted by the students will vary, but the instructor should see that the testamentary trust has all the required elements of a valid trust and that the language is clear, accurately reflects the intent of Harold, and accomplishes his goal. The life estate clause should be a valid life estate with a remainder to the children.
6. The answer will vary depending on the state. Generally, students should mention the prohibition against disinheriting a surviving spouse and the issue of undue influence, duress, and soundness of mind.

Assignment 6.6

1. The answer will vary depending on the state.
2. The answer will vary depending on the state.
3. The answer will vary depending on the student; however, a sample clause is as follows.
 “I give all the rest, or residue of my estate, consisting of all property I can dispose of by will and not effectively disposed of by the preceding articles of this will, to my surviving spouse, Ashika Jin, if she survives me, but if she does not survive me, to my children in equal shares.”

Assignment 6.7

1. The answer will vary depending on the student; however, two possibilities are to establish a property guardian, other than Rhoda, for Karen or to establish a testamentary trust for Karen.
2. Under Indiana law, it would seem that a request by one related by blood or marriage would have the same level of priority. Indiana law would consider Karen’s input only if over the age of 14 years. Therefore, it would seem a close call between the maternal grandparents and the stepfather. Other factors might be considered by the court.

The answer will vary for the student’s state.

Assignment 6.8

The answers will vary depending on the state.

Assignment 6.9

1. The testimonium clause might be considered by a court to be sufficient because it would not want to declare the will invalid and have Owen’s estate pass according to the laws of intestacy; however, the clause as changed is not a fair equivalent of most testimonium clauses.
 The testimonium clause should declare that the testator willingly signs and executes the document as the last will; it is a good idea to state the number of pages in the document; it should state that the testator requested the witnesses to attest to and subscribe the will; the date the will was signed by the testator is necessary; and it should identify the place the will is executed. Owen’s will does not do this.
2. Owen’s will does not mention that it was signed willingly, the number of pages is not included, no mention of the witnesses attesting the will is mentioned, the date line is confusing as to who signed it on the stated date, the place of execution is not mentioned; and what state is “this state”?
 The omissions and ambiguous terms can raise sufficient questions to make a contest likely.
3. The answer will vary depending on the student. The instructor should see whether the student’s choice of words is clear and equivalent to the traditional testimonium clause.

Assignment 6.10

1. The answer will vary depending on the state.
2. The answer will vary depending on the state.

Assignment 6.11

1. The answer will vary depending on the state.
2. The answer will vary depending on the state.

Assignment 6.12

The answer will vary depending on the state and the requirement for a notary public; however, some options are to print a clean copy of the will and have the testator execute it properly or if allowed by state law the paralegal/notary can have the testator declare and affirm that the signature is his/hers.

Assignment 6.13

1. The completed outline will vary depending on the student; however, the instructor should determine whether the outline contains all pertinent facts and property mentioned in the fact pattern.
2. Using the will of Leona Farrell, the instructor should compare the student's draft of the will to Leona's to determine if all necessary and important clauses are included. Also, the instructor should determine whether all stated property is included in the will or disposed of by the residue. If the student chooses to disinherit Maria and Casey, a specific clause should be included to that effect.

Assignment 6.14

The answer will vary depending on the state.

Assignment 6.15

Generally, this is not a conflict. The student's answer should question specifically what the end-of-life instructions are to ensure they agree with the do not resuscitate document.

If there is a conflict, the properly executed advance directive will take precedence.

Assignment 6.16

1. The answer will vary depending on the state and the student. The student should be able to explain his/her position and back it up with valid arguments.
2. The answer will vary depending on the state.
3. The answer will vary depending on the state and the student.
4. Generally, a patient is not required to hire a lawyer to make a valid living will, health care proxy, or a durable power of attorney. The patient might choose to have a lawyer draft the directives so that the patient is sure that it is executed according to the laws of the jurisdiction and will be valid. The patient may also have questions about any potential legal processes and conflicts that might arise, which can be best explained by an attorney.
5. The answer will vary depending on the state; however, if a state such as Massachusetts, Michigan, or New York does not recognize the living will for public policy reasons, it probably will not be valid there.
6. The answer will vary depending on the state and the student.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. Sample Clause:

Digital Assets. My attorney-in-fact shall have (i) the power to access, use, control, and manage my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device that currently exists or may exist as technology develops or such comparable items as technology develops for the purpose of accessing, modifying, deleting, controlling, managing, or transferring my digital assets, and (ii) the power to access, modify, delete, control, manage, use, and transfer my digital assets, including but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items that currently exist or may exist as technology develops or such comparable items as technology develops.

2. Answers will vary depending on the student.
3. Answers will vary depending on state law.

CHAPTER 7 THE PARTICIPANTS AND THE PROPER COURT

LEARNING OBJECTIVES

Students should be able to do the following:

- Identify the participants who are essential for drafting wills and trusts and for administering the estate of a decedent and explain their basic functions.
- Identify the proper court that supervises the administration and distribution of a decedent's estate.
- Explain what is meant by probate and jurisdiction.
- Identify the various elements of jurisdiction required by a specific court, such as the probate court.
- Determine the proper place (county/state) to commence probate proceedings of a decedent's estate.
- Recognize the necessity for establishing a second or ancillary administration of a decedent's estate when property of the decedent is located in another state.

LECTURE OUTLINE

I. Scope of the Chapter

- A. It is important to know who the participants are and their functions in the creation of wills and trusts, and the administration of estates.
- B. It is important to know the role of the proper court involved in the administration of an estate.
- C. Terms associated with the selection and function of the court are defined and explained.

II. The Participants

- A. The personal representative is the person or corporate institution, such as a bank or trust department, appointed by the proper court to administer the estate of the decedent who died with or without a will.
 1. The personal representative serves in a position of utmost trust and loyalty and has obligations called "fiduciary duties" to act in good faith solely for the benefit of another person.
 2. Trustees, guardians, and conservators are three other types of fiduciaries appointed in a will.
 - a. Personal representatives act for the beneficiaries or heirs of estates.
 - b. Trustees act for beneficiaries of trusts.
 - c. Guardians act for minors.
 - d. Conservators act for incompetent persons.
 3. The personal representative has a right to change his/her mind about serving and can reject the position before being appointed or resign after being formally appointed by the probate court.
 4. Most personal representatives are family members or friends who receive assistance in performing their functions from the court and the attorney representing the estate and his/her paralegal.
 5. If the personal representative named in the will is a man, he is traditionally called an executor; if a woman, she is called the executrix.
 6. If there is no will, the court appoints the personal representative, traditionally called an administrator if a man, or an administratrix if a woman.
 7. Executors and administrators perform similar duties, face similar liabilities, and hold similar powers.
 8. Even though state statutes grant numerous fiduciary powers to the personal representative, usually the court limits the powers to those stated explicitly in the will or incorporated into the will by reference. The UPC lists 27 types of transactions that personal representatives can perform.
 9. The role of the personal representative is as follows.
 - To probate the will or petition for estate administration when there is no will.
 - To collect, protect, preserve, and manage the probate estate of the decedent.
 - To publish notice to creditors to submit their claims by a specific date.

- To pay all federal and state taxes and approved creditor claims.
 - To distribute the remaining assets to the beneficiaries named in the will or to the heirs of the decedent if no will exists.
 - To refrain from engaging in acts of self-dealing, often referred to as the duty of loyalty. The personal representative cannot borrow, sell, or buy estate property. It may be appropriate for the paralegal to remind the personal representative of this duty.
 - To commence a civil lawsuit for claims on behalf of the estate against claims brought by creditors or disgruntled family members.
 - To keep all collected estate assets separate from the personal representative's own assets.
 - To not delegate the management of the probate estate or these fiduciary duties to others. This does not prevent the fiduciary from hiring professionals to advise him/her in performing these duties.
10. Some problems that may occur include the following:
- A beneficiary or heir cannot be found.
 - A beneficiary or heir challenges the personal representative's appointment or authority to act and proposes an alternate candidate.
 - Someone contests the will.
 - Someone challenges the personal representative's payment to creditors or distribution to heirs or beneficiaries.
- a. These problems are resolved by the probate court.
 - b. The resolution may cause lengthy delays and be costly, depleting the estate assets.
11. The personal representative distributes only probate property, not nonprobate property such as jointly owned property and the proceeds from an insurance policy payable to a named beneficiary other than the decedent's estate, even though the personal representative may be required to report all property for tax purposes.
12. Pre-probate duties, subject to state statute and requirements of individual wills, are as follows.
- Upon request, assist with anatomical gifts and funeral arrangements. Obtain copies of the death certificate from the funeral director.
 - Although not mandatory, hire an attorney to represent the estate and to help with its administration.
 - Help find and review any existing will.
 - Contact all of the decedent's financial advisers to obtain information about business records, papers, safe deposit boxes, etc.
 - Convene a conference of family members and other interested persons to discuss the provisions of the will or intestate laws, election rights, immediate financial needs, maintenance, and similar matters.
 - If appropriate, advise a surviving spouse of the right to obtain his/her own attorney and elect against the will.
 - Determine whether guardians or conservators are needed for minors or incompetent persons.
 - Locate and notify witnesses of the testator's death.
 - Discontinue the telephone and other utilities if advantageous or appropriate and notify the post office to forward mail to the address of the personal representative. Newspapers and other deliveries, as appropriate, should be stopped.
 - Determine the appropriate probate proceedings: solemn or formal probate or common or informal probate.

—**TEACHING SUGGESTION:** With regard to the personal representative assisting with funeral arrangements, it is a good idea to address the sensitive issues that may arise with various cultures and social diversification, such as issues involving nontraditional families.

13. Probate duties prior to appointment as personal representative include the following:
 - File all required legal documents, petitions, and accounts.
 - Petition for probate of the will or for general administration if no will and, in either case, for appointment of the personal representative.
 - Give notice of the decedent's death and notice of the date for the hearing to probate the will and for appointment of the personal representative.
 - Notify the surviving spouse and minor children of their rights.
 14. Estate administration duties from appointment to closing of the estate include the following:
 - Obtain from the court the Letters Testamentary or Letters of Administration (one-page certificates of appointment authorizing the personal representative to act on behalf of the estate) and file an oath of office as personal representative.
 - Arrange for a bond with surety if necessary.
 - Apply for an Employer Identification Number (EIN [Form SS-4]).
- TEACHING SUGGESTION:** A copy of Form SS-4 can be given to the students so they are familiar with its appearance and what information must be completed in order to obtain an EIN. You may obtain Internal Revenue Service forms at <http://www.irs.gov>.
- Open an estate checking account.
 - Open the decedent's safe deposit box.
 - Defend the estate against will contests.
 - Discuss the need for survivors to draft or rewrite their own wills and review their health and life insurance.
 - Protect, collect, and preserve assets.
 - Find and review all documents, records, and papers, such as business records, checkbooks, tax returns, pension plans, and insurance policies, concerning the financial affairs of the decedent. Notify local banks of the decedent's death and request information on accounts as of the date of death and safe deposit boxes.
 - Take possession of all personal property not set aside for the spouse and/or minor children and transfer all cash from such sources as savings and checking accounts, life insurance payable to the estate, and dividends from securities into the new estate checking account.
 - Inspect the condition of all real estate and review all written documents, including promissory notes, leases, mortgages, and deeds. Arrange for security, management, and collection of rents and pay insurance premiums, rent, and other obligations.
 - Determine the form of ownership of all real and personal property.
 - Protect both real and personal property with insurance and keep the property in reasonable repair. Place valuable personal property in a new estate safe deposit box or vault.
 - Collect information on all nonprobate assets to be used later in preparing tax returns.
 - Collect all debts, including family debts owed to the decedent, and place the funds in the estate account. Contact the decedent's employer and collect any amounts owed such as unpaid salary, bonus, and vacation pay. Make sure there is no pending litigation involving the decedent.
 - File claims for any Social Security, veteran pension benefits, etc.
 - Determine whether the decedent made any gifts for which a gift tax return must be filed.
 - Determine whether ancillary administration of out-of-state assets is necessary and handle where required.

- Ascertain whether the decedent owned any business and whether it should be liquidated, sold, or continued, the latter requiring the arrangement of proper management.
 - Review all securities and collect all interest and dividends, make decisions on proper investments, and determine whether any of these assets will have to be liquidated to pay expenses or administration, taxes, or creditors' claims.
 - Once the assets are determined and collected, inventory and appraise items valued at the date of the decedent's death or the alternate date of valuation.
 - Distribute family allowances, including support and maintenance to the surviving spouse and/or minor children, as determined by statute.
 - Examine all claims made against the estate; determine their reasonableness, timeliness, validity, and priority; defend against any improper claims.
 - Defend the estate against any litigation filed against it.
 - Pay all allowed claims against the estate according to their statutory priority.
 - Prepare and file all necessary federal and state tax returns and pay all taxes due.
 - Terminate the ancillary administration, if one exists, and pay any debts or taxes due.
 - Obtain and keep detailed records of all receipts and vouchers for all disbursements and prepare necessary data for the final accounting, listing assets, receipts, disbursements, and sales, noting any gains or losses, and providing a reconciliation of beginning and ending balances.
 - Obtain court approval of attorney's and personal representative's fees.
 - Distribute proper title to remaining assets to beneficiaries according to the will or to the heirs according to the intestate statute.
 - After the final accounting, obtain approval of the settlement of the estate and a discharge of the personal representative by the court.
 - Cancel the personal representative's bond, if one was necessary, with the surety (bonding) company, claim any refund, and close the estate.
- B.** Because many personal representatives lack the knowledge, experience, or expertise to handle estate administration, the services of an attorney are often requested.
- 1.** Potential ethical problems arise for the supervising attorney who is hired to draft the will in the following circumstances.
 - a. The attorney or his/her family is named a beneficiary of the will. See Rule 1.8(c) of the Model Rules of Professional Conduct.
 - b. The attorney is appointed in the will to be the personal representative.
 - c. The attorney is named in the will as the testator's choice to assist the personal representative.
 - d. It is important that the attorney or paralegal not solicit or suggest appointment as explained in item b because the appointment would be financially rewarding to the attorney and raise ethical concerns.
 - (1) The Model Rules of Professional Conduct should be consulted.
 - (2) Where the client wishes to name the lawyer, great care should be taken to avoid the appearance of impropriety.
 - 2.** The attorney has a duty to inform the heirs or beneficiaries that the attorney represents and works for the estate and not individually for them.
 - a. The heirs and beneficiaries cannot retain the attorney who is representing the estate because that would create a conflict of interest for the attorney.
 - b. The attorney owes a basic duty of loyalty to the client, the estate, and cannot become involved in a situation where a conflict may develop or where the attorney has a personal interest in the outcome.

- C. The legal assistant must act under the direction and supervision of an attorney and cannot give legal advice.
1. Some of the tasks of the paralegal concerning wills include the following:
 - Collect all data and information necessary for making a client's will.
 - After reviewing the client's financial information, discuss with the attorney the contents of the will, including topics such as incorporating trusts, tax considerations, and the beneficiaries of the will.
 - Prepare a preliminary draft of the will.
 - Review the draft with the attorney and client and make any corrections, additions, deletions, or modifications necessary to avoid inconsistencies and ensure that the will reflects the client's wishes.
 - Assist in the execution of the final draft of the will.
 2. Some of the main tasks of the paralegal in relation to trusts are as follows.
 - Obtain from the client data and information to create a trust.
 - Draft a preliminary trust.
 - Review the draft with the attorney and client to make any corrections, additions, deletions, and modifications as necessary.
 - Assist in the final execution of the trust.
 3. Some of the pre-probate tasks of the paralegal in estate administration are as follows.
 - If requested, help locate the will, if one exists.
 - Schedule a family conference and notify all family members and beneficiaries or heirs.
 - Assist in reviewing the will or intestacy procedures with the family and beneficiaries or heirs.
 - Explain the "tickler" system and probate procedures to the client.
 - Set up the "tickler" system with the personal representative and prepare for the maintenance and monitoring of the procedures.
 4. Probate tasks of the paralegal include the following:
 - Help locate, collect, preserve, and maintain assets and ensure that estate assets are not commingled with other assets of the law firm.
 - Handle communication with parties holding assets, creditors, beneficiaries, and heirs. None of the paralegal's communications may contain legal advice, and any information received must remain confidential.
 - Assist in preparing preliminary drafts of legal documents and forms associated with probate.
 - Maintain records of all collected assets, filing of documents, creditors' claims, etc.
 - Prepare an inventory and appraisal of all probate assets and list all nonprobate property and its value for federal and state death tax purposes.
 - Prepare preliminary drafts of final estate accounts and necessary tax returns.
 - Record the payment of debts and taxes due.
 - File legal documents.
 - File tax returns after review with the attorney.
 5. Paralegals who handle such time-consuming, detailed tasks decrease the cost of legal services.
 - a. Paralegals are responsible for seeing that the process flows smoothly and chronologically.
 - b. Paralegals can handle queries that do not involve the dispensing of legal advice and indirectly improve attorney-client rapport by allowing the attorney more time to advise the client.

—**TEACHING SUGGESTION:** Discuss the duties and functions that a paralegal with supervision can and cannot perform (Exhibit 7.1).

- D.** The court and judge, terms used synonymously, have an essential role in the administration of the decedent's estate.
1. The court that handles estate administration is the probate court, also called a surrogate, orphans', or chancery court in some states.
 2. Once the probate court has jurisdiction, its function is to ensure that the personal representative properly administers the estate so that
 - the homestead exemption, exempt property, family allowances, and maintenance are granted.
 - creditors with valid claims are paid.
 - taxes owed are paid.
 - the remaining property is distributed to the rightful beneficiaries according to the testator's wishes or according to the state intestate succession statute, and disputes are settled.
 3. By approving the will or identifying the decedent's rightful heirs, the probate court establishes clear title to the property distributed to the beneficiaries of the will or to the heirs.
- E.** The probate registrar, an officer of the probate court, is in charge of keeping records and at times acts on behalf and in place of the court. The registrar can answer questions about forms and procedures.
- F.** The clerk of the probate court is an administrative assistant to the court and administers oaths and authenticates and certifies copies of instruments, documents, and records of the court.
1. The clerk cannot give legal advice but is a valuable source of information about probate procedures and the execution of required forms.
 2. The clerk and the registrar are helpful in explaining "local customs" in the particular county.

—**TEACHING SUGGESTION:** If possible, a field trip to the local county probate court would be helpful for students to familiarize them with its location and setup. Many registrars and/or clerks are pleased to address groups of paralegal students; therefore, planning ahead and scheduling such an "introduction" is helpful. If a field trip is not possible, an alternative is to invite a probate judge, registrar, or clerk as a guest speaker to the class. If possible, obtain your local probate procedure guides and/or court rules.

III. Terminology Related to Probate Court Proceedings

- A.** Originally, probate referred to a proceeding in the appropriate court to prove that a certain document was a will.
1. To prove a will means to acknowledge its existence and validity as the properly executed last will of the decedent.
 2. A will that is proved is said to be admitted to probate.
 3. Today, the term *probate proceedings* expands the original definition to include the process of distributing the estate assets of a person who died testate or intestate and includes all other matters over which the probate court has jurisdiction.
 4. Sometimes the term *probate* is used to refer to the completion of the entire administration of the estate, including will contests, which are disputes or contests between two or more beneficiaries who claim the same item of property under a will.
- B.** Jurisdiction is the authority by which a particular court is empowered by statute to hear and decide a certain kind of case and to have its decision enforced.
1. The probate court has jurisdiction over the administration of decedents' estates.
 2. The powers and duties of the probate court are set out in the statutes or constitutions of each state.
 3. The probate court may be a division of a court system or a separate court within the system depending on the state.

- C. Domicile has been defined as the place a person has adopted as a permanent home, and to which the person intends to return when absent.
 1. Probate courts have jurisdiction over decedents who were domiciliaries.
 2. *Domicile* and *residence* are often confused but are distinct and separate terms.
 - a. Domicile is the legal home, the fixed permanent place of dwelling.
 - b. Residence is a temporary place of dwelling.
 - c. Domicile determines venue.
 - d. Evidence of domicile is where one lives, banks, goes to church, registers his/her car, pays taxes, and votes.
 - e. If uncertainty does arise as to a decedent's domicile, then probate proceedings are usually conducted in the county where the assets of the decedent's estate are located.
- D. Venue is the particular place where a court having jurisdiction may hear and decide a case and is not a term interchangeable with *jurisdiction*.
 1. Jurisdiction is abstract, meaning the power or authority of a court to act; venue is concrete, meaning the physical place of a trial and is the territorial jurisdiction of a court within a particular county.
 2. After the jurisdiction of a court is determined, the question of venue arises.
 - a. Venue corresponds to the decedent's domicile or to the decedent's residence at death.
 - (1) Proper venue for a resident decedent is usually in the county in which the decedent was domiciled at the time of death.
 - (2) Proper venue for out-of-state residents is generally the county in which the nonresident left real property.
 - b. The decedent's domicile aids the court in establishing *in rem* jurisdiction over the estate's probate assets.
 - (1) When two or more states are involved in the probate of a will, the state in which the testator was domiciled will collect the greater share of the state inheritance or estate taxes.
 - (2) Tax liability may vary noticeably, depending on which state is the place of domicile and in which state the estate assets are located.

IV. Ancillary Administration or Ancillary Probate Administration

- A. Ancillary probate administration becomes necessary when, if at death, the decedent owns any real property in a state other than the domiciliary state.
 1. Separate or secondary court proceedings, including admitting the will to probate, must be undertaken because the court in the county of the decedent's domicile has no jurisdiction over real property located in a "foreign state."
 2. Ancillary administration also protects creditors in the foreign state by providing notice of the probate proceedings.
 3. When ancillary administration is required, the property is administered under the laws of the state where it is located.
 4. An ancillary administrator/administratrix may be appointed in a variety of ways.
 - a. The testator or the court of the state of domicile may appoint someone.
 - b. Some states allow the personal representative of the domiciliary state to administer the ancillary proceedings.
 - c. States often require the ancillary administrator to be a resident of that state.
 - (1) This increases the expense of estate administration.
 - (2) Some states made an exception for nonresident family members to serve as ancillary administrators.
 - (3) The court must safeguard the rights of creditors of the decedent in weighing the decision whether to approve an out-of-state ancillary administrator.
 - (4) The UPC gives the domiciliary personal representative priority in being appointed ancillary administrator.

- d. Ancillary administration in the foreign state generally includes the following procedures.
 - Acceptance by the foreign state court of the will admitted to probate in the domiciliary state.
 - Issuance of letters of authority, e.g., Letters Ancillary Testamentary, to the ancillary administrator that permit the real property to be transferred to the designated devisee named in the will if all creditors of the testator in the foreign state have been paid.
 - If any inheritance or estate taxes are due to the foreign state, these must be paid to that state and not to the domicile state.
- e. Many states allow appointment of nonresidents to serve as personal representatives without any restrictions, while some states do have restrictions on the appointment of nonresident personal representatives.
- f. If the decedent died intestate, then the persons entitled to the decedent's real property in the foreign state will be determined by that state's intestate succession statute.
- g. If the decedent died intestate, all of the decedent's personal property, wherever located, will pass to the persons entitled to it according to the intestate succession law in the decedent's domiciliary state.

ANSWERS TO THE REVIEW QUESTIONS

1. A personal representative is a fiduciary. What does that mean?
A fiduciary is a person who serves in a position of utmost trust and loyalty. As a fiduciary, the personal representative has obligations called "fiduciary duties" to act in good faith solely for the benefit of another person.
2. Who may act as a personal representative?
A personal representative may be a natural person or a corporate institution such as a bank or a trust department. Exhibit 7.3 summarizes some of the eligibility requirements and disqualifications for a personal representative. The instructor should compare the student's answer with the exhibit to determine the completeness of the student's answer.
3. Why is a personal representative sometimes called an executor or an administrator?
If the personal representative is named in the will, he is called an executor; if female, an executrix. If there is no will, the court appoints the personal representative who is called an administrator; if female, an administratrix.
4. What are Letters Testamentary and Letters of Administration and how do they differ?
Letters Testamentary is the formal instrument of authority and appointment given to an executor by the proper court, usually the probate court, to carry out the administration of the decedent's estate according to the terms of the will. Letters of Administration is the formal instrument of authority and appointment given to an administrator of the estate by the proper court, usually the probate court, to carry out the administration of the decedent's estate according to the proper state intestate succession statute. Both establish the authority of the personal representative and are one-page certificates of appointment authorizing the personal representative to act on behalf of the decedent's estate in performing the tasks of estate administration. The difference between the two is that the Letters Testamentary are given to the executor of a will who will distribute the estate according to the terms of the will, whereas Letters of Administration are given to the administrator of the estate of an intestate who will distribute the estate according to the intestate succession statute of the state.
5. Summarize the duties of a personal representative.
The text discusses the duties of a personal representative in terms of pre-probate duties, duties prior to appointment as personal representative, and estate administration duties from appointment to closing of the estate. The instructor will determine how detailed or broad the "summary" should be and use the text as a guide.

6. What are three ethical problems an attorney and paralegal face when drafting a client's will?

Potential ethical problems arise when the following occur.

- The attorney or a family member of the attorney is named a beneficiary of the will. The ethical codes of some states and the Model Rules of Professional Conduct prohibit this type of situation except where the client is related to the donee.
- The attorney is appointed in the will to be the personal representative. Because this appointment would be financially rewarding to the attorney, the paralegal or the attorney must not solicit or suggest this type of appointment to the client. See the Model Code of Professional Responsibility.
- The attorney is named in the will as the testator's choice to assist the personal representative. Because this appointment would be financially rewarding to the attorney, the paralegal or the attorney must not solicit or suggest this type of appointment. See the Model Code of Professional Responsibility.

7. What are the general duties a paralegal may perform concerning wills, trusts, and estate administration?

The duties of a paralegal concerning wills include the following:

- Collect all data and information necessary for making a client's will.
- After reviewing the client's financial information, discuss with the attorney the contents of the will.
- Prepare a preliminary draft of the will.
- Review the draft with the attorney and the client and make any required corrections, additions, deletions, or modifications.
- Assist in the execution of the final draft of the will.

The duties of a paralegal concerning trusts include the following:

- Obtain from the client data and information needed for the creation of a trust.
- Draft a preliminary trust.
- Review the preliminary draft with the attorney and the client and make corrections, additions, deletions, or modifications as necessary.
- Assist in the final execution of the trust.

The duties of a paralegal concerning estate administration include the following:

- Locate the will, if one exists.
- Set up a family conference and notify all family members and beneficiaries or heirs.
- Assist in reviewing the will or intestacy procedures with the family and beneficiaries of the will or heirs of the intestate.
- Explain the "tickler" system and probate procedures.
- Set up the "tickler" with the personal representative and prepare for the maintenance and monitoring of the procedures.
- Help locate, collect, preserve, and maintain assets and ensure that estate assets are not commingled with other assets of the law firm.
- Handle communication with parties holding assets, creditors, beneficiaries, and heirs.
- Assist in preparing preliminary drafts of legal documents associated with administration.
- Maintain records of all collected assets.
- Prepare an inventory and appraisal of all probate assets and also list all nonprobate property and its value for federal and state death tax purposes.
- Prepare preliminary drafts of final estate accounts and necessary tax returns.
- Record the payment of debts and taxes due.
- File legal documents.
- File tax returns after review with the attorney. The instructor should also see Exhibit 7.1 for duties and functions a paralegal with proper supervision can or cannot perform.

8. What other titles besides probate court do states use to identify the court that supervises the administration of the decedent's estate?
Other titles include surrogate, registrars, orphans', or chancery court. In a few states, the court is part of the state's regular judicial system and can also be known as the probate division of the circuit court, the district court, the probate division of the court of common pleas, the county court, circuit court, or superior court.
9. How do the functions of a registrar and a court clerk differ?
The registrar is an officer of the probate court and designated by the court to act on behalf and in place of the court in informal proceedings. The clerk is an administrative assistant to the judge and administers oaths and authenticates and certifies copies of instruments, documents, and records of the court. Neither the registrar nor the clerk can give legal advice.
10. Why are the terms *probate* and *probate proceedings* often confused? Explain.
Originally, the term *probate* referred to a proceeding in the appropriate court to prove that a certain document was a will. When the will is proved, it is said to be admitted to probate. Initially, *probate* was used as an adjective; today, it is commonly used as a noun meaning "probate proceedings." This expands the definition and use of the term to include the process of distributing the estate of a person who died testate or intestate and includes all other matters over which probate courts have jurisdiction. Sometimes the term *probate* is used to refer to the completion of the entire administration of the decedent's estate, including will contests.
11. Are domicile and venue the same thing? Explain.
Domicile is the place a person has adopted as a permanent home, and to which the person intends to return when absent. Venue is the particular place, either a city or county, where a court having jurisdiction may hear and decide a case. Usually, venue corresponds to the decedent's place of domicile. The proper venue for the probate administration of the estate of the decedent is usually the county in which the decedent was domiciled at his/her death.
12. When is an ancillary administration necessary and what is its purpose?
If at death the decedent-testator owns any real property in a state other than his/her domicile state and, in some cases, any tangible personal property in another state, his/her will must be admitted to probate in each state where the property is located. These separate proceedings are known as ancillary administration. It is necessary because the court in the county of the decedent's domicile has no jurisdiction over real property located in another state. Also, by admitting the will to probate in each state and holding ancillary administration there, any local creditors of the decedent are protected. This includes settlement of any state estate or death taxes. If the decedent died intestate owning property in a foreign state(s), then ancillary administration is required also.
13. Who is authorized to act as an ancillary administrator in your state?
The answer will vary depending on the state.

ANSWERS TO THE CASE PROBLEMS

Problem 1

- A. To determine Alberto's domicile, some things to consider would be where Alberto lived, where he banked, went to church, registered his car, paid taxes, and voted. Alberto's passport might be evidence of his intended domicile. Also, one would look at the conduct of Alberto and all the surrounding circumstances of his living situation by looking at his acts and declarations.
- B. Alberto's domicile is the place that he adopted as his permanent home and to which he intended to return when he was absent from it. A residence is a temporary place of dwelling such as a summer home.
- C. The proper venue would be in the county in which Alberto was domiciled at his death.
- D. The Uniform Probate Code section 3-202 settles conflicts over a decedent's domicile by determining in which state the formal testacy or appointment proceeding commenced first. The determination of domicile in the proceeding first commenced must be accepted as determinative in the state that has adopted the UPC.

- E. Because Alberto died intestate, then the persons entitled to his real property in the foreign states will be determined by those states' intestate succession statutes. However, all of his personal property, wherever located, will pass to the persons entitled to the property according to Alberto's domicile state's intestate succession statute. The students will apply the decision in the cited case to this general rule. The instructor should determine whether the students have correctly interpreted the case. Because this is an Ohio case, it is not mandatory authority in Alberto's case unless he lived in Ohio.

Problem 2

- A. The facts state that Maura is a legal resident of Amarillo, Texas, but does not mention where she is domiciled. Maura's will should be probated in the state in which she was domiciled.
- B. Yes, ancillary administration is necessary in this case because wherever Maura is domiciled, she owns real property in at least one other state.
- C. Yes, ancillary administration is necessary whether Maura died testate or intestate, because she owned real property in two states.
- D. If Maura was domiciled in Texas, then ancillary administration would have to be in Oklahoma. Using Exhibit 7.3, the eligibility requirements in Oklahoma are that the ancillary administrator as a personal representative would have to be over 18 years of age; not have been convicted of any felony or infamous crime; not decreed incompetent; and, if a nonresident, the ancillary administrator must appoint a resident agent for service of process.
- E. U.P.C. § 3-203(g).

ANSWERS TO THE ASSIGNMENTS

Assignment 7.1

The answers will vary depending on the state.

Assignment 7.2

1. Her mother died testate.
2. Generally, executors and administrators only have the duty to collect money from insurance policies naming the estate as the beneficiary. However, if the named beneficiary predeceased the decedent and no alternate beneficiary was named, then they would have the duty to collect the proceeds as an asset of the estate if the policy was owned by the decedent at the time of death. Even though executors and administrators may not have a duty to collect the money, they do have the duty to collect information on the life insurance proceeds as a nonprobate asset to be used in preparing estate tax returns.
NOTE: Students' responses may vary depending on their familiarity with life insurance and naming beneficiaries.
3. A personal representative is responsible to act for the beneficiaries of the estate. The probate court ensures that the personal representative properly administers the estate.
4. The answer will vary depending on the state.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. The answer will vary depending on the state.
2. Answers will vary depending on the student's selection.
3. Answers will vary depending on the student's information.

CHAPTER 8 PERSONAL REPRESENTATIVES: TYPES, PRE-PROBATE DUTIES, AND APPOINTMENT

LEARNING OBJECTIVES

Students should be able to do the following:

- Identify and define the various types of personal representatives involved in the administration of decedents' estates.
- From the dialogue, identify and appreciate your role in the practice of the law of wills and probate.
- Understand the procedures for appointment of the personal representative in formal probate proceedings.
- Explain the basic functions and duties performed by the personal representative in the preparation of probate and estate administration.
- Recognize your role as an assistant to the personal representative in the performance of the required duties of estate administration.

LECTURE OUTLINE

I. Scope of the Chapter

- A. Personal representatives are identified and defined, and their duties in preparation for the administration of a decedent's estate are reviewed.
- B. The functions that must be performed soon after the decedent's death are discussed.
- C. The mechanics of the appointment of personal representatives are discussed.
- D. The basic powers and duties of the personal representative in preparing for formal proceedings and the paralegal's role in assisting with these duties are explained.

II. Types of Personal Representatives

- A. The Uniform Probate Code (UPC) term *personal representative* refers to anyone empowered or authorized to administer the estate of the deceased, whether the deceased died testate or intestate.
 1. Minors, incompetent persons, convicted felons, and judges of a court are prohibited from being personal representatives.
 2. Personal representatives need not be U.S. citizens but noncitizenship is a factor to consider for the suitability of the appointment of a personal representative.
- B. The role must be performed by a private individual, an attorney, or a trust officer of a corporate business such as a bank or trust company.
 1. In intestacy cases, the personal representative is selected according to the order of preference for appointment set by statute.
 2. In some states, if no one appears who is entitled to act as administrator, the court or registrar may appoint a public administrator to administer the estate of an intestate.
- C. The special administrator/administratrix is the personal representative appointed temporarily by a probate court to handle certain immediate needs of an estate, such as managing a business in the place of the decedent, until a general administrator or executor can be appointed.
- D. The administrator/administratrix *cum testamento annexo* (also called administrator C.T.A., meaning administrator with the will annexed) is appointed by the court in two situations.
 1. When the maker of the will does not name an executor
 2. When the maker of the will names an executor but the latter cannot serve because of a deficiency in qualifications or competency
- E. The administrator/administratrix *de bonis non* (also called administrator D.B.N., meaning administrator of goods not administered) is a court-appointed personal representative who replaces a previous personal representative who has begun but failed to complete the administration of a decedent's estate for any reason, including death.

- F. The public administrator is a public official appointed by the court to administer the property of an intestate who has left no kindred entitled to apply for appointment and Letters of Administration.

—**TEACHING SUGGESTION:** Use Exhibit 8.1 while explaining the different types of personal representatives. This way, students can see proper spellings also.

III. Introduction to Estate Administration: A Dialogue

—**TEACHING SUGGESTION:** This dialogue is an excellent summary of the probate procedures involved in a typical case. Not only does it convey the information, but it also demonstrates to the students how serious and formal the conference is. One way to approach this is to use this dialogue as a role play. Ask for four volunteer participants for each of the following roles: the Executor, the Attorney, the Paralegal, and a Narrator to “set the stage” by reading the facts. The classroom space should be arranged, as near as possible, to a conference table/room, set with the remaining students in a “gallery” section so as not to disturb the three main characters (the Narrator may exit the “conference” as soon as the introductory facts are presented). Exhibits 8.2, 8.3, 8.4, and 8.5 show the various documents referred to in the dialogue.

Also, verbalizing the dialogue helps students with presentation skills, proper pronunciation, and professionalism. At the conclusion, the “gallery” can constructively “critique” the dialogue and discussion can be centered around vocabulary and concept building and interviewing and interpersonal skill development.

IV. Preparation for Probate and Estate Administration—General Overview

- A. The personal representative has a fiduciary obligation with respect to the estate, that is, a duty to utilize the highest degree of care and integrity in handling the decedent’s property for the benefit of the estate beneficiaries and devisees.
1. Once appointed by the court, the personal representative has the following general responsibilities.
 - To discover, collect, and preserve all probate assets of any value and manage the probate estate until the estate is settled
 - To notify the decedent’s creditors of the death, giving them the opportunity to present their claims and then settle all just claims against the estate and see that creditors are paid
 - To file all required federal and state income, gift, estate, or inheritance tax returns and pay all taxes due
 - To distribute the remainder of the estate as required by the terms of the will or by law
 2. The authority of the personal representative to administer the decedent’s estate is governed by the will or by statutes that vary by state.
- B. Pre-Probate Duties of the Personal Representative and Paralegal
1. Immediately after the decedent’s death there are many duties that must be performed.
 - a. If the decedent left a letter of instructions for his/her funeral and burial or had a prepaid contract with a funeral director, the personal representative will help the family make the necessary arrangements.
 - b. During this time, the personal representative usually hires the attorney.
 2. Preparations for probate should begin immediately after the death of the testator.
 - a. The needs of the family take priority and it is often the task of the paralegal to see that the family needs are satisfied if possible.
 - b. The duties to be performed by the paralegal may include the following:
 - Search for and obtain the will and other personal and business records.
 - Notify appropriate parties of the decedent’s death.
 - Obtain certified copies of the death certificate from the funeral director.
 - Set a date for the family conference after contacting the appropriate persons.

3. One of the paralegal's first tasks while assisting the client in testate proceedings is to obtain, review, and make copies of the will.
 - a. The paralegal should check the letter of instructions for the will's location.
 - b. If the paralegal's firm drafted the will, he/she should check the law firm's file.
 - c. If the firm did not draft the will, the paralegal should contact the office of the decedent's attorney who drafted the will.
 - d. Other locations to check for the will are the decedent's safe deposit box and places in the decedent's home considered secure, or see if the will was filed with the court.
 - e. The paralegal may interview family, friends, business advisers, and associates, or contact them by phone or mail for information about the existence of the will and its location, and about any other personal or business records that may help to locate all assets.
 - f. If the will is found, copies are prepared for the beneficiaries, devisees, and the court, and a summary of the contents of the will is made.
 - g. The original will must be given to the probate court in the county of the state of the decedent's domicile within a specific period, usually 30 days after death.
 - (1) Any person in possession of a will who neglects or refuses to deliver the will to the court may, by law, be civilly liable for damages caused by the neglect or be criminally prosecuted.
 - (2) Some states have a procedure to compel production of a will by a petition requesting that the court order the person who allegedly has knowledge of the location or existence of the document to appear and be examined.
4. After finding the will, the paralegal may be asked to summarize it and send copies to persons named in the will.
 - a. The witnesses and other appropriate parties should be notified by phone or mail of the decedent's death.
 - b. Financial institutions may have to be notified so they can meet certain legal obligations.
 - (1) Persons must be prevented from withdrawing money from the decedent's accounts in an attempt to avoid death taxes.
 - (2) Safe deposit box contents must be safeguarded.
 - (3) All demand accounts of the decedent should be closed.
 - (4) All credit cards should be canceled.
5. Certified copies of the death certificate must be obtained from the state department of vital statistics or city/town clerk of place of death.
 - a. The funeral director obtains the necessary burial permits and the death certificate, which is the document executed by a physician listing the name of the decedent and the place, time, date, and cause of death.
 - b. Additional copies can be obtained from the state health department, the Bureau of Vital Statistics, the clerk of district court, or a state registrar.
 - c. A certified copy of the death certificate is usually filed with the Petition for Probate. The personal representative (or, in some cases, the paralegal) must include certified copies when he/she files claims, obtains insurance benefits, opens a decedent's safe deposit box, collects money from payable- or pay-on-death (POD) accounts, ends a joint tenancy, transfers stocks, collects benefits from Social Security or the Veterans Administration, and files deeds transferring title to real estate with the county recorder's office or Registry of Deeds.
6. The paralegal will schedule a family conference.
 - a. All persons named in the will should be asked to attend.
 - b. Whether the decedent dies testate or intestate, notice of the death must be given to all heirs and request that they, and the surviving spouse, attend.

7. At the family conference, the paralegal obtains information pertinent to the future administrative duties and the paralegal or the attorney will discuss various points with the family.
 - a. The provisions of the will if available should be explained.
 - (1) If no will exists, then the intestate succession statute provision will be explained.
 - (a) Only a paralegal who has mastered intestate succession statutes should perform this function.
 - (b) Legal advice about family concerns must come from the attorney.
 - (2) Ancillary administration, if applicable, should be explained.
 - (3) The general nature of probate administration and its procedures should be explained by the attorney or paralegal.
 - (4) The “tickler” system should be explained.
 - b. A discussion should be had concerning the need for appointing fiduciaries.
 - c. Information should be obtained from the family about the general size and nature of the estate using checklists, such as those in Chapter 5.
 - (1) The paralegal may explain that only probate assets will be subject to probate and that nonprobate assets pass directly to the beneficiary.
 - (2) Based on the information in the checklists, the type of probate proceeding to be used will be determined.
 - (3) Note that if all the beneficiaries and devisees oppose the probate of the will, the UPC does not allow it to be probated.
 - d. Verify that the personal representative protects all personal assets of the decedent and make sure that all real or personal property is sufficiently insured and protected and that any premiums due are paid. The personal representative should be advised to safeguard expensive personal property by placing items in a newly opened safe deposit box.
 - e. Identify and obtain a list of personal debts and those relating to any business interests, so that actual notice can be given of the death and the need to file claims; other creditors will be given notice by publication.
 - f. Obtain the facts necessary to prepare the Petition to Prove the Will, if the decedent died testate, or Petition for General Administration, if the decedent died intestate.

—**TEACHING SUGGESTION:** Throughout the administration part of the textbook, substitute the titles of the documents used in your particular jurisdiction to avoid confusing the students.
 - g. If the decedent owed any family member a debt, explain the need to file a claim.
 - h. To alleviate anxiety and concern about the family’s immediate financial matters, the paralegal must discuss the various forms of protection given a surviving spouse and children by some state statutes.
 - i. Explain what a disclaimer is, its procedures, and its effects.
 - (1) If a devisee disclaims, the paralegal will obtain, execute, and file it with the probate court.
 - (2) Disclaimers can be executed and filed by an executor or administrator on behalf of the estate of a deceased devisee or beneficiary or by a guardian for a minor.
 - (3) The interest will be distributed according to the will or by intestate succession and disposed of as if the disclaimant had died before the decedent.
 - j. Determine whether assets will need to be sold during probate administration to pay debts, taxes, and expenses of the estate. If assets must be sold, explain the abatement process and ask the family whether they wish to retain any particular items.
 - k. If authorized by statute or the decedent’s will, the paralegal must discuss the details necessary to arrange for the continuation of the decedent’s business.

- l. Check the estate plans of the surviving spouse and, if requested, make arrangements to amend his/her will.
 - (1) Be careful about improper solicitation for this will.
 - (2) If no surviving spouse and the decedent was the last occupant in a home, the paralegal may be asked to notify the post office to forward mail to the personal representative and stop newspapers and other deliveries.
 - m. In all cases, the paralegal must determine if the decedent made any advancements to any of the beneficiaries or heirs.
 - n. Discuss or inquire about any other documents that may have a bearing on the status or transfer of the estate.
 - o. Obtain names and addresses of the decedent's financial advisers, including tax adviser, accountant, banker, trust officer, insurance agent, and stockbroker.
 - p. In preparation for the probate procedure, the paralegal must create a checklist of probate procedures and prepare a tickler system of important tax dates and deadlines.
- C. Appointment Procedure—The Beginning
1. To begin the probate process and obtain appointment, the personal representative, often with the assistance of the paralegal, must complete the following steps.
 - File the original will and codicil if there is one.
 - File a petition either for probate of the will and appointment of the personal representative or for administration and appointment of an administrator; two separate forms request the same basic information.
 - Contact the witnesses who, if needed, must be present to testify at the hearing for probate of the will and appointment of the executor, unless the will was self-proved.
 - File a death certificate, if needed.
 - Pay filing fees, which the paralegal will verify.
 - Arrange for bond, if necessary.
 2. While the forms vary from state to state, in most states the petitions include the name and domicile of the decedent; the date and place of death; the names, ages, relationship to the decedent, and addresses of heirs or successors; the value and the nature of the decedent's real and personal property; the decedent's debts; and the name and address of the petitioner.
 3. The probate court sets a time and place for a hearing on the petitions, testate and intestate.
 4. At the hearing, after the witnesses testify, if the court allows the will or grants administration, the court appoints the personal representative who must file an oath of office and in some states post a bond, which constitutes an expense of the estate and is deducted on the death tax forms.
 5. A bond or surety bond is a certificate in which a surety (an individual or insurance company) promises to pay up to the amount of the bond to the probate court if the personal representative fails to faithfully perform the duties of administration of the estate.
 - a. A surety or bonding company is licensed to offer bonds to fiduciaries, such as personal representatives.
 - b. The purpose of the bond is to protect beneficiaries, heirs, creditors, and government tax collectors from losses due to improper, negligent, or fraudulent administration of the estate.
 - c. If required, a bond must be filed at the time of the appointment or shortly thereafter.
 - d. The requirements for a bond and surety vary from state to state.
 - (1) In some states, a bond may be required of all personal representatives.
 - (2) A bond is generally required if the testator requests it in the will, unless the court finds it unnecessary.
 - (3) In most states, a bond is not required if the testator states in the will that the personal representative may serve without bond.

- (4) Even if the will waives the bond, a probate court may agree to require one at the request and for the protection of interested parties.
 - (5) If a will does not mention the bond, and the personal representative is a family member or close friend and a resident of the state in which the estate is administered, the court can agree to exclude a bond if all the beneficiaries agree and waive the filing of a bond.
 - (6) No bond is required if a corporation is appointed personal representative.
 - (7) If there is no will, generally the personal representative must post a bond, especially if one or more minor children survive the intestate.
 - (8) When a bond is required, the amount of the bond is determined based on the value of the estate, the type of assets, the relationship of the personal representative to the decedent, and other relevant facts including the demands of beneficiaries and creditors.
 - (9) If bond is required, the paralegal must remind the personal representative to purchase and file it promptly. Cancel the bond as soon as the estate is closed.
6. Surety is a guarantee of an individual or an insurance company that, at the request of another, usually a fiduciary, it will pay a specified sum of money to the court if the fiduciary fails to perform the required duties.
- D. Probating (Proving) the Will or Granting Administration**
1. Depending on the state, a will is proved in a variety of ways and the court may require the subscribing witnesses to testify to the following in court.
 - That in attendance at the signing were the testator, the attorney, and the two witnesses
 - That the testator declared to the witnesses that the document was his/her will and requested them to act as witnesses to its execution
 - That the witnesses then saw the testator sign the will and other specific locations where signatures or initials might appear
 - That the testator asked the witnesses to read aloud the attestation clause that precedes the place for the witnesses' signatures
 - That both witnesses knew the testator and that he/she was over the age of majority, of sound mind, and not acting under any constraint or undue influence
 - That each witness then signed the will and added his/her address while the testator and the other witness watched
 2. If a notary public is present at the execution, hears the oaths and observes the acknowledgments and signatures, and officially notarizes the will, then the will is "self-proved" and the witnesses' testimony in court is not necessary.
 3. Another method to prove the will is to have an affidavit signed by one or more of the witnesses who attest to the facts and the proper execution of the will.
 4. Once the probate court has approved the will or, in intestate cases, has granted administration, the court issues Letters of Authority, which are certificates of appointment, often called Letters Testamentary or Letters of Administration.
 - a. Letters of Appointment are conclusive proof and evidence that the person named therein is the duly appointed, qualified, and acting personal representative of the estate with the powers, rights, duties, and obligations conferred by law.
 - b. Certified copies of the letters issued will be required for specific estate procedures including the following:
 - Opening the decedent's safe deposit box, removing contents, and canceling the box
 - Opening an estate safe deposit box to safeguard certain valuable assets such as documents and some personal property
 - Withdrawing money from existing bank accounts of the decedent
 - Opening a bank account for the estate
 - Transferring all assets
 - Forwarding the decedent's mail to the personal representative

- c. The person who applies to be personal representative must be competent to discharge the obligations of the position in the opinion of the court.
 - (1) Persons may be rejected as “unsuitable” because they have a felony record, are not a resident of the domicile state, or have a history of mental illness.
 - (2) The court is not compelled to appoint the named executor or the person who is the most suitable and competent of all possibilities.
- d. In most states the order of preference of appointment, absent the nominee in the will being able to serve, is set by statute and must be followed by the court, unless the statute provides otherwise.
- e. If an administrator has been appointed, but then a will naming an executor is discovered and admitted to probate, the court will terminate the powers of the administrator and approve appointment of the executor.

ANSWERS TO THE REVIEW QUESTIONS

1. Who is prohibited from being a personal representative?
Minors, incompetent persons, convicted felons, and judges of a court are prohibited from being personal representatives.
2. What is the difference between the following: an executor v. an executrix; a general administrator v. a special administrator; an administratrix *cum testamento annexo* v. an administratrix *de bonis non*; and a public administrator v. an ancillary administrator?
An executor is a man; an executrix is a woman. A general administrator is selected and appointed by the probate court to administer the entire estate of an intestate. A special administrator is appointed temporarily by a probate court to handle certain immediate needs of an estate until a general administrator or executor can be appointed. This person usually handles Summary Proceedings when the amount of the decedent’s property qualifies as a “small estate” in some states.
An administratrix *cum testamento annexo* is a woman appointed in two situations: when the maker of the will does not name an executor or executrix or when the maker of the will names an executor/trix but the latter cannot serve because of a deficiency in qualifications or competency. An executrix *de bonis non* is a woman appointed by the probate court who replaces a previous personal representative who has begun but failed to complete the administration of a decedent’s estate for any reason.
A public administrator is a public official appointed by the court to administer the property of an intestate who has left no kindred entitled to apply for appointment and Letters of Administration. An ancillary administrator is appointed by the probate court to oversee the distribution of that part of a decedent’s estate located in a jurisdiction different from the one of the main administration, which is the decedent’s domicile state at the time of death.
3. The personal representative is one type of a fiduciary. What does that mean? List other fiduciaries.
A fiduciary has the duty to utilize the highest degree of care and integrity in handling the decedent’s property for the benefit of the estate beneficiaries and devisees.
Other fiduciaries are guardians for minors, conservators for incompetent persons, trustees.
4. What are the primary or general duties of a personal representative when administering a decedent’s estate?
The primary duties are
 - to discover, collect, and preserve all probate assets.
 - to notify creditors and see that they are paid.
 - to file all required federal and state income, gift, estate, or inheritance tax returns and pay all taxes due.
 - to distribute the remainder of the estate as required by the terms of the will or by law.

5. How is a “tickler” system used for an estate administration?

A tickler system lists chronologically all the important steps and dates in the stages of the administration of the estate.

6. Is there a time limit for commencing probate in your state? How long does your state allow for the completion of an estate administration? Cite your state statute for each period.

The answer will vary by state.

7. In general, what are a paralegal’s duties in organizing, preparing, and conducting a family conference after a testator’s death?

The paralegal’s duties will include the following:

- Search for and obtain the will and other personal and business records.
- Notify appropriate parties of the decedent’s death.
- Summarize the will and send copies to persons named therein.
- Obtain certified copies of the death certificate.
- Set a date for the family conference.
- Participate in the family conference as appropriate and as allowed by the supervising attorney.

8. When does the probate court require a personal representative to post a bond? What is a surety bond? Draft a bond using your state’s form.

A bond or surety bond is a certificate in which a surety, an individual or surety company, promises to pay the amount of the bond to the probate court if the personal representative fails to faithfully perform the duties of administering the estate.

If required, a bond must be filed at the time of the personal representative’s appointment or shortly thereafter. The requirement for a bond is generally set by statute and it varies from state to state.

- In some states, both a bond and a surety are required of all personal representatives.
- A bond is generally required if the testator requests it in the will.
- In most states, a bond is not required if the testator states in the will that the executor may serve without bond.
- Even if the will waives the bond, a probate court may require one at the request and for the protection of interested parties.
- If a will does not mention the bond, and the executor is a family member or close friend and a resident of the state in which the estate is administered, the court can agree to exclude a bond if all beneficiaries agree and waive the filing of the bond.
- If an attorney is named the executor, the court usually requires the attorney to obtain a bond and be supervised by the court.
- No bond is required if a corporation, such as a bank or trust company, is appointed personal representative.
- If there is no will, generally the administrator must post a bond, especially if one or more minor children survive the intestate.
- A few states allow the personal representative to serve with a pledge rather than a bond and without using a surety.

9. How do Letters Testamentary and Letters of Administration differ?

Letters Testamentary are granted to an executor/executrix; Letters of Administration are granted to an administrator/administratrix.

10. Using the attesting and subscribing witnesses, what procedures are required to prove a will’s validity? Depending on the state, a will is proved in a variety of ways. If the will is not self-proved, then the court may require the subscribing witnesses to testify to the following:

- That those in attendance at the execution of the will included the testator, the attorney, and the two witnesses
- That the testator declared to the witnesses that the document was his/her will and requested them to act as witnesses to its execution

- That the witnesses saw the testator sign the will and sign or initial any other place in the will, depending on the facts
- That the testator asked each witness to read aloud the attestation clause
- That both witnesses knew the testator and that he/she was over the age of majority, of sound mind, and not acting under any constraint or undue influence
- That each witness then signed the will and added his/her address while the testator and the other witness watched, if this is what happened

ANSWERS TO THE CASE PROBLEMS TEACHING SUGGESTION

If the instructor has not already done so, he/she may want to distribute state-specific forms or direct students to locate forms in the library, if available. Depending on the size of the class, each student should not call the probate court clerk's office for copies of the forms.

Problem 1

- A.** through **I.** The answers will vary depending on the state.
- J.** The supervising attorney may be hired by the spouse to prepare a will under certain circumstances; however, there is a danger of a conflict of interest. Courts will look to see who requested to have the will drawn or amended. Be careful about improper solicitation for this will.

Problem 2

The answers will vary depending on the state.

ANSWERS TO THE ASSIGNMENTS

Assignment 8.1

1. Administratrix C.T.A.
2. Administratrix D.B.N.
3. Ancillary administratrix.
4. The court would appoint an Administrator C.T.A. in consultation with the statute in the jurisdiction that lists the preference of administrators.
5. Special administrator.

Assignment 8.2

The answer will vary depending on the student.

Assignment 8.3

The answer will vary depending on the state.

Assignment 8.4

The answer will vary depending on the state.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. Answer will vary with student information but a sample would be as follows:

APPOINTMENT OF EXECUTOR

I name my [identify relationship to testator i.e. husband], _____ [name of Executor] of _____ County, state of _____ as Executor of this my Last Will and Testament, to serve without bond. If my [name relationship, i.e., husband] fails to survive me or for any reason fails to qualify as my Executor, then I name and appoint my [identify relationship to testator, i.e., brother], _____ of _____ County, state of _____ to serve as Executor without bond.

2. The agency will vary depending on the state.
3. The answer will vary depending on the state.

CHAPTER 9 PROBATE AND ESTATE ADMINISTRATION

LEARNING OBJECTIVES

Students should be able to do the following:

- Explain the distinction between probate proceedings and estate administration.
- Identify and explain state alternative procedures to probate and estate administration when administering “small estates.”
- Recognize and define the traditional forms of probate and estate administration and compare the Uniform Probate Code alternative.
- List the circumstances under which solemn or formal probate proceedings are appropriate.
- Identify and explain the use of formal probate procedures and forms for administering a decedent’s estate whether death occurred testate or intestate.
- Explain the potential liability of the personal representative.
- Apply the procedures and prepare the legal forms used in formal probate and estate administration for a set of facts involving a decedent’s estate.

LECTURE OUTLINE

I. Scope of the Chapter

- A. Probate and estate administration procedures and the distinction between them is important to understand.
- B. There are alternative methods for administering “small estates.”
- C. The two traditional methods of probate and estate administration are solemn and common; the Uniform Probate Code (UPC) alternatives are formal and informal probate.
- D. There are many procedures and forms used in the administration of a typical estate using the formal probate method.

II. Probate or Estate Administration

- A. The personal representative’s work in dealing with a decedent’s estate is termed estate administration or the probating of the estate of the deceased.
 1. The decedent’s estate includes probate and nonprobate property.
 - a. Only the probate property is subject to the payment of creditors’ claims.
 - b. Only probate property is handled by the probate court.
 - c. A decedent’s will has no effect on nonprobate assets.
 2. It is the personal representative’s duty to see that probate procedures and forms are properly and timely executed.
 3. The attorney and the paralegal will help the representative perform his/her duties and the “tickler system” will play an important role in keeping the estate administration on schedule.
- B. The term *probate* initially meant “the act or process of proving the validity of a will”; today it generally refers to all matters over which the probate court has jurisdiction.
 1. The probate court has the power and authority to
 - establish the validity of a will and appoint the executor or the administrator of an estate when there is no will.
 - determine and verify the statutory rights of a spouse and children.
 - supervise the guardianship of minors or incompetent persons.
 - supervise and approve the personal representative’s payment of creditors’ claims, administration expenses, taxes due, and distribution of the decedent’s estate.
 - supervise all other matters pertaining to these subjects.

2. Sometimes the terms *probate administration* (or *probate proceedings*) and *estate administration* are used synonymously to refer to the actual administration of the decedent's estate from appointment of the personal representative to the final distribution of the property and the personal representative's discharge.
 - a. This textbook uses the term *probate* to refer to the process and procedures involved in establishing the validity of a will and the appointment of the personal representative in testate or intestate cases.
 - b. The term *estate administration* is used for the remaining procedures and duties of the personal representative, including the collection and inventory of assets, the payment of approved claims against the estate, the payment of all state or federal taxes due, and the final distribution of the remaining assets.
- C. In some states, estate administration may be avoided if the decedent
 - has no property in registered form, such as recorded deeds and certificates for securities.
 - has no individually owned property in the possession of third parties, such as bank accounts and employee benefit plans.
 - has no outstanding creditors' claims.
 - has an estate that is classified as a "small estate" where all assets consist entirely of exempt property with a limited monetary value such as family allowances or a homestead and no other real property.
 1. As an alternative to probate and estate administration, some states allow the heirs and devisees to collect, divide, and distribute the assets in "small estates" subject to their personal liability for paying all creditors' debts and all taxes.
 2. There is no need for estate administration if all the assets consist of nonprobate property.
- D. Small Estate Settlement and Administration
 1. Most states set a certain monetary limit to qualify as a small estate.
 2. Small estate procedures are simple.
 - a. Collection of assets is quick and easy.
 - b. Court fees are greatly reduced.
 - c. Debts are generally minimal and promptly paid.
 - d. Death taxes are usually not owed.
 - e. Assets can be distributed almost immediately, typically to a spouse and children.
 3. States commonly identify qualified small estates as those in which assets are within a certain limited monetary amount and/or consist entirely of exempt property, homestead allowance or exemption, family allowances, and where the estate debts are limited to funeral and burial expenses, and hospital and medical expenses of the last illness of the decedent.
 4. The procedures and forms used in the various states for expediting small estates vary widely.
 - a. The paralegal must review state statutes and procedures and be familiar with the required forms.
 - b. The forms to be distributed can be obtained from the county clerk or registrars of the probate court.
 - c. The probate court clerks or registrars often have developed an outline, a pamphlet, or a booklet for personal representatives that lists the required forms and procedures for handling small estates.
 - d. Some forms can be obtained from local or state publishers of legal forms.
 5. Although specific procedures vary depending on the state, in general, four traditional methods are used: Collection by Affidavit, Summary Administration, Universal Succession, and Family Settlement Agreements.

6. Collection by Affidavit: Many states allow an affidavit procedure to collect and transfer personal property to a beneficiary or heir; to collect debts owed the decedent; or to take possession of the decedent's property held by third parties.
 - a. Title and possession of personal property is transferred without involvement of others.
 - b. To collect the property, the beneficiary, devisee, or heir must present a certified copy of the decedent's death certificate to the debtor or possessor of the property with an affidavit stating the following:
 - That the value of the entire estate, less liens and encumbrances, does not exceed the state's maximum limit
 - That a minimum number of days, usually 30 to 45, have elapsed since the death of the decedent to allow creditors to present their claims
 - That no application or petition for the appointment of a personal representative is pending or has been granted in any state court
 - That the claiming beneficiary or heir is legally entitled to inherit the decedent's estate including the right to the payment or delivery of the property
 - c. Generally, real property cannot be transferred by affidavit.
 - d. If the decedent died with a will, some possessors may require a copy of the will and an affidavit and death certificates before they will transfer the property.
 - e. This method allows the holder of the property to be discharged of the debt; if the affiant was not legally entitled to collect the property, the affiant is responsible to the person who had the legal right to possession, and the former possessor who acted in good faith on the affidavit is released from any further liability based on the transfer.
 - f. Some individual states restrict the use of this method in various ways such as allowing only spouses and children to collect by affidavit, allowing only certain personal property to be collected by affidavit, and requiring some minimal court involvement such as filing the affidavit with the probate court.
7. Summary Administration: After the personal representative is appointed, he/she may apply for Summary Administration, which is shorter and simpler than regular estate administration, when the sum of the probate assets does not exceed the maximum limit set by statute or when the assets do not include any realty.
 - a. Summary Administration can be used if the value of the entire estate, less liens and encumbrances, does not surpass the amount payable for exempt property, family allowances, administration expenses, reasonable funeral and burial costs, the homestead exemption or allowance, and reasonable and necessary hospital and medical expenses of the last illness of the decedent.
 - b. The personal representative immediately distributes the estate assets according to the will or in order of priority set by an intestate statute and files a sworn closing statement with the probate court.
 - c. The intermediate procedures required under the formal probate process may be eliminated including notice to creditors, presentation of their claims, the formal inventory and appraisal, and the court's decree of distribution.
 - d. In some states, e.g., Massachusetts and New York, the person who performs duties similar to those involved in Summary Administration is called a voluntary administrator.
8. Universal Succession: The UPC has established another method of transfer of a decedent's estate that requires an application to a registrar and no further court involvement.
 - a. The recipients of the estate are designated the universal successors; there is no limit on the value of the estate that can be distributed to them.
 - b. This allows heirs of an intestate or beneficiaries and devisees under a will, except minors and incapacitated, protected, or unascertained persons, to take possession, control, and title to a decedent's property.

- c. The universal successors assume personal liability to pay taxes, debts, claims, and distributions to others legally entitled to a share in the decedent's estate.
 - d. At least 120 hours must elapse after a decedent's death before an application can be made. If granted, the registrar issues a written statement about the estate and states the applicants are named universal successors.
9. Family Settlement Agreements: A family settlement agreement is a private written agreement among heirs of an intestate or beneficiaries of a will by which they unanimously agree on the distribution of the estate without supervision by the court.
- a. In either testate or intestate cases, the settlement must be agreed to by all interested parties.
 - b. The settlement agreement supersedes and replaces the intestate succession statute or the will.
 - c. The UPC requires the settlement agreement to be in writing.
 - d. This speeds the distribution of estate assets, but a court order is still required to protect the estate from creditors and to clear title to the assets involved.
- TEACHING SUGGESTION:** Review the procedures and forms for administration of small estates in your particular jurisdiction. If possible, provide students with copies of the forms used.

III. Forms of Probate or Estate Administration

- A. Prior to the UPC, traditionally two forms of probate or estate administration, solemn and common probate, were used.
- B. With solemn probate, formal court supervision is required throughout the administration of the estate, and notice must be given to all interested parties so they may be present at an initial hearing to contest the validity of the will or the appointment of a personal representative.
 - 1. Solemn probate procedures are followed in intestate and testate estates.
 - 2. Solemn probate is established by court order recognizing the existence and validity of a will and may be used to set aside an earlier common probate proceeding or prevent a pending petition for common probate.
- C. Common probate, which is primarily used for smaller estates and is usually uncontested, is less formal and involves less supervision or none at all.
 - 1. Common probate does not require notice to all interested parties.
 - 2. In company with the witnesses to the will, the nominated personal representative delivers the will to an officer of the court, usually a registrar or surrogate.
 - a. This officer has the power and authority to do what the probate judge would normally do.
 - b. Under oath, the witnesses attest that the testator asked them to sign the will, that they saw the testator sign it, and that their own signatures are also on the will; then the will is considered proven (admitted to probate).
 - c. If others contest the will, they must petition the clerk, registrar, or surrogate to hold a formal hearing to determine the will's validity.
 - (1) The burden of proof is on the contestant.
 - (2) Common probate may be superseded and set aside by a request of an interested party for implementation of solemn probate.
 - d. Common probate is a faster and less expensive statutory method of administering an estate than solemn probate.
- D. The UPC has added another method for administering an estate, with options similar to the traditional forms except that they are called formal and informal.
 - 1. Formal probate is conducted under the supervision of the judge with notice to interested persons.
 - a. With formal supervised probate, the probate court has supervision over the entire duration of the estate administration.

- b. With formal unsupervised probate, the estate administration commences formally until the appointment of the personal representative, but the supervision lessens after the appointment.
2. Informal probate is conducted, without notice to interested persons, by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.
3. Interested persons are heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right or claim against the estate of a decedent.
4. The purpose of the UPC is primarily to simplify and clarify the law, terms, and procedures in estate administration; lessen the expense and time for administration; and provide an alternative system, which, if adopted by the states, establishes uniform law.
 - a. Several states have adopted the Uniform International Wills Act, a section of the UPC intended to facilitate using U.S. courts to validate and implement wills executed in another country and vice versa.
 - b. States are not required to adopt the Code.
 - c. Many states have continued to use the more traditional methods of estate administration.
 - (1) Nineteen states have adopted the UPC.
 - (2) Ten states use the solemn-common form.
 - (3) The remainder either use a hybrid mix that combines some features of the Code with their own statutes or have adopted an independent method.
 - (4) A few states have established a type of estate of administration called independent administration that is essentially free from court supervision or intervention.
 - (5) Regardless of method, all states require some form of notice prior to the admission of a will to probate, giving interested parties an opportunity to object to the probate of the will or to the appointment of the executor or personal representative.
- E. In the majority of cases, formal or solemn probate is used for administration of decedents' estates.
 1. Formal probate is unnecessary when the value of the estate is minimal, when it is not complex, or when the assets consist solely of nonprobate property.
 2. Formal probate would be the choice in any of the following situations.
 - Some beneficiaries are minors whose rights must be protected.
 - Real estate problems exist.
 - A beneficiary or creditor intends to challenge the proceedings.
 - The estate presents tax law difficulties.
 - In an intestate case, the number of the decedent's heirs is uncertain.
 - In a testate case, the beneficiaries cannot be located.
 - Family members disagree about their respective inheritances or the continuation or sale of a family business.

IV. Commencing Probate and Estate Administration Proceedings

- A. The paralegal will help the personal representative with the following procedures.
 - Petition for probate of a will or petition to prove a will.
 - Petition for administration when no will exists.
 - Obtain an Order for Hearing the Petition to Prove a Will or for Administration.
 - Arrange for publication of the Notice of Order for Hearing and Affidavit of Publication.
 - Mail the Notice of Order for Hearing and Affidavit of Mailing Notice to all interested persons, including creditors.
 - Mail notice of rights to the spouse and minor children and prepare an Affidavit of Mailing.
 - Pay funeral bills and obtain a receipt for the records.
 - Identify and review objections and arrange for the appearance of witnesses.
 - Perform miscellaneous duties before the hearing.

1. The paralegal must be aware that the forms and procedures vary from state to state. The paralegal should become familiar with state forms and the time limits for filing them.
 2. The paralegal should always be in contact with the clerk of the probate court to verify that the required forms and procedures have been completed accurately and to obtain helpful advice, always remembering that the clerk is forbidden by law to give legal advice.
- B. Petition for Probate of Will or Petition to Prove a Will**
1. This form (see Form 1 in Appendix A) is used to commence probate proceedings.
—**TEACHING SUGGESTION:** If your state uses the same forms as those in the book, you may want to advise students to bring their books to class so that they will have the forms in front of them for discussion. You may want to have transparencies made of the forms also. If your state forms are different, you may want to distribute copies of the forms discussed in this chapter to the students and, if possible, make transparencies for use in the classroom.
 2. Any person, called the petitioner, having an interest in the estate may file the will and a petition with the court to have the will proven or admitted to probate.
 - a. Some states have a statute of limitations that limits the time allowed for offering a will for probate by filing the petition for probating a will.
 - b. Other states have no such time limits.
 3. A petition is a written document addressed to a court or judicial official that requests the court order certain legal actions.
 - a. It is essential for determining that the court has jurisdiction over the estate.
 - b. The original will is filed with the petition.
 4. To establish jurisdiction in a state probate court, the petition to prove a will generally must allege the following:
 - The name, date of death, age, place of death of the decedent, and, if required, the Social Security number.
 - The domicile of the decedent.
 - The existence of the will and, in some cases, the names of its witnesses; unless previously filed with the court, the will usually accompanies and is filed with the petition.
 - The name and address of the petitioner seeking appointment as personal representative named in the will.
 - Names, addresses, ages, relationship to the decedent, and identity of any persons under legal disability, or any devisees, and also of heirs who would be entitled to distribution of the decedent's estate in the absence of the will; whether testate or intestate, the heirs must be listed in the petition for probate of a will or for administration of an estate.
 - The estimated value of the real and personal property that are probate assets.
 - The amount and general character of decedent's debts, if known.
 - In some states, if the decedent was survived by children and a spouse, a statement that "the children of the decedent are/are not also children or issue of the decedent's surviving spouse."
 - In some states, if the decedent was over 65 years of age, an Affidavit of Medical Assistance must be filed and sent to the Department of Welfare along with a copy of the Petition for Probate of Will if the decedent received any health benefits from the state's Medical Assistance program.
 5. The tasks of the paralegal are to contact the county clerk or registrar and obtain the forms and information for commencing probate; collect the necessary information to complete and execute the Petition for Probate of Will; be sure the paralegal or personal representative files the will and petition; obtain and file an Affidavit of Medical Assistance, if applicable; be sure the filing fee accompanies the documents filed with the probate court, if applicable.

- C. Petition for administration when no will exists.**
1. This form should contain the following:
 - The name, date of death, age, place of death of the decedent, and, if required, the Social Security number
 - The domicile of the decedent
 - The name and address of the petitioner requesting appointment as administrator and Letters of Administration
 - The name and address of the surviving spouse, if any
 - The names, ages, relationship to the decedent, and addresses of all heirs or heirs at law of the decedent so far as they are known
 - The estimated value of the real and personal property that are probate assets
 - The amount and general character of any debts, if known
 2. Generally, the surviving spouse has first priority to be appointed as general administrator, then the next of kin, or both, at the discretion of the court.
 - a. If either chooses, they may nominate another person to serve as administrator.
 - b. If all possible administrators are incompetent, unsuitable, or unwilling to serve, or if no petition has been filed within a statutory number of days after the decedent's death, administration may be granted to one or more creditors of the decedent or to the creditors' nominee; in this case an itemized and verified statement of the creditor's claim must accompany the petition.
 - c. Generally, minors, mentally incompetent persons, and often nonresidents of the state cannot act as personal representatives.
 3. The tasks of a paralegal are to
 - obtain information needed to execute the required forms and obtain the forms from the county clerk or local publisher of legal forms.
 - check the state statutes on priority of appointment of the administrator and ask the person who has first priority, whether he/she is willing to serve.
 - file, or the personal representative will file, the petition and death certificate, if required.
- D. Obtain an Order for Hearing the Petition to Prove a Will or for Administration.**
1. After the petition is filed, the court will make and enter an order, also called a citation, fixing a date, time, and place for hearing the petition.
 2. In some states, this date is the beginning of the statutory period for creditors to file claims.
 3. A court officer may prepare the order, but check to be sure this is done.
 4. See Form 2 in Appendix A.
- E. Arrange for publication of the Notice of Order for Hearing and Affidavit of Publication.**
1. The paralegal often contacts a legal newspaper, or at least a newspaper that is generally circulated in the county in which the proceedings are pending, and arrange for publication of the Order for Hearing.
 2. See Form 3 in Appendix A.
 3. The tasks of the paralegal are as follows.
 - Call the county clerk for information about procedures for publication; contact a local "legal notice" newspaper and arrange for publication within the statutory time required before the hearing.
 - File the Affidavit or Proof of Publication with an attached cut-out copy of the notice as it appeared in the newspaper.
 4. See Form 4 in Appendix A.
 5. Publication requirements vary from state to state; some states require the order to be published once a week for two or three consecutive weeks with the first publication within a statutory period.

6. The Affidavit of Publication must be filed within a statutory period prior to the hearing.
 - a. Even if the county clerk makes arrangements for publication, check to be sure it is done within the statutory time frame.
 - b. In some counties, the newspaper publisher sends the Affidavit of Publication directly to the court; in others, the publisher fills out the affidavit, which is filed with the court by the personal representative, the attorney, or paralegal.
- F. Mail the Notice of Order for Hearing and Affidavit of Mailing Notice to all interested persons, including creditors.
 1. The Order for Hearing requires the petitioner to serve the order personally or, after having the order published in a local legal newspaper, to mail the publication attached to the Notice of Order for Hearing the Petition to all interested persons named in the petition whose names and addresses are known, informing them that the petition has been filed and the order given listing the date, time, and place for the hearing.
 2. See Form 5 in Appendix A.
 3. In states using the citation, it contains the notice that all interested persons must receive and, in some states, the affidavit of service as well.
 4. “Interested persons” include all those who have a property right or claim against the estate, including creditors, heirs, devisees, beneficiaries, spouses, and children.
 5. Notice is required to set the starting date for the statutory period for creditors to file their claims.
 - a. Notice allows the interested person to file an objection to the appointment of the personal representative and propose another candidate or to contest the will.
 - b. Notice allows the surviving spouse to choose the elective share rather than the will’s provisions and enables the family to claim the statutory allowance available in many states.
 - c. Notice is necessary to establish the court’s jurisdiction over the estate, and the proceedings will be invalid if it is not delivered and/or mailed.
 6. If there are no heirs, beneficiaries, or devisees, the property will escheat to the state, and the notice should then be sent to the state attorney general.
 7. If an heir does not receive notice, the heir may later contest the will.
 8. If the decedent was born in a foreign country, notice must also be mailed to the consul or other representative of that country if a consul resides in the state and has filed a copy of his/her appointment with the state’s secretary of state.
 9. The personal representative must submit the affidavit, attesting to the mailing of the notices, to be filed with the court.
 10. The tasks of the paralegal are as follows.
 - Mail a copy of the Notice of Order for Hearing to all interested persons listed in the petition.
 - Make sure that personal service or service through the local paper is accomplished; prepare the Affidavit of Mailing notice and make sure that the personal representative sends it and files it with the court.
 11. A demandant, any person having financial property interests in the estate, may file with the court a demand for notice of any order of filing pertaining to the estate.
 - a. The demand must state the person’s name, address, and the nature of his/her interest.
 - b. The clerk mails a copy of the demand to the personal representative who must, in turn, mail the Notice of the Order for Hearing the Petition to the demandant.
- G. Mail the notice of rights to the spouse and minor children and prepare an Affidavit of Mailing.
 1. In most states, if there is a surviving spouse or minor children, a notice of right to the homestead exemption, exempt property, and family allowances must be mailed to each person within a period set by statute.

2. If the spouse has not already contested the will, the notice of rights dealing with renunciation and election must be mailed to the spouse.
 3. The paralegal will prepare these notices and the affidavit the personal representative must file with the court showing the mailing of both notices.
 4. An explanatory letter accompanying these notices can help avoid confusion.
- H. Pay funeral bills and obtain a receipt for the records.
1. The funeral bill is a debt for which a claim can be filed.
 2. The personal representative cannot pay the bill until appointed and need not pay it until the claim period expires; however, a discount may be obtained by prompt payment, in some cases.
 3. Sometimes by statute there is a limit on the amount that can be spent for funerals, or by statute the bill is limited to a stipulated amount.
 4. The funeral bill is generally a preferred claim.
 5. Timely payment is important with small estates since failure to pay this bill and other priority debts can lead to individual liability for the personal representative.
 6. Tasks of the paralegal are as follows.
 - Contact the decedent's spouse and family or the funeral director to determine how payment is to be made.
 - Obtain copies of the receipts for all funeral and related expenses from family members or the funeral director, especially if they paid the bills with the understanding that the estate would reimburse them.
- I. Identify and review objections and arrange for the appearance of witnesses.
1. Objections to the will are most commonly filed by the following persons.
 - A spouse dissatisfied with the amount received in the will
 - A child who has been omitted or disinherited
 - A devisee who claims that the will is a forgery or was signed under fraud or undue influence
 - A devisee who claims that the testator was incompetent
 2. If there are objections, the paralegal may arrange for the witnesses to the will to appear in court to testify that the testator knew and declared the document to be a will and freely signed it in accordance with statutes.
 3. If a witness lives more than 100 miles from the place of the hearing, a deposition (a written statement that the witness affirms to be true) may serve in lieu of testimony in open court.
 4. Usually, the testimony of one witness is sufficient.
 5. If neither witness is available, then others familiar with the testator's signature may acknowledge the validity of the signature.
- J. Perform miscellaneous duties before the hearing.
1. Before the hearing, the paralegal may perform the following tasks.
 - Send copies of the will and a preliminary estimate of the estate to the appropriate beneficiaries, devisees, and/or heirs.
 - Collect all available pertinent information for final income tax returns and prepare a "tickler" form, a list of the probate and estate administration procedures with all deadline dates and the person who performs the tasks.
- TEACHING SUGGESTION:** The instructor may want to review the tickler form with the students (Exhibit 8.3).
- Assemble data on nonprobate property.
 - If the decedent owned real property in joint tenancy with another, contact the state department of taxation and determine whether an affidavit of survivorship is necessary to resolve tax concerns; follow state procedure to transfer title.
 - Inquire into all substantial gifts made by the decedent and all transfers made in trust.

V. Probate Court Procedure

- A. Hearing on petition to prove the will or petition for administration**
 - 1. On the hearing date, the personal representative and at least one subscribing witness, if necessary, should accompany the attorney to court.
 - 2. Any person who contests the will or the appointment of the petitioner must file the objection with the court and should appear at the hearing, at which time the court will set a different hearing date for the contest.
 - 3. If no objections, the petitioner testifies to the facts of the will or intestacy.
 - a. If the testator is unable to testify to the facts, another person who can give such evidence must be present to testify.
 - b. This person testifies under oath and answers questions sufficient to prove the will.
 - 4. If necessary, one or both of the subscribing witnesses are sworn and testify as to the execution of the will and the capacity of the testator.
 - 5. Proof of publication and mailing of notice of the hearing should also be offered in evidence.
 - 6. After the hearing, the testimony of the subscribing witnesses should be signed and delivered to the judge unless the signatures are waived.
 - 7. If the will is contested, the witnesses must be prepared to testify at the hearing set for this contest, unless a deposition is appropriate.
- B. Selection of the personal representative**
 - 1. If an executor is named in the will, the court usually confirms and appoints that person.
 - 2. If the decedent dies intestate, the court appoints an administrator based on the priority appointment statute of the state.
- C. Order admitting the will or granting administration**
 - 1. After the hearing proving the will, the court enters its order admitting the will to probate (see Form 6 in Appendix A).
 - 2. In intestate proceedings, the court issues an order granting administration.
 - 3. The court then fixes the personal representative's bond, if needed, based on the value of the estate, the type of assets, the relationship of the personal representative to the decedent, and other relative facts.
 - 4. The paralegal may be asked to arrange for the bond with the bonding company.
 - a. The personal representative is responsible for making sure that the bond is in order.
 - b. The paralegal may prepare the forms of both the bond and the oath.
 - c. An employee of the bonding company may be present in court on hearing days with the bond forms so that the bond and oath can be completed and filed with the court immediately after the hearing.
 - d. For a corporate representative, the order will require the filing of an acceptance of the position of personal representative; however, no bond is required.
 - e. The court will consider, and usually grants, a request for minimum bond or no bond when the request is made in the will or is signed by all persons interested in the estate and submitted at or before the hearing.
- D. Issuance of Letters Testamentary or Letters of Administration**
 - 1. Once the bond and oath have been filed, the court issues the appropriate documents conferring authority on the personal representative.
 - 2. The authority conferred by these letters is the same.
 - 3. The letters are certified, accompanied by a certificate from the clerk of the court stating that they are in full force, thereby authorizing and qualifying the executor/administrator to act for the estate (see Forms 7 and 20 in Appendix A and Exhibit 9.7).
- E. File for a federal employer identification number**
 - 1. The personal representative files Form SS-4 to obtain a federal employer identification number, which is required on fiduciary income tax returns and is needed before a Notice Concerning Fiduciary Relationship can be filed as required by the Internal Revenue Code, IRC § 6903.

2. Because the estate is an entity in itself and will be taxed as such on income produced by the estate, these forms must be filed to establish that a fiduciary relationship exists.
 3. This filing enables the Internal Revenue Service (IRS) to mail the notices and tax forms to the fiduciary who is now responsible for the tax liability of the estate.
- F. Open a checking account for the estate**
1. Once the federal employer identification number (EIN) is obtained, a bank checking account for the estate must be opened to help the personal representative keep complete and accurate records of all financial transactions during administration.
 2. This account allows for consolidation into one account of all current and future liquid probate assets.
 3. All cash transactions of the estate are handled through the estate checking account.
 4. The checks accomplish three essential functions.
 - They establish a record of all payments and disbursements.
 - Once the check is endorsed, it acts as a creditor's admission of the payment of the debt.
 - When canceled, the checks serve as evidence and verification of payment of taxes and the final account.
 5. A competitive interest-bearing account insured by the Federal Deposit Insurance Corporation (FDIC) should be chosen.
 6. The paralegal may be asked to open the account for the estate; therefore, the paralegal should bring to the bank a signature card signed by the personal representative, a check for the initial deposit, a certified copy of the Letters Testamentary or Letters of Administration, and the death certificate, if required.
- G. Notice to creditors**
1. Many states give notice to creditors either by formal notice or by publication after the "Letters" have been issued.
 2. Actual notice must be given to all known or readily identified creditors of the deadline to file a claim against the estate.
- H. Appointment of trustees and guardians**
1. Even if guardians and conservators are named in the will, they must be approved and appointed by the probate court.
 2. Once appointed, the guardians are accountable to the court.
 3. The guardian's duties and powers are set by statute or by the provisions in the will.
 4. When acting in the name of the minor, the guardian should always sign legal documents listing the minor's name followed by the words "by _____, guardian."
 5. The tasks of the paralegal are as follows.
 - Contact the local county clerk and/or obtain the proper forms for the appointment of fiduciaries and review procedures with the clerk.
 - If the decedent was intestate, it is more complex and time-consuming since substantial legal research may be necessary to convince the judge that the guardian is in the best interests of the minor children.
 6. Parents are considered, by law, to be the natural guardians of their children but not necessarily over the children's property; however, the court has the final say in the appointment of guardians.
- I. Order admitting a foreign will to probate**
1. Disposing of property in a foreign state requires a separate ancillary administration procedure.
 2. The will admitted to probate in the domicile state may be admitted to probate as a foreign will in another state.
 3. The form used to appoint the ancillary administrator is called the Petition for Probate of Foreign Will.

4. The ancillary administrator collects assets and pays debts and taxes due in the state where the property is located and remits the residue and final documents to the personal representative of the domicile state for final settlement.
5. The ancillary procedures in the foreign state generally include the following:
 - The Petition for Probate of a Foreign Will must be filed, often with the following documents: an authenticated copy of the will; a certificate from the court affirming the will's correctness; a certificate from the probate judge reinforcing the clerk's certificate; a certificate affirming the court's authority to admit the will; and a copy of the order admitting the will to probate in the domiciliary state.
 - The Order for Hearing on the Petition must be published, and notice of the Order for Hearing must be sent to all interested persons, including creditors.
 - After the hearing on the petition, the court will execute an order accepting and admitting the will admitted to probate in the domiciliary state and appointing the ancillary administrator, whose qualifications vary from state to state.
 - The court will issue Letters of Authority to the ancillary administrator permitting the real property located in the foreign state to be transferred to the designated devisee named in the will if all creditors of the testator in the foreign state have been paid.
 - If the foreign state imposes any inheritance or estate tax, these must be paid before the property can be transferred back to the domiciliary state.
6. The tasks of the paralegal are as follows.
 - Identify the property to be administered and its location in the foreign state.
 - Check the foreign state's statutes to determine the qualifications and residency requirements for the ancillary administrator and see if the client qualifies.
 - Contact the foreign court and obtain the forms and written procedures for ancillary administration.
 - Execute and file all required documents.
 - Verify that foreign creditors and death taxes are paid. Retain receipts.
 - Verify that legal title to the property has been cleared and is submitted to the domiciliary state court for distribution.
7. If the ancillary administrator is a resident of the foreign state rather than the personal representative, the paralegal will
 - obtain the name and address of the person selected to be ancillary administrator.
 - obtain all required documents as above, execute them with appropriate signatures, and mail them to the ancillary administrator for filing.
 - keep in contact to help with any data or documents needed by the ancillary administrator.
 - ensure that Letters Ancillary Testamentary or Letters of Ancillary Administration are issued.
 - obtain the final documents and personal property from the foreign state and add it to the inventory.

—**TEACHING SUGGESTION:** Summarize and compare procedures in formal probate administration for testate and intestate cases (Exhibit 9.8).

VI. Procedures before Estate Distribution

- A. The personal representative must take possession of all property when required to do so and inventory all probate assets accurately and report all nonprobate assets.
- B. Open the safe deposit box.
 1. Most states require that once a bank learns of a decedent's death, it must freeze all savings and checking accounts and seal any safe deposit box leased by the decedent solely until the contents of the box have been examined by the county treasurer's office.
 2. Most banks require at a minimum a certified copy of the decedent's death certificate.

3. The box should be unsealed only in the presence of the personal representative, the county treasurer, a representative of the bank, and the estate's attorney or paralegal and a complete inventory of the box contents made.
 4. Proper disposition of the contents may present a problem since in some states, if the box was owned jointly, the surviving owner could be entitled to its contents unless the contents were not jointly owned.
 5. If life insurance policies are kept in the box, the policies can be given to the appropriate beneficiary. Copies should be made so that they can be used to calculate possible state and/or federal death taxes.
- C. Collect and preserve the decedent's assets.
1. A major responsibility of the paralegal is to help the personal representative to find, collect, preserve, value, and either liquidate or distribute all of the probate personal property.
 2. The paralegal helps locate real property and keep records for future tax concerns or distribution as the personal representative does not take title to real property unless it must be used to satisfy creditors' claims.
 3. The paralegal may help contact various persons by phone, letter, or in person to locate the real and personal property.
 4. The paralegal will prepare a list of nonprobate assets.
 5. Title to personal property vests in the personal representative retroactive to the date of death.
 6. The paralegal may help the personal representative arrange for insurance to keep all real property protected and in reasonably good repair.
 7. The paralegal may help the personal representative search for important documents, records, and papers that might contain information about unknown assets.
 8. The paralegal may help the personal representative protect certain items and documents of the estate, including renting an estate safe deposit box.
 9. The paralegal may help the personal representative check other insurance policies for coverage and expiration dates by preparing all correspondence to terminate, continue, or transfer policy benefits as appropriate.
 10. The paralegal may help the personal representative in miscellaneous activities, including checking on inheritance coming to the estate from others.
- D. Procedures for collecting specific estate assets.
1. Bank accounts in the name of the decedent solely must be closed and the funds transferred to the estate account.
 - a. The personal representative will need to present the decedent's bank statement and certified copies of the Letters Testamentary or of Administration and the death certificate.
 - b. The paralegal may be asked to prepare a letter for the signature of the personal representative with a certified copy of the Letter and an order directing the account be closed and a check for the balance, including interest payable to the estate, be sent to the personal representative.
 - c. Joint accounts must be located and records kept of the date on which the account was established, the source from which the account was created, and the amounts for tax purposes.
 - d. Even though Totten (POD) trusts are payable directly to the named beneficiary, information on the balance on the date of death and the date the account was opened is needed for tax purposes.
 2. Securities are often found among the decedent's possessions or in a safe deposit box.
 - a. The paralegal must search for all securities.
 - b. Generally, the securities are transferred to the proper beneficiaries after administration is completed.

- c. When securities are sold, the paralegal should verify that the proceeds are placed in the estate account.
3. Inquiry should be made into all outstanding debts owed to the decedent.
 - a. The paralegal should review county and city records to determine whether the decedent held any mortgages, contracts for deed, promissory notes, or similar evidences of indebtedness to the decedent.
 - b. The paralegal may interview family to determine any possible debtors such as friends, relatives, devisees, or heirs because the debts must be repaid to the estate and this might cancel out any benefits they receive from the estate unless the debts are forgiven in the will.
 - c. The paralegal may arrange by letter, phone, or personally for the continued collection of loans, rents, interest, alimony, dividends, royalties, unemployment compensation, worker's compensation, and tax refunds, and attempt to collect delinquent debts.
 - (1) The probate court will approve a reasonable compromise settlement of a disputed debt owed to the decedent if it is in the best interest of the estate.
 - (2) Because legal advice may be involved in the settlement of claims, this must be done by an attorney and the personal representative.
4. A cause of action for a legal wrong for which a civil lawsuit for damages can be brought may be involved in estate administration.
 - a. In some cases if the decedent-plaintiff dies before the litigation has been completed, the cause of action may also die.
 - b. In some cases, the personal representative is allowed to pursue the cause of action for the benefit of the estate and any recovery becomes an asset of the estate.
 - c. The paralegal must carefully read state statutes and commentaries to determine if a particular decedent's cause of action survives and should be continued; the findings must be discussed with the supervising attorney for final resolution.
5. Jointly owned property is a nonprobate asset and automatically becomes the surviving joint tenant's upon the decedent's death.
 - a. The paralegal helps the personal representative to clear title to real property held in joint tenancy by
 - executing in duplicate an Affidavit of Survivorship if the property is the homestead and the surviving joint tenant is in the decedent's spouse.
 - filing a certified copy of the death certificate of the decedent and one copy of the Affidavit of Survivorship with the proper section of the county land office.
 - sending one copy of the Affidavit of Survivorship to the office of the commissioner of taxation or the appropriate state tax officer.
 - ensuring that if the real property is Torrens or registered property, the surviving joint tenant must also file an Affidavit of Purchaser of Registered Land and the owner's duplicate Certificate of Title.
 - b. In some states, when the value of the homestead does not exceed a statutory amount and the homestead goes to the surviving joint tenant, the above procedures may cancel the state inheritance tax lien on the homestead that would otherwise exist.
 - c. To cancel an inheritance tax lien on all other jointly held real property, the surviving joint tenant must file the following with the county land office.
 - An Affidavit of Survivorship on which the appropriate state tax official has certified that no inheritance tax is due or that the tax has been paid
 - A certified copy of the decedent's death certificate
6. Insurance benefits.
 - a. The personal representative should obtain U.S. Treasury Form 712 Life Insurance Statements from each life insurance policy as these forms must be filed with the estate tax return and contain information needed to prepare the returns.

- b. The paralegal may perform the following:
 - Obtain and partially complete Form 712 for every insurance policy and mail the forms to each insurance company for final completion and signature.
 - When the estate is the beneficiary, assist in executing the proper forms for filing the claim to receive the proceeds from the policy by giving notice of the date of death by a certified copy of the death certificate, the return of the original life insurance policy (keeping a copy for estate records), and, if required, a certified copy of the Letters.
 - Notify hospitalization, medical, and disability insurance companies of the decedent's death.
- 7. The sale of or continuation of a business, whether sole proprietorship, partnership, or limited partnership, must be considered.
 - a. A personal representative has no authority to continue a decedent's business, and most states hold that the business must be liquidated.
 - b. If a devisee is to inherit the business and/or manage it, or statute allows, the personal representative may select a long-time employee willing to continue to manage the business until the devisee or heir takes over or the business is liquidated.
 - c. Complete and accurate records of all business activities must be kept and reviewed by the personal representative.
 - d. If the decedent was a partner in a partnership or limited partnership, the personal representative must obtain a copy of the partnership agreement to determine the procedures and partner's rights when a partner dies as there may be a buyout clause.
- 8. Other death benefits, payable to the estate, must be collected.
 - a. The paralegal may be asked to
 - contact federal and state government benefit plans, such as Medicare, Medicaid, Social Security, Veterans Administration, for benefits.
 - contact the decedent's employer to determine if the decedent was entitled to accrued earned pay, vacation pay, commissions, sick leave, terminal pay, pension or profit-sharing plans, 401(k) plans, deferred compensation plans, employee stock-ownership plans, group insurance plans, stock options, year-end bonus or back pay uncollected, and labor union benefit plans. If the decedent was self-employed, determine if the decedent funded a self-employment retirement plan.
 - b. If the benefits are a form of employee compensation such as pension or profit-sharing plans, these must be identified and it must be determined to whom they are payable.
 - (1) If payable to a named beneficiary and the decedent did not contribute to the plan, the entire proceeds are exempt from both state and federal death taxes.
 - (2) If the decedent did contribute to the plan, a portion of the proceeds is subject to tax.
 - (3) If payable to the estate, employee benefits are subject to federal tax and are usually subject to state death taxes also.
 - c. If the decedent was a veteran of any war, the beneficiaries or heirs may be entitled to benefits such as insurance, pensions, and burial expenses, according to the rules of the Veterans Administration or state law.
 - d. Death benefits under Social Security and veterans benefits are generally either paid directly to the surviving spouse or applied to the payment of funeral and burial expenses.
 - e. A Social Security lump-sum death benefit, a maximum of \$255, may be available to the estate.
 - f. A union or fraternal lodge to which the decedent may have belonged should be checked to see if any benefits are due.
 - g. The surviving spouse and minor children of a decedent covered under Social Security benefits may have the right to claim for monthly income benefits.

9. As owner of the decedent's automobile, the estate could become legally liable for injuries or damage caused by improper and negligent use.
 - a. The automobile should be transferred to the persons entitled to them as soon as possible after the death of the decedent, or, if state statute demands, within a certain number of days.
 - b. The method of transferring title varies from state to state.
- E. Prepare the inventory (a complete physical check of all probate assets owned by the decedent and a detailed listing of these assets and their estimated fair market value at the time of death) on the forms provided by the court for the inventory.
 1. Preparation of this inventory is one of the more important paralegal tasks.
 2. Nonprobate assets are not included in the inventory but are listed separately for death tax purposes.
 3. The inventory should include serial numbers for certificates for stocks, automobiles, or deposits; account numbers for bank accounts; and legal descriptions of real property.
 - a. The inventory should be well organized, complete, and accurate.
 - b. The appraisers can then expeditiously appraise and value the assets.
 4. Some states do not require an inventory and use their state death tax return instead.
 5. The time limit for filing the inventory is determined by state statute but is usually between 60 and 90 days.
 6. The value of securities for purposes of the inventory is generally computed as of the date of death or the alternate valuation date, as are all assets, and must include the following often forgotten items of interest and rent accrued at the date of death and dividends declared before death.
 7. A preliminary or partial inventory can be made if necessary and if additional property is found, an amended inventory may be required.
- F. An appraisal, a market-based valuation placed on real or personal property by a recognized expert, must be prepared and generally filed with the inventory.
 1. If the value of the property can be easily determined, the personal representative is allowed to do it.
 2. Generally, if real property is involved, the appraisers are real estate agents or brokers who have no interest in the estate or property.
 3. If a state requires appointment of an appraiser, the probate judge generally appoints qualified persons to determine the value of the particular type of property.
 4. Before appraisers begin their work, they should sign the oath of appraisers.
 5. After a written appraisal is obtained, the paralegal will assign the appraised fair market value to each property item as of the date of death or the alternate valuation date and ensure that the personal representative files this inventory and appraisal with the probate court and pays the appraisers' fees.
 - a. The normal fee for each appraiser is generally set by statute.
 - b. Some states set minimum and/or maximum appraisal fees depending on the size of the estate; other states no longer permit percentage fees.
 - c. Appraisers' fees can be deducted as a proper administration expense on both federal and state estate tax returns.
- G. Prepare a schedule of nonprobate assets.
 1. Nonprobate assets are exempt from creditors' claims.
 2. The schedule should identify all nonprobate assets and their value for estate tax purposes.
—**TEACHING SUGGESTION:** Review probate and nonprobate assets (Exhibit 9.10).
- H. File the inventory and appraisal.
 1. The original Inventory and Appraisal form with appraisal reports from any independent appraisers attached is filed with the court.
 2. Copies must be mailed to the surviving spouse and interested persons and creditors who have requested it.

VII. Distribution of the Estate and Payment of Claims

- A.** Distribution of family allowances to a surviving spouse and/or minor children can be made pursuant to a petition.
1. The paralegal will prepare the petition.
 2. After approving the petition, the court will issue an order setting apart said property.
 3. If the homestead passes directly by statute to the spouse and/or minor children, it is often exempt up to a statutory amount from inheritance taxation.
 - a. If the spouse receives ownership greater than a life estate in the homestead, federal tax law will allow it to be part of the marital deduction (IRC § 2056).
 - b. A homestead may qualify as part of the marital deduction for federal estate tax purposes if it passes directly to the surviving spouse.
 - c. In most states, any of the decedent's personal property set apart as a family allowance is not subject to state inheritance tax but instead is allowed as a deduction on the inheritance tax return.
 - d. No federal estate tax deduction is granted for the family allowance (IRC § 2056 and, generally, 2053–2057).
 4. Until final settlement of the estate, the surviving spouse and/or minor children may receive reasonable maintenance from the assets of the estate, the amount determined by the value of the estate and the socioeconomic status of the decedent.
 - a. The length of time that the family may receive maintenance is set by statute.
 - b. In most states, maintenance and the family allowances are exempt from the claims of creditors.
 - c. State statutes should be consulted to determine the monetary limit allowed as a tax deduction; in some states the amount deductible is the amount allowed for one year.
- B.** Filing and hearing of creditors' claims and payment of allowed claims must occur before any assets can be distributed to the beneficiaries, devisees, or heirs of the estate.
1. The tasks of the paralegal are as follows.
 - Collect and keep complete records of all claims sent to the personal representative and those filed with the probate court.
 - Determine that all claims have been filed within the required period.
 - Refer the personal representative to the attorney for legal advice on contesting any claim; the clerk of court should be contacted to help explain the procedures for denying claims.
 - Attend hearing on creditors' claims and pay allowed or approved claims.
 2. Statutes establish a definite procedure for the filing and hearing of claims.
 - a. In most states, the time limits for claims to be filed are established by either the court's order setting the date for the hearing of the Petition to Prove the Will or for Administration or the official appointment of the personal representative.
 - b. Creditors should use the Proof of Claim form containing the claimant's address and signature and the affirmation of a notary public (see Exhibit 9.11).
 - c. If the claim is based on any written instrument, the claimant must attach a copy of the instrument to the Proof of Claim.
 3. An estate cannot be closed before the period for claims to be filed has expired.
 4. If a claimant does not act within the time allowed, the right to present the claim at any other time is lost, unless the claimant can demonstrate good reason for requesting an extension, which the court may grant.
 5. If a personal representative pays late claims, he/she may be personally liable.
 6. The paralegal will need to check with the personal representative to determine whether any of the claims should be contested.
 - a. If contested, the personal representative must, before or on the date of the hearing, file all objections to the claim or file a counterclaim asserting that the decedent was actually entitled to the property.
 - b. The paralegal will prepare the Objection to Claim and serve it on the claimant and file it with the probate court.

7. The claims that are valid and proper will be admitted in writing.
 - a. Claims in which the personal representative has an interest are allowed only if proven by evidence satisfactory to the court.
 - b. Once allowed, the claims should be paid and the receipts or canceled checks filed for the Final Account and Petition (Exhibit 9.12).
 8. Certain debts have statutory priority.
 - a. Generally, family allowances, homestead allowance or exemption, and exempt property are paid before the debts.
 - b. Paralegals should check their statutes carefully to determine the order of payment.
 - c. Section 3–805 of the UPC, as illustrated in Exhibit 9.13, determines the priority of creditors' claims.
 9. The paralegal will assist the personal representative by identifying, locating, and giving notice to all creditors and then reviewing their claims.
 - a. Classifying the approved claims and categorizing them by priority are among the tasks of the paralegal.
 - b. The accuracy of the classification must be confirmed by the supervising attorney.
 10. An estate that has more debts than assets is called an insolvent estate.
 - a. Unless they are co-signers on a debt, the spouse and family have no personal liability to pay all or any part of the debts.
 - b. Creditors have no claim against the nonprobate assets of the deceased.
- C. Transfer of assets—real estate.
1. If personal property is sufficient to pay all obligations/claims of the estate, then the real estate will pass free and clear to named devisees or to heirs.
 2. If real estate must be sold to pay debts, the sale can be accomplished in two ways.
 - If the decedent's will gives the executor the power to sell the estate's real estate, the executor needs no court order to proceed, but one is advisable.
 - If the decedent had no will or failed to include in the will a power of sale, the executor may not proceed without a court order, which may authorize either a private or public sale of the real property.
 3. The paralegal will prepare all the necessary documents for execution by the personal representative and the purchasers.
 4. The personal representative may not sell, encumber, lease, or distribute real estate for 30 days from the date the Letters are issued.
 5. If the court authorizes a private sale, the paralegal will assist the personal representative in preparing and filing a Petition to Sell-Mortgage-Lease Real Estate to be presented to the court after the Inventory and Appraisal has been filed; this document is necessary only if the will does not give the power of sale to the executor or if there is no will.
 6. The judge then signs the Order for Hearing Petition to Sell-Mortgage-Lease Real Estate that sets the date, place, and time for the hearing and must be published and printed in the same manner as the hearing to prove the will.
 7. The paralegal will see that the notice of this hearing in the form of publication or a copy of the order is sent to the devisees or heirs in order to comply with the general probate notice requirements.
 8. At the Hearing on the Petition, the personal representative presents certified copies of the will, the order admitting the will to probate, the Letters Testamentary, and a Probate Deed, along with the judge's order; if satisfied as to the need to sell, the judge will sign the Order.
 9. If required by the court, the property must be reappraised by two or more disinterested persons; the form used is the Warrant to Appraisers at Private Sale.
 10. The appraisers sign the Oath of Appraisers and Appraisal of Lands Under Order for Sale.
 11. The court may require that the personal representative post an additional bond.

12. Once the private sale is completed, the paralegal will prepare and the personal representative will file the Report of Sale of Land at Private Sale Under Order for Sale with the court.
 13. After this has been filed the court will approve the sale and enter its Order Confirming Private Sale of Real Estate.
 14. The court authorizes the personal representative to execute and deliver the proper deed.
 15. To complete the sale and ensure that the buyer will have clear and marketable title to the land, the paralegal must verify that the personal representative has filed the following in the county recorder's office: certified copies of the Letters, the Order for Sale of Real Estate at Private Sale, the Order Confirming Private Sale of Real Estate, and the Probate Deed issued by the personal representative, called either the administrator's deed or the executor's deed.
 16. Public sale of real estate may also be authorized by the court; using the same documents and procedures as for a private sale.
 - a. The only additional requirement for the public auction is that if such a sale is authorized by the court, published notice of the time and place of the sale are often required for a specific statutory notice period.
 - b. Proof of publication must be filed with the court before the court will confirm the sale.
- D. Transfer of assets—securities (corporate stock).**
1. Generally, stocks need not be transferred to the name of the personal representative of the estate.
 - a. They may be left in the name of the decedent and sold or transferred to the persons entitled to them at the conclusion of the administration of the estate.
 - b. If sold, the proceeds must be placed in the estate checking account.
 - c. When stock is transferred from one person to another, the transfer is handled by a transfer agent or corporation.
 - (1) A transfer agent is the party designated by the corporation as the one to be contacted when a stock transfer is performed.
 - (2) When stock is to be transferred to a devisee under the will or an heir, the transfer agent will need the following:
 - The stock certificate representing the number of shares to be transferred, endorsed by the personal representative and the signature guaranteed by a bank or a member firm of the New York Stock Exchange
 - A certified copy of the Letters
 - A certified copy of the Decree of Distribution (see Form 10 in Appendix A)
 - The name, address, and Social Security number of the devisee or heir receiving the stock
 - (3) If transferring the stock from joint tenancy to the survivor, in addition to the above, the transfer agent must have a death certificate of the decedent and a state inheritance tax waiver for those states that require a stock transfer tax.
 - d. If the decedent owned any U.S. savings bonds that were not redeemed before death, they should be presented immediately for payment if they have matured and no longer bear interest.
 - (1) Most banks can help in reissuing bonds in the name of the distributee, if that is the preference.
 - (2) The personal representative will be required to endorse the bonds in the presence of the bank official.

VIII. The Final Account and Closing the Estate

- A. File the Final Account and Petition for Settlement and Distribution.**
 1. The paralegal will prepare and the personal representative will file a verified or notarized final account and petition the court for settlement of the estate (see Form 9 in Appendix A and Exhibit 9.12).

2. Beginning with the inventory, the final account must show all changes in the assets of the estate, including debits and credits of cash and accrued interest, fully disclosing the balance of property available for distribution.
 3. The property remaining for distribution must be identified in such a way that it is readily determined who is entitled to receive the property.
 4. The final account must be filed within the time allowed by statute, unless the court has granted an extension for good cause.
 5. The form for the final account lists the steps and information that must be included for the court's review.
- B. Request Order for Hearing on Final Account and Petition for Distribution.**
1. The probate court will order a hearing, setting the time and place for the hearing.
 2. This notice must be published in conformity with the statutory notice requirements; the paralegal will handle this.
 3. The newspaper may be required to file an affidavit with the court proving that it was published and to send a copy of the proof to the personal representative (see Form 4 in Appendix A).
- C. Give notice of the hearing to interested parties by mailing a copy of the court's order for a hearing to each devisee or heir within a statutory period; an affidavit of notice must be prepared, verifying notice has been mailed to these persons and the state's tax official.**
- D. Prepare and file copies of federal and state estate and income tax returns with the Final Account.**
- E. Hearing on the Final Account and Petition for Distribution.**
1. The hearing gives all interested parties the opportunity to appear and examine the accounting.
 2. Explanations and corrections of the account and intended distribution should be discussed and resolved at this time.
- F. Request Order Allowing Final Account; after all taxes have been paid and the final account accepted, the court signs an Order Allowing Final Account.**
- G. Compute and file state inheritance tax return or waiver.**
1. In states with an inheritance tax, a copy of the Order Allowing the Final Account generally must be filed with the state's official tax collector.
 2. The state tax return is filed after the final account has been allowed.
 3. Within a specified time after the filing of the tax return, objections to the amount of tax may be made; after the time expires, the state inheritance tax return becomes final.
- H. Receive Order for Settlement and Decree of Distribution.**
1. After the final account has been allowed, the court enters this order (see Form 10 in Appendix A).
 2. In its decree, the court determines the persons entitled to the estate, names the heirs or devisees, states their relationship to the decedent, describes the property, and determines the property to which each person is entitled.
 3. The decree also states
 - that notice for the final hearing was duly given.
 - that the deceased died testate or intestate, including the date of death and residency of the decedent.
 - that the estate has been fully administered, including the payment of all allowed claims, and administration, funeral, and last illness expenses.
 - that the final account has been approved and settled.
 - that all inheritance, estate, and income taxes have been paid.
 4. Once the final decree is entered, the assets can be transferred.

- I. Collect receipts for assets by distributee.
 - 1. After all distributions, the personal representative must collect receipts for all property distributed, real or personal.
 - 2. The personal representative must file these receipts in order to account for all the assets transferred.
- J. File Petition for Discharge of Personal Representative (see Form 11 in Appendix A).
- K. Request Order Discharging Personal Representative.
 - 1. This terminates the potential personal liability of the personal representative.
 - 2. The paralegal may have to prepare Form 12 in Appendix A.
- L. Cancellation of personal representative's bond.
 - 1. Send a copy of the Order Discharging Personal Representative to the bonding company to cancel the bond.
 - 2. The personal representative will ask for the return of any unused premium for the bond.
 - 3. This terminates the administration of the estate.

IX. Special Probate Proceedings

- A. Special administration is a procedure used by the probate court to administer the estate of a decedent under specific circumstances.
 - 1. A special administrator will be appointed when good reason exists, such as to preserve the estate until an executor or general administrator is appointed; and to give immediate attention, when necessary, to the management of a business left by the decedent.
 - 2. Special administration is accomplished in the following manner.
 - A Petition for Appointment of a Special Administrator is filed, including an itemized listing of the estate's real and personal property and a valid reason why a special administrator must be appointed.
 - The judge signs the Order Granting Special Administration and appoints the special administrator.
 - The special administrator files the bond, with the amount of the bond fixed by the court.
 - The court issues Letters of Special Administration conferring appropriate powers on the special administrator.
 - The special administrator files an Inventory and Appraisal of the personal property of the decedent (see Form 8 in Appendix A).
 - The powers of the special administrator officially cease when the personal representative is appointed and the Letters are issued.
 - Before being discharged, the special administrator must file a Final Account and Report of Special Administrator, including vouchers and receipts for all disbursements.
 - The probate judge signs the Order Approving the Final Account and Report of the Special Administrator.
- B. Administration of Omitted Property
 - 1. If additional property of the decedent is discovered after the estate has been closed and the personal representative discharged, proper disposition necessitates reopening the estate.
 - 2. A petition may be filed by any person claiming an interest in the omitted property.
 - 3. The court that has jurisdiction of the newly discovered assets will, upon petition, appoint a personal representative, the same person as previously appointed, if possible (UPC § 3-1008).
 - 4. At the hearing on the petition, the court will determine to whom the omitted property will be distributed, and the court can, without notice, summarily decree the distribution of the property once all tax liability has been paid.
- C. Decree of Descent
 - 1. When more than three years have passed since the decedent's death and no probate proceedings have been commenced, an interested party may petition the court to determine the descent of the decedent's property.
 - 2. The petition requires that a formal proceeding be held with notice and a hearing.

X. Limitations on and Liability of the Personal Representative

- A. The personal representative cannot personally profit from the collection and management of assets of the estate, because profit taking would violate the fiduciary duty to the estate.
- B. The personal representative is not allowed to purchase property or encumbrances against the estate or to sell property to the estate while retaining a personal interest in the estate.
- C. The personal representative who acts reasonably and in good faith faces no personal liability for decreases in the value of assets during administration.
- D. If decreases occur because of a breach of fiduciary duties due to negligence or delay, the court will impose damages on the personal representative to compensate the estate for the loss; this compensation is called a “surcharge” and is paid from the personal funds of the personal representative.
- E. If a personal representative places a less preferred creditor in a more favorable position than is appropriate and thus causing improper payment, the personal representative may be personally liable.
- F. If the decedent’s estate owes any federal taxes, the personal representative is held personally liable for any taxes that are not paid (IRC § 2002).

ANSWERS TO THE REVIEW QUESTIONS

1. What are the steps in the probate or estate administration of a decedent’s estate? List each step and explain your function in the performance of each procedure.
The student should list all 39 steps covered in this chapter and briefly explain the function a paralegal might perform. The student should specifically mention those functions in the What You Do sections of the chapter.
2. What is the distinction, if any, in your state between the words *probate* and *estate administration*?
The answer will vary depending on the state.
3. How are “small estates” administered in your state? What is the monetary limit in your state that allows an estate to be classified as a “small estate”?
The answer will vary depending on the state.
4. How do the following differ: solemn v. common probate; formal v. informal probate; and solemn v. formal probate (under the UPC)?
Solemn probate is a traditional form of probate where formal court supervision is required throughout the administration of the estate and notice must be given to all interested parties so that they may be present at an initial hearing to contest the validity of the will or the appointment of a personal representative and may request continued solemn probate proceedings. Common probate is another traditional form primarily used for smaller estates and is uncontested, less formal, and involves less supervision or none. It is simpler and does not require notice to interested parties. Under the UPC formal probate is conducted under the supervision of the judge with notice to interested persons. Informal probate is conducted, without notice to interested persons, by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative. Solemn probate is a traditional method of probate, while formal probate is a similar method under the UPC. They are very similar in procedure.
5. When would you choose to follow formal (solemn) probate instead of informal (common) probate when administering a decedent’s estate?
In the majority of cases, formal probate is used. Formal probate is unnecessary when the value of the estate is small, when it is not complex, when the estate assets consist solely of nonprobate property. Formal probate would normally be the choice in any of the following situations: some beneficiaries are minors whose rights must be protected; real estate problems exist; a beneficiary or creditor intends to challenge the proceedings; the estate presents tax law difficulties; in an intestate case, the number of the decedent’s heirs is uncertain; in a testate case, the beneficiaries cannot be located; or family members disagree about their respective inheritances or the continuation or sale of a family business.

6. In what ways can a county clerk or registrar assist you in your estate administration tasks? What are some things they cannot do?

The clerk can verify that the paralegal has completed the required forms and procedures accurately and can provide helpful advice and guidance concerning probate and estate administration procedures. The clerk is forbidden by law to give legal advice.

7. What information must you obtain to complete the form used to petition to probate a will? Is this information and the form the same when a person dies intestate?

The following information is required to complete the form to petition to probate a will: the name, date of death, age, Social Security number, and place of death of the decedent; the domicile of the decedent; the existence of the will and, in some cases, the names of its witnesses; the name and address of the petitioner seeking appointment as personal representative named in the will; names, addresses, ages, relationship to the decedent, and identity of any persons under legal disability, or any devisees, and also of those heirs who would be entitled to distribution of the estate in the absence of the will; the estimated value of the real and personal property that are probate assets; the amount and general character of decedent's debts, if known; in some states, if the decedent was survived by children and a spouse, a statement that "the children of the decedent are/are not also children or issue of the surviving spouse." The Petition for Administration requires similar information, such as the name, date of death, age, Social Security number, and place of death of the decedent; the domicile of the decedent; the name and address of the petitioner requesting appointment as personal representative; the name and address of the surviving spouse, if any; the names, ages, relationship to the decedent, and addresses of all heirs or heirs at law of the decedent so far as they are known to the petitioner; the estimated value of the real and personal property that are probate assets; the amount and general character of the decedent's debts, if known. The form for Petition to Prove a Will and the Petition for Administration are different.

8. In your state, what are the statutory requirements for giving notice to creditors? When and how is the notice given in your state, and what is the time limit creditors have to file their claims?

The answer will vary depending on the state.

9. How is a personal representative appointed? What document authorizes a personal representative to manage a decedent's estate? How is a fiduciary employer identification number obtained, and for what purposes does a personal representative use it?

The person seeking appointment files a Petition for Probate of Will or Petition to Prove a Will; an Order for Hearing the Petition to Prove a Will is obtained; the Notice of Order for Hearing is published and Affidavit of Publication is completed and filed with the court; the Notice of Order for Hearing is mailed to all interested persons, including creditors, and the Affidavit of Mailing Notice is filed; Notice of Rights is mailed to the spouse and minor children and the Affidavit of Mailing is filed; a Hearing to Prove a Will is held and, if necessary, the subscribing witnesses testify. The petitioner, or someone with knowledge, testifies to the facts of the will. If there are no objections, the court will issue an order admitting the will and approving the personal representative. Letters Testamentary or Letters of Administration authorize a personal representative to manage a decedent's estate. The personal representative files a Form SS-4 to obtain a federal employer identification number, which is required on fiduciary income tax returns and is needed before a Notice Concerning Fiduciary Relationship can be filed as required by the IRC § 6903. The EIN identifies the fiduciary responsible for preparing the fiduciary income tax return and for paying any tax due, it enables the IRS to mail the notices and tax forms to the fiduciary. It is also needed to open an estate checking account.

10. What are the various assets you will help the personal representative collect and preserve in an estate administration, and what procedures do you use for the collection? List 10 assets.

- The procedures used for the collection of assets vary; however, it will be necessary for the paralegal, by phone, letter, or in person, to contact many people: relatives, friends, business associates, tax advisers, banking officials, stockbrokers, accountants, attorneys, trust officers, insurance agents, employers, and the Social Security Administration and the Veterans

Administration, to examine all financial records to find all bank accounts, stock and bond holdings, insurance policies (including credit life insurance on any credit cards, loans, or savings accounts), outstanding loans or other debts owed to the decedent, and any stock options or deferred compensation. To take possession of all the decedent's personal property, nonprobate assets are not subject to the marshaling authority of the personal representative and the paralegal will prepare a separate list of nonprobate assets that must be maintained.

- **Bank accounts:** The paralegal prepares a letter for the signature of the personal representative with an order directing that the account be closed and a check for the balance including interest payable to the estate be sent to the personal representative. Certified copies of the Letters and a copy of the bank statement should accompany the letter. The check should be deposited in the estate account.

Securities: Generally, securities remain registered in the decedent's name and are transferred to the proper beneficiaries or devisees or to heirs after administration of the estate is completed.

- **Debts owed the decedent:** The paralegal reviews county and city records and filings to determine whether the decedent held any mortgages, contracts for deed, promissory notes, or similar evidences of indebtedness to the decedent. The paralegal interviews family to determine the presence of any such debts. The paralegal arranges by letter, phone, or personally for the continued collection of loans, rents from tenants, interest from financial institutions, alimony owed the decedent, dividends, royalties, unemployment compensation, workers' compensation, etc., and transfers the monies collected to the estate account.
- **Causes of action:** If allowed by statute, the personal representative pursues any causes of action for the benefit of the estate. The paralegal must research if a cause of action survives and discuss the findings with the attorney for final resolution.
- **Jointly owned property:** To clear title to real property held in joint tenancy, the paralegal will execute in duplicate an Affidavit of Survivorship if the property is homestead and the surviving joint tenant is the spouse; file a certified copy of the death certificate and one copy of the Affidavit of Survivorship with the proper section of the county land office; send one copy of the Affidavit to the office of the commissioner of taxation. If the real property is Torrens property, the surviving joint tenant must also file an Affidavit of Purchaser of Registered Land and the owner's duplicate Certificate of Title; an affidavit of Survivorship indicating no inheritance tax is due or that it has been paid and a certified copy of the death certificate must be filed with the county land office.
- **Insurance benefits:** Obtain and partially complete U.S. Treasury Form 712 for every insurance policy on the life of the decedent. Mail the forms to each insurance company for final completion and signature. When the estate is the beneficiary, the proper forms for filing the claim to receive the proceeds must be completed. Generally, a certified copy of the death certificate, the return of the original life insurance policy, and a certified copy of the Letters are mailed with the claim.
- **Sale of or continuation of a business:** The procedures vary depending on the nature of the business and the state where the business is located. Complete and accurate records of all business activities must be kept and reviewed during the administration.
- **Death benefits payable to the estate must be collected.** Contact Medicare, Medicaid, Social Security, Veterans Administration, etc., to see if any benefits are due. The decedent's employer must be contacted to determine if the decedent was entitled to any death benefits from any employee plans such as 401(k) plans, pension or profit-sharing plans, labor union benefit plans, etc.
- **Automobiles:** Title to the automobile should be transferred to the appropriate person as soon as possible to avoid estate liability. These procedures vary from state to state.

11. What are the inventory and appraisal, and how are they prepared?

An inventory is a complete physical check of all probate assets owned by the decedent and a detailed listing of these assets and their estimated fair market value at the time of the decedent's death on the forms provided for the inventory. It is prepared carefully and should be well organized, complete, and accurate. An appraisal or appraisement is a true and just valuation placed on real or personal property

by a recognized expert. The appraisal is generally filed with the inventory. Once the inventory is completed and the personal representative has signed an oath stating that all known property has been inventoried, a court-appointed or independently hired appraiser is contacted, if necessary. Before the appraiser begins to work, he/she should sign the oath of appraisers, then, accompanied by the attorney or the paralegal, the appraiser completes the work of determining the value of the property. After the appraisal is obtained, that will be the appraised fair market value for each property item.

- 12.** How does a creditor present a claim against the decedent's estate, and how does the personal representative contest a claim?

Those to whom the decedent owed money are given actual notice or notice through publication that the debtor has died and that they must file their claims with the probate court or with the decedent's personal representative within the time set by each state. If a personal representative decides to contest a claim, the personal representative must, on or before the date of the hearing, file all objections to the claim or file a counterclaim asserting that the decedent was actually entitled to the property. The document prepared is called an Objection to Claim and is served on the claimant and filed with the probate court. Contested claims are not heard on the date set for hearing allowed claims, but on another hearing date, for which arrangements must be made. Notice of the hearing date for contested claims must be given to the creditors.

- 13.** What is your state's priority for payment of creditors' claims? Cite the statute and give examples of items within each category.

The answer will vary depending on the state.

- 14.** How is the final account prepared, and what does it contain?

Once all just claims have been paid and receipts collected, the final account is prepared and a verified copy filed with the court. Beginning with the original inventory, the final account must show all changes in the assets of the estate, including debits and credits during the administration. The accounting should fully disclose the balance of property available for distribution after payment of creditors. The property remaining must be identified and readily determine the persons entitled to receive such property. The form lists the steps and information that must be included for the court's review.

- 15.** At what point can the personal representative transfer the decedent's assets (both real and personal property) to the appropriate parties? When does legal title pass to them?

Once the final decree is entered by the court, the assets of the decedent's estate can be transferred. Title to personal property passes immediately to the appropriate heirs or devisees. In some states, real property passes differently. The right to possess the decedent's real property may vest immediately after the Decree of Distribution, but legal title may remain with the personal representative until a certified copy of the decree has been filed with the county recorder or other official in the county where the land is located. The statutes of the individual state must be checked to determine the exact procedure.

- 16.** Can a decedent have more than one domicile? How would you resolve this problem so that ancillary proceedings can be finalized?

A decedent can have more than one residence, but only one domicile. Once the will has been admitted to probate and/or the personal representative appointed by the court, ancillary proceedings can be started in the foreign jurisdiction immediately. Keeping in close contact with the ancillary administrator facilitates the smooth handling of estate administration as the estate cannot be closed until the ancillary administration is completed since the determination of estate tax cannot be settled until the property, debts, and claims in all states are known.

- 17.** What happens to property of the decedent that is discovered after the estate administration has been completed?

If additional property of the decedent is discovered after estate administration has been completed, proper disposition of the assets will necessitate reopening the estate. A petition may be filed by any person claiming an interest in the omitted property. The court will appoint a personal representative, the same person as previously appointed, if possible. At the hearing the court will determine to whom the omitted property will be distributed. The court can then, without notice, summarily decree the distribution of the property once all tax liability has been paid.

18. Who is responsible for paying a surcharge, and under what circumstances would this occur?

The personal representative who acts reasonably and in good faith faces no personal liability for decreases in the value of estate assets during administration. If decreases occur because of a breach of fiduciary duties due to negligence or delay, however, the court will impose damages on the personal representative to compensate the estate for the loss. This compensation is called a surcharge and is paid by the personal representative out of his/her personal funds.

19. Should all states adopt the Uniform Probate Code? Explain.

This answer will vary depending on the student. The instructor should watch for valid rationale supported by critical thinking.

ANSWERS TO THE CASE PROBLEM

Problem 1

The checklists will vary depending on the student. Also, the probate procedures and forms will vary depending on the state.

—**TEACHING SUGGESTION:** If the instructor has not previously provided a packet of state-specific forms, one should be provided for students. Depending on the size of the class, the probate clerk's office may not be able to handle individual student inquiries and requests for forms. These can often be found on the court website and can be downloaded at no cost to the instructor.

ANSWER TO THE ASSIGNMENT

Assignment 9.1

Answers will vary according to state law.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. The answer will vary depending on student information.
2. The answer will vary depending on student information.
3. The answer will vary depending on student information.

CHAPTER 10 INFORMAL PROBATE ADMINISTRATION

LEARNING OBJECTIVES

Students should be able to do the following:

- Identify and explain the informal probate method of administering decedents' estates under the Uniform Probate Code.
- Recognize the circumstances under which informal probate procedures are appropriate.
- Explain the steps in informal probate administration of a decedent's estate.
- Apply the procedures and prepare the legal forms used in informal probate administration for a set of facts involving a decedent's estate.

LECTURE OUTLINE

I. Scope of the Chapter

- A.** Informal probate proceedings according to the Uniform Probate Code (UPC) are covered in this chapter.
 1. The procedural steps are outlined.
 2. Sample forms are included.
- B.** A case study is presented using a step-by-step application of informal probate.
—**TEACHING SUGGESTION:** Note that this chapter specifically reviews the UPC procedure and forms. If your state is a non-UPC state, then this chapter should be supplemented with state-specific information and forms. Again, it is suggested that the instructor supply the students with a packet of state-specific forms, if they are not available in the library, to avoid individual students making requests of the probate court clerk. Some states have the forms on their websites and may be downloaded at no cost to the instructor. The instructor may want to have transparencies made of these forms also for use in the classroom. Comparing the UPC procedures to your state procedures helps students analyze what the forms are used for and how and why they are used, rather than approaching forms as merely something to “fill out.”

II. The Choice of Formal or Informal Probate

- A.** The UPC offers three procedures to administer a decedent's estate.
 1. Formal probate and estate administration
 2. Informal probate and estate administration
 3. Affidavit and Summary Proceedings to collect a decedent's personal property for small or moderate-size estates
- B.** The UPC procedures are beneficial because they include the introduction of procedures that are unsupervised or only partially supervised by the court (informal probate) and simplified summary procedures that reduce the expenses of administration and make the transfer of small estates much easier.
- C.** Once the limit for summary proceedings has been exceeded, the petitioner may select a formal or an informal method of settling the estate.
 1. Formal proceedings are those conducted before a judge with notice to interested persons.
 2. Informal proceedings are those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.
 3. The UPC allows a unique “in and out” method of settling estates.
 - a. This method is partly “in” the probate court formally, even though most of the administration takes place “out” of it informally.
 - b. This allows flexibility for the personal representative who prefers the freedom of informal probate but who may encounter a complexity that the court is better suited to handle.
 - c. The personal representative can request court supervision at any time.

- D. Informal probate generally reduces the amount of time for administration.
 1. There are fewer steps and less complicated procedures than formal probate.
 2. The estate can be more easily distributed without required notices or court approval.
- E. One purpose of informal probate is to relieve congestion in the probate court; therefore, most informal probate is carried out without direct involvement by the court.
 1. Often, a hearing to prove the will and to appoint a personal representative is the only in-court proceeding.
 2. Any interested person may petition the court to determine a matter using formal proceedings.
- F. Although informal probate eliminates the required appraisal of estate assets in most cases, the value of real estate and closely held businesses should always be appraised by an independent expert hired by the personal representative and paid from estate assets.

III. Priority of Persons Seeking Appointment as Personal Representatives

- A. In both formal and informal proceedings, the order of priority of persons who could qualify as personal representative is as follows.
 1. The person named as personal representative by the will, if there is one
 2. The surviving spouse of the decedent who is a devisee of the decedent
 3. Other devisees of the decedent
 4. The surviving spouse of the decedent
 5. Other heirs of the decedent
 6. Any creditor of the decedent provided no one with a higher priority standing has applied for appointment within 45 days of the death of the decedent.
- B. The person who has the highest priority and who is willing to serve does not always become the personal representative.
 1. The court or registrar will not appoint a person who is under the age of 18, a felon, or is otherwise unsuitable for the position.
 2. If persons having priority fail to apply or are disqualified, the court, in a formal proceeding, will consider the nominees or persons having priority and try to arrive at a solution beneficial to the estate and satisfactory to those interested parties.
 3. Objections to the appointment must be made in a formal proceeding.

IV. Application for Informal Probate and Appointment of Personal Representative

- A. Informal probate commences when an applicant for personal representative submits a completed application for informal probate and informal appointment to the registrar for screening and acceptance (UPC § 3–301 and Form 13 in Appendix A).
 1. The paralegal will be asked to perform the following tasks to help with the procedures.
 - Gather the information necessary to complete the forms.
 - Prepare the forms and file them or verify the filing.
 - Communicate with the personal representative and registrar to ensure that all procedures and forms are properly executed.
 2. The applicant must verify, swear under oath, that the application is accurate and complete to the best of the applicant's knowledge, and file it with the registrar.
- B. The following general information is required on all applications for informal probate of a will or for informal appointment.
 - Interest of the applicant to the estate
 - Name, age, date of death of decedent, county and state of decedent's domicile at time of death; names and addresses of spouse, children, heirs, devisees, and ages of those who are minors
 - A statement indicating the county or city where the proceedings are to take place, if decedent was not domiciled at the date of death in the state where the application for informal probate has been filed
 - The name and address of any personal representative of the decedent who has been appointed in this state or elsewhere whose appointment has not been terminated

- A statement that the applicant has not received nor is aware of any “demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere”
 - A statement that the time limit for informal probate or appointment has not expired either because three years or less have passed since the decedent’s death, or, if more than three years from death have passed, circumstances as described by UPC § 3–108 authorizing late probate or appointment have occurred
- C.** If the application is for informal probate of a will, it must, in addition to the information and statements above, affirm
- that the court has possession of the original last will, or that the original will or an authenticated copy probated in another jurisdiction is included with the application.
 - that the applicant believes the will to have been validly executed.
 - that the applicant is unaware of any instrument that revokes the will and believes the submitted instrument is the decedent’s last will.
- D.** An application for informal appointment of a personal representative to administer an estate under a will sets forth the following in addition to the general information under B above.
- A description of the will by date of execution
 - The time and place of probate or the pending application or petition for probate
 - An adaptation of the statements in the application or petition for probate and the name, address, and standing of the applicant among those who are entitled to be personal representative under UPC § 3–203
- E.** In addition to the statements listed under B above, an application for informal appointment of an administrator when the decedent died intestate states the following:
- That the applicant is not aware of any unrevoked testamentary instrument relating to property located in the state, or if the applicant is aware of any such instrument, the reason for its not being probated (UPC § 3–301[4])
 - The priority of the applicant, and the names of any other persons who have a prior or equal right to the appointment under UPC § 3–203
- F.** If informal probate is begun believing the decedent died intestate, but subsequently was found to have died testate, or vice versa, a change of testacy status form would have to be completed (UPC § 3–301[5]).
- G.** By definition, informal probate and appointment are proceedings conducted without notice to interested persons; there are some circumstances where notice is required.
1. Notice must be given to those persons who have filed a written demand to be notified in accordance with UPC § 3–204 (see also UPC § 3–306).
 2. Notice must be given to anyone having a superior right to be personal representative.
- H.** Persons applying for informal proceedings must verify under oath the statements of their applications.
1. The registrar is required to make “proofs and findings” for informal probate and informal appointment applications to check the truth and accuracy of statements therein and has the power to disqualify or decline applications if not satisfied (UPC §§ 3–303, 3–305, 3–308, 3–309).
 2. Unintentional mistakes are correctable, but deliberate falsification that injures someone interested in the estate will give the injured person a cause of action against the applicant (UPC §§ 1–106, 3–301[b]).
- V. Acceptance by the Registrar**
- A.** The registrar reviews the submitted forms for errors or omissions that might invalidate the application, and the registrar must be satisfied with the following:
- That the applicant has carried out the requirements of the UPC
 - That the applicant has solemnly affirmed the statements made in the application to be true to the best of the applicant’s knowledge

- That the applicant is an interested person as defined by UPC § 1–201(23)
 - That the applicant has chosen the proper venue for the will to be probated or for the appointment of the personal representative
 - That persons who have demanded notice of proceedings (UPC § 3–204) have been notified
 - That 120 hours have elapsed since the decedent’s death—UPC § 2–104 requires that a person must survive the decedent for 120 hours to be an heir
- B.** The registrar will check each application for particular requirements.
1. For informal probate, the registrar must possess the original will, the statutory time limit for probate must not have expired, and the will must be the kind that may be probated informally.
 - a. Informal probate of certain wills may not be advisable.
 - b. The registrar has a duty to decline informal probate of alleged copies of lost or destroyed wills, wills consisting of a series of testamentary instruments, and other irregular instruments.
 2. For informal appointment, the priority of the person who is entitled to appointment is determined by statute.
 3. The registrar may deny informal probate because another person had applied for probate earlier.
 4. The registrar may deny informal probate because another personal representative had already been appointed and had not died or resigned.
 5. The registrar may deny informal probate if there is a possibility of a later will in existence.
- C.** Informal probate is available only for uncomplicated wills or estates.
- D.** Denial of an application usually results in the commencement of formal probate proceedings.
- E.** Acceptance of an application does not constitute a recommendation of informal over formal probate for a particular estate.
1. The responsibility for the choice between formal and informal probate belongs to the applicant.
 2. Acceptance of an application means only that the application meets the statutory requirements for filing.
- F.** Acceptance of the application is made by the registrar by issuing a written Statement of Informal Probate (Form 14 in Appendix A) and/or by appointing the applicant the personal representative by issuing Letters Testamentary or Letters of Administration (see Forms 7 and 20 in Appendix A).
1. The Letters empower the applicant to assume the powers and duties of the office but do not take effect until the applicant has filed a statement of acceptance of these powers and duties and has paid the necessary fees.
 2. Upon payment of the fees, the personal representative’s bond, if required, must be filed with the court.
 3. Any person who has an interest in the estate worth more than \$1,000 may demand that the personal representative be required to post a bond or the court may require it (UPC §§ 3–603 and 3–605).

VI. Notice Requirements

- A.** Although informal probate does not require that notice be given to interested parties, persons having an interest in the estate may file a demand to be notified of the petitioner’s application for informal probate or appointment.
1. An interested person might be one who has a financial interest in the estate, a previously appointed personal representative who is still acting in that capacity, or someone who occupies a place in the order of priority for appointment.
 2. When a demand has been filed, the registrar will notify the personal representative to keep the demandant informed of proceedings.

3. If the demandant objects to informal proceedings, the demand for notice ensures an opportunity to request formal or supervised administration when necessary.
 4. If the demandant is not given notice, the personal representative will be liable for any damages the demandant suffers as a result of the omission of notice (UPC § 3–204).
- B. Notice of Application for Informal Probate**
1. After the registrar accepts the application and grants informal probate and appointment, the petitioner must give notice as required by UPC § 1–401 to any person demanding it pursuant to UPC § 3–204 and Form 15 in Appendix A.
 2. No other notice is required.
- C. Notice of Application for Informal Appointment**
1. Notice must be given to any person who has a financial or property interest and is demanding notice, and to any person having a prior or equal right to appointment not waived in writing and filed with the court (UPC § 3–310 and Form 15 in Appendix A).
 2. No other notice is required.
- D. Demand for Notice of Order or Filing**
1. At any time after the death of the decedent, any interested person may file a demand with the court for notice of any order or filing relating to that estate (UPC §§ 3–204, 3–306).
 2. The demand must state the name of the decedent, the nature of the demandant’s interest, and the person’s address or that of the attorney representing the person.
 3. The clerk will mail a copy of such demand to the personal representative, if any.
 4. After the demand is filed, no order or filing to which the demand relates can be made or accepted without notice to the demandant or his/her attorney, as required in UPC § 1–401.
 5. If notice is not given, the order or filing is still valid, but the person receiving the order or making the filing may be liable for any damage caused by the failure to give notice.
 6. The notice requirement arising from a demand may be waived in writing by the demandant and will ease when the demandant’s interest in the estate terminates.
 7. Interested persons have available to them the remedies provided in UPC § 3–605 (demand for bond by interested persons) and § 3–607 (order restraining personal representative).
 8. Although not obliged to give notice, the personal representative should give personal notice to creditors.
 - a. The UPC allows creditors four months from the date of first publication of notice to file claims (UPC §§ 3–801, 3–802, 3–803).
 - b. If the estate is still open, the court has the discretion to allow late claims for good cause.
 - c. Once the account of the personal representative is settled, the court cannot allow late claims (see Form 15 in Appendix A).
- E. Method and Time for Giving Notice**
1. If requested, notice must be given in one of three ways.
 - By mailing a copy of the notice at least 14 days before the time set for the hearing by certified, registered, or ordinary first-class mail addressed to the person being notified at the post office address given in the demand for notice or at the person’s office or place of residence
 - By delivering a copy of the notice to the person being notified personally at least 14 days before the time set for the hearing
 - If the address, or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for three consecutive weeks a copy of the notice in a newspaper having general circulation in the county where the hearing is to be held, the last publication of which is to be at least 10 days before the time set for the hearing
 2. For good cause, the court may provide a different method or time of giving notice for any hearing.

3. Prior to or at the hearing, proof of notice and the Affidavit of Mailing Notice must be made and filed (UPC § 1–401 and Form 16 in Appendix A).
4. Notice must be given to every interested person or to one who can bind an interested person.

VII. Duties and Powers of the Personal Representative in Informal Probate

- A. The greatest responsibility of the personal representative is the proper distribution of the estate.
 1. The duties and powers of the personal representative in informal probate are outlined in UPC §§ 3–701 to 3–721.
 2. The personal representative must observe the standards of care applicable to fiduciaries; the personal representative is liable for damage resulting from improper use of power or mishandling of estate assets.
- B. Notification to Devisees or Heirs and Creditors
 1. Not later than 30 days following appointment, the personal representative must notify the devisees or heirs of the appointment (UPC § 3–705).
 - a. Notice is sent by ordinary mail and must include the name and address of the personal representative, state that it is being sent to all interested persons, state whether bond has been filed, and specify the court where the estate papers are on file.
 - b. This notice is part of the fiduciary obligation, but failure to give notice will not invalidate the appointment or powers of the office; if it damages a devisee or heir, that person has a cause of action against the personal representative for breach of fiduciary duty (UPC §§ 3–204 and 3–712).
 2. The personal representative must also notify creditors of the appointment by publishing in a general-circulation county newspaper.
 - a. The notice must be published once a week for three successive weeks.
 - b. Creditors have four months after the date of the first publication to present their claims (UPC § 3–801).
- C. Payment of Creditors' Claims
 1. After the four-month period, claims that have been determined to be valid must be paid.
 2. The order in which valid claims are paid is found in UPC §§ 3–805 and 3–807.
 3. Any claims found to be fraudulent or unjustly filed against the estate will be disallowed or disqualified (UPC § 3–803).
 4. Creditors can appeal the decision of the personal representative in court.
- D. Inventory Property
 1. Within the time set by state statute, the personal representative must prepare an inventory of all real or personal property owned by the decedent at the time of death and mail it to the surviving spouse and all other interested persons who request it.
 - a. The original may also be filed with the court (UPC § 3–706).
 - b. The inventory must list the assets of the estate with sufficient description for accurate identification, value the assets at fair market value, and include the kind and amount of mortgage or other encumbrance on each item (see Form 17 in Appendix A).
 2. The personal representative has permission to hire independent appraisers to assist in valuation, but if they do perform appraisals, their names, addresses, and the items they valued must be listed on the inventory (UPC § 3–707).
- E. Hold and Manage the Estate
 1. Until discharged or released, the personal representative has the same power over the title to the assets as the decedent.
 - a. The personal representative holds title in a manner similar to that of a trustee.
 - b. The powers and duties with regard to the property require the exercise of prudence and restraint expected of a fiduciary for the benefit of others.
 2. The personal representative is liable for loss or damage caused by improper exercise of these powers (UPC § 3–712).

F. Final Account and Closing the Estate

1. After the minimum time for closing an estate has passed and all approved creditors' claims paid, the personal representative must prepare and file the final account.
 - a. The final account is a listing of the probate assets, showing any increases or decreases in the assets; the payment of creditors' claims; administration expenses; funeral and last illness expenses; taxes; and the balance of assets on hand for distribution.
 - b. Only after a copy has been given to every distributee can the personal representative distribute the remaining assets to the persons entitled to receive them and seek a discharge from office.
2. An informally appointed personal representative may choose to close the estate informally and be discharged by signing a sworn closing statement or affidavit to the effect that he/she believes the estate's assets have been distributed correctly and its business transacted.
 - a. This method can be used if the administration has not been continuously supervised.
 - b. With continuous supervision, the UPC requires a final account and formal closing by either of the methods in UPC §§ 3-1001, 3-1003, and 3-505 or 3-1002 (see Forms 9 and 12 in Appendix A).
 - c. The sworn closing statement informally closing the estate must verify the following:
 - That a notice to creditors was published more than six months before the date of the present statement.
 - That the personal representative has fully administered the estate, paying all federal and state taxes due and claims against it, and that the assets have been distributed to the persons entitled.
 - That the personal representative has mailed a copy of the closing statement to all of the creditors who have made themselves known and all distributees of the estate (UPC § 3-1003); once copies have been mailed, the original Statement to Close is filed with the probate court.
3. The periods creditors have to assert and present claims include the following:
 - Under UPC § 3-803, all claims against a decedent's estate that arose before the decedent's death are barred unless presented within four months after the date of the first publication of notice to creditors if notice is given in compliance with UPC § 3-801, or within one year after the decedent's death, if notice to creditors has not been published.
 - Under UPC § 3-1005, the rights of all creditors whose claims have not been previously barred against the personal representative for breach of fiduciary duty, UPC § 3-803, are barred unless a proceeding to assert the claim is commenced within six months after the filing of the personal representative's closing statement; fraud or inadequate disclosure can be the basis for a cause of action against the personal representative.
4. If a personal representative has distributed the assets to other claimants, a creditor with a valid but undischarged claim must press the claim in a judicial proceeding against one or more of those who received the assets (UPC § 3-1004).
5. If no proceedings involving the personal representative are pending one year after the closing statement is filed, the personal representative's authority is terminated (UPC § 3-1003).
6. It is important that the personal representative obtain receipts or evidence of payment for everything distributed from the estate.
 - a. This allows the personal representative to reinforce the closing statement or request that the court formally close the estate.
 - b. Alternatively, affidavits reciting that the correct property and amount was received can be obtained from each distributee.
7. If additional assets are discovered after the estate has been closed and the personal representative discharged, proper disposition will necessitate reopening the estate.

VIII. Step-By-Step Procedures in Informal Probate

—**TEACHING SUGGESTION:** This case study provides an excellent class activity. The case study should be reviewed carefully with the students. It may be helpful for the students to take turns reading aloud the paragraphs in the case study. If your state uses the UPC, review the appropriate forms and steps with the students. If your state does not use the UPC, use this same case study to demonstrate your state-specific forms and procedures and to point out the differences between the two. Again, analyzing the procedures and forms in this manner makes this type of review less boring and more meaningful for the student and instructor.

ANSWERS TO THE REVIEW QUESTIONS

1. According to your state statute, who has top priority to be appointed the personal representative of a testator's estate? Of an intestate's estate?
The answers will vary depending on the state.
2. What function does a registrar or surrogate perform in an informal or common probate administration?
In informal probate administration a registrar or surrogate takes the place of the judge and has the power to do whatever the judge normally would do, e.g., appoint the personal representative and make findings of fact in relation to the will.
3. How do informal probate procedures differ in testate versus intestate cases?
Generally, the procedures are the same; however, the forms may differ and the information required will correspond either to testate or intestate situations. The information required on the application for informal probate of a will and informal appointment of the executor, and an application for informal appointment of an administrator, vary and must be tailored to the situation. The textbook points out the requirements needed and the variations required.
4. Under what circumstances can a registrar reject an application for informal probate proceedings? If the registrar denies an application, what results?
The registrar can reject an application for informal probate proceedings if he/she is not satisfied that the applicant has met the requirements of the UPC; that the applicant has solemnly affirmed the statements made in the application; that the applicant is an interested person; that the applicant has chosen the proper venue; that the persons who have demanded notice have been notified; that 120 hours have elapsed since the decedent's death. In addition, the registrar will check for requirements such as whether the original will has been filed, whether the statutory time limit for probate has expired, and whether the will is the kind that may be probated informally; also that the applicant is entitled to appointment by the order of priority. The registrar must also be satisfied that the estate is uncomplicated. Denial of an application usually results in the commencement of formal probate proceedings.
5. Since informal probate procedures are not supervised by the court and do not require that notice be given, what rights and procedural steps are available to creditors?
Creditors may file a demand to be notified of the petitioner's application for informal probate or appointment. Once a demand has been filed, the registrar will notify the personal representative to keep the demandant informed of proceedings related to the estate. If the demandant objects to any part of the informal proceedings, the demandant can request formal or supervised administration when necessary. If the demandant is not notified and suffers damages as a result, the demandant may have a cause of action against the personal representative. Creditors also have available the remedies provided in UPC § 3-605 (demand for bond by interested persons) and § 3-607 (order restraining personal representative).
6. Explain what is meant by the Uniform Probate Code's *in and out* feature available for those using informal probate proceedings.
This means that the method of settling the estate is partly "in" the probate court formally, even though most of the administration takes place "out" of it informally. In informal proceedings, the personal representative or an interested person may petition the court to adjudicate a disputed issue. After settlement of the dispute, the personal representative may resume informal procedures.

7. Must an inventory be prepared in informal probate? If required, to whom must the inventory be given?
Yes, an inventory of all real or personal property owned by the decedent at the time of death must be prepared and mailed to the surviving spouse and all other interested persons who request it. The personal representative may also file the original copy of the inventory with the court.
8. Using informal probate, how is an estate administration closed?
An informally appointed personal representative may choose to close the estate informally and be discharged by signing a sworn closing statement to the effect that he/she believes the estate's assets have been distributed correctly and its business transacted (see Form 9 in Appendix A). If no proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the personal representative's authority is terminated.
9. In informal probate, what time limits are placed on creditors for claims against the decedent's estate and the personal representative for breach of fiduciary duty?
Under UPC § 3–803, all claims against an estate that arose before the decedent's death are barred unless presented within four months after the date of the first publication of notice to creditors if notice is given, or within three years after the decedent's death, if notice has not been published.
Under UPC § 3–1005, the rights of all creditors whose claims have not been barred against the personal representative for breach of fiduciary duty according to § 3–803 are barred unless a proceeding to assert the claim is commenced within six months after the filing of the closing statement.
10. In informal probate, when does the personal representative's authority officially terminate?
If no proceedings involving the personal representative are pending in court one year after the closing statement is filed, the personal representative's authority is terminated (UPC § 3–1003). Termination does not automatically accompany closing. The authority of the personal representative remains active for one year.

ANSWERS TO THE CASE PROBLEMS

—**TEACHING SUGGESTION:** These problems are excellent to discuss with the class because they allow for critical thinking and anticipation of obstacles to the administration of the estate. Anticipation of potential problems in these cases allows for students to discuss and argue alternative points of view. It is helpful to demonstrate that even with informal probate, the process is not merely filling out forms.

Problem 1

This problem requires students to informally probate the estate of Carl Bergmeister according to the UPC. The instructor should determine how well the students comprehend the process according to the Code and whether the correct forms are chosen from the Appendix. Some forms will vary depending on how students deal with the fact pattern and discuss possibilities or alternatives.

Problem 2

This problem also is a great fact pattern to use to discuss the forms. The list of forms that could be used is included; therefore, students only need to focus on why each form is used, in which situations, and possibly to complete the forms for practice.

Problem 3

This answer will vary depending on the state. This problem helps students to make the transition to applying their own state statutes and forms to the same fact pattern as Problem 2.

ANSWERS TO THE ASSIGNMENTS

Assignment 10.1

1. Students should discuss the meaning of the term *interested person* as someone with a financial interest in the estate, a previously appointed personal representative who is still acting in that capacity, or someone who occupies a place in the order of priority of appointment.

2. Students should discuss the issue of priority of appointment in this response.
3. Students should discuss the aspect of notice and UPC §§ 1–401, 3–204, and especially 3–310 and Form 4 in Appendix A. This question also involves the issue of priority of appointment.
4. Students should discuss the issue of domicile and jurisdiction of the probate court and ancillary administration.
5. Students should discuss how one would check on such information with the probate court and how this will affect Laurel’s application.
6. Students should discuss the issue of truthfulness and accuracy to the best of the applicant’s knowledge. They should also mention that this might affect the registrar’s decision whether to accept the application.

Assignment 10.2

1. The forms Sara might use in administering her mother’s estate according to the UPC are as follows.
 - Application for Informal Probate of Will and for Informal Appointment of Personal Representative (Executor)
 - Testimony of Witness to Will
 - Statement of Informal Probate of Will and Order of Informal Appointment of Personal Representative
 - Notice of Informal Probate of Will and Appointment of Personal Representative and Notice to Creditors
 - Proof of Placing Order for Publication
 - Affidavit of Publication, often provided to registrar by publisher
 - Affidavit of Mailing Notice of Informal Probate of Will
 - Notice to Spouse and Children and Affidavit of Mailing
 - Acceptance of Appointment as Personal Representative and Oath by Individual
 - Bond, if required
 - Letters Testamentary
 - Inventory and Appraisement
 - Written Statement of Claim
 - Final Account
 - Receipt for Assets by Distributee
 - Unsupervised Personal Representative’s Statement to Close EstateEven though some of these forms may not be filled out by Sara, students should or may mention any of these. The instructor should note how well the forms are completed by the students.
2. Students should discuss the affect the newly found will may have on the administration and on Sara’s appointment. The penalties for concealing a will should be mentioned also. The fact that this new will may require the estate to be probated formally from that point on should be mentioned.
3. Students should discuss the ability of a minor to inherit, the possibility that this will cause the estate to be probated formally, that guardianship would have to be established, and other similar issues.
4. Students should discuss the various aspects of how appointment occurs and the fact that the court has the final say in applying the order of priority and that the person with the higher priority is not necessarily the one appointed by the court. The question of age or order of birth determining priority should be discussed with emphasis on the fact that Elvira nominated Sara as executor in her will.
5. Students should discuss the tax implications, if any, and the liability of Sara for improper distribution of the estate assets, if the chair is not listed in the inventory. Students should discuss the possibility of amending the inventory.
6. Students should discuss whether Sara has violated her fiduciary duty by completing the sale without being appointed special administrator by the probate court.
7. Students should discuss the issue of truthfulness and completeness and accuracy in the preparation of the inventory. This policy should definitely be included in the inventory. Students should discuss the order of abatement and the fact that the policy would be distributed according to the residuary clause or intestate succession statutes if there was no residuary clause in the will.

8. Students should discuss the rights of creditors to notice and to require bonding. Students should discuss the ability of the creditor to demand notice and to require a bond be posted according to UPC § 3–605. Pursuant to this section of the UPC, the store would not be able to demand that Sara post bond as the amount owed to the store does not approach the \$1,000 threshold amount to exercise this right.
9. Sara could authenticate the signature by having persons familiar with Elvira’s signature testify. Also, if the will was executed in an attorney’s office, perhaps certain evidence may assist in this matter. Even if the will is not admitted to probate, Sara could still follow informal procedures by applying for informal appointment as administrator and administer the estate according to the intestate succession laws.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. Answers will vary depending on the selected funeral home, but the letter should include the following information: (1) the date of the request, (2) the request for a copy of the funeral bill reflecting that it has been paid in full, (3) the identifying information of the decedent, and (4) to whom the bill should be forwarded.
2. The information to be contained on the Excel spreadsheet should be as follows:
 - a) Ralph (son):

automobile	\$1,400
tent trailer	600
cash	3,500
 - b) Sara

antique furniture	\$2,000
cash	3,500
 - c) Christa

cash	\$5,500
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3. Answers will vary depending on the student.

CHAPTER 11 TAX CONSIDERATIONS IN THE ADMINISTRATION OF ESTATES

LEARNING OBJECTIVES

Students should be able to do the following:

- Distinguish and identify the income, gift, and death taxes that must be paid.
- Understand and explain various ways to transfer assets while alive in order to lessen the amount of taxes owed to the state and federal governments by a decedent's estate.
- Understand the current tax consequences for gifts and estates created by changes in the tax laws.
- Prepare the tax returns of a decedent's estate.

LECTURE OUTLINE

I. Scope of the Chapter

- A.** The paralegal must be knowledgeable about legal and procedural matters applicable to estate administration, including the tax consequences to the estate of the decedent.
- B.** To specialize in estate administration, the paralegal must acquire an extensive knowledge of tax laws and procedures.
- C.** Federal and state statutes must be checked for accuracy and if they have been repealed, amended, or new statutes enacted.
- D.** Sources for current federal tax laws are Commerce Clearing House loose-leaf tax service as well as the updated Internal Revenue Service (IRS) publications and state publications.

—**TEACHING SUGGESTION:** Call your local IRS Service Center's Educational Division. They will be able to provide you with multiple copies of IRS tax returns and publications for distribution to the class. In addition, they may be able to arrange for a guest speaker to address the class on a variety of issues, most notably, completing estate tax forms. You may also log on to <http://www.irs.gov> to access their website and find forms.

- E.** The paralegal must consult with other professionals, including the attorney and accountant, who are familiar with tax laws and the preparation of tax returns.
- F.** The chapter incorporates the basics of preparing federal tax returns and some state death tax returns; however, state tax laws and forms vary and the paralegal must be familiar with the state forms and law.
- G.** There is a discussion of tax considerations such as the applicable credit amount (unified credit), the unified transfer gift and estate tax rates, the marital deduction, trusts, lifetime gifts, and generation-skipping transfers.
- H.** Tax returns, federal and state, are discussed, including the decedent's final income tax return; the fiduciary's income tax returns; the gift tax returns; the estate tax returns; and the state inheritance tax return.

II. Introduction to Tax Concerns

- A.** Income taxes are levied by the federal government and all but seven (Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming) state governments.
 - 1.** The income subject to tax includes personal income, corporate income, and trust income, which is a form of personal income.
 - 2.** The personal representative has the duty to file the decedent's personal income tax returns for the decedent's year of death and to pay any tax owed, federal and state, out of the estate assets.
 - 3.** The personal representative must file federal and/or state fiduciary income tax returns for any income that accrues or is earned after the decedent's death until the close of the taxable year or until final distribution of the estate.

- B.** Estate tax is a death tax that is levied on the transfer of property at death.
 - 1. The tax is levied on the estate, not on the successors.
 - 2. The rate and amount of the estate tax is determined by the size of the estate and, like income tax, is progressive.
 - 3. Currently, the federal gift and estate tax ranges from 18 to 40 percent.
 - 4. A state inheritance or succession tax is levied on the privilege of receiving property from a decedent at death.
 - a. The rate or amount of the tax is determined by state law and depends on the amount of the share of the decedent's estate received by a particular successor and on the relationship to the decedent.
 - b. It is a progressive tax; 14 states impose an inheritance tax on successors.
- C.** A gift tax is levied on the privilege of transferring property during life and is a tax on the donor, not the donee.
 - 1. The federal gift tax rate generally follows the same schedule used for the federal estate tax.
 - 2. Two states, Connecticut and Tennessee, have state gift taxes, which generally follow the rates and exemptions prescribed under the state death tax statutes.
- D.** There is a federal estate and gift tax but no inheritance tax.
 - 1. States usually have an estate, an inheritance, a gift, or some tax that combines the three.
 - 2. The tax laws require the personal representative to file the appropriate tax return by a prescribed time, unless an Application for Extension of Time to File has been filed with the appropriate agencies.
 - a. The taxes must be paid within a prescribed time.
 - b. Extensions of time to file do not extend the time to pay taxes, which are due by the regular due date.
 - c. Extensions may be allowed in cases when reasonable cause can be shown.
 - d. A personal representative who fails to make timely payment is personally liable for any interest charged or penalties resulting from this neglect.
- E.** The personal representative is responsible to pay all taxes out of the estate assets, unless the will specifies that the devisees pay the inheritance tax out of their legacies or devises.
 - 1. If the estate does not have enough cash or assets to be sold to pay the taxes and that this is not due to any fault of the personal representative, he/she is free from individual liability to pay the taxes.
 - 2. If the estate is distributed and then there are not enough assets to pay the taxes, the personal representative must pay the taxes out of pocket.
 - 3. It is imperative that the personal representative is sure there are sufficient assets for the payment of all taxes and debts before distributing any estate assets.
 - 4. Certain preferred claims have priority for payment before taxes, such as administrative expenses, funeral expenses, and expenses of the last illness, in many states.

III. General Tax Considerations

- A.** The most frequently used methods to save taxes on a decedent's estate are making use of the applicable credit amount (unified credit) and the Unified Rate Schedule for federal estate and gift taxes, making use of the marital deduction, creating trusts, and making gifts during the decedent's lifetime.
- B.** Applicable Credit Amount (Unified Credit)
The 1997 Taxpayer Relief Act (TRA) took effect on January 1, 1998. It replaced the unified credit with an applicable credit amount, which is subtracted from the tentative tax due.
- C.** Unified Transfer Gift and Estate Tax Rates
 - 1. The 1976 TRA created a unified transfer tax credit for gifts and estates.
—**TEACHING SUGGESTION:** Discuss the unified rate schedule.
 - 2. The rates are progressive and based on cumulative lifetime and deathtime transfers.

3. The 1976 TRA unified the tax rates for estate and gift taxes into a single schedule.
4. With the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001, the top applicable tax rate was 45 percent for 2009 and the estate applicable exclusion amount was \$3,500,000. Under the 2010 Tax Relief Act, the top applicable rate became 35 percent and the exclusion amount \$5,000,000 for the years 2010–2012.
5. The gift tax applicable exclusion amount remains \$1,000,000 for 2010 and increases to \$5,000,000 for 2011 and 2012 with a top tax rate of 35 percent. Under legislation covering years 2010–2012, the generation-skipping transfer taxes have applicable exclusion and lifetime exemption amounts of \$5,000,000 and a top rate of 35 percent. The exclusion currently increases annually and the rates are adjusted by the U.S. Congress.
6. The TRA of 2010 created the new concept of portability, which allows the unused portion of a predeceased spouse's estate or gift tax exclusion amount to be combined with the surviving spouse's applicable exclusion amount at their death.
7. Gift taxes are computed by applying the Unified Rate Schedule to cumulative lifetime taxable transfers and subtracting the taxes paid for prior taxable periods.
8. Federal estate taxes are computed by applying the Unified Rate Schedule to cumulative lifetime and deathtime transfers and then subtracting the gift taxes paid. The amount of the applicable credit amount (unified credit) allowed cannot be greater than the amount of the computed transfer tax.

D. Calculating the Federal Estate Tax

—**TEACHING SUGGESTION:** Review in detail the method of computing the federal estate tax (Exhibit 11.1).

1. Tax credits include the applicable credit amount (unified credit); the credit for foreign death taxes; and for estate taxes paid by the estates of other decedents for assets included in the current decedent's estate called "credit for tax on prior transfers" and is allowed only if the two deaths occur within a short time of each other in order to prevent the same property from being taxed too often.
2. The credit for tax on prior transfers is allowed in a declining percentage of the smaller of the following amounts.
 - The amount of the federal estate tax attributable to the transferred property in the transferor's estate
 - The amount of the federal estate tax attributable to the transferred property in the current decedent's estate

E. The Marital Deduction

1. The 1981 Economic Recovery Tax Act (ERTA) provided for an unlimited federal estate tax marital deduction for transfers between spouses.
 - a. A testator's estate is entitled to the marital deduction if there is a surviving spouse and if the decedent leaves all or a portion of his/her estate to that spouse.
 - b. If a decedent spouse dies intestate the amount of the marital deduction is the amount of the surviving spouse's statutory share.
2. The 1981 ERTA added to Internal Revenue Code (IRC) § 2056 in that the law contains a "terminable interest rule," which allows certain property to qualify for the estate and gift tax marital deduction.
 - a. The eligible property is "qualified terminable interest property" (QTIP), which is property that passes from the decedent spouse in which the surviving spouse has a qualified income interest for life.
 - b. Examples of QTIPs are trusts with a life interest to the surviving spouse and the remainder to the children, and a legal life estate to the surviving spouse and the remainder to others, e.g., their children.

3. For property to qualify as QTIP for marital deduction treatment, certain elements are required.
 - a. The surviving spouse life tenant must have a “qualifying income interest for life” in the property.
 - (1) This interest occurs if the surviving spouse is entitled to all the income for life from the property, payable at least annually or at more frequent intervals, and no person during the surviving spouse’s lifetime has the power to appoint any part of the property to any person other than the surviving spouse.
 - (2) A power exercisable only at or after the death of the surviving spouse is allowed.
 - b. The personal representative of the decedent spouse’s estate must elect to treat the property as QTIP type property on the decedent’s federal estate tax return (see Form 706).
 - (1) With testamentary transfers, the personal representative makes the election.
 - (2) In the case of a lifetime transfer, the donor-spouse makes the QTIP election.
4. The unlimited marital deduction can also be used for gift transfers between spouses.
 - a. There is no upper limit on the amount that can be transferred between spouses.
 - b. No gift tax return, IRS Form 709 (), must be filed regardless of the amount of the transfer between spouses.

F. Creation of Trusts

1. It is possible to leave property in a testamentary trust for beneficiaries named by the testator-settlor to avoid additional estate taxes at the death of the beneficiary.
2. If the trust is properly planned and combined with a marital deduction, substantial tax savings to the estate of the decedent over the course of two generations can be realized.
3. Taxes can also be diminished using *inter vivos* trusts.

G. Lifetime Gifts

1. The donor is responsible for the payment of the gift tax.
2. All taxable gifts made after December 31, 1976, called adjusted taxable gifts, are included in the decedent’s gross estate and are subject to federal estate tax; a credit against the tax for gift taxes previously paid is then deducted.
3. Any appreciation in value of a lifetime gift that may accrue between the date the gift is made and the date of the donor’s death is not subject to a transfer tax.
4. Income taxes may be reduced when the gift property produces income and the property is transferred during life to a donee in a lower income tax bracket than the donor.
5. The laws governing gifts and taxes on those gifts provide the following:
 - A gift must be intended and delivered by the donor.
 - Any person can give a gift of up to \$14,000 per year tax-free to each donee, and, with gift splitting when the donor’s spouse joins in the gift, the exclusions of both spouses may be used, resulting in an exclusion of \$28,000 tax-free to both the donor and donee.
 - Some gifts made within three years of the donor’s death are automatically included in the donor-decedent’s gross estate and are subject to federal estate tax (IRC § 2035).
 - The federal unified gift and estate tax rate is a progressive and cumulative tax.
 - When the gift is to the donor’s spouse, there is an unlimited gift tax marital deduction.
 - When a gift is made to a charitable organization, some limits are placed on the amount of the charitable deduction from the gift tax, depending on the type of gift and the charity to which it is given.
 - Transfers to a political organization (IRC § 2501 [a][4]) or amounts paid on behalf of a donee to an educational organization as tuition or a care provider for medical care (IRC § 2503[e]) are not subject to the gift tax.
6. Once transferred, the property can no longer be controlled by the donor because the property passes to the donee who has title to it; if the donor retains control over the gift, income from the gift property will be taxed to the donor, and the property will be included in the donor’s gross estate for federal estate tax purposes upon the donor’s death (IRC §§ 2036–2038).

7. While there is annual gift tax exclusion, once the applicable credit amount (unified credit) is used, it is terminated.
 8. The Gift-Splitting Provision
 - A married donor, with the other spouse's consent, may split a lifetime gift to the donee. The gift will then be treated as though half was given by the donor and the other half by the spouse, even though the entire gift comes from only one spouse's assets.
 - Spouses may give \$28,000 or more annually, when adjusted for inflation, to each donee tax-free if each spouse consents to having the gift treated as being given half by each spouse.
 - Thus, a married donor can put more property into a trust while paying less gift tax than a single person would pay.
 9. Today, nearly all states have adopted the Uniform Transfers to Minors Act (UTMA).
 - a. The UTMA allows any kind of real or personal property to be transferred to a custodianship as a gift to a minor.
 - b. A custodian (selected by the donor) manages and invests the property for the support, education, and welfare of the donee (minor).
 - c. The gift under this act is irrevocable.
 - d. The donee (minor) has legal title to the property.
 - e. A custodianship is a less expensive alternative to the appointment of a guardian in a will.
- H. Generation-Skipping Transfers and Their Tax Consequences**
1. Congress realized a tax loophole existed by which family members could create a generation-skipping transfer trust that partially avoided federal gift and estate taxes on large transfers of money or other valuable assets between generations of family members; therefore, Congress closed the loophole by creating a generation-skipping transfer tax.
 2. The definitions and rules concerning these transfers and their tax computations are complicated; the Code provisions must be reviewed carefully and the paralegal must work closely with the supervising attorney when preparing the appropriate tax returns.
 3. This tax is levied when a younger generation is bypassed in favor of a later generation and this tax is applied in addition to other death taxes.
 4. The current generation-skipping transfer tax applies to lifetime transfers.

IV. Tax Returns

- A.** Depending on the situation, the personal representative may have to file some or all of the following tax returns.
- Federal Individual Income Tax Return
 - State Individual Income Tax Return
 - Federal Fiduciary Income Tax Return
 - State Fiduciary Income Tax Return
 - Federal Gift (and Generation-Skipping Transfer) Tax Return
 - State Gift Tax Return
 - Federal Estate (and Generation-Skipping Transfer) Tax Return
 - State Estate Tax Return
 - State Inheritance Tax Return
- B.** Decedent's Final Income Tax Returns, Federal and State
1. The personal representative is responsible to file the required federal and state income tax returns for the decedent, IRC § 6012(b); the filing and payment of the income taxes must be completed within the period determined by law.
 2. If the return is not filed and the tax paid by the required date, the personal representative may be personally liable for any interest and penalties assessed.
 3. IRC § 6109 requires that an identification number be included on tax returns and other documents; on the decedent's final federal income tax return, this is usually the decedent's Social Security number.

4. Federal Individual Income Tax Return.

—**TEACHING SUGGESTION:** The instructor can contact the IRS to request multiple copies of the Form 1040 instruction booklets and forms to distribute to the students.

- a. A final Form 1040 must be filed for persons having a specified minimum of gross income.
- b. Examples of income that must be reported include income from wages, salaries, tips, self-employment, rents, pensions, annuities, royalties, alimony, dividends, profits from partnerships, income from trusts or estates, bartering income, and interest on deposits, bonds, or notes.
- c. Examples of income that need not be reported are gifts and inheritances, compensation for injuries or sickness, child support, life insurance proceeds received due to a person's death, interest on most state or local bonds, the \$250,000 (single) or \$500,000 (joint return) and the exclusion of gain from the sale of a home.
- d. If a refund is due, the personal representative can file a Statement of Person Claiming Refund Due a Deceased Taxpayer along with the federal income tax return or the personal representative can attach to the return a copy of the Letters of appointment as personal representative.
- e. There are a number of special tax considerations when preparing a decedent's final federal income tax return.
 - (1) If survived by a spouse, a joint return can be filed if the surviving spouse agrees and if the surviving spouse has not remarried before the close of the taxable year.
 - (a) Both federal and state tax returns should be computed separately and jointly to determine which method results in the lesser tax and whether prompt filing or requesting an extension would be more advantageous.
 - (b) If the decedent's final tax return is filed as a separate return, it may be advantageous to file the return as soon as possible and, in some cases, to request early audits by the IRS.
 - (c) With a joint federal return, the proportion of the total tax due to be paid by each spouse is determined by the percentage of the total income each earned during the year.
 - (2) IRC § 213(c) permits the personal representative to treat the decedent's medical expenses that are paid from the estate within one year after death as deductions on the income tax return for the year.
 - (a) If this election is made, a Medical Expenses Deduction Waiver must be filed, waiving the right to claim the medical expenses as an estate tax deduction (IRC § 2053; see Form 1040).
 - (b) The choice should be made on the basis of which offers the greater tax saving; only medical and dental expenses that exceed 7.5 percent of the adjusted gross income may be deducted.
 - (3) A personal exemption is allowed for each taxpayer and an additional exemption is allowed for a spouse and for each dependent who qualifies under the tax law.
 - (4) Income "in respect of the decedent," which is the gross income that the decedent had a right to receive or could have received had he continued to live, should be properly included in the final return.
 - (a) If such income is omitted from the final return because it is received after the return is filed, it is included in the fiduciary's income tax return.
 - (b) Tax may be saved on certain bonds, e.g., U.S. Series E and EE savings bonds, by electing not to pay the tax on the interest earned until the earlier of the year they are cashed or the year they mature (IRC § 454).

5. State Individual Income Tax Return

- a. On the state level, a final income tax return is required if the state has a state income tax.
- b. The return must be filed and taxes paid in a timely manner; an extension of time to file the final return is available.

6. Extensions for Federal and State Returns
 - a. An Application for Automatic Extension of Time to File U.S. Individual Income Tax Return (U.S. Treasury Form 4868) may be filed, except where the IRS is requested to compute the tax; then there is a court order to file the return by the original due date, or a six-month extension while traveling abroad has been given previously.
 - b. The application must be filed on or before April 15 or the normal due date of the return.
 - c. The extension does not extend the time for payment of the tax due.
 - (1) If the tax is not paid, interest accrues from the regular due date of the return until the tax is paid.
 - (2) For each month the return is late, there is a 5 percent penalty of the tax due, not to exceed a maximum of 25 percent.
 - d. A copy of the federal automatic extension form must accompany the state return when that return is filed in order to qualify for the state extension also.
 - e. States may or may not require the filing of a form requesting an extension to file, but all tax must be paid on or before the original due date, even if the return is not filed, and interest and penalties apply to any unpaid tax.
- C. Fiduciary's Income Tax Returns, Federal and State
 1. Federal Fiduciary Income Tax Return
 - a. The personal representative must also file the federal Fiduciary Income Tax Return, IRC § 6012, that includes accrued income and income earned after the decedent's death that is not included on the decedent's final individual income tax return.
 - b. The fiduciary income tax return is due from the date of the decedent's death to the date of final distribution and any tax due must be paid out of estate assets.
 - c. Within a statutory number of days of appointment (e.g., 30 days), the personal representative must file a Notice Concerning Fiduciary Relationship with the IRS (IRC § 6903), accompanied by satisfactory evidence that the personal representative has the authority to act as a fiduciary, such as a certified copy of the Letters appointing the personal representative.
 - d. The personal representative or trustee uses an Employer Identification Number, obtained from the IRS in the district where the decedent lived, instead of the decedent's Social Security number.
 - e. Form 1041, U.S. Income Tax Return for Estates and Trusts, must be filed for all domestic decedent estates with gross income for the taxable year of \$600 or more; for estates that have a beneficiary who is a nonresident alien; and for some domestic trusts (IRC § 6012).
 - (1) The return must be filed on or before the 15th day of the fourth month following the close of the taxable year of the estate or trust.
 - (2) When filing its first return, an estate may choose the same accounting period as the decedent, a calendar year, or any fiscal year it wishes.
 - (3) If the estate chooses the decedent's accounting year, which is most likely a calendar year, the first return will be for the part of the year covering the period from the decedent's date of death to the end of the tax year.
 - (4) The estate should choose a taxable year that coincides with the state estate filing requirements to be consistent.
 - (5) The return is sent to the IRS Center for the state where the fiduciary resides.
 - f. If an extension of time is needed, an Application for Extension of Time to File can be filed.

- g. When the fiduciary return is filed, a copy of the will, if any, must be filed with it only if the IRS requests it.
 - (1) If a copy of the will is required, a written declaration must be attached to the copy stating that it is a true and complete copy.
 - (2) A statement should be included saying that the will, in the opinion of the personal representative, determines the extent to which the income of the estate is taxable to the estate and the beneficiaries, respectively (Reg. § 1.6012-3(a)(2)).
- 2. State Fiduciary Income Tax Return
 - a. Personal representatives may need to obtain a state identification number and file a state fiduciary income tax return.
 - b. Important considerations for fiduciary income taxes are the determination of the state's share of distributable net income, distribution deductions, the character of distributed income, and simple or complex trusts.
 - c. Ancillary administration could entail the filing of more than one state's fiduciary return.
 - d. The state fiduciary return must be filed on the date due and submitted to the state fiduciary income tax division at the state Revenue Department.
 - e. Some states may require that a copy of the federal fiduciary income tax return be attached as well as a copy of the will and statement similar to that required by the federal government.
- D. Decedent's Gift Tax Returns, Federal and State
 - 1. U.S. Treasury Form 709, the U.S. Gift (and Generation-Skipping Transfer) Tax Return, must be executed and filed whenever a donor makes an *inter vivos* gift in excess of \$14,000 in any calendar year to any donee.
 - 2. The return is due on or before April 15 following the close of the calendar year the donor made the gifts.
 - 3. If the donor dies, the personal representative must file the return no later than the earlier of the due date for the donor's estate tax return or April 15.
 - 4. The donor's Social Security number is used and payment is due when the tax return is filed.
 - 5. An extension of time for filing and paying the tax may be granted upon proper application by letter or by extending the time to file the federal estate tax return, which will also extend the time to file the gift tax return.
 - 6. U.S. Treasury Form 709 is also used to report generation-skipping tax due on *inter vivos* direct skips; the instructions that accompany the form must be reviewed carefully.
 - 7. A few states impose a state gift tax and, when applicable, refer to the individual state's forms and instructions for filing.
- E. State Gift Tax Return
 - 1. A number of states impose this tax on the recipients of both real and personal property transferred to them from the estate of a decedent. Check state statutes and refer to the individual state's forms and instructions.
- F. Decedent's Estate Tax Returns, Federal and State
 - 1. U.S. Treasury Form 706, U.S. Estate (and Generation-Skipping Transfer) Tax Return, must be filed within nine months of the decedent's death for the estate of every U.S. citizen or resident whose gross estate on the date of the person's death is greater than the lifetime exclusion.
 - a. This form is used to report any generation-skipping transfer tax owed the federal government on direct skips occurring at death.
 - b. The identification number used on this return is the decedent's Social Security number.

- c. An extension of time to file and to pay the tax may be obtained by completing the Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Tax on Form 4768.
 - d. The tax is imposed on the total value of the estate to the extent of the decedent's interest at the time of death (IRC §§ 2031, 2033); however, any personalty that a surviving spouse claims as his/hers is not included in the deceased person's total estate if such a claim can be reasonably supported.
2. The gross estate includes all assets owned by the decedent at death and the value of any interest the decedent held in any property (IRC § 2033).
- a. The gross estate also includes lifetime gifts in which the decedent retained "incidents of ownership."
 - b. For estate tax purposes, the gross estate is valued in one of two ways.
 - (1) The assets may be valued on the basis of their fair market value on the date of the decedent's death (IRC § 2031).
 - (2) The personal representative may elect an alternate valuation date for determining the fair market value of the decedent's property (IRC § 2032).
 - (a) The alternate valuation date may not be allowed for a state's inheritance tax calculations.
 - (b) If the election is to be allowed, the alternate valuation date must decrease both the value of the gross estate and the federal estate tax liability.
 - (c) The purpose of the alternate valuation date is to prevent an unreasonable tax liability on the decedent's estate whenever the value of the property takes a drastic plunge shortly after the decedent's death.
 - (d) Property included in the gross estate that has not been distributed, disposed of, sold, or exchanged as of the alternate valuation date, a date six months after the decedent's death, may be valued as of that date if the personal representative so elects instead of assigning the value that prevailed at the date of death (IRC § 2032.)
 - (e) The personal representative must elect the alternate valuation date on the estate tax return during the statutory period allotted for filing the return, e.g., nine months after the date of death unless an extension has been granted; otherwise the right to the election is lost.
 - (f) Once the alternate date is elected, it cannot be changed.
 - (3) Under IRC § 2042, the gross estate will include the proceeds of all life insurance policies payable to the estate and to all other beneficiaries in which the decedent at death possessed any "incidents of ownership," or within three years of death, had assigned all the "incidents of ownership."
 - (a) "Incidents of ownership" refer to the right of the insured (decedent) or the estate to the economic benefits of the policy.
 - (b) This includes the right to change the beneficiary or to cancel the policy.
 - (4) The assets of the gross estate are listed in separate schedules and identified as Schedules A through I in the U.S. Estate Tax Return. (See the updated instructions for Form 706, U.S. Estate Tax Return.)

—**TEACHING SUGGESTION:** Discuss some of the basic data included on each schedule of Form 706 (Exhibit 11.3). If possible, have students refer to the form at the same time. The information in Exhibit 11.4 can be used to discuss where specific property in the gross estate would be reported.

- 3. After the gross estate has been determined, the various exemptions, deductions, and claims allowed by statute are subtracted from the gross estate to determine the taxable estate, which is the estate on which the tax is imposed (IRC § 2051).
 - a. The estate tax is computed using the unified rate schedule.

- b. Any credits allowed against the tax are then subtracted from the gross tax, and the difference is the final net tax due.
- c. The deductions, claims, and credits allowed include the following:
 - Specific deductible items such as expenses, liens, encumbrances, debts, and taxes
 - Losses during the handling of the estate
 - Marital deduction
 - Charitable deductions
 - State death tax deduction
 - Applicable credit amount (unified credit) and other allowable credits, foreign death taxes, and tax on prior transfers
 - Deductions, credits, and special taxes are reported on Schedules J through U of the U.S. Estate Tax Return

—**TEACHING SUGGESTION:** Use Exhibit 11.5 to discuss the basic data to be included in Schedules J through U.

4. Deductible Items

- a. IRC § 2053 identifies deductible expenses and liabilities.
 - b. Expenses that are deductible include funeral and estate administration expenses.
 - (1) The fees for the personal representative and the attorney for the estate are deductible either for federal estate tax purposes (IRC § 2053) or for purposes of figuring the federal fiduciary income tax (IRC § 642).
 - (2) If administration expenses are taken as a deduction on the estate tax return, they cannot be used again on the federal fiduciary income tax return.
 - (3) Medical expenses for the last illness used on the estate tax return cannot be used again on the decedent's final individual income tax return.
 - c. Proper administration expenses include the personal representative's compensation, attorney's fees, court costs, surrogate's fees, accountant's fees, appraiser's fees, storing costs, and other expenses necessary for preserving and distributing the assets of the estate.
 - d. A reasonable amount of funeral expenses is deductible; what is reasonable must be considered in light of the size of the estate and the amount of indebtedness.
 - e. Estate planning expenses such as fees paid to the estate planners regarding tax matters, investment, and setting up a revocable funded living trust are deductible; fees incurred for planning for disposition of property by will or *inter vivos* gift are expenses that are not deductible.
 - f. Lifetime debts are proper deductions; debts incurred after death as part of the administration of the estate are not deductible as debts of the decedent but may be deductible as administration expenses.
 - g. The deduction for taxes is limited to those that accrued against the decedent while alive, not to taxes accruing after death.
 - (1) The final federal income tax of the decedent is deductible.
 - (2) The income tax on the estate's income is not deductible.
 - (3) Federal estate is; however, a deduction is allowed for state death taxes and a credit for foreign death taxes that must be paid.
5. Any losses sustained during the administration of the estate are subtracted from the gross estate (IRC § 2054).
- a. Deductible losses are theft and casualty losses including loss due to fire, storm, shipwreck, etc.
 - b. A decrease in value of property is not a deductible loss.
 - c. When losses are recovered from insurance policies or from a lawsuit for damages, they are not deductible.

6. Marital Deduction

- a. The unlimited marital deduction is calculated after expenses, losses, and debts have been subtracted from the gross estate, leaving the adjusted gross estate (IRC § 2056[c][2]).
- b. If a decedent devises less to the surviving spouse than the amount to which he/she is entitled under applicable state law, the spouse may elect to receive the amount to which he/she is entitled under the waiver, dower, or curtesy rights and the amount received by such election becomes the amount of the marital deduction.
- c. The marital deduction in estate planning is only one tool to save taxes, and, if used without regard for other methods of disposition, such as successive estates to avoid a second tax upon the death of the surviving spouse, the tax liability of the two estates might be increased.

7. Many spouses were reluctant to take advantage of the marital deduction because they did not want to give their spouses the general power of appointment that allowed the surviving spouse to determine to whom the trust property would be given on that spouse's death.

8. This problem was resolved with the creation of the QTIP trust that allows property to qualify for the marital deduction and ensures the right of the children to receive the assets when the second spouse/parent dies.

- a. The essential difference between the standard marital deduction trust with the power of appointment and the QTIP trust is the executor's election on the decedent spouse's estate tax return to specifically elect QTIP status for that trust, which would give income to the surviving spouse for life, then the remainder to the children, but the surviving spouse has no power to dispose of the principal at death.
- b. The disadvantage of the QTIP trust is that the executor's election causes the QTIP trust property to be taxed in the second spouse's estate when he/she dies even though he/she does not get the property or have the right to determine to whom it will go.
- c. The IRC provides that any additional taxes generated by the QTIP trust will be paid from assets of the trust unless the surviving spouse directs otherwise.

—**TEACHING SUGGESTION:** Review QTIP and marital deductions carefully with students.

9. Charitable Deductions

- a. The charitable deduction includes any transfer of estate assets for public, charitable, educational, and religious purposes; the kinds of transfers that qualify for the charitable deduction are described in IRC § 2055, which is in the textbook.
- b. The amount of the deduction allowed under IRC § 2055 is the value of property in the estate that was transferred by the decedent during life or by will and is limited to the amount actually available for charitable uses.
- c. Charities may have similar names; therefore, it is important that the charity be designated in the will or trust by its full and correct name, that it is properly identified to prevent later conflicts.
- d. Two tax advantages may be obtained by making charitable gifts
 - By decreasing the value of the donor's estate
 - By claiming an income tax deduction for the amount of the gift on the donor's federal income tax return

10. **State Death Tax Deduction.** Prior to 2005, a credit was allowed for state death taxes paid on property included in the gross estate. The credit has been repealed and replaced with a deduction for state estate, inheritance, legacy, or succession taxes paid as the result of the decedent's death.

- 11. Gross Estate Tax**
 - a. After the taxable estate (total gross estate less allowable deductions) is determined, the adjusted taxable gifts made by the decedent after 1976 (lifetime taxable gifts from all the decedent's gift tax returns, Form 709, not included in the gross estate) are added to the taxable estate.
 - b. A tentative estate tax is calculated on this sum using the Unified Rate Schedule.
 - c. The gift tax payable on the post-1976 adjusted taxable gifts is then subtracted from the tentative tax to arrive at the gross estate tax, which is then subject to allowable credits.
- 12. Credits**
 - a. The following credits against the gross estate tax are included under IRC §§ 2010–2015.
 - The applicable credit amount (unified credit).
 - The credit for state death taxes that have actually been paid to the decedent's state for years 2010 to 2012 if this credit has not been repealed and changed to a deduction depending on IRS application of the 2010 Tax Relief Act.
 - The credit for federal gift taxes on certain transfers the decedent made before January 1, 1977, that are included in the gross estate; obtain Form 4808, Computation of Credit for Gift Tax, to calculate this credit.
 - The credit for foreign death taxes.
 - The credit for tax on prior transfers, e.g., a credit for estate taxes paid on the estate of the spouse of the decedent when the spouse died 10 years or less prior to or two years after the decedent.
- 13. Net Estate Tax**
 - a. Once the allowable credits are determined and subtracted from the gross estate tax, the remaining figure, called the net estate tax, is the tax due the federal government.
- 14. Additional Taxes**
 - a. The following additional tax is added to the net estate tax to arrive at the total transfer taxes to be paid when the federal estate tax return is filed.
 - The generation-skipping transfer tax on direct skips
 - b. Federal estate, state estate, and state inheritance taxes must be paid either out of the estate assets or by the persons to whom the estate assets are distributed; the taxes are usually paid out of the residue of the estate unless the will directs otherwise.
 - c. Sometime after the personal representative files the estate tax return, the IRS sends an "estate tax closing letter" or notifies the personal representative that the return is not acceptable.
 - d. If the return is not acceptable, the IRS will determine the proper tax and request prompt payment.
 - e. Because estate tax returns are routinely audited, the personal representative should file Form 2848, Power of Attorney and Declaration of Representative with the federal estate tax return, authorizing the attorney for the personal representative to represent the estate.
- 15. State Estate Tax Return**
 - a. The state of the decedent's domicile has power to impose an estate tax on the decedent's estate.
 - b. If property is located in a state other than the decedent's domicile state, the property in that state is taxable by that state.
 - c. Since the enactment of the EGTRRA, which provided for the phaseout of the state tax credit, several states amended their estate tax laws to fix their tax to a credit allowable under the federal estate tax law in effect prior to the EGTRRA, or they have a standalone estate tax that will continue without regard to federal law.
 - d. The due date for the state estate tax return is usually the same as for the federal return, and any extension of time granted for the federal return automatically extends the filing deadline for the state return; however, state statutes vary and should be reviewed.

G. State Inheritance Tax Return

1. A number of states impose an inheritance tax on the recipients of both real and personal property transferred to them from the estate of a decedent resident of the state.
2. It is a tax on inherited property, i.e., a tax on the beneficiaries who receive the decedent's property, and the rate of tax (usually graduated) varies with the relationship of the heir or devisee to the decedent and the value of the property received.

ANSWERS TO THE REVIEW QUESTIONS

1. What is the difference between estate and inheritance taxes? Are they levied by both the state and federal governments?
Estate taxes are levied on the privilege of transferring property at death and are levied on the estate itself, not on the successors. An inheritance tax is levied on the privilege of receiving property from a decedent at death. The federal government levies an estate tax. Seventeen states impose an inheritance tax on successors.
2. What types of taxes, e.g., income, gift, or death taxes, are imposed or levied by your state?
The answer will vary depending on the state.
3. Who is responsible for paying taxes of the estate, and what funds are used to pay them?
The personal representative is responsible for paying all taxes out of the estate assets.
4. What is the alternate valuation election? Under what circumstances is it used?
The personal representative may value assets at date of death or six months after date of death. It is used to minimize either the positive or negative effects of the decedent's death on the value of property.
5. What is meant by the "applicable exclusion amount"?
The applicable exclusion amount is the maximum value of property that can be transferred to others without incurring any federal gift or estate tax because of the application of the applicable credit amount (unified credit).
6. How does the use of the marital deduction save estate taxes?
The marital deduction saves estate taxes because it allows for an unlimited federal estate tax marital deduction for transfers between spouses.
7. What is QTIP property and how does it qualify for the marital deduction?
QTIP property is qualified terminable interest property, property that passes from the decedent spouse in which the surviving spouse has a qualified income interest for life. QTIP property qualifies for the estate and gift tax marital deduction when the QTIP property is a trust with a life interest to the surviving spouse and the remainder to the children or other beneficiaries, and when it is a legal life estate to the surviving spouse and the remainder to others. To qualify as QTIP property for marital deduction treatment, the following are necessary.
 - The surviving spouse life tenant must have a "qualifying income interest for life" in the property if (1) the surviving spouse is entitled to all the income for life from the property, payable at least annually or at more frequent intervals, and (2) no person during the surviving spouse's lifetime has the power to appoint any part of the property to any person other than the surviving spouse.
 - The personal representative or executor of the decedent spouse's estate must elect to treat the property as QTIP property on the decedent's federal estate tax return.
8. How are gifts made between spouses taxed before and after death? Also, explain gift splitting.
Gifts between spouses are not taxed either before or after death because they qualify for the unlimited marital deduction.
Any person can give a gift of up to \$ \$14,000 per year tax-free to each donee, and if the donor's spouse joins in the gift, the exclusions of both spouses may be used, resulting in an exclusion of \$28,000. This is called gift splitting.

9. Briefly explain the Uniform Transfers to Minors Act.

This act provides a means of transferring any kind of property to a minor by creating a custodianship to manage the property for the benefit of the minor. It is created by registering the property transferred in the name of the custodian “as custodian for the minor under the UTMA.” A gift under this act is irrevocable and the custodianship ends when the minor reaches age 21, or 18 in some states, at which time the property and any undisposed income must be given to the minor.

10. Who is responsible for filing the decedent’s tax returns? What liability exists? How is a tax refund obtained?

It is the responsibility of the personal representative of the decedent’s estate to file income tax returns for the decedent and the estate and to pay any taxes owed out of the estate assets. If the representative does not file the tax returns and pay the taxes due, the personal representative may be personally liable for any interest and penalties assessed.

If a refund is due, the personal representative can file a Statement of Person Claiming Refund Due a Deceased Taxpayer along with the federal income tax return. Alternatively, the personal representative can attach to the return a copy of the court certificate showing the appointment as personal representative.

11. Does your state have an income tax?

The answer will vary depending on the student.

12. When preparing the federal estate tax return, how are the decedent’s gross estate and taxable estate determined?

The decedent’s gross estate includes all assets owned by the decedent at death and the value of any interest the decedent held in any property. It will also include lifetime gifts of property in which the decedent retained “incidents of ownership” and all taxable gifts made after December 31, 1976, which are given the technical name of adjusted taxable gifts.

The taxable estate is determined by taking the gross estate and subtracting the various exemptions, deductions, and claims allowed by statute.

13. Briefly explain the generation-skipping transfer tax.

This tax is levied when a younger generation is bypassed in favor of a later generation and the tax is applied in addition to other death taxes. The current generation-skipping transfer tax applies to lifetime transfers by gift made after September 25, 1985, and to transfers by will or revocable trust where the decedent or grantor dies after October 22, 1986. The tax is a flat rate tax, the maximum rate allowed under the unified gift and estate tax schedule.

ANSWERS TO THE CASE PROBLEMS

Problem 1

The answers will vary depending on the student.

Problem 2

The answers will vary depending on the state.

ANSWERS TO THE ASSIGNMENTS

Assignment 11.1

There are several ways this problem can be answered, depending on who is giving the gift, individually or as a couple. Further analysis can be found in the gift-splitting analysis in the text.

Assignment 11.2

The answer will vary depending on the state.

Assignment 11.3

1. The answer will vary depending on the state.
2. The answer will vary depending on the state.
3. Sufficient income to require filing of a decedent's final federal income tax varies depending on the category of the filer.

The amount required on state income tax returns will vary depending on the state.

Federal fiduciary income tax return must be filed for all domestic decedent estates with gross income for the taxable year of \$600 or more. The amount required on state fiduciary income tax returns will vary depending on the state.

4. Under the federal income tax, a joint tax return can be filed by the personal representative if the surviving spouse agrees and if the surviving spouse has not remarried before the close of the taxable year.
5. The federal Fiduciary Income Tax Return (IRC § 6012) includes accrued income and income earned after the decedent's death that is not included on the decedent's final individual income tax return. The return must be filed for all domestic decedent estates with gross income for the taxable year of \$600 or more; for estates that have a beneficiary who is a nonresident alien; and for some domestic trusts.

Assignment 11.4

In all likelihood, the personal representative will have to file a federal Fiduciary Income Tax Return. The amount received is in excess of \$600; however, whether a Fiduciary Income Tax Return will need to be filed depends on whether any of this income received after Abe's death was reported or able to be reported on Abe's final individual income tax return.

Assignment 11.5

1. This answer will vary depending on the student.
2. The discussions of the marital deduction and its use will vary depending on the student. Generally, students should mention that the marital deduction is unlimited; its importance as a tax-saving measure; QTIP options and marital trusts; the pros and cons of these trust options.
3. The expenses allowed by the federal government when computing the federal estate tax include funeral and estate administration expenses, e.g., the fees for the personal representative and the attorney, medical expenses for the last illness, the personal representative's compensation, attorney's fees, court costs, surrogate's fees, accountant's fees, appraiser's fees, storing costs, and other expenses necessary for preserving and distributing the assets of the estate.

The debts or claims allowed are any lifetime debt of the decedent that is allowed by the personal representative or the probate court. The deductions allowed are for taxes that accrued against the decedent while alive; losses sustained during the administration of the estate such as casualty losses and theft; the marital deduction; and charitable deductions.

The credits allowed are the unified estate and gift tax credit; the credit for federal gift taxes on certain transfers the decedent made before January 1, 1977, that are included in the gross estate; the credit for foreign death taxes; the credit for tax on prior transfers.

4. Examples of charitable deductions are transfers for public, charitable, educational, and religious purposes. Students may list any of the examples mentioned in IRC § 2055 as reprinted in the text.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1.
 - a. Stock—Schedule B
 - b. Grave Headstone—Schedule J
 - c. Checking Account—Schedule C
 - d. Land Contract—Schedule A
2. Answers will vary depending on selected stock.
3. Answers will vary depending on student's selections.

CHAPTER 12 INTRODUCTION TO TRUSTS

LEARNING OBJECTIVES

Students should be able to do the following:

- Understand the basic terminology of trusts.
- Identify and define the essential elements of trusts.
- Identify the participants in the creation and operation of a trust and be able to explain their functions and roles.
- Explain the ways in which a trust terminates.

LECTURE OUTLINE

I. Scope of the Chapter

- A. Working in the field of trusts, a paralegal must learn the terminology, identify the various kinds of trusts and understand their functions, and learn how to draft trust agreements.
- B. Only a few states have trust codes; most state law in regard to trusts is a combination of statutes, case law, and the Restatement of Trusts.
- C. Paralegals must know terminology; be able to identify the terms in a trust instrument, know the purposes of trusts, elements of a trust, and the trust property; and know how a trust is terminated.

II. Terminology Related to Trusts

- A. A trust is a property arrangement in which real or personal property is transferred from the settlor to one or more trustees who hold the legal title to the property for the benefit of one or more beneficiaries who hold the equitable title.
- B. The settlor, also called the creator, donor, grantor, or trustor, is the person who creates a trust.
- C. The trustee is the person who holds legal title to property in trust for the benefit of one or more beneficiaries.
 1. The trustee is a fiduciary.
 2. The trustee is required to perform all duties according to the terms of the trust instrument with loyalty, honesty, and in good faith for the sole benefit of the beneficiary.
- D. Legal title is a title, enforceable in a court of law, that is the complete and absolute right of ownership and possession.
- E. The beneficiary or *cestui que* trust is the person who has the enjoyment and benefit of the property. The beneficiary holds equitable title to the trust property.
- F. Equitable title, or beneficial title, refers to the right of the beneficiary to receive the benefits of the trust.
- G. Trust property, also called the trust corpus, trust res, trust fund, trust estate, or subject matter of the trust, is the real or personal property that the trustee holds subject to the right of one or more beneficiaries.
- H. A trust instrument is any written instrument that creates a trust, such as a will, trust agreement, or declaration of trust.
 1. A trust included in a will is called a testamentary trust.
 2. A trust agreement is a written agreement or contract between the settlor and trustee(s) that creates the trust and is signed by them.
 3. A declaration of trust is a document that creates a trust in which the settlor is also the trustee; the document declares the creation of a trust in which the settlor names herself/himself as trustee and retains the legal title but transfers the equitable title to another person as beneficiary. When the property being transferred is real estate, the method of transfer is often a deed of trust or a trust transfer deed.

- I. A revocable living trust is a trust that the settlor has a right or power to revoke or change at any time prior to death.
 - 1. This power must be expressly stated or reserved by the settlor in the trust instrument; otherwise trusts are generally irrevocable.
 - 2. Property held in a revocable living trust becomes a nonprobate asset and is not subject to probate or creditors' claims; however, it is included in the decedent's gross estate and is subject to federal estate tax.
- J. An irrevocable living trust cannot be revoked or changed by the settlor; property in an irrevocable living trust is not subject to probate or federal estate tax.
- K. Principal is the capital or property of a trust as opposed to the income or profits generated by the capital.
- L. Income is the financial gain measured in money that is generated from the principal.
- M. The income beneficiary is the person or charity that is entitled to receive the income produced from trust property.
- N. The Restatement of Trusts is a compilation of existing rules of law affecting trust creation and administration, including illustrations and comments, originally written in 1935 and revised in 1959 as the Restatement (Second) of Trusts, by a group of trust experts working for the American Law Institute. In 1992, another partial revision was completed. In 2003, the Restatement of Trusts (Third) was issued.
- O. In response to the expanding interest in trusts, the National Conference of Commissioners on Uniform State Laws determined that there was a need to develop a code of trust law to govern the creation, administration, and termination of trusts. The Uniform Trust Code was approved in 2000 and updated in 2005 and again in 2010.
 - 1. The Code is based on existing state statutes, judicial decisions, and the Restatement.
 - 2. The Code has been adopted in some substantive form in 25 states and the District of Columbia.
- P. Parol evidence is oral or written evidence.
- Q. The Statute of Frauds is state law that provides that no suit or civil action shall be maintained on certain classes of oral contracts unless the agreement is put in writing and signed by the party to be charged, i.e., the person being sued or an authorized agent of that person.

—**TEACHING SUGGESTION:** The instructor can use the Carter Jackson Durham fact pattern and Exhibit 12.2 to review and illustrate trust terminology with the class. In addition, the instructor will want to review the terms remainder and remainderman as they relate to trusts.

III. The Essential Elements of a Trust

- A. Each trust has the following elements.
 - A settlor who creates the trust
 - One or more trustees who administer and manage the trust
 - One or more beneficiaries who receive the benefits and enforce the trust
 - Real or personal property that must be transferred to the trust
- 1. A trust differs from a sale or gift of property.
 - a. After a sale or gift, the entire legal title passes from seller to buyer or from donor to donee.
 - b. After the creation of a trust, title to property must pass to at least two persons; the title is "split" into legal title held by the trustee and equitable title held by the beneficiary.
 - c. Consideration is a requirement of a sale; it is not a requirement for a trust because a trust is a gratuitous transfer of property.
- 2. Once the trust is created, the settlor is not involved during the life of the trust unless the same person is both settlor and either trustee or beneficiary of the trust.
- B. The settlor must clearly intend to establish a trust.
 - 1. The settlor expressly imposes a duty on the trustee with respect to specific property.
 - 2. No particular words are necessary to create a trust as long as the trust purpose, the property, and the beneficiaries are designated.

3. To be a settlor, a person must own a transferable interest in property, have the right or power to dispose of the property interest, and have the ability to make a valid contract.
 - a. Only those who have contractual capacity can transfer property into a trust.
 - b. If the property transfer is accomplished through duress, fraud, or undue influence, the settlor may avoid or cancel the trust.
 4. At the termination of the trust, the settlor may have the right to the return of the trust property if he/she has retained a reversionary interest.
 5. A settlor may expressly retain the power to revoke or cancel the trust and recover the trust property.
 - a. At first, a settlor may want the trust to be revocable to see how well it works and what changes, if any, are necessary.
 - b. Eventually, the settlor may wish to make it irrevocable, as retention of control over the trust, including the power to revoke, exposes the settlor to tax liability for the trust income. The trust income and principal will be included in the settlor's gross estate and will be subject to estate and inheritance taxes unless the settlor makes the trust irrevocable and retains only limited powers over the trust before death.
 6. The same person cannot be settlor, trustee, and beneficiary, but the same person can be settlor and trustee, or settlor and beneficiary.
 - a. A sole trustee cannot be the sole beneficiary.
 - (1) When legal and equitable title are merged in the same sole individual, the trust ends.
 - (2) A sole beneficiary cannot enforce the trust against himself/herself, if he/she is also the sole trustee.
 - b. Where the sole trustee is one of several beneficiaries, or the sole beneficiary is also one of several trustees, the trust is valid.
- C. The trustee is a fiduciary who owes fiduciary duties to act honestly and loyally for the sole benefit of the beneficiary.
1. The settlor has the right or power to select the trustee, but this right may be given to the beneficiary or another; failure to name a trustee is not fatal to the trust because the court will appoint one.
 2. The trustee is either a natural or a legal person.
 - a. If a trust is to be long lasting, it may be best to select a corporate trustee such as a bank to ensure continued reliable management.
 - b. Banks are often chosen as trustee or as co-trustee because of the experience and expertise of bank trust officers.
 - c. The cost of using corporate trustees is an important consideration.
 - d. Any natural person having the legal capacity to hold, own, and administer property may be a trustee.
 - (1) Minors, intoxicated persons, and mentally incompetent persons take and own property, but they lack the capacity to make a valid contract; therefore, they cannot properly administer a trust because their contracts are voidable.
 - (2) When a trustee lacks capacity, the court will remove the trustee and appoint a new trustee at the request of the beneficiary.
 - e. If there is a question of capacity of the trustee, the equity court will either ratify (confirm) or deny the selection.
 - f. The court will not allow a trust to fail for lack of a trustee; the court has the power and authority to appoint or replace a trustee if
 - no one is nominated as trustee.
 - the trustee dies.
 - the trustee is incompetent.
 - the named trustee declines the position.
 - no successor is named as a replacement in the provisions of the trust.

3. The trustee has the right to renounce or reject the appointment by words or conduct.
 - a. In the absence of a definite rejection or disclaimer, acceptance will be presumed.
 - b. Any positive act such as taking possession of the trust property will confirm the trustee's acceptance.
 - c. The failure of the trustee to do or say anything to indicate acceptance within a reasonable time will be construed as a disclaimer.
 - d. Once disclaimed, a trusteeship cannot thereafter be accepted.
 - e. To eliminate any doubt of acceptance or rejection, the trustee should deliver to the proper person a signed document stating his/her decision.
4. A trustee can be relieved of the duties and office by the settlor, by death, by removal by the equity or probate court, or by resignation.
 - a. Resignation is an exercise of the trustee's discretion and must be accepted by the proper court.
 - b. Removal of the trustee is an exercise of the court's discretion when it believes that the continuation of acts by the trustee would be detrimental to the beneficiary's interests.
 - c. Grounds for removal of a trustee include the following:
 - Lack of capacity
 - Commission of a serious breach of trust
 - Refusal to give bond when bond is required
 - Refusal to account for expenditures, investments, and the like
 - Commission of a crime, particularly one involving dishonesty
 - Long or permanent absence from the state
 - Showing of favoritism to one or more beneficiaries
 - Unreasonable failure to cooperate with the co-trustee if one exists
 - d. Friction between the trustee and beneficiary is not sufficient grounds for removal.
 - e. Unless required by statute, by terms of the trust, or by order of a court, a trustee is not required to take an oath that he/she will faithfully discharge the duties or to secure a certificate of authority from a court.
5. The powers of the trustee are determined by the express authority granted by the terms of the trust instrument and by the statutes in the state in which the trust is established.
 - a. The powers granted by trust document are often broad to give the trustee flexibility to manage and administer the trust property.
 - b. A trustee in the trust instrument holds the power to
 - sell assets, including real estate, and reinvest the proceeds.
 - lease or rent trust property.
 - carry on a business.
 - vote stock and give proxies.
 - lend or borrow money, including pledging or mortgaging trust property.
 - hire attorneys, stockbrokers, accountants, and insurance agents.
 - compromise, settle, contest, or arbitrate claims and disputes.
 - subdivide, exchange, develop, or improve real property.
 - do anything necessary to carry out any of the above.
 - do whatever a legal owner of property can do subject to the required performance of the trustee to act as a fiduciary.
6. Trustees have the duty to manage the property or to exercise discretion or judgment; if the duty is merely to hold property, it is a passive trust that the law declares void.
 - a. A trustee has a duty of performance and due care.
 - (1) The main duty is to carry out the terms and purpose of the trust.
 - (2) The trustee is personally liable for any loss sustained by failure to perform the duties unless the trustee has exercised the degree of care that a reasonable person would exercise under the circumstances.

- (3) The trustee can delegate the performance of some personal duties to others.
 - (4) The trustee has a fiduciary duty to use ordinary and reasonable skill, prudence, and diligence in the administration of the trust and in the performance of trust duties; the law does not hold a trustee who acts in accord with such a rule responsible for errors in judgment.
 - (5) If a trustee has a higher degree of ability or special skills, then that trustee may be held to a higher standard; professional fiduciaries are measured by the standard of skill and prudence of the average, ordinary professional corporate trustee in the community where the trust is created.
 - (6) If a trustee disregards the standard of care, it is not a justifiable excuse that he/she acted in good faith, did not intentionally misuse the trust property, or that he/she was simply following the practices the settlor had always followed when ordinary skill and prudence would dictate another course.
- b. A trustee owes a duty of loyalty.
- (1) The trustee cannot profit personally from the position as trustee other than to receive fair compensation allowed by contract or law.
 - (2) Loyalty to the beneficiaries is one of the most important duties of a trustee.
 - (a) A trustee is obliged to act solely in the best interests of the beneficiary.
 - (b) A disloyal act would include any transaction by the trustee that creates a conflict of interest between the trustee and the beneficiaries or between the beneficiaries and third persons.
 - (c) A conflict of interest is the creation of circumstances by the trustee in the administration of the trust that benefits someone other than the beneficiary.
 - (d) The beneficiaries may elect to disaffirm and avoid such transactions or to treat them as legal and binding when a question of conflict arises.
 - (3) Buying or leasing trust property to himself or herself, or profiting from the sale of his or her own property to the trust as an investment would be an act of disloyalty by a trustee.
 - (a) It does not matter that the trustee acted in good faith or with honest intentions, that the beneficiaries suffered no loss, or that the trustee made no profit from the disloyal transactions.
 - (b) The trustee may be held liable for the amount of gain to himself/herself or a third person, and the court may remove the trustee from the trusteeship.
- c. The trustee has the duty to take possession of and preserve trust property.
- (1) Trust property must be protected from possible loss or damage.
 - (2) Trust property must never be commingled with the trustee's property.
 - (3) Separate fiduciary bank accounts should be opened and identified as a trust account.
 - (4) Title to property held in trust should be taken by the trustee and kept securely in the name of the trust; the paralegal can remind the trustee that all trust property should be clearly distinguished from the trustee's own property.
 - (5) Some acts a trustee may be responsible to perform include placing money in a trust account; filing legal documents such as deeds and mortgages; depositing important legal papers, documents, and valuable personal property in an appropriate place such as a safe deposit box; paying taxes on realty and maintaining the property in reasonable condition to avoid deterioration; transferring shares of stock to the appropriate person's name; maintaining adequate insurance coverage on all appropriate trust property.
- d. The trustee has the duty to invest the trust property.
- (1) The trustee is required to invest the money or property in transactions that will yield an income to the trust.

- (2) Some states establish a list of specific types of investments that may be made.
- (3) Investments must be reviewed at regular intervals and careful records kept.
- e. The trustee has the duty to make payments of income and principal to the beneficiaries.
 - (1) Most trusts have two kinds of beneficiaries: income beneficiaries who receive the net income from trust property for a determined number of years or for the beneficiaries' lives, and remainder beneficiaries, who receive the principal of the trust after the rights of the income beneficiaries are satisfied.
 - (2) If the trust provides for separate disposition of trust income and principal, and if the trust property is cash, it is advisable to open two accounts, one for the principal and one for the interest.
 - (3) If a trust does not specify how to allocate the funds, the Uniform (or Revised Uniform) Principal and Income Act adopted in most states, provides for the method of allocation.
 - (4) The general rule for disbursement is that money paid for the use of the trust property and any benefit from using the property are to be treated as income, while substitutes for the original trust property, such as the proceeds from the sale of the property, are considered trust principal.
 - (5) The general rule when allocating receipts or expenses between income beneficiaries and remaindermen is that ordinary or current receipts and expenses are allocated or assigned to the income beneficiary, whereas extraordinary receipts and expenses are allocated to the remaindermen.

—**TEACHING SUGGESTION:** Students without a business or property background are usually baffled by such discussions. Using Exhibit 12.5 is useful in distinguishing receipts and expenses, ordinary and extraordinary. Care should be taken not to assume that students know what the terms mean that are listed in the exhibit; therefore, a practical explanation should be given for each term.

- f. Trustees have a duty to account.
 - (1) Trustees must keep accurate records to determine whether there has been proper administration.
 - (2) Accounts should be made at reasonable intervals.
- 7. Breach of trust by the trustee may result in legal action against the trustee.
 - a. The beneficiary can bring a civil action to compel the trustee to reimburse the trust for any loss or depreciation in value of the trust property caused by the trustee's breach of the trust.
 - b. The beneficiary can obtain an injunction to compel the trustee to do, or refrain from doing, an act that would constitute a breach of trust.
 - c. The beneficiary can trace and recover trust property that the trustee has wrongfully taken, unless it has been acquired by a purchaser who, believing the trustee has a right to sell, pays an adequate price and purchases the property without having been informed of the breach.
 - d. The beneficiary can request that the court remove the trustee for misconduct and to appoint a successor trustee.
 - e. The beneficiary can sue for specific performance to compel the trustee to perform the duties created by the terms of the trust.
 - f. The beneficiary can sue for breach of loyalty, which is any action by the trustee that upsets the trustee-beneficiary relationship resulting from the failure to administer the trust solely in the interest of the beneficiary.
- 8. Trustees may be compensated for their work.
 - a. The trust may provide a reasonable allowance for the trustee.

- b. If the trust does not, state statutes may fix the amount or the courts will fix a reasonable annual compensation.
 - c. A trustee should not make an unreasonable profit from the trust; therefore, the actual amount of compensation is usually a small percentage of the trust's annual income and principal.
 - d. In a testamentary trust, in determining whether the fee is reasonable, the court considers the size of the estate, the services performed, the time spent, and the results achieved.
 - e. In an *inter vivos* trust, fees are generally negotiated or set by statute.
- D.** Every trust must have a beneficiary.
1. In a private trust, the beneficiaries must either be identified by name, description, designation of the class to which the beneficiaries belong, or the trustee must be able to ascertain the identity of the beneficiary within the period of the Rule Against Perpetuities.
 2. In a charitable trust, it is sufficient that the beneficiaries be members of the public at large or a general class of the public.
 3. If the trust describes the beneficiary too vaguely, the court cannot validate the trust.
 4. Any person, natural or created by law, capable of owning property may be a beneficiary, but incompetents and minors generally require guardians to act as beneficiaries for them.
 5. Beneficiaries do not need to have capacity to hold property or to make a contract, because the trustee has legal title to and control of the property.
 6. Beneficiaries must be definite but not necessarily named individually; they may be described by class designation.
 7. The description of the class of beneficiaries cannot be vague, broad, or have varied application.
 8. Beneficiaries do not have to be persons or institutions; they can be pets.
 9. The length of time the beneficiary holds equitable interest may be limited to a period of years, to the life of the beneficiary or that of someone else, to a condition precedent, to a condition subsequent, or to the nonoccurrence of a specified event.
 - a. A beneficiary's equitable interest in realty usually passes on his/her death to the beneficiary's heirs or devisees; personal property passes to the beneficiary's personal representative.
 - b. The trust may provide that the beneficiary's interest terminates on death.
 10. Multiple beneficiaries usually hold property as tenants in common; however, if co-beneficiaries are joint tenants or tenants by the entireties, the doctrine of survivorship applies.
 11. A beneficiary can transfer the interest in trust property by mortgage or devise, in the absence of any restriction imposed by statute or by the terms of the trust.
 - a. Some states require that all transfers be in writing and signed by the beneficiary; others only require the writing to transfer realty.
 - b. Unless prohibited by statute or by the trust, beneficiaries may transfer their interest by an assignment.
 12. Creditors may attach the beneficiary's interest unless statutes or trust provisions exempt the interest from creditors' claims; a trust restricting creditor's rights to reach and the beneficiary's right to assign interest in the trust is called a spendthrift trust.
- E.** Trust property can be any transferable interest in an object of ownership, real or personal property.
1. A trust involving personal property only may be created orally, but a settlor transferring title to real property must comply with the state Statute of Frauds.
 2. The trust instrument, especially for realty, must include the purpose of the trust; the length of time it will last; a description and conveyance of the property; the names of the trustee and beneficiary; and the powers, duties, and rights of the parties.

3. Realty must be transferred by specific legal documents such as a deed or a will; personal property may be delivered to the trustee.
4. Trust property must be in existence and owned by the settlor if a court is to enforce a trust.
5. A testamentary trust created in the residue is valid, even though the exact amount cannot be determined immediately, because the facts needed to identify the amount of the residue exist on the date the trust is created, i.e., the date of the testator's death.
6. The fact that trust property may change during the trust period does not make the trust void.

IV. Termination of Trusts

- A. A trust may be terminated in the following ways.
 - In accordance with its terms
 - By the completion of the trust's valid purpose
 - By revocation by the settlor when allowed by the terms of the trust
 - By merger of legal and equitable interests in the same person
 - On the request of all the beneficiaries when there is no express purpose that requires continuation of the trust
- B. When a trust does terminate, the trustee must account for all assets and obtain a receipt and release from the recipients.

ANSWERS TO THE REVIEW QUESTIONS

1. What is meant by the statement "The most unique feature of a trust is that a trust splits title to property?" Explain.
Students should explain that for a valid trust to exist, title to the property held in trust is "split," with legal title being held by the trustee and equitable title being held by the beneficiary.
2. In trust law, what is the difference between legal and equitable title?
Legal title is a title, enforceable in court, that is the complete and absolute right of ownership and possession. The trustee holds legal title without the benefits of the trust.
Equitable title, or beneficial title, refers to the right of the beneficiary to receive the benefits of the trust. The beneficiary is regarded as the real owner, although the legal title is held by another, the trustee.
3. In what ways can a trust be created?
A trust can be created orally, if personal property and in accord with the Statute of Frauds, or in writing by a testamentary trust in a will; a trust agreement in writing between the settlor and trustee that creates the trust and is signed by them; or by a declaration of trust, which is a document that creates a trust in which the settlor is also the trustee. When the property transferred is real property, the method of transfer is often a deed of trust or a trust transfer deed.
4. What are the essential elements of a valid trust?
Each trust has the following elements: (1) a settlor who must intend to create the trust; (2) one or more trustees who must be named to administer and manage the trust; (3) one or more beneficiaries who must be named to receive the benefits and enforce the trust; and (4) real or personal property that must be transferred to the trust. It is also required that the title to the property be split into legal title held by the trustee and equitable title held by the beneficiary.
5. What are the qualifications required for a person to become a settlor, the creator of a trust?
To be a settlor, a person must own a transferable interest in property, have the right or power of disposing of a property interest, and have the ability to make a valid contract.
6. Why would a settlor create a revocable trust, and what are the advantages of making the trust irrevocable?
While alive, the settlor must expressly retain the power to revoke or cancel the trust. There are many reasons why a settlor would create a revocable trust. First, the settlor may do it to retain control over

the terms of the trust. Another is that the settlor may want it revocable to see how well it works and what changes, if any, are necessary before the trust is made irrevocable.

The advantages of making the trust irrevocable are that the trust income and principal are excluded from the settlor's gross estate and it is not subject to estate and inheritance taxes.

7. What are the standard powers and duties of a trustee who, like a personal representative, is a fiduciary? The powers of the trustee are determined by the express authority granted by the trust instrument and/or by the statutes in the state in which the trust is established. A trustee in the trust instrument holds the power to

- sell assets, including real estate, and reinvest the proceeds.
- lease or rent trust property.
- carry on a business.
- vote stock and give proxies.
- lend or borrow money, including pledging or mortgaging trust property.
- hire attorneys, stockbrokers, accountants, and insurance agents.
- compromise, settle, contest, or arbitrate claims and disputes.
- subdivide, exchange, develop, or improve real property.
- do anything necessary to carry out any of the above.
- do whatever a legal owner of property can do subject to the required performance of the trustee to act as a fiduciary.

A trustee has a duty

- of performance and due care.
- of loyalty to the beneficiaries of the trust.
- to take possession of and preserve trust property.
- to invest the trust property.
- to make payments of income and principal to the named beneficiaries.
- to account.

8. What are the beneficiary's rights for breach of trust by a trustee? Explain.

The beneficiary can maintain a civil lawsuit to compel the trustee to reimburse the trust for any loss or depreciation in value caused by the breach of trust.

The beneficiary can obtain an injunction to compel the trustee to do, or refrain from doing, an act that would constitute a breach of trust. The beneficiary can trace and recover the trust property that the trustee has wrongfully taken, unless the property has been acquired by a purchaser who, believing the trustee has a right to sell, pays an adequate price and purchases the property without having been informed of the breach of trust. The beneficiary can request the court to remove the trustee for misconduct and to appoint a successor trustee. The beneficiary can sue for specific performance to compel the trustee to perform the duties created by the terms of the trust. The beneficiary can sue for breach of the trustee's loyalty for failure of the trustee to administer the trust solely in the interest of the beneficiary.

9. Must a person have contractual capacity to be a beneficiary of a trust? Explain.

No, beneficiaries do not need to have capacity to hold property or to make a contract, since the trustee has legal title to and control of the trust property. In fact, many trusts are created specifically because the beneficiary lacks legal or actual capacity to manage property without assistance. However, incompetents and minors generally require guardians to act as beneficiaries for them.

10. May a settlor be the sole trustee and sole beneficiary of a trust? Explain.

No, a settlor may not be the sole trustee and sole beneficiary of a trust because such a relationship would cause the legal and equitable title in the trust property to merge, thereby invalidating the trust. To be valid, legal title and equitable title to the trust property must be held separately. Therefore, if the same person holds title, this requirement of a trust is not met. However, a settlor may be the sole trustee and one of several beneficiaries or a co-trustee and the sole beneficiary.

11. Does a trust always have to be in writing? Explain.

A trust involving the transfer of personal property only may be created orally, as long as it complies with the Statute of Frauds. A trust involving the transfer of real property must be in writing according to the Statute of Frauds.

12. Are there any limits on the kind of property that can be placed in trust? Explain.

As long as the interest in the property is transferable, the property may be trust property. This includes ownership of real or personal property. Nontransferable property interests may not be the subject matter of a trust.

13. How are trusts terminated?

- A trust may be terminated in the following ways.
- In accordance with its terms
- By the completion of the trust's valid purpose
- By revocation by the settlor when allowed by the terms of the trust
- By merger of all interests, legal and equitable, in the same person
- On the request of all the beneficiaries when there is no express purpose that requires continuation of the trust

ANSWERS TO THE CASE PROBLEMS

Problem 1

- A.** There are many reasons why Suki's letter is not a valid holographic will. These reasons include the following:
- The letter was not signed.
 - The letter was a request for a response from Tomura, not a definite testamentary disposition.
 - There is question as to whether the letter was intended to be a testamentary disposition.
 - In some states, even holographic wills must be witnessed.
- B.** The use of the words *trust* or *trustee* is not necessary to create a valid trust. These words are helpful but not mandatory. As long as the essential elements of the trust are present, a trust is created.
- C.** The simple answer is, it depends. If Suki's letter was clear enough in stating her intent to establish a trust and the trust purpose, the property, and the beneficiaries are designated, a valid *inter vivos* trust might have been created. The court would look carefully at all the circumstances in making a determination. The trust res is the \$200,000. The beneficiaries and, arguably, the purpose of the trust are identified. The identity and duties of the trustee, while broad, are stated. Much would depend on the law of the particular jurisdiction.
- D.** If a trust exists, it would be an *inter vivos* private trust. If Suki did not expressly reserve the right to revoke the trust in the letter, then the trust is irrevocable.

Problem 2

- A.** Mere friction between the trustee and the beneficiary is not sufficient grounds for removal; however, showing favoritism to one beneficiary over another is grounds for removal. Because of the broad discretion Ricardo has in distributing the trust income, a court might not find that his favoritism was outside of his discretion as trustee. However, because Maria is the widow, and Yolanda is "only" the sister of the settlor, the court may be swayed that the favoritism is unreasonable, and a breach of the loyalty owed to Maria.
- B.** The answer will vary depending on the student. The instructor should review the student's response to determine if it has been critically analyzed, both sides of the issue examined, and based on appropriate material. Some issues to be discussed are conflict of interest, duty of loyalty owed by a fiduciary, and grounds for removal of a trustee.
- C.** The instructor should determine whether the students have correctly read and compared the cited cases. The students should list any reasons mentioned in the cases as circumstances that a court should consider before deciding a request for removal of a trustee based on hostility between the

trustee and a beneficiary. Some things to consider are the intent of the trustee, the reasons for the hostility, the best interest of the beneficiary, whether the hostility interferes with the trustee's ability to perform the required duties, and whether the hostility adversely affects the administration of the trust. Students may think of additional circumstances to consider. It is important that students realize that hostility can be present, yet not be grounds for removal of a trustee.

ANSWERS TO THE ASSIGNMENTS

Assignment 12.1

1. Garrett Patrick's children, Cece's grandnieces and grandnephews, are the *cestui que* trust or beneficiaries.
2. Income is the gain measured in money that is generated from the principal and the appreciation and/or investment thereof. In this case, the income would be the monthly rent and any appreciation of the value of the property that will vest at the termination of the trust.
The principal is the capital or property of the trust. In this case, the principal is the four-unit apartment building.
3. Cece Schrader is the settlor. Settlers are also referred to as creators, donors, grantors, or trustors.
4. Garrett Patrick is the trustee. His function is to hold the property and manage it for the benefit of the beneficiaries. In this case, he may have to collect rents, maintain the building, pay any expenses such as insurance, taxes, maintenance and repair costs, and any other tasks necessary to deal with the property. Any other specific functions would be mentioned in the trust.

Assignment 12.2

1. The settlor is Ruby, the beneficiary is Kirby, the trustee is Candy, and the trust corpus is the \$30,000 in cash.
2. A trust differs from a sale or gift in a variety of ways. After a sale or gift, the entire legal title to the property passes from seller to buyer or from donor to donee. But after the creation of a trust, title to the property must pass to at least two persons as the title is split into legal and equitable title. The trustee receives legal title and the beneficiary receives equitable title. With a sale of property, consideration or payment to the settlor based on the reasonable value is required. Because a trust is a gratuitous transfer of property, consideration is not necessary.

Assignment 12.3

1. To determine if Stacy Robertson is violating his duty of reasonable care, the student must discuss whether he was carrying out the terms of the trust; whether his actions were allowed by the terms of the trust as a performance of a personal duty that he could not delegate; and whether he acted in good faith and used ordinary, reasonable skill, prudence, and diligence in the administration of the trust. Stacy would not be responsible for an error of judgment unless he did not use the care and skill of an ordinary capable person. However, Stacy cannot defend against liability by asserting that he acted in good faith or did not intentionally misuse the trust property, or that he was simply following the practices that the settlor had always followed if ordinary skill and prudence would have dictated otherwise. It might be argued that buying the birthday present for Beatrice, the settlor's invalid mother, was for her "benefit."
2. Whether Stacy violated his duty of reasonable care in following the advice of an executive where he works depends on whether that person on whom Stacy relied had any special expertise in investments. What were the skills of the executive and was Stacy reasonable in relying on his advice? Stacy would not be responsible for every error in judgment, but he must use the care and skill of an ordinary capable person who is charged with preserving the trust.

Assignment 12.4

1. This is disloyal in that it creates a conflict of interest, even though Judith paid fair market value for the display case. It does not matter that Judith acted in good faith or with honest intentions, or that the beneficiaries suffered no loss. The actions of Judith are not automatically void if the beneficiaries elect

to affirm the transaction treating it as legal and binding. Additional facts to know would be whether the property guardian of Reynold and Richard knew of the transaction and affirmed it on behalf of the minors. It would also help to know the circumstances surrounding the sale. For example, was the bakery trying to sell the case for a long time with no potential buyers; what benefit was gained by the bakery and by Judith from the sale/purchase of the case? Students may list other facts also.

2. This is a disloyal act even though Judith did not seem to be the one to benefit directly. Again, even though the act was disloyal, it is not automatically void. Some facts that may be helpful to know are the circumstances surrounding the sale. For example, was the property withheld to get a higher price than what it would have sold for had the friend not been the purchaser? Also, what would the ramifications have been to the trust by the delay? Was the property associated with the trust or only with the estate? Students may list other facts that they wish to know also. This may be a case of disloyalty of Colin also.
3. This is a disloyal act. It seems as though the only basis for the agreement is Judith's friendship with the Hanrahans. Unlike the situations above, there does not seem to be any benefit, real or potential, to the trust from this arrangement. This arrangement harms the trust as it wastes the assets of the trust by having the bakery pay more than what would be required. One question would be whether there is any benefit to the trust by having a relationship with the Hanrahans. Are there other supplies that can provide the bakery at a lower cost?

Assignment 12.5

1. This is a violation of the duty to preserve and protect the trust property. The funds were not given to a professional to invest. Arguably, a reasonably prudent businesswoman would not act in the manner described. Additional facts that would be helpful to know might be what the friend's "track record" has been with investing, how much money was involved, what interest rate the bank account was giving, what the "track record" of the losing investments had been prior to the losses, and whether the reasons for the losses were foreseeable.
2. It does not matter that the friend's advice was lucky. The question is whether a reasonably prudent businesswoman acted in such a way to preserve and protect the trust property. The fact that the investments were lucky does not make the decision "reasonable." This was still a violation of the duty owed.
3. Neglecting to repair the staircase could be a breach of her duty as fiduciary, depending on the circumstances. The facts would be very important for this case. Following are some questions to ask in order to determine whether this was a breach of duty.
Was the defect one that a nonexpert could observe or was it a hidden defect? How did Lin handle maintenance of the building? Were there any previous complaints about the staircase? Would a reasonably prudent businesswoman have reason to believe that the staircase was defective? The students may have many more facts that they wish to know.

Assignment 12.6

1. Students should examine whether the sale of the business will violate the duty to invest in a way that will yield an income to the trust. If the trust allows the sale of the business and the business was, in fact, not profitable, there may be no violation in this case. Questions should be asked as to the terms of the trust, whether Katarina has the authority to execute the sale, and whether such a sale was reasonable under the circumstances.
2. Katarina has the duty to use ordinary and reasonable skill, prudence, and diligence in performing her trust duties. The question is whether Katarina, an accountant, acted as a reasonably prudent accountant in making the investment. There is a possibility that she will be held to a higher standard. Whether this is a violation may depend on what the interest rates of the other debentures were, were all the conditions equal or equivalent, were there tax advantages to one or the other kind, was the investment a more secure or conservative investment, and what were the relative risks of the various investments.

3. Again, Katarina's conduct will be measured by what was reasonably prudent for someone of her skill and knowledge. It would appear that this is a violation of her duty to properly invest the money. Questions need to be answered as to how long the money had been kept in the safe, had Katarina been unreasonable in the delay, were there unusual requests and details that had to be dealt with, had the executor of the estate been appointed, had the will with the testamentary trust been admitted to probate giving Katarina the power to act, what time was involved, and how much money was lost by the failure to deposit the money.

Assignment 12.7

In answering this question, students should focus on the requirements of the terms of the trust to pay out at least annually. It appears that she has the ability to withhold from the quarterly payment if she eventually pays out the money annually. Much will depend on whether she was reasonable in her belief that there would be emergency expenses. Also, one would have to examine whether Fionna's conduct was dealing with the beneficiaries impartially and whether she, as remainderman, would benefit from the withholding of the income distribution. It would be a good idea to segregate the money withheld in a separate account to avoid any question of whether all the income was distributed at least annually.

Assignment 12.8

These questions call for the students to express their own opinions. The instructor should read the answers to determine whether the students have provided valid reasons on which they based their opinions. Critical thinking is important for these responses.

Assignment 12.9

1. There are various duties that might have been violated depending on the circumstances; however, the most obvious is the duty of loyalty because Alexei Burov is an employee of the firm.
2. This would definitely be a violation of the duty of loyalty, but, also, the commingling would be a violation of the duty to take possession of and preserve the trust property and the duty to invest.
3. Under usual circumstances, just because a beneficiary is unhappy with the handling of the trust property, the trustee is under no obligation to comply with the beneficiary's demands. The duty of the trustee is to manage the property in accordance with the directives of the trust. If Lena complied with the beneficiary's demands for no good reason other than to appease the beneficiary, this could be a violation of her duty of performance and due care, her duty to take possession of and preserve trust property, and her duty to invest the trust property. However, if the beneficiary was dissatisfied with Lena's handling of the trust property due to mishandling or violations of a duty of loyalty and the like, the beneficiary would have the right to complain to the probate court and petition for removal of Lena as trustee. However, unless Lena violated the reasonableness test, it would be inappropriate for her to transfer the property just because the beneficiary demanded it.

Assignment 12.10

1. This question calls for the student to discuss whether the class designation in the trust was "definite" because it included a beneficiary that the settlor did not know because she was born after the settlor died. The students should point out that a beneficiary does not have to be described by name and that frequently, the settlor leaves a class gift to provide for after born members of the class. This trust would probably not fail unless there is evidence of a different intent by the settlor or unless it violates the Rule Against Perpetuities, which it does not seem to do.
2. No, the trustee is not correct. Any person who is capable of owning property may be a beneficiary in a trust. In general, trusts in which aliens are beneficiaries have been upheld by law. In fact, even foreign countries can be named as beneficiaries.

Assignment 12.11

The answer will vary depending on the student; however, the instructor should determine whether the student discussed the following: whether trust property has been identified and transferred to the trustee to hold for the benefit of the beneficiary; whether the property transferred was, in fact, a transferable

interest; whether the Statute of Frauds required the trust to be in writing; whether the terms of the trust include the purpose of the trust, the length of time the trust will last (Rule Against Perpetuities), and a description and conveyance of the trust property; whether the names of the trustee and beneficiary are included; whether the powers, duties, and rights of the parties, including how much the beneficiaries are to receive and when they are to receive it are stated.

Assignment 12.12

This question calls for a discussion of the application of the Statute of Frauds. Whether this transaction violates the Statute of Frauds or other statutes will depend on the specific jurisdiction; however, most Statutes of Frauds require a written trust signed by the party to be charged whenever real property is involved. Norman, as beneficiary, is not the party to be charged; therefore, he does not have to sign the trust. The fact that Norman did not know of the trust when it was drawn has no effect on the validity of the trust. It appears as though Norman is correct and the trust is valid.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. The student should complete Form SS-4 to establish an Employee Identification Number. In addition to identifying information for the decedent, the student should identify the Type of Entity as an estate.
2. Sample clause:

TERMINATION OF TRUST

This trust shall terminate when there are no living children of mine under the age of 25. Upon termination, the Trustee shall distribute the trust principal and accumulated income in equal shares to be determined without regard to any non-pro rata distributions of income or principal that may have been made during the term of the trust.

3. The answer will vary with student information.

CHAPTER 13 CLASSIFICATION OF TRUSTS, THE LIVING TRUST, AND OTHER SPECIAL TRUSTS

LEARNING OBJECTIVES

Students should be able to do the following:

- Identify and define the classes of trusts.
- Explain the uses and functions of the various kinds of trusts.
- Explain the formation, use, advantages, and disadvantages of revocable and irrevocable living trusts.
- Identify and explain the function of Totten, spendthrift, and sprinkling trusts and a pour-over will.
- Prepare preliminary drafts of private express trusts, including living trusts.
- Avoid common errors in the initial drafts of living trusts.
- Explain the pre-death and post-death administration of the revocable living trust.

LECTURE OUTLINE

I. Scope of the Chapter

- A. Various kinds of trusts, including living trusts, are identified and discussed.
- B. The classification of trusts and an examination of a private express trust lead to a detailed discussion of the living trust.
- C. The steps necessary for drafting trusts, including the accumulation of data through appropriate checklists, are outlined.

II. Classification of Trusts

- A. All trusts are either express or implied.
 1. An express trust is created or declared in explicit terms for specific purposes and is represented by a written document or an oral declaration.
 - a. Express trusts fall into the following subcategories.
 - (1) Private or public (charitable) trusts
 - (2) Active or passive trusts
 - (3) *Inter vivos* or living trusts
 - b. The most common types of express trusts are testamentary and living trusts.
 2. Implied trusts are created not by the settlor's express terms but by the presumed intent of the settlor or by a decree of the court.
- B. Express Trusts—Private versus Public (Charitable)
 1. A private trust is created expressly either orally or in writing between a settlor and a trustee(s) who holds legal title to property for the financial benefit of a beneficiary.
 - a. It is one of the most common types of trusts.
 - b. The essential elements of an express private trust are as follows.
 - (1) The settlor must intend to create a private trust.
 - (2) A trustee must be named to administer the trust.
 - (3) A beneficiary must be named to enforce the trust.
 - (4) The settlor must transfer sufficiently identified property to the trust.
 2. A public or charitable trust is an express trust established for the purpose of accomplishing social benefit for the public or the community.
 - a. The beneficiary does not always have to be the general public.
 - b. The trust must be designated either for the benefit of the general public or a reasonably large, indefinite class of persons within the public who may be personally unknown to the settlor.
 - c. In the majority of states, the true test for creation of a valid public trust is not the indefiniteness of the persons aided by the trust but rather the amount of social benefit that accrues to the public.

- d. The purpose of the charitable trust must not include profit-making by the settlor, trustee, or other persons.
 - e. The essential elements of an express public or charitable trust are as follows.
 - The settlor must intend to create a public trust.
 - A trustee must be named to administer the trust.
 - Property must be transferred to the trust.
 - A charitable purpose must be expressly designated.
 - The general public must be benefited.
 - An indefinite class of persons must be named beneficiaries.
 3. The doctrine of *cy-pres* means that where a testator or settlor makes a gift to charity or for a charitable purpose and it subsequently becomes impossible or impractical to apply the gift to that particular charity, the court may order the gift applied to another charity “as near as possible” to the one designated by the settlor, and no contrary intent by the settlor is apparent.
 - a. The doctrine is only applied to public charitable trusts.
 - b. The rationale is to continue the operation of charitable trusts so as not to terminate public benefits.
 - c. For the doctrine to apply, the settlor’s intent must be broad and general and not restricted to one specific objective or to one particular method of accomplishing the purpose of the trust.
- C. Express Trusts—Active versus Passive**
1. The features that distinguish active trusts from passive trusts are the obligations of management and administration that active trusts impose on the trustee.
 - a. Express trusts are active trusts.
 - b. Implied trusts are passive trusts.
 2. An express private active trust must give oral or written affirmative powers and duties to a trustee to perform discretionary acts of management or administration for the benefit of named beneficiaries.
 3. For a passive trust, the trustee has no responsibilities or discretionary duties to perform.
 - a. The mere holding of the trust property for the beneficiary with no obligations or powers to administer the trust indicates that the trust is passive.
 - b. Passive trusts result from the failure of the settlor to create an active trust, either accidentally or deliberately.
- D. Express Trusts—*Inter Vivos* (Living) versus Testamentary**
1. The most common types of express trusts are living trusts and testamentary trusts.
 2. The criterion for whether a trust is living or testamentary will be the time the trust became effective.
 3. Both types of trusts are often used to conserve property for the benefit of a surviving spouse and children or for the children of a single parent.
 4. An *inter vivos* trust allows the settlor to see how well the trust operates while he/she is still alive.
 5. Testamentary trusts are probated; living trusts are not probated.
- E. Rule Against Perpetuities**
1. The rule places a term (time limitation) on how long a private, noncharitable trust may exist.
 2. An interest in property must take effect no later than 21 years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest.
 3. Charitable trusts have an unlimited duration.
- F. Implied Trusts—Resulting and Constructive**
1. Implied trusts are passive trusts imposed on property by the courts when trust intent is lacking.

2. Implied trusts are created by operation of law.
3. Resulting trusts are created because of inferred or presumed intent of a property owner, generally in three types of situations.
 - a. The purchase-money resulting trust. When one person's money has paid for land or personal property, but the legal title is conveyed to another person, the law presumes that a purchase-money resulting trust has been created for the benefit of the person who paid the money.
 - (1) The person who paid the money received equitable title to the property.
 - (2) The person to whom the property was conveyed is considered the trustee.
 - (3) Since it is created by implication and operation of law, a purchase-money resulting trust need not be evidenced by writing.
 - (4) The evidence must be clear and convincing for the court to establish a resulting trust, and the burden of proof rests on the party seeking to establish the resulting trust.
 - (5) The court allows parol evidence to be used in these cases.
 - (6) The grounds for the court's presuming a purchase-money resulting trust are that a person who furnishes consideration for a conveyance to another probably does so for reasons other than gift giving.
 - (7) Several states have abolished or modified purchase-money resulting trusts.
 - b. The failed trust. When a settlor creates an express private trust gratuitously and the trust fails or is declared void for any reason except that it has an illegal objective, a resulting trust arises for the benefit of the settlor or his/her successors.
 - (1) If the private express trust was created for an illegal purpose, then the court generally does not decree a resulting trust but instead declares the trust void.
 - (2) When a charitable trust fails and the court cannot apply the *cy-pres* doctrine, the property is held by the trustee for the benefit of the original settlor or the settlor's successors in a resulting trust.
 - c. The excessive endowment trust. When the property of a private express trust exceeds what is needed for the purpose intended by the settlor, or some part of the trust property remains after the trust has ended, the court may establish a resulting trust for the benefit of the settlor or his/her successors.
4. A constructive trust is a creation of the court and is established for the purpose of rectifying a serious wrong such as fraud, duress, unconscionable conduct, or preventing unjust enrichment of the wrongdoer.
 - a. When someone acquires title by unlawful or unfair means or by breach of duty as trustee, the court will construct a trust for the benefit of the person rightfully entitled to the property.
 - (1) The wrongdoer holds the property as a constructive trustee.
 - (2) The constructive trustee has no administrative duty other than the obligation to transfer the title and possession to the proper person.

—**TEACHING SUGGESTION:** Review the major types of trusts to ensure student comprehension (Exhibit 13.2).

G. Miscellaneous Trusts

1. A spendthrift trust is created to provide a fund for the maintenance of a beneficiary while safeguarding the fund against the beneficiary's own extravagance or inexperience in spending money.
 - a. Only a certain portion of the total amount of the funds is given to the spendthrift beneficiary at any one time.
 - b. The trust provides that the beneficiary cannot assign to anyone the right to receive future payments of income or principal from the trust.

- c. The settlor declares that creditors of the spendthrift cannot reach the trust benefits by obtaining a court order awarding them to the creditors.
 - d. The protection of the spendthrift trust ends once the beneficiary actually receives the distribution of the trust income.
 - e. Some states allow creditors to reach the beneficiary's interest despite the spendthrift clause if they have supplied "necessities" to the beneficiary.
2. A Totten trust, also called a payable- or pay-on-death (POD) account, is a savings account in which money is deposited in the depositor's name as trustee for another person named as beneficiary.
 - a. Such deposits permit the depositor-trustee to withdraw money while alive and allow any remaining balance to be transferred to the beneficiary after the depositor's death.
 - b. If the beneficiary dies before the depositor, the trust terminates, and the money belongs to the depositor, not the beneficiary's estate.
 - c. Some courts hold that the depositor may revoke the trust by withdrawing the entire fund or changing the form of the account.
 - d. The requirements for the creation and distribution of funds in such trusts vary from state to state.
 - e. The money in a Totten trust is a nonprobate asset.
 3. A sprinkling trust gives the trustee the authority and power to accumulate or distribute the income of the trust or the principal, or both, among the beneficiaries in varying amounts.
 - a. Advantages to a sprinkling trust are as follows.
 - The trustee has the opportunity to change distributions to meet the needs of the beneficiaries.
 - The trust funds are more difficult for creditors of the beneficiaries to reach since the trustee alone decides how much to give each beneficiary.
 - Such trusts may help to reduce estate taxes.
 - b. A disadvantage is that if the trust is intended to qualify for the marital deduction on the decedent's estate tax return, the surviving spouse must receive all the income during the spouse's lifetime.
 - c. The settlor must select a trustee known to be reliable, experienced, and reasonable.

III. The Purposes of Trusts

- A. A trust can be created for any lawful purpose, but it must not contravene common or statutory law.
 1. Most trusts are to distribute the income from the trust property and/or to preserve the trust property for later distribution on termination of the trust.
 2. A trust is a practical way to manage and transfer property in the best interests of a beneficiary.
- B. Advantages of trusts are numerous and the settlor can provide the following:
 - Funds for the support of dependent family members
 - Funds for the college education of children
 - Professional financial management for those inexperienced in handling large sums of money, which relieves a spouse or children from this responsibility and spares a settlor the burden of property management
 - A method to avoid probate
 - A public, charitable trust
- C. There are some legal restrictions on purposes of trusts.
 1. There are restrictions on purposes contrary to public policy, such as imposing total restraint on marriage or attempting to encourage divorce.
 2. Some restrictions are statutory and generally framed, requiring judicial interpretation, while others contain further restrictions, usually in the area of real property trusts.

3. Some restrictions are imposed on private noncharitable trusts by the Rule Against Perpetuities, which prohibits indefinite accumulations of wealth or property.
4. A valid trust cannot be formed if it is based on an illegal contract or agreement.
5. A trust cannot violate public policy such as imposing total restraint of marriage, of having children or a normal family life; cannot restrain one from communicating or having social relations with other family members; and cannot induce the beneficiary to change his/her religious faith.
6. Courts have upheld trusts containing “reasonable restraints” that provide that the beneficiary will lose his/her interest if he/she
 - marries a particular person.
 - marries before reaching majority.
 - marries before reaching majority without the consent of the trustee (or someone else).
 - marries a person of a particular religious faith.
 - marries a person of a faith different from that of the beneficiary.

IV. Informal and Incomplete Creation of a Trust

- A. Some of the major mistakes made in an improperly drafted trust instrument are as follows.
 - A testator-settlor, in a hand-drawn will, indicates that he/she wants certain testamentary trust objectives accomplished but expresses this using precatory words such as *hope*, *desire*, *request*, or *wish* rather than expressing it as a mandate.
 - The trust document does not sufficiently identify the beneficiary or fails to name a beneficiary.
 - The trust instrument fails to name a trustee or fails to name a successor when the named trustee does not want to serve.
 - The document names the trustee and describes the beneficiaries but does not specify the duties of the trustee.
 - Although the trust instrument purports to be transferring legal title, the trust terms are not specified, or they have only been implied in an informal oral agreement.
- B. To create an express trust, the court must be satisfied that the settlor manifested an intention to impose enforceable duties on the trustee to manage the property for the benefit of others.
 1. When precatory words are used to devise property, the court must determine whether the settlor intended it as an absolute gift or as a trust.
 2. Some courts hold that the use of precatory words does not create a trust and that the intent to create a trust must be proven by other sections of the trust instrument or by extrinsic circumstances. Other courts hold that precatory words create a precatory trust and allow the trust to be performed.
 3. When drafting wills and trusts, it is best to avoid these precatory words.
- C. When the trust fails to name a beneficiary, a few cases give the trustee absolute ownership, but the general rule is that a “resulting trust” arises in favor of the decedent’s estate if the instrument was testamentary; if a living trust is created and it fails to name a beneficiary, the attempt to create a trust fails.
- D. A valid trust will not fail for want of a trustee or successor trustee.
 1. Lack of a trustee may occur as follows.
 - If the settlor does not name a trustee in the trust instrument or fails to name a successor trustee to resolve the problem of the original trustee’s death, resignation, or nonacceptance
 - If the named trustee does not qualify or is refused confirmation of the office by the court because of incompetence
 - If the named trustee does not have legal capacity to hold property in trust
 - If the named trustee is removed or resigns after the effective date of the trust
 2. The courts will preserve trusts and appoint a new trustee as long as the trust is otherwise valid.

3. Where a trustee is needed to execute and manage a trust, state statutes authorize the court to appoint one.
 - a. An original trustee, where the trust document or will creating the trust has not nominated a trustee or the nominee is unable or unwilling to serve
 - b. A successor trustee, when the original trustee has ceased to act and a replacement is required to finish the administration of the trust
4. The trust will only fail if it can be shown that the settlor intended that only the named person and no one else could be the trustee.
5. Co-trustees generally hold title to trust property as joint tenants with the right of survivorship even in those few states that prohibit joint tenancies.

V. Living (*Inter Vivos*) Trusts

- A. A living trust is created by a settlor and operates during the settlor's lifetime.
 1. The trust property is a nonprobate asset; therefore, it is not part of the decedent's probate estate and is not under the jurisdiction of the probate court.
 2. A living trust can be created in two ways.
 - a. A declaration of trust in which the settlor retains the legal title to the trust property and is, therefore, also the trustee and, thereafter, names another person to be the beneficiary. It must be signed by the settlor and at least two witnesses or notarized.

—**TEACHING SUGGESTION:** Have students open their textbooks to Exhibit 13.3, a sample declaration of trust, and go through it in class. Familiarize students with the important sections of the document.
 - b. In a trust agreement, the settlor transfers legal title to another party, the trustee, who manages the property for the beneficiary who holds the equitable title and receives the benefits of the trust.

—**TEACHING SUGGESTION:** Use Exhibit 12.2, The Durham Trust, to review a trust agreement. Review the important sections in the trust. Point out differences between the declaration of trust and the trust agreement.
- B. In a revocable trust, the settlor reserves the right to amend, revoke, or cancel the trust while living.
 1. Upon the death of the settlor, the living trust becomes irrevocable and the trust property is disposed of according to the terms of the trust.
 2. Since revocable trusts avoid the need for and cost of probate, they are commonly used in estate planning.
 3. Only an irrevocable trust offers the tax benefit of reducing estate taxes.
 4. Many people use a revocable living trust as a substitute for a will because it allows them to transfer their entire estate to the trust, manage and control the trust, receive the income from the trust during their lifetime, distribute the trust property to the named beneficiaries after they die, and avoid the often substantial costs and delays of probate.
 5. Generally, the settlor will name himself/herself trustee, or, if married, the settlor and spouse will act as co-trustees, which grants either spouse the legal authority to act as trustee.
 - a. If one spouse becomes disabled or dies, the other automatically has control of the trust if he/she has been named co-trustee.
 - b. As trustee, the settlor retains complete control of the property and avoids paying management fees.
 6. If the settlor appoints someone else trustee, the trust agreement usually provides that the trustee is to manage and invest the trust property for the benefit of the settlor-beneficiary for life, and pay to the settlor-beneficiary all the income and as much of the principal of the trust as the trustee determines to be required for the settlor's care.
- C. If a revocable living trust is to act as a will substitute, all assets owned by the settlor or in which he/she has or acquires an interest must be transferred to the trust.
 1. Title to real property is changed to the trustee by quitclaim deed or a deed of trust that changes the title from the owner to the trustee; it is a change of title, not a transfer of title.

2. Title to personal property, including checking and savings accounts, stocks, bonds, certificates of deposit, mutual funds, cars, boats, and any other titled property, must be changed to the name of the trustee.
 3. Untitled personal property can be transferred into a trust more easily by making a list of the items and stating that they are to be added to the trust; the list should be signed by the settlor and notarized.
 4. All property that allows the settlor to name a beneficiary should be changed so that the beneficiary is the name of the revocable living trust.
 - a. Although the items that name a beneficiary already avoid probate, changing the beneficiary to the revocable living trust consolidates these assets and avoids the possible dilemma if the current owner and beneficiary die in a common accident.
 - b. A settlor may wish to continue to list an individual beneficiary but the trust could be added as the successor or secondary beneficiary to the policy or plans.
 - c. Title or ownership of all retirement benefits and all the other retirement plans must not be changed or transferred to the living trust but should remain in the settlor's name.
- D. Advantages of a Revocable Living Trust as a Substitute for a Will**
1. It avoids probate since trust property is a nonprobate asset, and it avoids probate expense.
 2. It avoids the lengthy delays often associated with estate administration—even if a testamentary trust is included in a decedent's will, it takes time to have a trustee appointed whenever beneficiaries of the will are minors, disabled, or incompetent persons.
 3. It can diminish the cost and delays caused by will contests or invalid creditors' claims.
 - a. A trust can be contested but not as easily as a will.
 - b. Since the settlor creates the trust while living, it is in operation while the settlor can personally alter it; thus reflecting the settlor's true wishes, and the court would be reluctant to change it.
 4. It avoids publicity; the will, its contents, and the probate file and documents are public records.
 5. It is not under the control or supervision of the probate court.
 6. It also affords the settlor, while living, an opportunity to view the operation of the trust, verify its performance, and make necessary and appropriate changes, such as granting more or less power to trustees, changing beneficiaries, or selling and giving away trust property, or even canceling the revocable trust.
 7. It provides lifetime or longer management of trust assets by experienced professional corporate trustees for the benefit of the settlor, the settlor's spouse and family, or other named beneficiaries.
 8. It allows the settlor who owns real estate in other states to avoid the time and expense of the ancillary administration.
 9. It avoids the need, expense, and delay of appointing a guardian or conservator required should the settlor become disabled or be declared incompetent.
 10. It also eliminates the need, expense, and delay for court-appointed guardians for minors or conservators for dependents with special needs due to physical or mental incapacity.
 11. It may allow the settlor to save on death taxes, but only if it is an irrevocable living trust; however, wills containing testamentary trusts may also limit these taxes.
- E. Disadvantages of a Revocable Living Trust**
1. It may be more costly to create the trust than to draft a will depending on the amount of assets the settlor-testator owns or the complexity of the estate, and the trustee's management and administration fees are a continual expense throughout the life of the trust.
 2. It does not provide for or establish a time limit on the length of time creditors have to present their claims after the settlor has died.
 - a. A will establishes a time limit for creditors.
 - b. Some states have statutes that allow a living trust to limit the time for creditors to make their claims.

3. It requires that all of the settlor's assets be transferred into the living trust by changing titles to the property and beneficiary designations to the name of the trustee of the trust. If the settlor does not do this, the property whose title is unchanged must go through probate.
- F.** A pour-over will ensures that property acquired by the settlor after the revocable living trust was established or property that the settlor forgot to transfer into trust will be distributed according to the terms of the trust rather than pass by intestate succession. As a companion to the revocable living trust, the pour-over will can perform the following important functions.
1. It can dispose of property the testator neglected to add to the trust before death.
 2. It can dispose of property acquired through gifts, inheritance, or good fortune shortly before death.
 3. It can allow the testator to specifically disinherit family members, which can only be done by a clear and expressed statement in the will.
 4. It can allow the testator to name a personal and/or property guardian for minor children.
 5. It can allow the testator to name the same person as trustee of the living trust and personal representative of the will.
- G.** An irrevocable living trust may not be amended, revoked, or canceled after its creation.
1. Living trusts are irrevocable unless the trust instrument contains a provision stating it is revocable.
 2. An irrevocable trust not only avoids probate and its expense, but it also can be used to save taxes.
 - a. The living trust cannot save on a family's federal income taxes, but it can save on federal estate tax.
 - b. It can save on federal estate tax, in appropriate trusts, by excluding the trust property from the decedent settlor's gross estate, thereby reducing or avoiding the federal estate tax. This is commonly accomplished using an irrevocable life insurance trust.

VI. Drafting a Living Trust

- A.** The drafting of trusts is delegated only to attorneys who are knowledgeable in the area of trust law.
1. The paralegal may be asked to prepare a preliminary draft.
 2. The instrument must conform to the Internal Revenue Code and to state law.
 3. Before the paralegal prepares the preliminary draft under the attorney's supervision, there must be a clear understanding of the settlor's purposes and desires in creating the trust as well as the applicable federal and state tax consequences.
- TEACHING SUGGESTION:** Have students carefully review the facts of the hypothetical cases of Landon J. Kreger and Geraldine Bass so they will be fully aware of the fact situations for which details must be included in the preparation of a draft of a private express revocable living trust and a private express irrevocable living trust, respectively.
- B.** A checklist is used to gather information necessary for drafting a trust.
1. It reflects details to be included in the prospective trust instrument based on the client's situation.
 2. Checklists must be tailored to each individual client's wishes and intent.
- TEACHING SUGGESTION:** Use Exhibit 13.9 to review a checklist adapted to Geraldine Bass's case. Review this with students to highlight the provisions appropriate to the case based on the stated facts. Then use Exhibit 13.6 to demonstrate a blank sample checklist needed to draft a living will. Students should be cautioned about the correct usage of checklists and that they are only suggested formats that must be tailored to each individual client's case. Exhibit 13.10 illustrates an annotated sample irrevocable living trust.
- TEACHING SUGGESTION:** If any local banks have trust departments, it might be possible to arrange for one of the trust officers or trust paralegals to talk to the class about their functions and daily tasks with regard to working in the area of trust law.

VII. Trust Administration

- A. Pre-death administration requires the least amount of administration. After the trust is created and funded, its administration includes the following:
 1. Managing the trust property
 2. Preserving, maintaining, and protecting the trust property
 3. Filing the annual individual income tax returns
- B. Post-death administration requires more administration, including the following:
 1. Filing for a federal Employer Identification Number (EIN)
 2. Filing a Notice Concerning Fiduciary Relationship
 3. Opening a checking account for the trust
 4. Transferring funds to the new checking account
 5. Notifying beneficiaries of the settlor's death
 6. Collecting, preserving, and valuing the trust property as of the decedent's date of death
 7. Preparing a schedule of property held outside the trust
 8. Determining the investment and disbursement of trust property and any other obligations as provided in the trust agreement
 9. Pursuing or defending any claims in favor of or against the trust estate
 10. Paying creditors' claims
 11. Making income and principal payments as provided in the trust agreement
 12. Establishing and funding any additional trusts provided for in the original trust after the death of the settlor
 13. Obtaining professional management and investment services
 14. Filing the trust (fiduciary) annual income tax return
 15. Preparing an annual Schedule K-1 (Form 1041) for each beneficiary who receives a distribution from the trust
 16. Paying expenses of the decedent and trust
 17. Preparing federal and state income, gift, and death tax returns
 18. Apportioning and disbursing the beneficiaries' shares as provided for in the trust agreement
 19. Filing the final trust (fiduciary) income tax return (Form 1041)
 20. Requesting discharge as trustee

ANSWERS TO THE REVIEW QUESTIONS

1. What are the differences between the following kinds or classes of trusts: express versus implied; private versus public; active versus passive; *inter vivos* (living) versus testamentary; and resulting versus constructive?

An express trust is established by intentional deliberate acts of a settlor and is represented by a written document or an oral declaration. An implied trust is created not by deliberate acts but by the presumed intent of the settlor or by a decree of the equity court. A private trust is created between a settlor and one or more trustees who hold legal title to the trust property for the benefit of a certain named beneficiary or beneficiaries. It must comply with the Rule Against Perpetuities. A public or charitable trust is established for the purpose of accomplishing social benefit for the public or community. The beneficiaries must be the general public or a reasonably large, indefinite class of persons within the public who may be personally unknown to the settlor. If the trust limits the distribution to named individuals rather than to an indefinite class of persons, the trust will be classified as a private trust. The purpose of the trust, unlike a private trust, cannot be profit-making. A charitable trust does not have to comply with the Rule Against Perpetuities and can use the *cy-pres* doctrine, of which private trusts cannot avail themselves. What distinguishes active from passive trusts are the obligations of management and administration that active trusts impose on the trustee. In a passive trust, the trustee does not have responsibilities or discretionary duties to perform. The trustee's mere holding of the trust property for the beneficiary with no obligations or powers to

administer the trust indicates that the trust is passive. Passive trusts are generally void. An *inter vivos* trust is created and becomes effective while the settlor is alive. A testamentary trust is usually contained in a will and is effective upon the death of the settlor-testator. The living trust allows a settlor to see how well the trust works and make any necessary or desired changes while he/she is alive. With a testamentary trust, this is not possible. A resulting trust and a constructive trust are both implied trusts, but they occur in different ways. A resulting trust is created because of inferred or presumed intent of a property owner. It is created by the equity court to carry out the true intent of the owner where the intent is adequately expressed and title is held by someone other than the person intended. A constructive trust is imposed by courts of equity as a means of accomplishing justice and preventing unjust enrichment. A constructive trust is not based on either actual or presumed intent of the parties.

2. What elements are necessary to create an express private trust? How do they differ from the elements needed to create an express public trust?

The essential elements of an express private trust are as follows.

- The settlor must intend to create a private trust.
- A trustee must be named to administer the trust.
- A beneficiary must be named to enforce the trust.
- The settlor must transfer sufficiently identified property to the trust.

The essential elements of an express public trust are as follows.

- The settlor must intend to create a public trust.
- A trustee must be named to administer the trust.
- Property must be transferred to the trust.
- A charitable purpose must be expressly designated.
- The general public must be benefited.
- An indefinite class of persons must be named beneficiaries.

3. Does the *cy-pres* doctrine apply to all trusts? Explain.

The *cy-pres* doctrine only applies to public or charitable trusts. With private trusts, where it is clear that the settlor intended the trust to be performed exactly as indicated or not at all, the trust fails when it is not possible to follow such direction. However, in the absence of this clear intent by a settlor of a public trust, the law will not permit a public charitable trust to fail even though the beneficiary no longer exists or the original purpose has been accomplished or can no longer be achieved. Instead, the court will apply the *cy-pres* doctrine and direct the trust fund be held for another purpose that will be “as near as possible” to that intended by the settlor. The rationale behind the application of *cy-pres* is that the law tries to continue the operation of a charitable trust so as not to terminate public benefits.

4. What is meant by the phrase “the law allows resulting trusts to be proved by parol evidence”?

In this answer the students should explain what parol evidence is, what the parol evidence rule generally states, the fact that this is an exception to the parol evidence rule, and the rationale why it is allowed in such cases.

5. What are spendthrift and sprinkling trusts, and why would a settlor create them?

A spendthrift trust is a trust created to provide a fund for the maintenance of a beneficiary while safeguarding the fund against the beneficiary’s or spendthrift’s own extravagance or inexperience in spending money. The settlor creates this type of trust to prevent a beneficiary from assigning to anyone the rights to receive trust income or principal, to prevent creditors from reaching the trust benefits by obtaining a court order, to protect the beneficiary who cannot or will not handle money wisely. A sprinkling trust gives the trustee the authority and power to accumulate or distribute the income or the principal, or both among the trust beneficiaries in varying amounts. This gives the trustee the opportunity to change distributions to meet the needs of the beneficiaries that might change over time. It also gives some protection from creditors since the trustee alone decides how much to give each beneficiary. Such trusts also may help reduce estate taxes.

6. What is the proper way of creating a Totten trust, and can it be used to disinherit a surviving spouse? Explain.

Generally, money is deposited in a depositor's name as trustee for another person named as beneficiary. The requirements for the creation and distribution of Totten trusts vary from state to state. Whether this may be used to disinherit a surviving spouse may depend on each particular state's laws, but, generally, the money in a Totten trust is a nonprobate asset and as such not part of the depositor's estate and not reachable by a surviving spouse.

7. What are some of the most common reasons or purposes for creating trusts?

A trust can be created for any lawful purpose. Most trusts are created to distribute the income from the trust property to family members, friends, or a charity and/or to preserve the trust property for later distribution to such persons on termination of the trust. Other common purposes for establishing trusts are to provide the following:

- Funds for the support of dependent family members
- Funds for the college education of children
- Professional financial management for those inexperienced in handling large sums of money, which relieves a spouse or children from this responsibility and spares a settlor the burden of property management
- A method to avoid probate
- A public, charitable trust

8. Give three examples of trust restrictions that are "reasonable restraints" and do not violate public policy.

Any three of the following may be listed by students.

Courts have upheld trusts that provide that the beneficiary will lose his/her interest if he/she

- marries a particular person.
- marries before reaching majority.
- marries before reaching majority without the consent of the trustee or someone else.
- marries a person of a particular religious faith.
- marries a person of a faith different from that of the beneficiary.

9. When is a precatory trust declared valid?

Precatory words will usually invalidate a trust because the settlor's intent to create a trust is not clear. The early English used precatory words as a courteous means of creating duties enforceable by the courts. Today, both English and American courts hold that such words do not create a trust unless other sections of the instrument or extrinsic circumstances make the testator's intent clear.

10. What is the court's position on a trust that has all its required elements but lacks a trustee? Explain.

A valid trust will not fail for want of a trustee or successor trustee if the trust is otherwise valid. Usually the court will preserve the trust and appoint a trustee. The trust will fail only if it can be shown that the settlor intended that only the named person and no one else could be the trustee; in this case the court will not name a successor trustee.

11. Why are living trusts today often considered to be more desirable than wills? Which do you prefer? Why?

Reasons why revocable living trusts are often considered more desirable than wills include the following:

- A living trust avoids probate and the accompanying cost of probate.
- A living trust avoids the lengthy delays often associated with estate administration.
- A living trust can diminish the cost and delays caused by will contests or invalid creditors' claims.
- A living trust avoids publicity because a will, its contents, and the probate file and documents are public records.
- A living trust is not under the control or supervision of the probate court.
- A living trust is established while the settlor is living, and, if it is a revocable living trust, the settlor has an opportunity to view the operation of the trust, verify its performance, and make necessary and appropriate changes.

- A living trust provides lifetime or longer management of trust assets by experienced professional corporate trustees for the benefit of the beneficiaries.
- A living trust allows the settlor who owns real estate in other states to avoid ancillary administration.
- A living trust avoids the need, expense, and delay of appointing a guardian or conservator required should the settlor become disabled or be declared incompetent.
- A living trust also eliminates the need, expense, and delay for court-appointed guardians for minors or conservators for dependents with special needs due to physical or mental incapacity.
- A living trust may allow the settlor to save on death taxes, but only if it is an irrevocable living trust. The student's preference of a living trust or a will and the reasons for such a choice will vary. The instructor should determine whether the student's preference is clearly stated and supported. If a student chooses a living trust, he/she should mention the benefits of a pour-over will in addition to the trust.

12. What are the major disadvantages of revocable living trusts?

Some of the disadvantages are as follows.

- It may be more costly to create the trust than to draft a will depending on the amount of assets the settlor-testator owns or the complexity of the estate, and the trustee's management and administration fees are a continual expense throughout the life of the trust.
- It does not provide for or establish a time limit on the length of time creditors have to present their claims after the settlor has died.
- If it is used instead of a will, it requires that all the settlor's assets be transferred into the living trust by changing titles to the property and beneficiary designations to the name of the trustee of the trust.

13. How are real and personal property transferred into a living trust?

All real estate must be transferred to the trustee of the trust. Most likely, quitclaim deeds or deeds of trust are the documents used to correct or change title ownership of real property to the trustee. This is a change of title, not a transfer of title.

All personal property that is titled, such as bank accounts, stocks, bonds, certificates of deposit, mutual funds, cars, and boats, must be changed to the name of the trustee. Untitled property can be transferred into the trust by making a list of the items and stating that they are to be added to the trust. This document must be signed and notarized.

All property that allows the settlor to name a beneficiary should be changed so that the beneficiary is the name of the trust. If the settlor wants an individual to be beneficiary, then the successor beneficiary should be the trust.

14. What is the purpose of a pour-over will? Do assets included in such a will have to be probated? Explain.

The pour-over will ensures that property acquired by the settlor after the revocable living trust was established or property that the settlor forgot to transfer into the trust will be distributed according to the terms of the trust rather than pass by intestate succession. It helps eliminate challenges to the living trust by dissatisfied family members who might otherwise be entitled to the settlor's property, and it resolves the probate problems of every decedent concerning the payments of his/her debts and settlement of any tax liabilities. The property will have to be probated, but it will eventually be transferred to the trust and then distributed according to the terms of the trust.

15. What are some of the uses of an irrevocable living trust?

An irrevocable living trust not only has the advantages of avoiding probate and its expense, but also can be used as a tax-saving device to save on a family's federal income taxes by shifting the trust income from the settlor to the trust when it is in a lower tax bracket than the settlor; and it can save on federal estate tax by excluding the trust property from the decedent-settlor's gross estate, thereby reducing or avoiding the federal estate tax.

ANSWERS TO THE CASE PROBLEMS

Problem 1

- A. A majority of states allow settlors to create a beneficiary's interest in the trust if it contains a spendthrift provision.
- B. The answer will vary depending on the state.
- C. Most states have statutes and/or case law that allow creditors to reach the beneficiary's trust income despite a spendthrift clause if they have supplied "necessaries" to the beneficiary.

Problem 2

- A. While the Statute of Frauds would generally apply to all transactions involving real property, this may be a case where the court might impose a resulting trust, in which case there is an exception to the Statute of Frauds and the court will admit parol evidence to prove or disprove Zari's intent.
- B. If a court determines that this is a situation where a resulting trust is appropriate, then parol evidence can be used because this is an exception to the parol evidence rule.
- C. The court will determine the true nature of the transaction in the following manner.
 - It may presume that the transaction was intended by the parties to be a purchase-money resulting trust instead of a gift.
 - If the party who contends that it was a gift can offer in support convincing evidence that overcomes the presumption that it was not a gift, the presumption will fail.
 - But failure to represent enough evidence will allow the opposing party, whom the presumption supports, to win.
- D. The answer will vary depending on the student.
- E. The answer will vary depending on the student; however, if the student decided that it was a resulting trust, the property would pass according to Zari's will or the intestate succession statute in her domicile. If the student decided it was a gift to Kaleehja, Kaleehja would keep it.

ANSWERS TO THE ASSIGNMENTS

Assignment 13.1

- 1. It appears that the settlor does intend to create a trust.
- 2. The trustee would be Randall Martinez.
- 3. The trust property is the royalties to his book.
- 4. The beneficiary is Martha Giesler.

Assignment 13.2

- 1. It appears that the settlor did intend to create a trust.
- 2. The trustee is Luke Marra.
- 3. The \$100,000 is the trust res.
- 4. Yes, the expressed purpose of the trust is charitable.
- 5. While the general public is not benefited, a reasonably large, indefinite class of persons within the public is identified.
- 6. Yes.

Assignment 13.3

- 1. The trust is express.
- 2. The trust is private.
- 3. Yes, the trustee must perform administrative duties.
- 4. The trust is active.

Assignment 13.4

- 1. It appears that the settlor intends to create a trust.
- 2. Janet is the trustee.

3. The \$40,000 is the res.
4. The charitable purpose, while broad, is stated.
5. No.
6. Yes.

Assignment 13.5

It is a common law rule that has been codified in most states. It prevents the accumulation and monopolization of property and income over many questions.

Assignment 13.6

The answer will vary depending on the state.

Assignment 13.7

1. An express private *inter vivos* trust was created.
2. In all probability, the court will find that an implied resulting trust existed.
3. It will depend on whether Laverne is Bailey's heir or whether the property will pass according to Bailey's will.
4. If the court declares a resulting trust, Bailey's estate will receive the equitable title and Westside State Bank still has the legal title, which it will then turn over to the estate if the court so orders, causing the title to merge.

Assignment 13.8

1. It would appear that Francis has been unjustly enriched by the transaction. It would be advisable for Russell to ask the court to create a constructive trust for his benefit because there is a possibility of wrongdoing by Francis.
2. The answer will vary depending on the state.

Assignment 13.9

Because Alice is inexperienced in handling securities, is headstrong, and will not listen to sound advice, transferring the property to Jana may not be wise. A spendthrift trust would be a definite option to provide Alice with the benefit of the property, yet safeguard the fund against her inexperience as she apparently cannot or will not handle money or the property wisely by not listening to sound advice.

Assignment 13.10

The two possibilities are that this is an express private trust with Ursula and Eduardo as remaindermen or that this will be viewed as a life estate for Gerard with the remainder passing to Ursula and Eduardo. Ursula and Eduardo are remaindermen. This means that whatever property is remaining at the death of Gerard will pass to Ursula and Eduardo.

Assignment 13.11

1. The settlor is Jean-Luc, the beneficiary is Lenore, and the trust property is government bonds valued at \$25,000.
2. Jean-Luc might appoint himself as trustee or someone else who has knowledge of financial matters. Lenore has little knowledge of financial matters so it is wise to appoint a trustee experienced in this area.
3. Because Lenore has recently arrived from Martinique and has little knowledge of financial matters, it would be a wiser choice to establish a trust.

Assignment 13.12

1. On its face, the trust appears to be legal. If it violates any state or federal law, especially environmental laws, then it would be illegal. If Sherman's purposes for the trust are contrary to public policy or statutory or case law or federal or state regulatory law, then the trust is invalid.
2. If the purpose or provisions of the trust are contrary to state or federal law or public policy, then the trust would be invalid.

3. This will depend on whether the court decides that the purposes are independent or dependent. If the purposes can be easily separated, and the valid purpose enforced without violating the settlor's objective for establishing the trust, then the valid sections can be enforced and the illegal sections voided. If the purposes are so inextricably connected that the settlor's intent cannot be achieved without executing both the valid and the invalid sections, then the entire trust must fail.

Assignment 13.13

The answer will vary depending on the student; however, the format and language should closely follow the annotated sample trust in the text.

Assignment 13.14

The answers will vary depending on the student. Checklists should be similar to Exhibit 13.9.

Assignment 13.15

The answers will vary depending on the student. The self-proved pour-over will should resemble the sample in this chapter.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. Students should complete IRS Form 56 using the information for their own state probate court so assignments will vary. The information for the decedent is: Landon Kreger, 53 Lake Drive, Alexandria, Minnesota 56308. The trustee, Tanner Kreger, resides at the same address. The instructor may provide appropriate dates. The instructor should verify that students have selected "d" under Section A.
2. The answers will vary depending on student's selections.
3. Sample Clause:
Trustee Powers Over Digital Assets: Without limiting the other powers granted to my trustee, my trustee shall have (i) the power to access, use, and control my digital devices including, but not limited to, desktop computers, laptop computers, tablets, mobile telephones, smartphones, peripherals, storage devices, and any similar digital device that currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets, and (ii) the power to access, modify, delete, control, and transfer my digital assets including, but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items that currently exist or may exist as technology develops, and (iii) the power to obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my digital devices and digital assets described above.

CHAPTER 14 ESTATE PLANNING

LEARNING OBJECTIVES

Students should be able to do the following:

- Explain the components of estate planning.
- Understand the adverse factors that diminish an estate's value and how to minimize them.
- Utilize the knowledge acquired from earlier chapters to draft appropriate wills and trusts necessary for an estate plan.
- Identify and incorporate into an estate plan the tax-saving devices that increase the deductions from the gross estate or reduce the gross estate, thereby reducing or possibly eliminating federal and/or state death taxes.

LECTURE OUTLINE

I. Scope of the Chapter

- A. The fundamentals of estate planning and the process for creating estate plans are discussed.
- B. The legal documents for an estate plan and the devices that save estate tax either by reducing the gross estate or by increasing the deductions from the estate are discussed.
- C. Postmortem estate planning is also discussed.

—**TEACHING SUGGESTION:** If possible, the instructor can invite an estate or financial planner to speak with the class about the role of the estate or financial planner, the background necessary for someone wanting to enter that field, and, generally, what a typical day or assignment is like for the person.

II. Estate Planning

- A. Developing an estate plan for the client begins when the client reaches a “comfort level” with the supervising attorney and paralegal so that the paralegal can start accumulating the personal and financial data.

—**TEACHING SUGGESTION:** The instructor should review some of the techniques used to accomplish the goal of obtaining the requisite information from the client and the rules of professional conduct that apply, especially the caution not to provide legal advice. Many of these points were discussed in Chapter 5.

- B. There are potential adverse factors that will diminish any estate.
 1. Federal gift and estate taxes are imposed on the transfer of property while living by gift and at death whether to beneficiaries of a will or to heirs by the intestate succession statutes.
 - a. Under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the estate tax was to be repealed in 2010, however, it was reinstated in 2011. The gift tax was retained with an applicable exclusion amount of \$1,000,000 and a top tax rate of 35 percent.
 - b. Under the provisions of the 2010 Tax Relief Act, the estate tax returns for the years 2011 and 2012, with applicable exclusion amounts of \$5 million and 5.12 million, respectively, and a top tax rate of 35 percent. Effective January 1, 2013, the estate tax was made a permanent part of the tax code and the exemption amount automatically indexed for inflation. For the 2014 tax year, the estate tax exclusion amount is \$5.34 million. It increases to \$5.43 million for 2015. The American Tax Relief Act (ATRA) also increased the tax rate on estates in excess of the exemption amount from 35 percent to 40 percent. The important thing for the paralegal to realize is that these amounts change periodically and they must remain knowledgeable of these changes.
 - c. With proper planning, a married couple can use devices, such as trusts, to transfer significant assets (\$10,000,000 was the amount in 2012) free of estate tax after the deaths of both spouses. Any procedure that can diminish the tax must be included in the estate plan.

2. State death taxes are imposed by the states, and they vary considerably. Some states have completely eliminated estate taxes.
 - a. The inheritance tax is determined by the value of property received and the relationship of the beneficiaries to the decedent.
 3. Administration expenses including the commission of the personal representative, attorney's fee, court costs and filings, and costs of administering the estate including the decedent's funeral and burial expenses are all incurred during estate administration.
 - a. These expenses must be paid from the assets of the estate and may lessen its value.
 - b. Ancillary administration will add to the costs.
 - c. Any estate planning method that reduces the gross estate also reduces the probate fees and administration expenses.
 - d. The personal representative may elect to take the administration expenses as a deduction on the federal estate tax return or as a deduction on the estate's fiduciary income tax return.
 4. The personal representative may be forced to sell assets in order to pay legitimate and approved creditors' claims, federal and state taxes, and administration expenses.
 - a. The personal representative should review the potential property to be sold with the beneficiaries.
 - b. He/she will then select and sell, according to statutory guidelines, the assets that cause the least shrinkage from their fair market value and the estate.
 5. A substantial loss of income to the estate may result for many reasons including the direct consequence of the employee's untimely and unexpected death. Although an estate plan may not eliminate this, it will help to limit the effects.
- C.** The adverse effects of some or all of these factors cannot be entirely eliminated, but a well-designed estate plan can help to minimize them. After information has been obtained from interviews and questionnaires and reviewed with the client, an estate plan is created using the following documents and devices.
1. The documents are wills and trusts.
 2. Estate tax-saving devices that increase the deductions from the gross estate are the marital deduction and the charitable deduction.
 3. Estate tax-saving devices that reduce the gross estate are gifts, powers of appointment, trusts, and life insurance.
- D.** An estate plan should be reviewed periodically.
1. An ethical issue arises if the attorney or paralegal openly solicits clients to conduct this review.
 2. The client is responsible for initiating a review when changes known only to the client occur that mandate the modification of the estate plan.

III. Documents Used to Create the Estate Plan

- A.** Wills are the most common and important estate planning documents.
1. A will allows a testator to leave the entire estate to a surviving spouse or limit the spouse's interest to the share required by state statute since the surviving spouse cannot be disinherited.
 2. A will allows a testator to leave the estate to children or disinherit one or more or all of them completely.
 3. A will allows a testator to leave the estate to anyone, such as friends or faithful employees, whether they are family or not.
 4. A will allows a testator to leave the entire estate to charity or other public institutions, except for the surviving spouse's elective/forced share.
 5. A will allows a testator to identify the estate assets and the beneficiaries who are to receive them, thereby minimizing confusion and the possibility of costly will contests.

6. A will allows a testator to appoint both personal and property guardians for minor children.
 7. A will allows a testator to establish testamentary trusts within the will to reduce or even avoid estate taxes and select the trustee who will administer the trusts.
 8. A will allows a testator to appoint a personal representative to carry out the terms of the will and administer the estate.
- B.** Trusts are the other key planning documents.
1. Trusts benefit family members by providing lifetime income for a surviving spouse and then pass the property to children and grandchildren.
 2. Trusts benefit family members by preserving privacy, because, unlike a will, a trust is not a public document.
 3. Trusts benefit family members by protecting a spendthrift.
 4. Trusts benefit family members by obtaining professional management of the trust property to maximize the income potential.
 5. Trusts benefit family members by spreading or sprinkling trust income or principal to family members years after the testator's death when their needs are better known.
 6. Trusts benefit family members by enabling the trust property to be controlled by the settlor-trustee while living and, after the settlor's death, by the successor-trustee for the benefit of the beneficiary.
 7. Trusts benefit family members by avoiding the lengthy delays and expense of probate, including ancillary administration expense.
 8. Trusts benefit family members by diminishing problems such as will contests.
 9. Trusts benefit family members by eliminating the need for the probate court to appoint a guardian or conservator for minors or for oneself due to declining health.
 10. Trusts benefit family members by reducing federal and state death taxes by using trusts to increase the marital and charitable deductions and allowing a married couple to make maximum use of their estate tax exclusions after their deaths.

IV. Estate Tax-Saving Devices That Increase Deductions from the Gross Estate

A. The Marital Deduction

1. The marital deduction is an unlimited federal tax deduction allowed on the transfer of property from one spouse to another. The marital deduction also applies to same-sex couples who reside in a state that recognizes their marriages. The unlimited deduction is allowed under IRC §§ 2523 for *inter vivos* gifts and is allowed under IRC §§ 2056 for property passing from a decedent to his/her surviving spouse.
2. The unlimited marital deduction is an essential consideration in estate tax planning for a married couple since spouses frequently leave their estates to the surviving spouse, however, not all gifts to surviving spouses qualify for the marital deduction. If the gift is a terminable interest—one that ends or fails because of the occurrence of an event or lapse of time—it will not qualify for the marital deduction. Life estates and property given to a surviving spouse that would revert to the children if the surviving spouse remarries will not qualify. Under some circumstances, bequests made to spouses who are not U.S. citizens also may not qualify.
3. Without an appropriate estate tax plan, considerable federal estate tax that could have been avoided may be owed on the death of the second spouse.
4. The process of rearranging property ownership of total estate assets so each spouse's estate has approximately the same value, which enables each spouse to take the maximum advantage of the unified credit amount, is called estate equalization.
 - a. The attorney and paralegal must be especially careful when acting for and advising both spouses about interspousal gifts, because serious ethical problems can result when the attorney advises one spouse to make substantial gifts to the other spouse.
 - b. The ethical concern is that the marriage might subsequently be dissolved.

- c. The solution is to explain the difficulty raised by estate equalization and make sure both spouses understand the situation, acknowledge their awareness of the potential problem, and indicate their consent to the estate plan, in writing.
 - d. Then one spouse can create what is called a bypass trust, in which a deceased spouse's estate passes to a trust rather than to the surviving spouse to pay income to the survivor for life but then pass to their children without being taxed when the surviving spouse dies.
 - (1) The bypass trust is funded with all of the first deceased spouse's unused unified credit exemption without incurring any estate tax.
 - (2) Because the interests of the surviving spouse as beneficiary of the bypass trust are sufficiently limited to only a life estate, when he/she dies, the trust assets are not included in his/her gross estate for estate tax purposes.
 - (3) The trust bypasses the surviving spouse's estate, and the assets pass tax-free to their children or other beneficiary.
 - (4) This allows the survivor to take advantage of his/her own unused unified credit exemption for his/her separate property.
 - (5) While the surviving spouse forgoes ownership of the assets of the bypass trust, he/she still receives all trust income during his/her lifetime, and the principal may be distributed to the survivor at the discretion of the trustee; the survivor may even act as trustee or co-trustee, but the discretion to distribute principal to himself/herself is limited to an "ascertainable standard," such as a need for health, education, support, or maintenance. See IRC §§ 2041(b)(1).
 - (a) The survivor may also have the right to appoint principal of the trust during his/her lifetime or at death, provided that he/she does not appoint the property to himself/herself, his/her estate, his/her creditors, or creditors of his/her estate.
 - (b) The survivor does not have a general power of appointment over the trust assets, which would cause them to be taxable to his/her estate when he/she died.
 5. Section 2056 of the IRC establishes that a "qualifying" marital deduction is not limited to a gift in a probate transfer or to transfers made at the time of the decedent's death; property transferred by joint tenancy, *inter vivos* gifts, trust transfers, pension plan benefits, life insurance proceeds, and transfers made through the exercise of powers of appointment all qualify as part of the marital deduction.
- B. The Charitable Deduction**
1. To be a charitable deduction, a gift must be made for religious, scientific, charitable, literary, or educational purposes, IRC §§ 170(c), and the charity cannot be an individual.
 - a. Charitable gifts made to qualified charities during the donor's lifetime can be used to reduce both estate and income taxes.
 - b. The value of real or personal property given by a will or trust to certain qualified charities is deductible from the donor's gross estate for estate tax purposes (IRC §§ 2055).
 2. Often the donor/testator will make a direct, outright gift of cash.
 3. Alternatively, the donor/testator may give highly appreciated securities and real estate because doing so can reduce both estate taxes and capital gains taxes.
 4. A donor can establish a charitable remainder trust.
 5. A charitable remainder trust allows a settlor or the named beneficiary to retain the income from the trust, usually for life, then the trust property as given to a "qualified" charity. Charitable remainder trusts can provide the following benefits.
 - Reduce income tax by allowing a settlor-donor an income tax deduction for the gift in the year the contribution is made.
 - Increase current income by providing a life income for the settlor or other named beneficiaries by using property that currently does not provide income.

- Avoid capital gains tax on gifts of long-term appreciated property.
 - Reduce federal estate tax liability.
 - Provide funds from lower taxes and increased income to the settlor that can be used to purchase life insurance through an irrevocable life insurance trust to replace the value of the donation.
 - Allow the settlor-donors to make substantial gifts to charities of their choice.
6. Two types of irrevocable charitable remainder trusts are the Charitable Remainder Unitrust and the Charitable Remainder Annuity Trust.
 - a. In a Charitable Remainder Unitrust, cash or property is placed in the trust, which pays a distribution of a fixed percentage of not less than 5 percent of the fair market value determined annually to a noncharitable income beneficiary for life, IRC §§ 664(d)(2) & (3); then the property passes to the qualified charity.
 - (1) If the value of the trust property increases, so does the beneficiary's income.
 - (2) The unitrust allows additional contributions to be made to the trust property.
 - b. In a Charitable Remainder Annuity Trust, the settlor places property in the trust, which must pay a fixed amount (sum certain) of income at least annually to the noncharitable beneficiary for life; then the trust property passes to the qualified charity.
 - (1) The fixed annual income given to the noncharitable beneficiary must be at least 5 percent of the initial net fair market value of all property placed in the trust and the amount can never change. See IRC §§ 664(d)(1).
 - (2) If the trust property's income diminishes for some reason, the annual fixed payment must come from the principal of the trust.
 - (3) If the trust property's income is greater than the sum certain, the excess remains in the trust.
 - (4) No additional contributions may be made to the trust property.
 - (5) This trust is primarily for individuals who want a guaranteed fixed income.
 7. If a client does not have enough property to set a charitable remainder trust, he/she can contribute to a public "pooled income" fund such as the American Cancer Society or the March of Dimes.
 - a. All individual gifts are placed in the larger "pooled" fund, and each donor receives annual income based on his/her contribution compared to the value of the entire fund.
 - b. When the client dies, the property passes to the charity.

V. Estate Tax-Saving Devices That Reduce the Gross Estate

- A. An important goal when preparing an estate plan is to identify and incorporate various ways to reduce or eliminate federal and state estate taxes commonly accomplished through the following:
 - Gifts made during the donor's lifetime
 - Powers of appointment
 - Trusts that qualify for the marital deduction or avoid multiple taxation
 - Life insurance
- B. Gifts Made during the Donor's Lifetime—The Gift Tax Annual Exclusion
 1. Beginning in 2013, any donor can make a gift of up to \$14,000 to any number of recipients each year during the donor's life without being required to pay the gift tax. See IRC §§ 2503(b).
 2. Spouses may join in the annual gift to any number of donees and combine their individual \$14,000 gifts so as to give \$28,000 to each donee free of the gift tax.
 - a. This practice is called gift splitting and is only available between spouses.
 - b. A gift tax return for each spouse must be filed with the IRS.
 3. Gift giving is an obvious solution when donors are looking for a method to reduce their estates in order to diminish their potential federal estate tax and the cost of probate administration.

4. The gift tax exclusion is available only for present interests, which are the unrestricted rights to the immediate possession, use, or enjoyment of property.
 - a. A present interest gift results when the donor makes a direct transfer of property to a donee.
 - b. An unrestricted right to receive trust income, a legal life estate, and a gift to a custodian under the Uniform Transfers (Gifts) to Minors Act are examples of a present interest; the custodianship, however, must end and all property must be transferred to the minor at age 18, 21, or, in a few states, 25.
 5. Gifts of future interests, such as gifts of remainder interests and gifts in trust subject to a preceding life estate, do not qualify for the annual gift tax exclusion.
 6. In addition to the annual exclusion, no gift tax is owed for gifts made directly to a college or university or hospital or doctor to pay certain tuition and medical care payments for an individual donee regardless of the relationship of the donor to the donee. See IRC §§ 2503(e).
 7. All lifetime gifts made in a given year that exceed the annual exclusion must be reported on Form 709 or Form 709A if the gift is split between spouses; however, no tax is owed or paid for gifts over the annual exclusion until the unified credit is exceeded. Any gift tax owed is assessed against the donor who is primarily obligated to pay it.
 8. A donor who plans to make gifts to children should leave them highly appreciated property, such as real estate or securities, in his/her will or in a trust and give them other property during his/her lifetime.
 - a. The problem with making a gift of highly appreciated property while living is that the advantage of the “stepped-up basis” of the property is lost.
 - b. Property “basis” is the value that is used to determine loss or gain for income tax purposes.
 - c. The difference between what the donor paid for the property and the amount received when the property is sold is taxable.
 - d. Property given while alive retains the donor’s basis; however, property passed through a will or trust when the donor dies takes a new “stepped-up basis,” which is the current value of the property on the date of the donor-testator’s death or alternate valuation date.
- C. A power of appointment is created by will or trust when the donor confers a power or authority upon the donee to appoint the person, the appointee, who is to receive and enjoy an estate, or an income therefrom, or receive a trust fund after the donee’s death.
1. The purpose of a power of appointment is to enable the appointees who will receive the estate or trust fund to be named later when their needs are better known.
 2. There are two types of powers according to Section 2041 of the IRC.
 - a. A general power of appointment means a power that is exercisable in favor of the decedent, his/her estate, his/her creditors, or the creditors of his/her estate. Only a general power of appointment causes the value of the property appointed to be included in the gross estate of the person who possesses the power of appointment for federal estate tax purposes.
 - b. A special power of appointment means the donor limits the donee’s right of appointment to an identified person or persons, other than the donee, to whom the property can be distributed.
 - (1) A common use occurs between spouses where one spouse names the other as the beneficiary-donee and gives the beneficiary-donee the power to appoint the principal only to their children.
 - (2) This special power of appointment does not cause the value of the property appointed to be included in the gross estate of the spouse-donee.

D. Trusts That Qualify for the Marital Deduction or Avoid Multiple Taxation**1. Outright Transfers between Spouses by Gift or Trust**

- a. The simplest and most common form of marital deduction transfer is a direct transfer of ownership from one spouse to the other by gift, will, or operation of law.
- b. A transfer in trust may be more appropriate if the recipient spouse is unable to manage the trust property or if the settlor wants to determine and select the ultimate beneficiaries at the spouse's death instead of allowing the surviving spouse to make that decision.
- c. The major tax problem created by the outright transfer to a spouse is that the entire trust property is now part of the surviving spouse's estate and may be liable for considerable estate taxes upon that spouse's death if the value of the estate is greater than the estate tax applicable exclusion amount available for year of death.

2. Life Estate with General Power of Appointment Trusts

- a. A common alternative to an outright transfer that also qualifies for the marital deduction is the general power of appointment trust.
- b. This living or testamentary trust requires the trustee to distribute trust income to the surviving spouse for life and gives the spouse an unqualified general power to appoint the trust property to anyone that he/she names in his/her will.
 - (1) Under a general power of appointment trust, the surviving spouse must receive all the trust income at least annually, and only the surviving spouse may have the power to appoint any part of the interest in the trust property.
 - (2) If the surviving spouse fails to exercise the power of appointment in his/her own will, the trust assets pass as directed in the trust document.
- c. The trust property in this case is included in the gross estate of the person who possesses the power, i.e., the surviving spouse. See IRC §§ 2041(a)(2).
- d. If a testamentary trust gives property for life to the surviving spouse and gives that spouse an unrestricted right to withdraw all or any part of the principal at any time, a general power of appointment occurs.
- e. To avoid unfavorable estate tax consequences, a special power of appointment trust can be created; when special powers of appointment are created, the trust property is not included in the surviving spouse's estate on death.

3. Qualified Terminable Interest Property (QTIP) Trusts

- a. The QTIP trust is a popular type of trust that occurs when the settlor wants the surviving spouse to have all the income from the trust for life but wants the principal of the trust to pass to someone other than the surviving spouse (usually children).
- b. The surviving spouse is not given a general power of appointment.
- c. Property qualifies for the estate marital deduction only to the extent that the personal representative, after the settlor's death, so elects, called the QTIP election, on the federal estate tax return and for the gift marital deduction, if the donor spouse makes the QTIP election. See IRC § 2056(b)(7)(B)(ii)(II).
- d. Generally, if a spouse places property in trust for the surviving spouse for life, and the remainder to their children when the survivor dies, this is a terminable interest that does not qualify as a marital deduction for the settlor-spouse.
 - (1) However, if the QTIP election is made so that the property is treated as qualified terminable interest property, then the terminable interest restriction is waived and the marital deduction is allowed.
 - (2) In exchange for the deduction, the surviving spouse's gross estate must include the value of the QTIP election assets, even though the survivor has no control over the ultimate disposition of these assets.
 - (3) Terminable interest property qualifies for the election if the donee is the only beneficiary of the property in trust during his/her lifetime, and the income is distributed from the trust property at least annually.

- (4) If the trust property is transferred as a gift, the donor spouse is the one who makes the QTIP election.
 - (5) If the trust property is transferred by death, the executor of the estate of the deceased spouse-settlor has the right to make the election.
 - e. There are two advantages to the QTIP trust.
 - (1) The testator of a testamentary trust or the settlor of an irrevocable living QTIP trust is allowed to direct the distribution of the trust principal at the death of the surviving spouse.
 - (2) The trust is flexible for purposes of the gift or estate tax marital deduction, because the testator of a testamentary trust can direct the executor or the settlor can direct the trustee in an irrevocable living trust to elect on the estate tax return to qualify all or any part of the trust principal for the marital deduction.
 - f. The major disadvantage of the QTIP trust is that the spouse is not permitted to make gifts to children from the trust principal.
4. Bypass Trusts
 - a. A bypass trust is also called Trust B of an A-B trust, credit shelter trust, residuary trust, or family trust.
 - b. This is an estate planning device whereby a deceased spouse's estate passes to a trust rather than directly to the surviving spouse, thereby reducing the likelihood that the surviving spouse's subsequent estate will exceed the estate tax threshold.
 - (1) The surviving spouse is given a life estate in the bypass trust. This ends at the spouse's death and passes the remainder of the estate to named beneficiaries, usually children.
 - (2) The trust allows spouses with substantial estates to transfer their property, after both have died, to their children and avoid paying any federal estate tax by appropriately planning and using the marital deduction and their individual estate tax exemptions.
 - d. Estate equalization is an important aspect of the estate planning for this type of trust.
 - e. Harmony between the spouses is essential to this strategy and marital friction and discord may make this device impossible.
- E. Life Insurance
 1. Life insurance is a planning device available to conserve the value of the estate.
 - a. Life insurance is a contract between the policyholder, the owner of the policy and the person whose life is insured, and an insurance company whereby the company agrees, in return for annual premium payments, to pay a specific sum of money to the designated beneficiary upon the death of the policyholder.
 - b. The insurance company is called the insurer or the carrier; the policyholder is called the insured.
 2. There are three major types of life insurance.
 - a. Ordinary, straight, or whole life insurance combines lifetime protection with a minimum savings feature called cash surrender value or, more commonly, cash value.
 - (1) Premium payments remain the same during the contract and are required throughout the policyholder's lifetime.
 - (2) The cash value slowly increases throughout the duration of the contract and the policyholder may surrender the policy at any time and take out the cash value for his/her own use or retain the policy until death for the benefit of the named beneficiary.
 - b. Term life insurance is pure protection without savings or cash surrender or loan value.
 - (1) It is the least expensive insurance.
 - (2) The insurance company pays the face amount of insurance to the beneficiary if the policyholder dies within a given period or term.
 - (3) It is usually renewable from term to term without an additional medical examination. The cost to renew increases with the age of the insured.

- c. Universal life insurance covers a specific period and builds cash value for the policyholder over that time.
 - (1) The coverage emphasizes the separation of the portion of the premium that is used to cover the insurance protection from the portion of the premium allocated to an investment that is used to build the policy's cash value.
 - (2) Investments are usually flexible and selected with a view to maximize the rate of return.
- 3. Tax Consequences of Life Insurance**
- a. Regardless of the type of life insurance, the entire proceeds are included in the decedent policyholder's estate if the proceeds are payable to the decedent's estate or the proceeds are payable to other beneficiaries and the decedent retained any "incidents of ownership" in the policy.
 - b. An incident of ownership is an element or right of ownership or degree of control over a life insurance contract.
 - c. Examples of incidents of ownership are as follows.
 - The right to change the named beneficiary of the policy
 - The right to cancel or surrender the policy
 - The right to transfer or assign ownership of the policy to another person or to a trust
 - The right to pledge the policy as collateral for a loan
 - The right to obtain a loan against the cash value of the policy from the insurer
 - d. The retention of any incident of ownership will cause the policy proceeds to be included in the gross estate of the policyholder upon death and be subject to federal estate tax. See IRC § 2042(2).
 - e. The policyholder can avoid this detrimental tax consequence by transferring the ownership of the policy to a trust or to another person other than the spouse since there is no tax advantage because of the unlimited marital deduction, by a written statement given to the insurer, formally relinquishing all incidents of ownership, or by another person paying the premiums, thus making the other person the owner. The IRC also requires that the policyholder live three more years after the date of the transfer or the date of the formal relinquishment in order for the proceeds to not be included in the gross estate, and thus not subject to federal estate tax.
 - f. When proceeds are paid to the beneficiary upon the death of the policyholder, they are exempt from federal and state income tax.
 - g. Life insurance proceeds are distributed by various methods.
 - (1) If the estate is the beneficiary, the proceeds are normally distributed as a lump sum.
 - (2) When the beneficiary is an individual, several options are available under most policies.
 - The company holds the proceeds and interest accumulates.
 - The company pays the beneficiaries the proceeds and interest in installments over a specific period.
 - The company uses the proceeds to purchase an annuity for lifetime payments to the beneficiary.
 - The company pays the beneficiary a lump sum to be invested or used as the beneficiary wishes.
- 4. Life Insurance Trusts**
- a. To conserve wealth, families often use the irrevocable life insurance trust.
 - b. The settlor establishes this trust by assigning the ownership of a new or existing policy to the trust and/or annually contributing money to the trust, which is used by the trustee to pay premiums on a life insurance policy on the settlor.
 - c. The policy is owned by the trust, and the proceeds are paid to the trust, which is the named beneficiary of the policy on the death of the settlor.

- d. This enables the settlor to direct the trustee to pass the proceeds to the trust's named beneficiaries and keeps the proceeds from being included in the settlor's taxable estate for federal estate tax purposes.
- e. If the settlor transfers an existing policy to the trust, the settlor must live for three years from the date of the establishment of the trust to avoid the federal estate tax.
- f. Depending on the replacement value of the existing policy, the amount it would cost to buy the policy at the present time, a gift tax may be due, unless under the annual gift tax.
- g. If designed properly, the trust can take advantage of the decision in the case of *Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968) and allow the trust's income to be given to the settlor's surviving spouse for life and pass the principal to their children tax free after the spouse's death.

—**TEACHING SUGGESTION:** Have students read the case of *Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968) as an exercise in reading and interpreting cases in this area.

VI. Postmortem Estate Planning

- A. Postmortem estate planning is often used for tax-saving purposes.
- B. A disclaimer is a refusal to accept a bequest, inheritance, or a gift acquired through a will, trust, or the law of intestate succession or to accept proceeds from life insurance or other gratuitous transfers.
- C. Beneficiaries disclaim gifts primarily because of their age, health, and financial security and because disclaimers offer the opportunity to make tax-saving decisions.
- D. When a beneficiary disclaims a gift that results in a transfer of the property from the disclaimant to another person, the question arises whether the transfer is subject to gift or estate tax.
 - 1. The case of *Estate of Boyd v. C.I.R.*, 819 F.2d 170 (1987) addressed the issue whether a disclaimer of a forgiveness of a debt is subject to either tax. In the ruling that the rejection of a forgiveness of a debt exercised by the donee of the forgiveness was not a taxable transfer under IRC § 2518, the court stated: “the forgiveness of a debt owed to the testator (was) as much a bequest as an outright gift” (and when the) intended recipient disclaims it, (the) disclaimer is effective under § 2518.
 - 2. The types of disclaimers that qualify to avoid gift and estate tax are found in state statutes and in IRC § 2518(c)(3), which provides that prior to acceptance of any benefit or gift, the disclaimant must make an irrevocable, unqualified, and unequivocal refusal to accept an interest in property; the refusal must be in writing; the written instrument of disclaimer must be received by the transferor of the interest, his/her legal representative, or the holder of the legal title to the property no later than nine months after the later of either the date of the transfer or the day on which a minor disclaimant reaches age 21; the disclaimer must not accept an interest or any of its benefits; and the refusal must be legally effective to pass the specific gift to another person without direction from the disclaimant.
 - 3. As a result of the disclaimer, the interest does not pass to the disclaimant and is not subject to gift or estate tax; however, the property, thus qualified, can pass directly to another person without following the directive for its disposition from the disclaimant.
 - 4. A disclaimer is accomplished by delivering the written disclaimer to the personal representative and filing a copy with the probate court.
 - 5. With a trust, the disclaimer would be given to the trustee.
- E. Estate tax reduction after death can also be achieved by purposely allowing the personal representative to transfer the property disclaimed to a charity or spouse, thereby increasing the charitable and marital deductions and lowering the gross estate.
- F. A surviving spouse's elective rights against a will can also be used to increase the marital deduction if the elective share is greater than the amount the spouse receives through the will.
- G. State inheritance taxes are sometimes based on the amount of property and the relationship of the beneficiary to the testator; therefore, disclaimer by a spouse may cause the property to pass to the child and be taxed at a lower rate for inheritance tax purposes.

- H. By controlling the timing and amount of property distributed to the beneficiaries or prolonging the time period of estate administration into a second taxable year, the estate may realize federal and state income tax savings.
- I. The personal representative can elect to use estate administration expenses as a deduction for either estate tax or income tax purposes.

ANSWERS TO THE REVIEW QUESTIONS

1. Who are the individuals you would choose to help you prepare an estate plan for a client?
This answer will vary depending on the student; however, typical persons to include are an attorney, an accountant, trust officers from banks and trust companies, investment advisers, financial planners, and life insurance agents.
2. What is the purpose of an estate plan? Methods for reducing or avoiding taxes are part of every estate plan. Such tax avoidance methods may be legal, but are they ethical?
The purpose of estate planning is to identify, preserve, and expand or increase the assets owned and to provide for distribution of these assets, with the least possible tax expense, to family members and institutions the owner wishes to benefit during life as well as after death.
The second part of the question calls for a student's personal opinion; however, this opinion must be based on an analysis of the accepted role of certain participants, the role of law making and legal advice, and an analysis of ethical rules applicable to attorneys.
3. How do potential adverse factors diminish the value of an estate? List at least three such factors. Potential adverse factors diminish the value of an estate generally by increasing the amount and types of debts that the estate must pay. Students should list at least three of the following:
 - Federal death (estate) tax
 - State death taxes
 - Administrative expenses
 - Forced liquidation
 - Loss of management
4. What are the two key documents used to prepare an estate plan? How does each document benefit a decedent's surviving family members?
Wills and trusts are the two key documents. A will benefits a decedent's surviving family members by
 - leaving the entire estate to a surviving spouse or limiting the spouse's interest to the share required by statute.
 - leaving the estate to children or disinheriting one or more or all of them completely.
 (The student may list other ways or may state these in a more general way.)
A trust benefits a decedent's surviving family members by
 - reducing the amount of estate taxes.
 - obtaining professional management of the trust property.
 - providing lifetime income for a surviving spouse and then passing property to children and grandchildren.
 - protecting spendthrifts.
 - spreading or sprinkling trust income or principal to family members years after the testator's death when their needs are better known.
 - enabling the trust property to be controlled by the settlor-trustee while living and then by the successor trustee for the benefit of the beneficiary.
 - avoiding the lengthy delays and expense of probate.
 - diminishing problems such as will contests.
 - eliminating the need for the probate court to appoint a guardian or conservator for minors or for oneself due to declining health.
 (The student may list other ways or may state these in a more general way.)

5. How is the marital deduction used to lower the net estate that is subject to federal estate tax?
The amount of property passed to a spouse through a lifetime gift or from a decedent to a surviving spouse without incurring federal estate tax is unlimited.
6. Under what circumstances does estate equalization between spouses become important?
Estate equalization is important because it allows for maximum use of the marital deduction; however, if there is any possibility of the marriage being subsequently dissolved, there is an ethical question for the attorney who advised one spouse to make substantial gifts to the other spouse.
7. How does the charitable deduction reduce both federal estate and income taxes?
Charitable gifts made during a person's lifetime may be deductible from his/her annual income taxes in the year the gift is made.
The value of real or personal property given by a will or trust to certain kinds of qualified charities is deductible from the donor's gross estate for federal and state estate tax purposes.
8. How does a Charitable Remainder Unitrust differ from a Charitable Remainder Annuity Trust? What function does each charitable trust serve?
A Charitable Remainder Unitrust is when cash or property is placed in a trust, which pays a distribution of a fixed percentage of not less than 5 percent of the fair market value of the trust property, determined annually, to a noncharitable income beneficiary for life. When the life beneficiary dies, the trust property passes to the qualified charity. If the value of the trust property increases, so does the beneficiary's income. There can be additional contributions made to the trust property.
A Charitable Remainder Annuity Trust is when the settlor places property in the trust, which must pay a fixed amount, a sum certain, of income at least annually to the noncharitable beneficiary for life; after the beneficiary dies, the trust property passes to the qualified charity. The fixed annual income given to the noncharitable beneficiary must be at least 5 percent of the initial net fair market value of all the property placed in the trust. The annuity trust does not allow additional contributions. The amount of the annuity does not change and must come from the principal of the trust if the trust property's income diminishes. The function of each type of trust is to allow the settlor or named beneficiary to retain the income from the trust for life and to take advantage of the charitable deduction for estate tax purposes.
9. What are the most common methods used to reduce federal and state death taxes? List four methods and explain how each reduces these taxes.
The most common methods to reduce federal and state death taxes are as follows.
- Gifts made during the donor's lifetime
 - Powers of appointment
 - Trusts that qualify for marital deduction or avoid multiple taxation
 - Life insurance
- The student should generally explain each of these methods including the following points.
- Gifts the annual gift tax exclusion amounts gift splitting present and future interests "basis" considerations
 - Powers of appointment general powers of appointment special or limited powers of appointment
 - Marital deduction trusts outright transfers by gift or trust general powers of appointment trusts QTIP trusts Bypass trusts
 - Life insurance straight or whole life insurance term life insurance universal life insurance life insurance trusts
10. According to current federal tax law, what are the gift tax annual exclusion, the marital deduction, and the unified transfer tax credit (applicable credit) for gifts and estates? Explain how each is used to reduce federal taxes.
The gift tax annual exclusion is \$14,000 to each of any number of recipients each year; spouses may be joint in the annual gift and combine their individual \$14,000 gifts so as to give \$28,000 to each donee each year free of gift tax.

The marital deduction is unlimited.

The unified transfer tax credit depends on the amount of the transfer. The students should explain what each is and how it reduces the taxes.

- 11.** What is the distinction between a general and a special power of appointment? Why is a power of appointment used in a will or a trust?

A power of appointment is when a donor confers a power or authority upon a donee to appoint the person who is to receive and enjoy an estate, or income therefrom, or receive a trust fund after the donee's death.

A general power of appointment means a power that is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate.

A special power of appointment is one in which the donor limits the donee's right of appointment to an identified person or persons, other than the donee, to whom the property can be distributed. The purpose of a power of appointment is to enable the appointees who will receive the estate or trust fund to be named later when their needs are better known.

- 12.** What are four methods of transferring property that qualify for the gift or estate tax marital deduction? Explain each one.

The four methods include outright transfers by gift or trust; general power of appointment trust; qualified terminable interest property (QTIP) trusts; and bypass trusts, also known as A-B trusts, credit shelter trusts, exemption equivalent trusts, residuary trust, or family trust.

The students should explain each method.

- 13.** What is a QTIP trust? Explain its function and advantages.

A QTIP trust is a type of trust set up when the settlor wants the surviving spouse to have all the income from the trust for life but wants the principal of the trust to pass to someone other than the surviving spouse.

The trust allows property to qualify for the estate marital deduction but only to the extent that the executor, after the settlor's death, so elects on the federal estate tax return and for the gift marital deduction, if the donor spouse makes the QTIP election. There are two advantages to the QTIP. First, the testator of a testamentary trust or the settlor of an irrevocable living QTIP trust is allowed to direct the distribution of the trust principal at the death of the surviving spouse to ensure that the testator's or settlor's children or other intended family members will be the ultimate beneficiaries of the trust. The second advantage is the trust's flexibility for purposes of gift or estate tax marital deduction because the testator can direct the executor or the settlor can direct the trustee in the irrevocable living trust to elect on the estate tax return to qualify all or any part of the trust principal for the marital deduction.

- 14.** Why is life insurance such an important planning device for an estate plan? What is the function of an irrevocable life insurance trust?

Life insurance is such an important planning device because it conserves the value of the estate. The irrevocable life insurance trust enables the settlor to direct the trustee to pass the proceeds to the trust's named beneficiaries and keeps the proceeds from being included in the settlor's taxable estate for federal estate tax purposes.

- 15.** What are the incidents of ownership of a life insurance policy? What effect do they have on a decedent-policyholder's potential federal estate tax?

The incidents of ownership are as follows.

- The right to change the named beneficiary of the policy
- The right to cancel or surrender the policy
- The right to transfer or assign ownership of the policy to another person or to a trust
- The right to pledge the policy as collateral for a loan
- The right to obtain a loan against the cash value of the policy from the insurer

The retention by the policyholder of any incident of ownership in a life insurance policy will cause the policy proceeds to be included in the policyholder's gross estate upon death and be subject to federal estate tax.

ANSWERS TO CASE PROBLEMS

Problem 1

- A. The answer will vary depending on the student and the state.
- B. The answer will vary depending on the student and the state, but potential fiduciaries needed are an executor, if it is a will, a property guardian for the children, a personal guardian for the children can be recommended, and a trustee.
- C. The answer will vary depending on the state.
- D. The answer will vary depending on the state.
- E. The answer will vary depending on the student.
- F. The answer will vary depending on the student.

Problem 2

To eliminate all federal taxes is probably fantasy, unless the entire estate is given to charity; however, the student could propose some options to reduce the amount of taxes that will be due.

ANSWERS TO THE ASSIGNMENTS

Assignment 14.1

1. This answer will vary depending on the student; however, some of the suggestions made in Chapter 5 should be included in the answer.
2. The answer will vary depending on the student.

Assignment 14.2

The answer will vary depending on the information given by the instructor. See text Appendix B for a sample A-B Trust.

Assignment 14.3

This Document Can:	Will (without a testamentary trust)	Revocable Living Trust	Irrevocable Living Trust (if funded)
1. Be private	No	Yes	Yes
2. Avoid probate	No	Yes	Yes
3. Avoid court appointment of fiduciaries	No	Yes	Yes
4. Use professional management	Yes	Yes	Yes
5. Protect a spendthrift child	No	Yes	Yes
6. Avoid ancillary administration	No	Yes	Yes
7. Allow maker to control assets while alive	Yes	Yes	No

8. Delay inheritance	No	Yes	Yes
9. Avoid federal estate tax	No	No	Yes
10. Diminish contests of the document	No	Yes	Yes
11. Be revoked	Yes	Yes	No
12. Provide for the maker's disability	No	Yes	Yes

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. Term insurance provides protection only for a specified period of time and typically does not build up any cash value.
2. \$14,000
3. Answers will vary depending on the state.

CHAPTER 15 LONG-TERM CARE

LEARNING OBJECTIVES

Students should be able to do the following:

- Identify the users and their need for long-term care. Explain how the cost of such care is financed by individual assets, state and federal sources, and long-term care insurance.
- Determine the segment of the population that should consider the purchase of long-term care insurance.
- Interpret the options available for a long-term care insurance policy.
- Analyze different policies and determine the appropriate coverage and premium for specific situations.
- Evaluate the insurance companies for their financial strength, size, and history for payment of claims.

LECTURE OUTLINE

I. Scope of the Chapter

- A. Long-Term Care Discussion
- B. History and Development of Long-Term Care
- C. Need for Long-Term Care
- D. Resources Available to Help Pay Long-Term Care Expenses
- E. Need for Long-Term Care Insurance
- F. Long-Term Care Insurance

—**TEACHING SUGGESTION:** If possible, the instructor can invite an insurance representative to speak with the class about various long-term care insurance policies.

II. Long-Term Care

- A. During the past 30 years, medical technology has advanced to the point of extending life spans. This increase in life span has generated a new law specialty called elder law. Elder law practitioners recognize estate planning as one aspect in their practice. Estate planning should be considered a tool to accomplish many of their client's increasing needs. Additional issues include, but are not necessarily limited to, the following:
 - 1. Provisions for long-term care, including financing issues
 - 2. Social Security, Supplemental Security Income
 - 3. Medicare and Medicaid
 - 4. Long-term care insurance
- B. Long-term care is the support that disabled, frail, or chronically ill people need when they can no longer care for themselves. They may be cared for in their home, nursing homes, adult day care centers, or in assisted living facilities such as continuing care retirement communities.
 - 1. Nursing home stays average 2.5 years.
 - 2. Most long-term care is provided at home by family and friends with the part-time assistance of home health care and respite caregivers.
- C. Personal resources help cover the cost of long-term care. These include individual income and assets from employment, home ownership, investments (stocks and bonds), and retirement plans including pension and profit-sharing plans, Individual Retirement Accounts (IRAs), 401(k) plans, and retirement plans for self-employed taxpayers. Federal programs to help cover the costs include Social Security, Medicare, and Medicaid.
- D. Federal Old Age, Survivor's, and Disability Insurance (OASDI) Benefits Program is more commonly known as Social Security.
 - 1. In 2003 the full benefit retirement age began to rise from 65 and will continue rising until the end of 2027 when the retirement age with full benefits will be 67. Age 62 remains the age for early retirement with reduced benefits.

2. Social Security is not based on financial need.
 3. Social Security benefits are paid to retired workers, starting at age 62, and their dependents; disabled workers (any age) who have qualified for disability and their dependents; surviving dependents of deceased workers; surviving dependents of deceased disabled workers; former spouses if married for at least 10 years.
 4. Every qualified worker is also entitled to a special one-time death benefit payment of \$255 and some higher income taxpayers may have to pay income tax on a portion of their Social Security benefits.
- E.** Supplemental Security Income, also known as SSI, makes monthly payments based on need to low-income people who have few assets. There are eligibility requirements. If eligible, a person may receive both Social Security and SSI benefits subject to a maximum combined benefit.
- F.** Medicare is a federal program that provides hospital and medical insurance for people age 65 and older, certain disabled persons under 65 who qualify under Social Security, and people with permanent kidney failure treated with dialysis or a transplant. Medicare has four parts: A, B, C, and D.
1. Part A is a hospital insurance program that pays for inpatient hospital care; home health care; hospice care; inpatient care in a skilled nursing facility following a required three-day hospital stay (not custodial or long-term care); and inpatient care in a religious nonmedical health care institution.
 2. Part B is a medical insurance program that helps pay for the following: doctor's services; outpatient hospital care; diagnostic tests; durable medical equipment; necessary ambulance services; and home health visits needed after an injury, illness, or surgery.
 3. Part C provides for Medicare Advantage Plans. In addition to the traditional plan, participants can choose Medicare Advantage Plans, which include Health Maintenance Organization (HMO) Plans, Preferred Provider Organization (PPO) Plans, Private Fee-for-Service Plans, and Special Needs Plans for a limited membership. Participants must have Medicare Parts A and B to join these plans.
 4. Prescription Drug Coverage helps pay for prescription drug costs through Medicare prescription drug plans and other health plan options. This coverage is optional and available if Medicare coverage is in effect.
 5. Medicare participants have health plan choices. Participants need to evaluate the plans carefully.
- G.** Medicaid is a form of public assistance, sponsored and funded jointly by the federal and state governments, which provides medical aid for people whose income and assets fall below a certain level. In most states, the list of medical care covered by Medicaid includes: physician services; prescription drugs; dental care; medical tests; home health care; physical therapy; eyeglasses; hearing aids; and hospital and long-term nursing home care.
1. Typically, Medicaid applies to those who have little or no resources.
 2. Other middle-income spouses who wish to leave their children an inheritance, but realize one of them faces a debilitating illness that will wipe out their resources, will attempt to use a method, often referred to as the spend-down procedure, to qualify for Medicaid but pass the inheritance without impoverishing the healthy spouse.
 3. The spend-down process requires an individual to spend enough income and resources to qualify for Medicaid eligibility.
- H.** Long-term care insurance enables the insured to pay expenses of long-term care, maintain and protect estate assets, and leave an inheritance to family. It pays a fixed monetary benefit during the period in which the insured receives care at home or in a nursing home.
1. Benefit payments from long-term care insurance are not subject to federal taxation.
 2. Premium payments for tax-qualified long-term care insurance policies are deductible as personal medical expenses if the policyholders itemize their deductions.

- I. Determining appropriate coverage for long-term care insurance policy options should be carefully compared, including the following options: amount of maximum benefit; duration of the coverage; type of coverage; cost of the policy; housing facilities and services provided; waiting period; inflation protection; preexisting condition limitation; nonforfeiture benefits; waiver of premium payment; third-party notification, and premium refund on death.
- J. Prospective buyers of long-term care insurance should evaluate the insurance companies for strength, size, and history of payment of claims. There are two often-used rating services, A.M. Best Company and Standard & Poor's Insurance Rating Services.
- K. There are alternatives to long-term care insurance. A person may borrow from the cash value of a whole-life insurance policy or use a reverse mortgage on his/her home. A person must be at least age 62 and own the home mortgage-free or be able to pay off any existing mortgage balance with funds from the reverse mortgage loan. The loan interest accrues and becomes due with the loan when the owner moves or dies.

ANSWERS TO THE REVIEW QUESTIONS

1. Explain the effect the baby boomer generation will have on long-term care.
The baby boomer generation (those born between 1946 and 1964) will affect long-term care since they accounted for the largest percentage increase of any age group during the 1990–2000 decade. The first half of the 21st century is being called the “Era of the Seniors,” and we will continue to have a dramatic increase in the number of elderly persons who will require special housing and long-term medical care.
2. Who will be responsible for most of the long-term care of our seniors?
Most of the aging baby boomers will initially stay in their homes; by the year 2030 (when they begin to reach the age of 85) other housing, especially nursing homes, will likely be their option.
3. What federal programs are available to defray the cost of long-term care?
Social Security, Medicare, and Medicaid.
4. Using your Medicare handbook, list the services covered and not covered under Medicare Part A for each of the following: services provided by a skilled nursing facility; home health care; and a hospice.
This answer will depend on the most current information in the Medicare handbook.
5. Describe the prescription drug benefit provided by Medicare (see the Medicare handbook).
This answer will depend on the most current information in the Medicare handbook. This coverage is optional and available if Medicare coverage is in effect.
6. Explain the spend-down procedure.
This is a procedure that requires an individual to spend enough income and resources to qualify for Medicaid eligibility.
7. Explain the tax advantage of a tax-qualified long-term care insurance policy under current law. How can the law be improved so there is more incentive for people to purchase long-term care insurance?
Under current law the benefits you receive from long-term care insurance policy are not taxed. You also may itemize as a deduction the amount of premium you pay.
8. What should you look for when evaluating long-term care insurance companies?
You should select a company that has an established history of prompt payments and excellent service. You can check a private company, such as A.M. Best Company or Standard & Poor's Insurance Rating Services, to look at the rating of the insurance company.
9. What are the options you consider most important in selecting a long-term care insurance policy and why?
You should consider: Amount of the maximum benefit; duration of the coverage; types of coverage; cost of the policy; housing facilities and services provided; waiting period; inflation protection; preexisting condition limitation; nonforfeiture benefit; waiver of premium payment; third-party notification, and premium refund on death.

10. What are long-term care partnerships? What states participate in these partnerships?

Long-term care partnerships that exist between four states, i.e., California, Connecticut, Indiana, and New York, and their Medicaid agencies allow resident purchasers of a long-term care insurance policy to go on Medicaid when the policy benefits are exhausted without first having to deplete (spend down) their own assets to become eligible.

ANSWERS TO THE CASE PROBLEMS

Problem 1

The answer will vary depending on the student. Consultation with Mary Olson is necessary to determine her wishes.

Problem 2

The answer will vary depending on the student. If students are familiar with Excel software, you might have them prepare an Excel chart showing the costs over a five-year period.

ANSWERS TO THE ASSIGNMENTS

Assignment 15.1

The answer will vary depending on the student and the state.

Assignment 15.2

The answer will vary depending on the student.

Assignment 15.3

The answer will vary depending on the student.

Assignment 15.4

The answer will vary depending on the student.

Assignment 15.5

The answer will vary depending on the student.

Assignment 15.6

Types of coverage will vary according to the insurance contract. Preexisting conditions may not be covered.

Assignment 15.7

The answer will depend on the hypothetical facts given by the instructor.

ANSWERS TO THE PRACTICAL ASSIGNMENTS

1. The answers will vary depending on student selection.
2. Instructor will need to review the letter, but essential elements will be to advise the client that benefits for Medicaid will not commence until Otis has attained the age of 65 or is considered permanently disabled under the Social Security definition. In general, to be disabled Otis must have been unable to work for a year or more because of his disability. Additionally, Otis must prove that he is a U.S. citizen or meets certain immigration rules, is a resident of the state where he applies, and has a Social Security number.
3. Mrs. Mannington would need to submit the following documents: (1) A birth certificate or other proof of birth (2) Proof of U.S. citizenship or lawful alien status if Mr. Mannington was not born in the United States (3) U.S. military discharge paper(s) if Mr. Mannington had military service before 1968, (4) W-2 forms(s) and/or self-employment tax returns for last year, and (5) Mr. Mannington's death certificate.

TEST BANK

CHAPTER 1: THE CONCEPT OF PROPERTY RELATED TO WILLS, TRUSTS, AND ESTATE ADMINISTRATION

MATCHING

- a. chattel
- b. chose in action
- c. nonprobate property
- d. intestate succession statutes
- e. joint tenants
- f. partition
- g. community property
- h. commingling
- i. fee simple estate
- j. remainder
- k. digital assets

1. *The division of real property held by joint tenants or tenants in common into separate portions so that the individuals may hold the property in severalty*
2. *Two or more persons who own or hold equal, undivided interests in property with the right of survivorship*
3. *A future estate in real property that takes effect on the termination of a prior estate created by the same instrument at the same time*
4. *An estate in which the owner has an absolute, unqualified, and unlimited interest in real property*
5. *Real and personal property owned by the decedent at the time of death that cannot be transferred by will or inheritance*
6. *Combining community and separate property*
7. *State laws that provide for the descent and distribution of property to those whom a decedent would probably have chosen if the decedent had made a will*
8. *Any item of personal property*
9. *All property, other than that received by gift, will, or inheritance, acquired by either spouse during marriage that is considered to belong to both spouses equally*
10. *A right to bring a civil lawsuit to recover money damages or possession of personal property*
11. *Assets that are stored electronically*

TRUE/FALSE

1. Real property is property that is immovable, fixed, or permanent.
2. Real property can be tangible or intangible.
3. A United States savings bond payable upon death to a named beneficiary is a form of probate property.

4. The law of property is mostly statutory.
5. In order for a joint tenancy to be created, common law requires unity of time, unity of title, unity of interest, and unity of possession.
6. When a joint tenant dies, his or her share of the property transfers to his or her spouse, children, or other designated heir.
7. While alive, each joint tenant has the right of severance.
8. Neither party in a tenancy by the entirety can sell, give away, or otherwise convey the property on his/her own.
9. Most states today still retain dower and curtesy.
10. No notice to terminate is required for a tenancy for years.

MULTIPLE CHOICE

1. Which is an example of real property?
 - a. Crops cultivated for sale
 - b. Automobile
 - c. Apartment building
 - d. Stocks and bonds
2. Which is NOT used to determine if personal property has been converted into a fixture?
 - a. Conveyance
 - b. Annexation
 - c. Adaptation
 - d. Intention
3. A dishwasher is an example of a/an:
 - a. Agricultural fixture
 - b. Domestic fixture
 - c. Trade fixture
 - d. Commercial fixture
4. Which is an example of tangible personal property?
 - a. Stamp collection
 - b. Cash
 - c. Trademark
 - d. Government bond
5. Which is (are) an example(s) of intangible personal property?
 - a. Online blog
 - b. Cash
 - c. Bitcoins
 - d. All of the above

6. Which is an example of probate property?
 - a. Annuity contracts with a named beneficiary
 - b. Property owned in tenancy
 - c. Money placed in a bank account as a Totten trust
 - d. Gain from the sale of a business

7. Which is an advantage of joint tenancy?
 - a. The person who creates the joint tenancy has complete control over the property.
 - b. Joint tenancy avoids probate.
 - c. All joint tenants must agree before the joint tenancy can be terminated.
 - d. The surviving recipient of the property previously held in joint tenancy is always the intended beneficiary.

8. Which is NOT an example of community property?
 - a. Property owned by the spouses in partnerships
 - b. Property obtained from community property income during the marriage
 - c. Income earned or acquired during the marriage by either spouse's employment
 - d. Inheritance to a single spouse during the marriage

9. Which is a characteristic of a life estate?
 - a. A life estate may not last for the lifetime of the original owner.
 - b. A life estate cannot be created by deed.
 - c. Life tenants while living may convey their interest in the property by sale or gift to a third person.
 - d. A life estate can be transferred by will.

10. Which does NOT apply when a life estate is created and a reversion is retained?
 - a. The grantee is the only person entitled to a reversion.
 - b. The real property that reverts does not go through the probate process of the life tenant's estate.
 - c. The grantor can transfer the reversion by deed or will.
 - d. The reversion is not lost if the grantor dies before the grantee.

11. The few states that retain dower and curtesy agree on all of the following EXCEPT:
 - a. *Dower and curtesy rights can be released by spouses upon verbal agreement.*
 - b. *Dower and curtesy occur only upon the death of a spouse.*
 - c. *Dower and curtesy apply even if the decedent died testate.*
 - d. *Dower and curtesy are exempt from the claims of creditors of the decedent spouse.*

CHAPTER 2: THE ESTATE PLAN AND THE PURPOSE AND NEED FOR A WILL

MATCHING

- a. testamentary capacity
 - b. testator or testatrix
 - c. real property
 - d. ambulatory
 - e. codicil
 - f. property guardian
 - g. fiduciary duty
 - h. legal title of a trust
 - i. principal
 - j. domiciliary administration
-
1. *An individual or trust institution appointed by a court to care for and manage the property of a minor or an incompetent person*
 2. *The capital or property of a trust, as opposed to the income, which is the product of the capital*
 3. *The sanity (sound mind) requirement for any person making a valid will*
 4. *Subject to change or revocation any time before death*
 5. *A written amendment to a will that changes but does not invalidate the will*
 6. *The form of ownership for a trust property held by the trustee, giving the trustee the right to control and manage the property for another person's benefit*
 7. *A man or woman who makes and/or dies with a valid will*
 8. *The administration of an estate in the state where the decedent was domiciled at the time of death*
 9. *A duty or responsibility required of a fiduciary, which arises out of a position of loyalty and trust, to act solely for another person's benefit*
 10. *Land, buildings, and the objects permanently attached to them*

TRUE/FALSE

1. Not everyone can legally make a will.
2. All wills are ambulatory.
3. Copies of the letter of instructions should be given to family members.
4. The testator has no control over the determination of the source from which death taxes will be paid.
5. Everyone needs a will.

6. The surviving natural parent is automatically appointed the property guardian for the decedent's minor or incompetent children.
7. A single person can be a settlor, trustee, and beneficiary.
8. To acquire the authority and powers of the position, a personal representative must be appointed by the testator.
9. Anyone may dispose of property as a gift while alive.
10. Most states require that a valid will be dated.

MULTIPLE CHOICE

1. Which is NOT a reason that many people die without a valid will?
 - a. Procrastination
 - b. Assumed expense
 - c. Reluctance to discuss property and finances with strangers
 - d. Request of the beneficiary
2. When a testator signs his or her name at the bottom of the will, he/she is:
 - a. Subscribing
 - b. Executing
 - c. Attesting
 - d. Witnessing
3. The minor daughter of a decedent can generally be any of the following EXCEPT:
 - a. Distributee
 - b. Executrix
 - c. Heir
 - d. Next of kin
4. If a person preplans his/her funeral and burial arrangements, these arrangements should be included in the:
 - a. Letter of instructions
 - b. Will
 - c. Codicil
 - d. Uniform Probate Code (UPC)
5. Which would be a reason for the creation of a trust?
 - a. To save taxes but incur probate expenses
 - b. To encourage spendthrift beneficiaries to deplete the trust fund
 - c. For religious, educational, or charitable purposes
 - d. To appoint a property guardian for a minor
6. Which is LEAST likely to be used as a substitute for a will?
 - a. Testamentary trust
 - b. Joint tenancy
 - c. Life insurance
 - d. Community property agreement

7. In order for a will to be valid, it must:
 - a. Include the date of death
 - b. Be signed only by witnesses
 - c. Be witnessed by no fewer than five people
 - d. Be written or typed with a typewriter or word processor

8. If a person wants to donate his/her organs or remains, this request should be made in the:
 - a. Letter of instructions
 - b. Will
 - c. Codicil
 - d. Donor card signed only by the donor

9. Who is the only person a testator CANNOT disinherit?
 - a. Surviving minor child
 - b. Surviving spouse
 - c. Surviving adult child
 - d. Sibling

10. A testator must have all of the following EXCEPT:
 - a. Executor
 - b. Testamentary capacity
 - c. Legal capacity
 - d. Designation of property

CHAPTER 3: THE LAW OF SUCCESSION: **DEATH TESTATE OR INTESTATE**

MATCHING

- a. succession
- b. testacy
- c. statutory will
- d. legacy and bequest
- e. escheat
- f. nuncupative will
- g. holographic will
- h. living will
- i. affinity
- j. consanguinity

1. *One that is made orally*
2. *The passage of an intestate decedent's property to the state when there are no surviving blood relatives or a spouse*
3. *Related by blood through a common ancestor*
4. *Related by marriage*
5. *A fill-in-the-blank will that is created and authorized by statute in a few states*
6. *A separate document that concerns the withholding or withdrawal of life support*
7. *Replaced by the term devise under the UPC*
8. *The act of acquiring property from a decedent by will or by operation of law when the person dies intestate*
9. *One that is handwritten*
10. *Death with a valid will*

TRUE/FALSE

1. States that allow holographic wills generally require that the wills also be signed by witnesses.
2. A living will states where the decedent wishes his/her children to be raised.
3. Abatement can cause the gifts made in a will to be reduced or even eliminated.
4. If a person dies intestate, his or her property passes automatically to the state.
5. Common law computation is used to determine the degree of relationship between the decedent intestate and a potential heir.

6. When a spouse dies intestate, the surviving spouse's rights to the decedent spouse's estate are determined by state statute and by which other family members survive the intestate.
7. In some states, if a person marries after making a will, the marriage revokes the will.
8. A revocable living trust set up by a person for the benefit of his/her children from a prior marriage may be revoked by the second spouse upon the death of the person who set up the trust.
9. Only the living, natural, marital children of a man or woman have a right to his/her estate upon death.
10. In some states, a homestead allowance may be granted in place of a homestead exemption.

MULTIPLE CHOICE

1. Which is NOT a basic type of will?
 - a. Joint will
 - b. Holographic will
 - c. Statutory will
 - d. Living will
2. Which form of will is NOT made in writing?
 - a. Statutory will
 - b. Nuncupative will
 - c. Living will
 - d. Holographic will
3. Which is a gift of a fixed amount of money from the assets of a testator's estate?
 - a. Specific legacy
 - b. Residuary legacy
 - c. Specific devise
 - d. General legacy
4. If a decedent left three children and five grandchildren, two of whom are the sons of a deceased daughter, and the per stirpes method of distribution is used, how much of the decedent's estate will the two children of the deceased daughter receive?
 - a. One-eighth
 - b. One-fifth
 - c. None
 - d. One-fourth
5. When a person dies intestate and has no spouse or children, the estate then goes to:
 - a. Lineal ascendants
 - b. Other lineal descendants
 - c. Other next of kin
 - d. The state
6. How long would a decedent and spouse have to be married for the surviving spouse to be entitled to an elective-share percentage of 50 percent of the augmented estate?
 - a. 15 years
 - b. 5 years
 - c. 10 years
 - d. 20 years

7. Which of the following is an advantage of a will?
 - a. It eliminates complicated procedures
 - b. The probate of a will is generally quick, easy, and inexpensive.
 - c. It retains privacy and confidentiality about the decedent's property and beneficiaries.
 - d. It allows a person to leave property to someone who would not be entitled to inherit under intestate succession

8. In orthodox terminology, which of the following refers to the recipient of personal property, other than money, according to a will?
 - a. Beneficiary
 - b. Devisee
 - c. Legatee
 - d. Heir

9. After execution of a will, the testator, by an intentional act of ademption, has the right to do all of the following EXCEPT:
 - a. Add a beneficiary
 - b. Revoke or cancel a testamentary gift
 - c. Deliver the gift to the beneficiary before the testator's death
 - d. Substitute a different gift for the original one

10. Which is NOT a general rule of distribution under most states' intestate succession statutes?
 - a. If an intestate decedent is survived by a spouse and children who are all born to the surviving spouse and decedent, the spouse receives a lump sum of money and/or a portion of the estate, and the children receive the remainder of the estate equally
 - b. If an intestate decedent is survived by a spouse and children, some of whom are not the children of the surviving spouse, the spouse receives a lump sum of money and/or a portion of the estate, and only the children born to both the decedent and the surviving spouse receive the other half of the estate.
 - c. If an intestate decedent has no surviving spouse or kindred relatives, the state receives the decedent's property.
 - d. If an intestate decedent has no surviving spouse or lineal descendants but is survived by a parent and other collateral relatives, the parent will receive the estate.

CHAPTER 4: WILLS VALIDITY REQUIREMENTS, MODIFICATION, REVOCATION, AND CONTESTS

MATCHING

- a. testamentary capacity
 - b. testamentary intent
 - c. publication
 - d. interested witness
 - e. operation of law
 - f. standing
 - g. in terrorem clause
 - h. ambulatory
 - i. attest a will
 - j. revocation by subsequent writing
1. *The requirement that only a person who stands to lose a pecuniary interest in a decedent's estate if a will is allowed may contest the will*
 2. *To bear witness and to affirm or verify a will as genuine*
 3. *The sound mind requirement for a person to make a valid will*
 4. *A person who is a beneficiary and a witness of the same will*
 5. *The automatic revocation or amendment of a will by state statute without the testator's knowledge of or agreement to the revocation*
 6. *Revocable and subject to change*
 7. *The requirement for a valid will that the testator must intend the instrument to operate as his or her last will*
 8. *The cancellation of a will by the writing of a new will or the adding of a codicil to the will*
 9. *A statement in a will that if a beneficiary of the will objects to probate or challenges the will's distributions, that contestant forfeits all benefits of the will*
 10. *The formal declaration of a testator at the time of signing a will that it is his/her last will and testament*

TRUE/FALSE

1. For a will to be declared a legal document that can transfer a decedent's estate after death, the maker must have testamentary intent.
2. The most common method of creating a will today is by videotape.
3. In states that allow nuncupative wills, the testator does not have to be legally capable of making a written will.
4. Every page of a will should be numbered.

5. Today, codicils are almost obsolete.
6. Once executed, a will can be revoked only by changing it or writing an entirely new will.
7. If a will is lost, it is automatically revoked.
8. Creditors can generally contest a will.
9. Any will is open to a will contest, even if the maker of the will fulfills all requirements for a valid will.
10. A testator may stipulate in his/her will that if a certain person contests the will, then he/she forfeits all benefits of the will.

MULTIPLE CHOICE

1. Which is NOT a requirement for the creation of a valid will?
 - a. The beneficiary must be legally and mentally capable.
 - b. The testator must intend that a document be his/her last will.
 - c. The will must be signed by witnesses.
 - d. The testator or a person other than the testator must sign the will or make some other written mark.
2. Which of the following indicates that a testator lacks mental capacity?
 - a. The testator suffers from insane delusions.
 - b. The testator has a low level of intelligence or suffers from a mental illness or senility.
 - c. The testator does not remember the persons who are the “natural objects of his or her bounty.”
 - d. The testator is neglectful of his/her person and makes a will containing eccentricities.
3. Which witness to the execution of a will is LEAST likely to have a conflict of interest?
 - a. Paralegal working with the attorney who drafts the will
 - b. Beneficiary of the will
 - c. Attorney who drafts the will
 - d. Nonbeneficiary associate of the testator
4. Witnesses to the execution of a will must do all of the following EXCEPT:
 - a. Sign in the presence of one another
 - b. Sign at the bottom of the will
 - c. Sign in the presence of the testator
 - d. Witness the testator’s signature or witness the acknowledgment of the signature
5. Which is NOT a way to accomplish revocation?
 - a. By operation of law
 - b. By physical act
 - c. By intent
 - d. By subsequent writing
6. Which is NOT an example of revocation by a physical act?
 - a. A person uses a pen to cross out all clauses of a will, despite the testator’s objections.
 - b. The testator burns the will.
 - c. A person shreds a will upon the testator’s instructions in the presence of witnesses.
 - d. The testator tears the will in half.

7. Which is NOT an example of revocation by subsequent writing?
 - a. A single testator writes a new will.
 - b. The testator crosses out all clauses of the will with a pen.
 - c. The testator adds a codicil to the will.
 - d. An engaged testator writes a new will prior to marriage.

8. Which constitutes grounds for contesting a will?
 - a. The testator was uninfluenced by fraud to write or change the will.
 - b. The will has been revoked.
 - c. The will has been properly executed.
 - d. The will is free of contradictions.

9. If a client wants to leave a monetary gift for the attorney who drafts the will, to ensure ethical practice, the attorney should:
 - a. Ensure that the gift is the major asset of the estate
 - b. Draft the will as requested
 - c. Fully disclose the code of conduct to the client
 - d. Direct another attorney in the firm to draft the will

10. A presumption of undue influence may be raised if a contestant shows that:
 - a. The alleged influencer actively participated in preparing the will.
 - b. A confidential relationship did not allow the alleged influencer an opportunity to control the testamentary act.
 - c. The alleged influencer will not unduly profit as a beneficiary.
 - d. The testator was not in a sickened or weakened condition when the will was executed.

CHAPTER 5: PREPARATION TO DRAFT A WILL: CHECKLISTS AND THE CONFERENCE WITH THE CLIENT

MATCHING

- a. spendthrift
 - b. life estate
 - c. disinheritance
 - d. dividend
 - e. fair market value
 - f. homestead
 - g. receivables
 - h. life insurance
 - i. contract for deed
 - j. primary beneficiary
1. *Debts established in the course of business that are currently due from others*
 2. *An agreement to sell real property on an installment basis*
 3. *The family home and adjoining land*
 4. *A legally binding agreement by which one party promises to pay another a certain sum of money if the policyholder dies or suffers a disability*
 5. *One who wastes money or spends it unwisely*
 6. *The person who has a superior claim over all others to the benefits of a life insurance contract*
 7. *The monetary amount an item would bring if it were sold on the open market*
 8. *An interest in real property*
 9. *The share of profits or property to which the owners of a business are entitled*
 10. *A testator's act of specifically depriving someone who would otherwise be that testator's legal beneficiary*

TRUE/FALSE

1. Checklists should be used to collect information during the initial interview.
2. In order to efficiently assist the attorney, the paralegal needs to develop drafting and counseling skills.
3. The paralegal should familiarize the client with the taxes imposed on a decedent's estate and give legal advice about how to minimize them.
4. Recommending periodic reviews of the will whenever the client's marital status changes constitutes improper solicitation.
5. One of the paralegal's duties is to collect complete information about the client, his/her family, and the beneficiaries to be named in the will.

6. For smaller estates, joint tenancy ownership can prevent additional administration expenses.
7. A spouse can be legally disinherited, but a child cannot.
8. Witnesses must read and be informed of all contents of a will before signing.
9. When drafting a will, simple language should be used.
10. The client should receive a rough draft of the will.

MULTIPLE CHOICE

1. The checklist for family data should include all of the following EXCEPT:
 - a. Tangible personal property, including personal effects and clothing of considerable value
 - b. Age and marital status of the testator
 - c. Mental and physical health of the testator and spouse
 - d. Full names, addresses, and phone numbers of the participants
2. Which type of checklist will include a “Patents” heading?
 - a. Family data
 - b. Family advisers
 - c. Assets and liabilities
 - d. Life insurance data
3. Which is an example of a liability?
 - a. Individual retirement account (IRA)
 - b. Automobile loan
 - c. Partnership agreement
 - d. ATM card
4. Which is NOT a disadvantage of using a preprinted will form?
 - a. Words on preprinted forms are often crossed out or deleted by ink or type.
 - b. A preprinted will form is easily forged.
 - c. A preprinted will form might not meet the special needs of the testator.
 - d. A preprinted will form is expensive to *use*.
5. When drafting a will, the paralegal should:
 - a. Make sure all copies of the will are signed
 - b. Use legal words and elaborate phrasing whenever possible
 - c. Include a residuary clause
 - d. Erase as many mistakes as necessary, and make any corrections needed on the final will
6. Which is a government grant that gives an inventor an exclusive right to make, use, and sell an invention?
 - a. Copyright
 - b. Patent
 - c. Royalty
 - d. Receivable

7. What is an annuity?
 - a. A fixed sum to be paid at regular intervals to an insurance policyholder for either a certain or indefinite period
 - b. The cash reserve that increases each year an insurance policy remains in force as a minimum savings feature
 - c. An annual sum that the insured pays to an insurance company as consideration for the insurance contract
 - d. An alternative that a party to an insurance contract agrees to follow to discharge the agreement

8. An agreement or contract to sell real property on an installment basis is:
 - a. A promissory note
 - b. A mortgage
 - c. An installment purchase
 - d. A contract for deed

9. A condition or specific event that must occur before an agreement or obligation becomes binding is:
 - a. A condition precedent
 - b. A condition subsequent
 - c. A defeasance
 - d. An advancement

10. Which is tangible personal property?
 - a. Cash
 - b. Stocks and bonds
 - c. A vacation home
 - d. Automobiles

CHAPTER 6: FINAL DRAFT AND EXECUTION OF A VALID WILL

MATCHING

- a. exordium clause
 - b. residuary clause
 - c. conservator
 - d. delay clause
 - e. simultaneous death clause
 - f. principal
 - g. attestation clause
 - h. medical power of attorney
 - i. nondurable power of attorney
 - j. springing power of attorney
1. *A person who directs an agent to act for the principal's benefit subject to the principal's direction and control*
 2. *A statement in a will that determines the distribution of property in the event there is no evidence as to the priority of time of death of the testator and another, usually the testator's spouse*
 3. *The authority of a person to act on behalf of the principal that is triggered by the occurrence of a specified anticipated event*
 4. *The authority of a person to act on behalf of the principal that ends when a specified event occurs*
 5. *The guardian and manager of property left to minor or incompetent children*
 6. *The authority of a person appointed by a patient to make decisions about his/her medical care when he/she becomes incapacitated and unable to make such decisions*
 7. *A requirement of most states that a person must survive the first decedent by at least 120 hours to qualify as a surviving beneficiary*
 8. *The beginning or introductory clause of a will*
 9. *A statement by the witnesses in a will that they have attested and subscribed the testator's signature*
 10. *A statement in a will that disposes of the remaining assets of the decedent's estate after all debts and gifts in the will are satisfied*

TRUE/FALSE

1. A safe deposit box in the name of the testator is the preferred choice for storage of the will.
2. The durable power of attorney for health care document gives the designated agent the right to obtain and disclose the principal's medical records.
3. The Patient Self-Determination Act requires health care providers who work with Medicaid and Medicare to provide each patient or authorized surrogate written information about the patient's right to be informed, upon admission by the health care facility, of policies that concern patients' rights.

4. The United States Supreme Court has ruled that a constitutional right to die exists.
5. Some states allow an option for self-proving a will.
6. The testimonium clause generally introduces new information.
7. A delay clause is used to prevent an estate from being taxed twice in the event of simultaneous death.
8. A surviving natural parent will usually be denied custody of a child if the decedent was the custodial parent and named another person to be appointed as guardian.
9. A decedent's wish to donate his/her body to science will be denied if the nearest relatives object.
10. In most states, a prior will is automatically revoked when the testator writes, dates, and signs a new will.

MULTIPLE CHOICE

1. Which is NOT a standard clause or provision of a will?
 - a. Specific testamentary gifts
 - b. Provision for residue of estate
 - c. Testator's signature
 - d. Power of attorney
2. Which is related to, but NOT part of, a standard will?
 - a. General revocation clause
 - b. Appointment of personal representative
 - c. Letter of instructions
 - d. Appointment of personal and/or property guardian
3. The purpose of the exordium clause is to declare to the public all of the following EXCEPT:
 - a. Identity of the attorney
 - b. The testator's intent and capacity to create a will
 - c. The testator's intent to make this document the last will
 - d. The location of the testator's principal residence or domicile
4. Which person is generally NOT automatically covered when the term *children* is used in a will?
 - a. Natural, marital child
 - b. Stepchild
 - c. Nonmarital child
 - d. Adopted child
5. Which part of a will names the person whom the testator wishes to care for his/her children in the event of the testator's death?
 - a. Appointment of personal and/or property guardian
 - b. Testamentary trust clause
 - c. Testimonium clause
 - d. Provision for residue of estate

6. A Letter of instructions is preferred to include which clause?
 - a. Exordium clause
 - b. Provision for payment of debts and funeral expenses
 - c. Instructions for funeral and burial
 - d. Specific testamentary gifts clause

7. Which grants another person the right to act legally on behalf of the person who authorizes and grants the power?
 - a. Living will
 - b. Power of attorney
 - c. Letter of instructions
 - d. Self-proving affidavit

8. Which is the LEAST desirable place for a will to be kept?
 - a. With the testator
 - b. In the lawyer's office vault
 - c. With the clerk of the appropriate probate court
 - d. In a safety deposit box

9. What is the first priority in drafting a will under an attorney's supervision?
 - a. Understanding the client's objectives
 - b. Reviewing the selected draft with the client
 - c. Gathering data from the client
 - d. Analyzing the information

10. Which is NOT an example of a specific testamentary gift?
 - a. Devise
 - b. Bequest
 - c. Legacy
 - d. Memorandum

CHAPTER 7: THE PARTICIPANTS AND THE PROPER COURT

MATCHING

- a. Letters Testamentary
- b. tickler system
- c. registrar
- d. probate (of a will)
- e. jurisdiction
- f. *in rem* jurisdiction
- g. disbursements
- h. venue
- i. residence
- j. domicile

1. *Expenses and debt payments*
2. *The dwelling in which one temporarily lives or resides*
3. *The authority of the court over the decedent's property*
4. *The particular place, city or county, where a court has authority to hear and decide a case*
5. *The formal document of authority and appointment given to a personal representative by the court to administer a decedent's estate according to the terms of a will*
6. *The legal home where a person has a true, fixed, and permanent place of dwelling and to which the person intends to return when absent*
7. *The authority by which a particular court is empowered by statute to decide a certain kind of case and to have its decision enforced*
8. *A chronological list of all the important steps and dates in the stages of the administration of a decedent's estate*
9. *The procedure by which a document is presented to the court to confirm it is a valid will*
10. *A person designated by a judge to perform the functions of the court in informal proceedings*

TRUE/FALSE

1. A personal representative is obligated to act in good faith solely for the benefit of another person.
2. If a personal representative is a man, he is referred to as an executrix.
3. A personal representative has a duty to commence a civil lawsuit for claims on behalf of the estate when necessary.
4. A personal representative does not have to be appointed by the court if the will clearly states who the decedent wished to serve as the personal representative.
5. A personal representative generally handles all the estate administration duties on his/her own.

6. An attorney or paralegal should never solicit or suggest that he/she be made personal representative if hired to draft a will.
7. Paralegals handle many of the time-consuming details of administering a decedent's estate.
8. Residence determines venue.
9. A decedent's will must be entered into probate only in his/her domiciliary state even if he/she owns property in other states.
10. A personal representative can act as the ancillary administrator in all states.

MULTIPLE CHOICE

1. Who is NOT involved in the preparation of wills and trusts and the administration of a decedent's estate?
 - a. Probate court
 - b. Personal representative of the estate
 - c. Paralegal
 - d. Beneficiary
2. Which is a responsibility of the personal representative?
 - a. Administering oaths in court
 - b. Preparing a preliminary draft of the will
 - c. Publishing a notice to creditors to submit their claims by a specific date
 - d. Keeping records and acting on behalf of the court
3. Which is the responsibility of a court clerk?
 - a. Authenticating and certifying copies of documents
 - b. Keeping records and acting on behalf of the court
 - c. Executing the final draft of a will
 - d. Collecting, protecting, preserving, and managing the probate estate of the decedent
4. Which is the responsibility of a paralegal?
 - a. Distributing the remaining assets to the beneficiaries named in the will
 - b. Assisting in the execution of the final draft of a will
 - c. Ensuring that the personal representative properly administers the estate
 - d. Keeping records and acting on behalf of the court
5. Which circumstance would NOT make the personal representative's job more difficult?
 - a. Creditors cannot be found.
 - b. Heirs cannot be found.
 - c. Someone contests the will.
 - d. Someone contests the representative's payment to creditors.
6. Which is a pre-probate duty of the personal representative?
 - a. Opening an estate checking account
 - b. Helping to find and review any existing will
 - c. Notifying the surviving spouse and/or minor children of their rights
 - d. Appraising all assets by value at the time of the decedent's death

7. Which is NOT an aspect of the personal representative's duties to protect, collect, and preserve assets?
 - a. Finding and reviewing all documents, records, and papers concerning the decedent's financial affairs
 - b. Taking possession of all personal property not set aside for the spouse and/or minor children
 - c. Locating and notifying witnesses of the testator's death
 - d. Determining whether the decedent gave any gifts that would require a gift tax return

8. Which is NOT a probate task of the paralegal?
 - a. Filing legal documents
 - b. Maintaining records of all collected assets
 - c. Helping to locate the will, if requested
 - d. Handling communication with parties holding assets, creditors, beneficiaries, and heirs

9. Jurisdiction is generally determined by the decedent's:
 - a. Residence
 - b. Domicile
 - c. Will
 - d. Venue

10. Ancillary administration in the foreign state generally includes all of the following procedures EXCEPT:
 - a. Transfer of the decedent's personal property to persons entitled to the property according to the foreign state's intestate succession statute
 - b. Payment of taxes imposed by the foreign state to that state
 - c. Acceptance by the foreign state court of the will admitted to probate in the decedent's domiciliary state
 - d. Issuance of letters of authority that permit the real property to be transferred to the designated devisee named in the will

CHAPTER 8: PERSONAL REPRESENTATIVES: TYPES, PRE-PROBATE DUTIES, AND APPOINTMENT

MATCHING

- a. special administrator
 - b. administrator *cum testamento annexo*
 - c. administrator *de bonis non*
 - d. public administrator
 - e. ancillary administrator
 - f. Letters Testamentary
 - g. Letters of Administration
 - h. surety bond
 - i. Decree of Distribution
 - j. final account
 - k. disclaimer
-
1. *A court order appointing an administrator of an estate when the decedent died intestate*
 2. *A court order recognizing that all allowed claims and expenses of an estate have been paid and that all heirs are named and the share of the decedent's property to which they are entitled is listed*
 3. *A court order admitting a will as valid and authorizing the executor named in the will to handle the administration of the decedent's estate*
 4. *A certificate in which an individual or corporation promises to pay the probate court a certain amount of money if the personal representative fails to faithfully perform the duties of administering the decedent's estate*
 5. *A personal representative appointed temporarily by a probate court to handle certain immediate needs of an estate*
 6. *A list made by an executor or administrator of an estate that includes all estate assets that he/she has collected as well as all receipts and disbursements*
 7. *A person appointed by the court to oversee the administration of a decedent's estate that is located in a foreign state*
 8. *A personal representative appointed by the court when a will maker does not name an executor or the named executor cannot serve*
 9. *A public official appointed by the court to administer the property of an intestate who has left no person entitled to apply for appointment as personal representative and Letters of Administration*
 10. *A personal representative appointed by the court when a previous personal representative begins but fails to complete administration*
 11. *A petition filed with the court by a beneficiary who wishes to surrender any interest in a will*

TRUE/FALSE

1. Court judges are prohibited from being personal representatives.
2. The personal representative is responsible for discovering, collecting, and preserving all probate assets of any value.
3. If a personal representative does not possess adequate skills to discover, collect, and preserve digital assets, he/she should hire someone who has the requisite knowledge.
4. When a will has been discovered, copies of the will should be prepared for the beneficiaries and devisees.
5. The attorney is likely to be called in to assist in sorting out a decedent's estate before the funeral arrangements are complete.
6. Only family members should be invited to the family conference.
7. Property in joint tenancy is a probate asset and should be included in the list of assets subject to probate.
8. During the family conference, the paralegal should ask whether the decedent made any advancements to any beneficiaries or heirs.
9. The requirements for a bond and surety vary from state to state.
10. Witnesses to a will must appear in court to testify to the validity of the will.
11. Letters of Authority must be presented to have the decedent's mail forwarded to the personal representative.

MULTIPLE CHOICE

1. While in the process of administering the estate of his deceased brother, Larry, John also died, and his sister, Sue, having been appointed the new personal representative, is now the:
 - a. Administratrix *cum testamento annexo*
 - b. Public administratrix
 - c. Administratrix *de bonis non*
 - d. Special administratrix
2. A paralegal working with a personal representative might be responsible for all of the following EXCEPT:
 - a. Notifying appropriate parties of the decedent's death
 - b. Providing certified copies of the death certificate to the funeral director
 - c. Searching for and obtaining the will and other personal business records
 - d. Setting a date for the family conference
3. Which is a legal obligation of financial institutions with which the decedent did business?
 - a. To close any demand accounts held by the decedent
 - b. To encourage those who hold accounts with the decedent to withdraw funds to avoid death taxes
 - c. To cancel all credit card debts
 - d. To present safe deposit box contents whenever requested

4. During the family conference, the paralegal or the supervising attorney should:
 - a. Provide family members with a list of personal debts
 - b. Assume no family members were owed a debt by the deceased
 - c. Provide family members with the names of the deceased's financial advisers
 - d. Discuss the need for appointing fiduciaries
5. The personal representative will generally NOT need to file a bond if:
 - a. A corporation is appointed personal representative
 - b. There is no will
 - c. The testator requested a bond in the will
 - d. A bond is required by state statute
6. The court may require the subscribing witnesses to testify in court to all of the following EXCEPT:
 - a. That they watched the testator sign the will
 - b. That they knew the testator and that he/she was legally capable and competent
 - c. That a self-proved will is valid
 - d. That the testator declared the document to be the will
7. Certified copies of the Letters Testamentary or Letters of Administration are needed to do all of the following EXCEPT:
 - a. Open an account in the name of the estate
 - b. Open the decedent's safe deposit box
 - c. Withdraw money from existing savings accounts of the decedent
 - d. Obtain the Letters of Authority
8. What would cause a person applying for Letters Testamentary to be deemed unsuitable?
 - a. A misdemeanor record
 - b. Residency in the domiciliary state
 - c. Being a minor
 - d. No history of mental illness
9. Which is NOT performed by an ancillary administrator?
 - a. Providing a petition to prove the will
 - b. Collecting assets in a foreign state
 - c. Paying any creditors in a foreign state
 - d. Transferring the balance of the estate to the domiciliary representative
10. Which is NOT a duty of the personal representative in closing the estate after the distribution of assets?
 - a. Signing and filing a petition for settlement and distribution
 - b. Paying the law firm's fee
 - c. Proving that the remaining assets of the estate have been distributed
 - d. Submitting a final account that contains a list of all assets collected

CHAPTER 9: PROBATE AND ESTATE ADMINISTRATION

MATCHING

- a. interested parties
 - b. independent administration
 - c. “qualified small estate”
 - d. summary administration
 - e. petition for administration
 - f. citation
 - g. federal employer identification number
 - h. inventory
 - i. cause of action
 - j. appraisal
1. *A court order that fixes a date, time, and place for hearing the petition to prove a will or for administration; the petitioner is required to give notice of the hearing to all interested persons*
 2. *The right of a person to commence a lawsuit*
 3. *Beneficiaries or heirs and creditors of the decedent*
 4. *A form of administration that is generally limited to small estates that have survivors, which include a spouse and minor children, and insufficient assets to pay all creditors*
 5. *A filing with the court that a person seeking appointment as personal representative uses when there is no will*
 6. *A complete physical check of all probate assets owned by the decedent and a detailed listing of these and their estimated fair market value at the time of the decedent’s death*
 7. *A form of estate administration used in a few states that is essentially free of court supervision or intervention*
 8. *A market-based valuation of a decedent’s real or personal property by a recognized expert*
 9. *An identification of the fiduciary responsible for preparing the fiduciary income tax return and for paying any tax due*
 10. *An estate that consists entirely of statutorily exempt property or allowances and funeral and administration expenses and is within a certain limited monetary value*

TRUE/FALSE

1. Probate and estate administration are the only methods of settling an estate.
2. Summary Administration is allowed for certain small estates.
3. Under the Uniform Probate Code (UPC), formal probate is conducted under the supervision of a judge without notice to interested persons.
4. All states are required to adopt the Uniform Probate Code (UPC).

5. Prior to a hearing, a paralegal might be asked to assemble data on nonprobate property.
6. Creditors can contest a will, but they cannot challenge the appointment of a personal representative.
7. A personal representative is required to file for a Federal Employer Identification Number.
8. If a decedent leaves real property in another state, the paralegal will need to check the foreign state's statutes to determine the qualifications and residency requirements of the ancillary administrator.
9. When transferring real estate assets, it is the responsibility of the paralegal to prepare the Report of Sale of Land at Private Sale Under Order for Sale.
10. If an estate includes digital assets and the decedent has left instructions on how to access those assets, the personal representative may still be precluded from doing so because of state and/or federal law.
11. The personal representative may personally profit from estate transactions.

MULTIPLE CHOICE

1. The probate court has the power and authority to do all of the following EXCEPT:
 - a. Determine and verify the statutory rights of a spouse
 - b. Create a will if none exists
 - c. Supervise the guardianship of minors
 - d. Establish the validity of a will and appoint a personal representative
2. Estate administration may NOT be needed if:
 - a. There is property in registered form
 - b. The decedent has individually owned property in the possession of a third party
 - c. There are outstanding creditors' claims
 - d. An estate is classified as a small estate
3. When settling a small estate, Collection by Affidavit is generally allowed in all of the following situations EXCEPT:
 - a. When two days have passed since the death of the decedent
 - b. When the value of the entire estate does not exceed the state's maximum limit
 - c. When the claiming beneficiary is legally entitled to inherit the decedent's estate
 - d. When no application or petition for the appointment of a personal representative is pending or has been granted
4. The primary purpose of the Uniform Probate Code (UPC) is to:
 - a. Make estate administration more expensive
 - b. Increase the time required to administer an estate
 - c. Provide an alternate system that establishes uniform law
 - d. Make the laws more complex so that administration is more involved
5. Which is NOT a way that the paralegal assists the personal representative?
 - a. Petitioning for probate when no will exists
 - b. Arranging for publication of the Notice of Order for Hearing and Affidavit of Mailing Notice to all interested persons
 - c. Identifying and reviewing objections and arranging for the appearance of witnesses
 - d. Mailing a notice of rights to the spouse and minor children

6. To establish jurisdiction, the petition to prove a will must generally include:
 - a. The decedent's place of birth
 - b. The estimated value of the real and personal nonprobate assets
 - c. The amount of debts paid prior to the death of the decedent
 - d. The original will

7. When petitioning for administration when no will exists, which of the following is a duty of the paralegal?
 - a. Ensuring that the petition and death certificate are filed
 - b. Filing the Affidavit of Publication
 - c. Collecting all information needed to complete and execute the petition for probate of will
 - d. Arranging for witnesses to appear in court to testify on behalf of the testator

8. Checks from the estate checking account do all of the following EXCEPT:
 - a. Act as creditors' admissions of payment
 - b. Establish a record of all payments and distributions
 - c. Serve as evidence and verification of payment of taxes
 - d. Act as a credit account until estate funds are released

9. Which procedure occurs during the final account and closing of the estate phase?
 - a. The hearing on creditors' claims and payment of allowed or approved claims
 - b. The computation and filing of a state inheritance tax return or waiver
 - c. The opening of the safe deposit box
 - d. Notice to creditors

10. Which will NOT be issued by the court during the special administration process?
 - a. Inventory and Appraisal of the personal property of the decedent
 - b. Order Approving the Final Account and Report of the Special Administrator
 - c. Letters of Special Administration
 - d. Order Granting Special Administration

CHAPTER 10: INFORMAL PROBATE ADMINISTRATION

MATCHING

- a. in and out method
 - b. formal proceedings
 - c. informal proceedings
 - d. registrar
 - e. commencement of informal probate
 - f. demand to be notified of petitioner's application for informal probate or informal appointment
 - g. closing statement
 - h. valid but undischarged claim
 - i. Statement of Informal Probate
 - j. court order closing an estate
1. *An affidavit signed by the personal representative at the end of informal probate proceedings to close the estate and to be discharged*
 2. *A court document that accepts an application for informal proceedings*
 3. *A filing with the court by any persons who have an interest in the estate*
 4. *A claim by a creditor of the estate that was not paid during the distribution of assets*
 5. *Settlement of an estate in which some proceedings may be handled by the probate court but most of the administration takes place informally, out of the court*
 6. *Terminates administration*
 7. *An applicant who seeks to be appointed personal representative submits a completed application for informal probate and informal appointment*
 8. *Administration conducted before a judge with notice to interested persons*
 9. *An officer of the court who is authorized to act in place of a judge in informal probate*
 10. *Administration conducted without notice to interested persons by an officer of the court*

TRUE/FALSE

1. Informal probate generally extends the time required to complete the administration of a decedent's estate.
2. Informal probate requires the appraisal of estate assets.
3. The surviving spouse who is a devisee of the decedent has the highest priority for consideration as the personal representative in informal probate proceedings.
4. When applying for the informal probate of a will, an applicant must affirm that he/ she is unaware of any instrument that revokes the will.

5. A person applying for informal appointment does not need to notify any other parties who might have a right to be personal representative.
6. A person applying for informal probate of a will does not need to notify parties interested in the estate unless they have filed a written demand to be notified.
7. If the registrar denies an application for informal proceedings, this usually results in the commencement of formal proceedings.
8. Any party that has an interest of \$100 or more in an estate may demand that the personal representative post a bond.
9. A person who has a financial or property interest in an estate must file a demand for notice of any order or filing related to the estate within 120 hours of the passing of the decedent.
10. The personal representative is required to give personal notice of informal proceedings to all creditors.

MULTIPLE CHOICE

1. Who has the highest priority for consideration as personal representative of a decedent's estate?
 - a. Other heirs of the decedent
 - b. Non-devisee surviving spouse of the decedent
 - c. Devisee of the decedent other than the spouse
 - d. Creditor of the decedent
2. Which of the following is NOT required on applications for informal probate of a will or informal appointment?
 - a. Statement that the time limit for informal probate has expired
 - b. Interest of the applicant in the decedent's estate
 - c. Statement indicating the county or city where the proceedings are to take place
 - d. Decedent's personal information, including name, date of death, domicile, and so on.
3. The registrar will examine the forms submitted for informal proceedings for all of the following EXCEPT:
 - a. Evidence that other wills exist
 - b. Confirmation that two weeks have elapsed since the decedent's death
 - c. Compliance of the application with the Uniform Probate Code (UPC)
 - d. Evidence that all who have demanded notice of proceedings have been notified
4. Which is an acceptable method for giving notice of a hearing on a petition to an interested party?
 - a. Personally delivering a copy of the notice 14 days prior to the hearing
 - b. Publishing the notice in the newspaper every other week for a month if the identity of interested parties is unknown
 - c. Mailing a copy of the notice at least seven days before the time set for the hearing
 - d. Publishing the notice in the newspaper at least once, 14 days prior to the hearing
5. Which is NOT a duty of the personal representative during informal probate?
 - a. Providing a final account
 - b. Paying creditors' claims
 - c. Holding and managing the estate
 - d. Obtaining court approval for every item distributed

6. Within the time set by state statute, the personal representative must prepare an inventory that includes all of the following EXCEPT:
 - a. A valuation of the assets at fair market value
 - b. All real and personal property owned by the decedent at the time of death
 - c. Administration expenses
 - d. Identify any encumbrances on assets
7. Which can an informally appointed personal representative choose as a means of closing an estate informally and being discharged?
 - a. A filing of the final account with the court
 - b. A closing statement
 - c. A formal closing
 - d. A notice of final distribution of assets
8. The affidavit signed by the personal representative at the end of informal probate proceedings to close the estate and to be discharged must verify all of the following EXCEPT:
 - a. All assets of the estate have been distributed in full to the persons entitled to them.
 - b. All federal and state taxes have been paid.
 - c. A notice to creditors was published more than six months before the date of the affidavit.
 - d. A copy of the affidavit was mailed to all distributees of the estate.
9. When is the personal representative's appointment for informal proceedings terminated?
 - a. When the formal closing ends
 - b. Automatically upon closing of the estate
 - c. When the personal representative has completed all duties that he/she is required to perform
 - d. One year after the closing statement is filed, if no proceedings involving the personal representative are pending in the court
10. Which of the following would necessitate the reopening of an estate?
 - a. The location of additional omitted property of the decedent after the estate has been closed and discharged
 - b. A creditor seeking to collect a valid but undischarged claim
 - c. The personal representative committed fraud or inadequate disclosure to a creditor related to the settlement of the decedent's estate
 - d. A claim against a decedent's estate that arose before the decedent's death is presented six months after the date of the first publication of notice to creditors

CHAPTER 11: TAX CONSIDERATIONS IN THE ADMINISTRATION OF ESTATES

MATCHING

- a. estate tax
 - b. income tax
 - c. gift tax
 - d. 1997 Taxpayer Relief Act
 - e. Uniform Transfers to Minors Act
 - f. Form 1040
 - g. Form 4868
 - h. Form 709
 - i. Form 706
 - j. Form 4768
-
1. *The United States Individual Income Tax Return*
 2. *The United States Estate Tax Return*
 3. *Tax levied on an estate for the transfer of property upon death*
 4. *A law that replaced the unified credit with an applicable credit amount*
 5. *A law that allows any kind of real or personal property to be transferred to a custodianship as a gift to a minor*
 6. *The United States Gift Tax Return*
 7. *Tax levied on wages, rents, pensions, annuities, royalties, alimony, and dividends*
 8. *The Application for Extension of Time to File a Return and/or Pay United States Estate Taxes*
 9. *The Application for Automatic Extension of Time to File a United States Individual Income Tax Return*
 10. *Tax levied on a donee who transfers property during life*

TRUE/FALSE

1. Trust income is not subject to federal income tax.
2. Estate tax is a type of death tax.
3. The personal representative is generally responsible for paying all taxes out of estate assets.
4. Death tax payments are assessed against all income brackets, from the poor to the wealthy.
5. After a decedent's death, his/her estate is a new legal entity.
6. Any state in which a decedent held property may impose estate tax on the decedent's estate.

7. The gross estate is the taxable estate.
8. The federal unified gift and estate tax rate is a progressive and cumulative tax.
9. All states have adopted the Uniform Transfers to Minors Act.
10. Every transferor is allowed a lifetime exemption from the generation-skipping transfer tax.

MULTIPLE CHOICE

1. Which is NOT a reason that many people die without a valid will?
 - a. Inheritance tax
 - b. Estate tax
 - c. Gift tax
 - d. Income tax
2. A testator's estate is entitled to the marital deduction if:
 - a. There is a surviving spouse and the decedent leaves all or a portion of the estate to him/her.
 - b. There is a surviving heir other than the spouse, and the decedent leaves all or a portion of the estate to the surviving heir.
 - c. There is no surviving spouse, but had there been, the decedent would have left all or a portion of the estate to him/her.
 - d. The marital deduction is not allowed because it has been repealed.
3. Which of the following states imposes an inheritance tax on successors?
 - a. Wyoming
 - b. Minnesota
 - c. South Carolina
 - d. Kentucky
4. Bob and Mary have a son, Steven, and a granddaughter, Kelly. If Bob made a transfer of interest in property to Kelly, who would be the skip person?
 - a. Mary
 - b. Bob
 - c. Kelly
 - d. Steven
5. Which does the personal representative NOT have to file?
 - a. Federal Individual Income Tax Return
 - b. State Estate Tax Return
 - c. Federal Sales Tax Return
 - d. State Individual Income Tax Return
6. A joint federal tax return can be filed for the decedent ONLY if:
 - a. The surviving spouse agrees to file a joint return.
 - b. The surviving spouse remarried before the close of the year.
 - c. The surviving spouse lives in a different state.
 - d. The decedent was employed prior to his/her death.

7. Which is an example of a Qualified Terminable Interest Property (QTIP) property?
 - a. A life insurance policy with a one-time lump sum payment to the surviving spouse
 - b. An automobile
 - c. A homestead
 - d. A trust with a life interest to the surviving spouse and remainder to the children

8. Which state has a state income tax?
 - a. New York
 - b. Nevada
 - c. Washington
 - d. Florida

9. Which does NOT generally have to be filed by April 15?
 - a. Federal Income Tax Return
 - b. Federal Estate Tax Return
 - c. Federal Gift Tax Return
 - d. Most state income tax returns

10. Which CANNOT be subtracted from the gross estate to determine the taxable estate?
 - a. Certain expenses, liens, and encumbrances
 - b. Charitable deductions
 - c. The lessening of the value of estate assets
 - d. Marital deduction

CHAPTER 12: INTRODUCTION TO TRUSTS MATCHING

- a. legal title
 - b. *cestui que* trust
 - c. equitable title
 - d. testamentary trust
 - e. trust agreement
 - f. principal
 - g. income
 - h. Restatement of the American Law of Trusts
 - i. Uniform Trust Code
 - j. parol evidence
1. *The monetary gain that is generated from the principal of a trust*
 2. *A uniform law available for adoption by states to provide a uniform codified law on trusts*
 3. *The capital or property of a trust*
 4. *The authority on trust law in most states*
 5. *The form of ownership of trust property held by the trustee and giving him/her the right to control and manage the property for another's benefit*
 6. *Oral testimony or written evidence*
 7. *A contract, made between and signed by the settlor and trustee, that creates a trust*
 8. *The person who has the enjoyment and benefit of trust property*
 9. *A trust included in a will*
 10. *The right of the beneficiary to receive the benefits of the trust*

TRUE/FALSE

1. The trust instrument must either specifically describe the trust property or clearly define the procedure to be followed in identifying the trust property.
2. Any transferable interest in an object of ownership may become trust property.
3. A single trust may have only one beneficiary.
4. Beneficiaries of a trust must be defined by name.
5. An infant may be a beneficiary of a trust.
6. Trustees must generally be paid.
7. After the creation of a trust, title to property placed in the trust passes to at least two persons with the trustee receiving the equitable title and the beneficiary receiving the legal title.

8. A settlor may cancel a trust if a property transfer is accomplished through duress.
9. The settlor's retention of control over the trust arrangement exposes the settlor to tax liability for the trust income.
10. If there are two trustees, one may make a determination to take action without the other's consent.

MULTIPLE CHOICE

1. Which is NOT an essential element of a trust?
 - a. A sale or gift of property
 - b. One or more beneficiaries
 - c. Real or personal property
 - d. One or more trustees
2. To be a settlor, a person must meet all of the following requirements EXCEPT:
 - a. Own a transferable interest in property
 - b. Have the right or power to dispose of a property interest
 - c. Act as the beneficiary
 - d. Have contractual capacity
3. The court may appoint or replace a trustee in all of the following circumstances EXCEPT:
 - a. The trustee is incompetent
 - b. The named trustee declines the position.
 - c. The trustee dies.
 - d. The named trustee is also a co-beneficiary.
4. Which is an invalid trust combination?
 - a. The settlor, trustee, and beneficiary are three different people.
 - b. The settlor is also a co-trustee and a co-beneficiary.
 - c. The settlor is also the trustee and beneficiary.
 - d. The settlor is also the beneficiary, and another person is the trustee.
5. Which is NOT considered valid grounds for the removal of a trustee?
 - a. Lack of capacity
 - b. Resignation of the trustee
 - c. Commission of a crime
 - d. Showing favoritism to one or more beneficiaries
6. The trustee in the trust instrument is granted the power to do all of the following EXCEPT:
 - a. Delegate the performance of personal duties
 - b. Hire attorneys and stockbrokers
 - c. Subdivide or exchange real property
 - d. Lend or borrow money
7. Which is NOT a trustee's duty?
 - a. Duty to account
 - b. Duty of performance and due care
 - c. Duty to make payments of income and principal to the named beneficiaries
 - d. Duty to prevent the investment of the trust property

8. Which duty prohibits a trustee from personally profiting from his/her position as trustee (other than the compensation allowed by contract or law)?
 - a. Duty to take possession of and preserve trust property
 - b. Duty of loyalty
 - c. Duty to prevent the investment of the trust property
 - d. Duty to make payments of income and principal to the named beneficiaries

9. Which is an example of remainder beneficiary expenses?
 - a. Royalties
 - b. Depreciation
 - c. Stock splits
 - d. Costs incurred in the sale or purchase of principal

10. Which judicial remedy can a beneficiary use to be compensated monetarily (either directly or through the trust) for a trustee's breach of trust?
 - a. Civil lawsuit to compel the trustee to reimburse the trust for any loss or depreciation in value of the trust property
 - b. Removal of the trustee and appointment of a new trustee
 - c. An injunction to compel the trustee to do or refrain from doing the act that would constitute the breach of trust
 - d. Suing for specific performance

CHAPTER 13: CLASSIFICATION OF TRUSTS, THE LIVING TRUST, AND OTHER SPECIAL TRUSTS

MATCHING

- a. active trust
 - b. *inter vivos* trust
 - c. purchase-money resulting trust
 - d. failed trust
 - e. excessive endowment trust
 - f. spendthrift trust
 - g. sprinkling trust
 - h. Totten trust
 - i. declaration of trust
 - j. irrevocable living trust
-
1. *A trust that provides a fund for the maintenance of a beneficiary while safeguarding the fund against the beneficiary's extravagance or inexperience in spending money*
 2. *A trust made when a settlor retains title to property and simply declares himself/herself trustee of the property for the benefit of another person*
 3. *An express trust that can be either private or charitable*
 4. *A trust that is declared void for reasons other than that it has an illegal objective*
 5. *A trust that is established when the value of property exceeds the amount needed for the purpose of a private express trust*
 6. *A savings account in which money is deposited in the depositor's name as trustee for another person named as beneficiary and is payable upon the death of the depositor*
 7. *A trust made between living persons*
 8. *A trust that may not be amended, revoked, or canceled after its creation*
 9. *A trust for which the trustee has the authority and discretion to accumulate or distribute trust income or principal, or both, among the trust beneficiaries in varying amounts*
 10. *A resulting trust in which property is purchased and paid for by one person, at whose direction the seller transfers possession and title to another person*

TRUE/FALSE

1. All trusts must be either express or implied.
2. Charitable trusts, as public trusts, must benefit the general public.
3. The law will permit a public trust to end if the beneficiary no longer exists.
4. If a settlor wishes to see how well a trust operates while he/she is alive, a testamentary trust should be established.

5. The Rule Against Perpetuities places a time limit on how long a private noncharitable trust may exist.
6. Courts frequently use resulting trusts to settle legal disputes.
7. The money in a Totten trust is a probate asset.
8. A trust that provides income payments to a person whose spouse has died only until the person remarries opposes public policy.
9. On the death of the settlor, a revocable living trust becomes irrevocable.
10. A living trust can decrease income taxes.

MULTIPLE CHOICE

1. Which is NOT a subcategory of express trusts?
 - a. *Inter vivos* or testamentary trusts
 - b. Private or public trusts
 - c. Active or passive trusts
 - d. Implied or nonimplied trusts
2. Which is NOT an essential element of an express trust?
 - a. A charitable purpose must be expressly designated.
 - b. The settlor must transfer sufficiently identified property to the trust.
 - c. The settlor must intend to create a private trust.
 - d. A beneficiary of the trust must be named.
3. Which is NOT a requirement for an express public trust to be valid?
 - a. The settlor must intend to create a public trust.
 - b. It must benefit the general public or an indefinite class of persons.
 - c. It must limit the distribution of its fund to named individuals.
 - d. A charitable purpose must be expressly designated.
 - e. A trustee must be named to administer the trust.
4. Which is NOT a type of resulting trust?
 - a. Failed trust
 - b. Purchase-money resulting trust
 - c. Implied trust
 - d. Excessive endowment trust
5. Which of the following is a type of implied trust?
 - a. Testamentary trust
 - b. Private trust
 - c. Active trust
 - d. Constructive trust
6. Which trust is in the form of a savings account?
 - a. Totten trust
 - b. Sprinkling trust
 - c. Spendthrift trust
 - d. Constructive trust

7. Which of the following is NOT a feature of a revocable living trust?
 - a. On the death of the settlor, the living trust becomes irrevocable.
 - b. It can be used as a device for saving estate taxes
 - c. It allows the settlor to manage and retain full control over the assets of the trust.
 - d. It allows the settlor to name himself/herself as trustee.

8. Which of the following is generally a pre-death task in the administration of a trust?
 - a. Filing the annual individual income tax returns
 - b. Opening a checking account for the trust
 - c. Preparing a schedule of property held outside the trust
 - d. Requesting discharge as trustee

9. Which is NOT an advantage of using a revocable living trust as a substitute for a will?
 - a. The need for court-appointed guardians for minors is eliminated.
 - b. Publicity is avoided.
 - c. The settlor maintains ownership of assets.
 - d. A living trust is not under the control or supervision of the probate court.

10. Which function CANNOT be performed by a pour-over will?
 - a. It can allow the testator to name a personal guardian for minor children.
 - b. It can dispose of property that the testator neglected to add to the trust before death.
 - c. It can dispose of property acquired by the testator through gifts, inheritance, or good fortune shortly before death.
 - d. It can be used independently as a substitute for a will.

CHAPTER 14: ESTATE PLANNING

MATCHING

- a. marital deduction
 - b. charitable remainder
 - c. gift splitting
 - d. present interest
 - e. legal life estate
 - f. stepped-up basis
 - g. general power of appointment
 - h. term life insurance
 - i. disclaimer
 - j. bypass trust
1. *An increase in the income tax of appreciated property, which is valued on the date of the donor's death or the alternate valuation date*
 2. *The right of a beneficiary or heir to refuse a gift by will, trust, or inheritance without any adverse tax consequences*
 3. *An unlimited amount of a decedent's gross estate that may be given to the surviving spouse without being subject to federal estate tax*
 4. *An immediate and unrestricted interest in real or personal property*
 5. *An estate created by operation of law and not directly by the parties themselves*
 6. *The least expensive form of life insurance, which provides pure protection without cash surrender or loan value*
 7. *A trust in which the settlor or named beneficiary can retain income from the trust, usually for life, and after death, the trust property goes to a qualified charity*
 8. *An estate planning device whereby a portion of a deceased spouse's estate passes to a trust instead of directly to the surviving spouse*
 9. *The right to pass on an interest in property to whomever a donee chooses, including himself/herself, the estate, creditors, or creditors of the estate*
 10. *A practice available to spouses to join in annual gifts and combine their individual gifts to donees to avoid gift taxes*

TRUE/FALSE

1. Only attorneys are qualified to give estate-planning advice.
2. When it is designed appropriately, an estate plan should meet all the testator's objectives and provide him/her with a comfortable retirement income.
3. After it is established, an estate plan does not need to be reviewed again until the testator's death.

4. A charitable remainder annuity trust allows for additional contributions to be made to the trust property.
5. Gifts of future interests do not qualify for the annual gift tax exclusion.
6. Estate planning must always take place before the death of a testator.
7. If a same-sex couple has a legally recognized civil union in their home state, they qualify for the federal marital deduction.
8. If a husband gives his wife a gift of \$500,000, neither party has to pay federal gift tax.
9. An elderly beneficiary may choose to disclaim an inheritance.
10. Estate administration expenses can be used as a deduction for estate tax purposes.

MULTIPLE CHOICE

1. Which is NOT a potentially adverse factor that could diminish any estate?
 - a. Administration expenses
 - b. Trusts that transfer property after the deaths of both spouses
 - c. Forced liquidation
 - d. Termination of employment
2. As part of an estate plan, a will allows the testator to:
 - a. Protect a spendthrift child
 - b. Preserve privacy
 - c. Appoint both personal and property guardians for minor children
 - d. Provide a lifetime income for the surviving spouse
3. Which is NOT a way in which an estate planner can use trusts to benefit family members?
 - a. Identify the estate assets and the beneficiaries who are to receive them.
 - b. Diminish problems such as will contests.
 - c. Reduce federal and state death taxes.
 - d. Avoid probate.
4. Which is NOT a common method of reducing the gross estate?
 - a. Life insurance
 - b. Trusts that do not avoid multiple taxation
 - c. Gifts made during the donor's lifetime
 - d. Special power of appointment
5. Which is NOT a major type of life insurance?
 - a. Universal life insurance
 - b. Whole life insurance
 - c. Term life insurance
 - d. Custodial life insurance
6. To qualify for the charitable deduction, a gift cannot be made to a(n):
 - a. Private school
 - b. Religious charity
 - c. Individual
 - d. Library

7. Which of the following is NOT a benefit of a charitable remainder trust?
 - a. It acts as a form of life insurance that benefits the settlor's children.
 - b. It reduces income tax.
 - c. It increases current income by providing life income for the settlor.
 - d. It reduces federal estate tax liability.

8. Which of the following is a feature of a Charitable Remainder Annuity Trust?
 - a. It is revocable.
 - b. Payments to the beneficiary vary annually.
 - c. It counteracts the effects of inflation.
 - d. Additional contributions cannot be made to the trust property.

9. The practice of gift splitting is available only between:
 - a. Spouses
 - b. A parent and a natural child
 - c. A parent and an adopted child
 - d. Siblings

10. A QTIP trust must:
 - a. Be in the form of a testamentary trust
 - b. Give the surviving spouse the right to all the income from the trust property for life
 - c. Allow the trustee to use any amount of the trust principal for any purpose
 - d. Give the surviving spouse a general power of appointment

CHAPTER 15: LONG-TERM CARE

MATCHING

- a. nursing home
- b. assisted living facility
- c. Social Security
- d. Supplemental Security Income
- e. Medicare
- f. Medicaid
- g. long-term care insurance
- h. inflation protection
- i. nonforfeiture benefit
- j. waiver of premium payment
- k. elimination period

1. *A form of public assistance that provides medical aid for people who have income and assets below a certain level*
2. *A federal program that provides hospital and medical insurance for people age 65 and older*
3. *A provision in a long-term care insurance policy that allows the insured to stop paying premiums once benefits are received*
4. *A feature that returns a portion of the premiums if the insured cancels the insurance policy or allows it to lapse*
5. *A federal program that provides benefits for eligible workers when they retire*
6. *An option that provides for increases in benefit amounts to help pay for expected future increases in the costs of long-term care services*
7. *A federal program that makes monthly payments based on need to people age 65 or older who have low income and few assets*
8. *A residential institution that provides care and services for the elderly or infirm*
9. *A policy that pays a fixed monetary benefit, usually per day, for a designated benefit period during which the insured generally receives care at home or in a nursing home*
10. *A community residential living arrangement that provides individual personal care and health services for people who need help with activities of daily living*
11. *The time that people must wait from the date they are certified as chronically ill until the date on which benefit payments for covered services begin*

TRUE/FALSE

1. An agent is required to help with the purchase of long-term care insurance.
2. Most insurance companies pay benefits to family members who care for loved ones at home.

3. People with high incomes and assets generally have no need for long-term care insurance.
4. Medicaid Part A pays for outpatient hospital care.
5. The government pays for all nursing home care expenses.
6. Since baby boomers are generally wealthier and better educated than their counterparts of today, there will be far less need for them to plan for long-term care.
7. Reverse mortgages are recommended for most people to help pay for long-term care.
8. If a person wants to buy long-term care insurance, he/she should buy a policy that covers both in-home and nursing home care.
9. A long-term care insurance policy can include an option to notify a third party if the policy is about to lapse for nonpayment.
10. One purpose of long-term care insurance is to leave an inheritance to the family.

MULTIPLE CHOICE

1. Which is a Medicare qualified facility that specializes in skilled care or rehabilitation services under the supervision of licensed nurses and based on a doctor's orders?
 - a. Nursing home
 - b. Skilled nursing facility
 - c. Assisted living facility
 - d. Continuing care retirement community
2. All of the following are features of Social Security EXCEPT:
 - a. Social Security pays benefits based on financial need.
 - b. It is funded by taxes paid by workers, employers, and self-employed people.
 - c. It provides benefits to retired workers, people who are disabled, and dependents of deceased and disabled workers.
 - d. At the end of 2027, the retirement age with full benefits will rise to 67 years of age.
3. To receive a Supplemental Security Income (SSI) basic monthly benefit, a person must:
 - a. Be 62 years old or older
 - b. Have contributed to Social Security by working throughout their adult lives
 - c. Not be eligible for food stamps, Medicaid, or Social Security
 - d. Be a U.S. resident
4. Which of the following is NOT covered by Medicare?
 - a. Physician services
 - b. Hospice care
 - c. Prescription drugs
 - d. Long-term care expenses in a nursing home or at home
5. Which is the LEAST reliable and complicated way to pay for long-term care?
 - a. Buying long-term care insurance
 - b. Using a reverse mortgage on the home owned by the person needing care
 - c. Accelerating the death benefits from life insurance
 - d. Borrowing from the cash value of a whole life insurance policy

6. Which of the following is NOT one of the six activities of daily living?
 - a. Continence
 - b. Dressing
 - c. Reading
 - d. Transferring

7. What was the amount of monthly checks for an individual receiving the basic SSI monthly benefit in 2015?
 - a. About \$300
 - b. About \$1,000
 - c. About \$733
 - d. About \$1,300

8. Medicare Part A would pay for which of the following?
 - a. Prescription medications
 - b. Inpatient care in a skilled nursing facility following a required three-day hospital stay
 - c. Medicare Advantage Plans
 - d. Outpatient hospital care

9. Which of the following is NOT covered by Medicare Part B?
 - a. Diagnostic tests
 - b. Durable medical equipment
 - c. Hospice care
 - d. Necessary ambulance services

10. Medicare Advantage Plans that are available in all states include all of the following EXCEPT:
 - a. Medicare Cost Plans
 - b. Health maintenance organizations
 - c. Preferred provider organizations
 - d. Private fee-for-service plans

TEST BANK ANSWER KEYS

CHAPTER 1: THE CONCEPT OF PROPERTY RELATED TO WILLS, TRUSTS, AND ESTATE ADMINISTRATION

MATCHING

- a. chattel
- b. chose in action
- c. nonprobate property
- d. intestate succession statutes
- e. joint tenants
- f. partition
- g. community property
- h. commingling
- i. fee simple estate
- j. remainder
- k. digital assets

1. *The division of real property held by joint tenants or tenants in common into separate portions so that the individuals may hold the property in severalty*
2. *Two or more persons who own or hold equal, undivided interests in property with the right of survivorship*
3. *A future estate in real property that takes effect on the termination of a prior estate created by the same instrument at the same time*
4. *An estate in which the owner has an absolute, unqualified, and unlimited interest in real property*
5. *Real and personal property owned by the decedent at the time of death that cannot be transferred by will or inheritance*
6. *Combining community and separate property*
7. *State laws that provide for the descent and distribution of property to those whom a decedent would probably have chosen if the decedent had made a will*
8. *Any item of personal property*
9. *All property, other than that received by gift, will, or inheritance, acquired by either spouse during marriage that is considered to belong to both spouses equally*
10. *A right to bring a civil lawsuit to recover money damages or possession of personal property*
11. *Assets that are stored electronically*

1. ANS: F
2. ANS: E
3. ANS: J
4. ANS: I
5. ANS: C
6. ANS: H

7. ANS: D
8. ANS: A
9. ANS: G
10. ANS: B.
11. ANS: K

TRUE/FALSE

1. Real property is property that is immovable, fixed, or permanent.
ANS: T
True
Correct. A house is an example of real property.
False
Incorrect. Land is an example of real property.
2. Real property can be tangible or intangible.
ANS: F
False
Correct. Personal property can be tangible or intangible.
True
Incorrect. Real property is always tangible.
3. A United States savings bond payable upon death to a named beneficiary is a form of probate property.
ANS: F
False
Correct. A bond paid to a named beneficiary will not be subject to estate administration.
True
Incorrect. Probate property is subject to estate administration.
4. The law of property is mostly statutory.
ANS: T
True
Correct. State statutes dictate how property can be distributed when a person dies intestate.
False
Incorrect. States have the power to enact statutes that govern the passage of property upon death.
5. In order for a joint tenancy to be created, common law requires unity of time, unity of title, unity of interest, and unity of possession.
ANS: T
True
Correct. These are referred to as the “four unities.”
False
Incorrect. The phrase “to two or more persons as joint tenants” does not necessarily create a joint tenancy.
6. When a joint tenant dies, his or her share of the property transfers to his or her spouse, children, or other designated heir.
ANS: F
False
Correct. The decedent’s ownership rights transfer automatically to the other owners.
True
Incorrect. The other joint tenants assume ownership of the property.

7. While alive, each joint tenant has the right of severance.
ANS: T
True
Correct. When a joint tenant conveys his or her equal interest in the property, the joint tenancy is severed.
False
Incorrect. A transfer of interest by gift or sale while the owner is alive is the only way the joint tenancy can be severed.
8. Neither party in a tenancy by the entirety can sell, give away, or otherwise convey the property on his/her own.
ANS: T
True
Correct. This rule is a characteristic difference between this and other forms of joint tenancy.
False
Incorrect. A tenancy by the entirety is available only to a husband and wife.
9. Most states today still retain dower and curtesy.
ANS: F
False
Correct. Dower and curtesy tended to provide inadequate support for the surviving spouse.
True
Incorrect. Most states have replaced dower and curtesy with statutes establishing a surviving spouse's right to a share of the entire estate.
10. No notice to terminate is required for a tenancy for years.
ANS: T
True
Correct. A tenancy for years is a type of leasehold estate.
False
Incorrect. The tenancy is created and terminates under its own rules.

MULTIPLE CHOICE

1. Which is an example of real property?
- a. Crops cultivated for sale
 - b. Automobile
 - c. Apartment building
 - d. Stocks and bonds
- ANS: C
Crops cultivated for sale
Incorrect. Trees, grass, etc., are real property, but crops grown to be sold are not.
Apartment building
Correct. An apartment building is a permanent structure affixed to land.
Automobile
Incorrect. An automobile is not a fixture or piece of land.
Stocks and bonds
Incorrect. Stocks and bonds are personal property, not real property.

2. Which is NOT used to determine if personal property has been converted into a fixture?
- Conveyance
 - Annexation
 - Adaptation
 - Intention

ANS: A

Conveyance

Correct. Conveyance is a transfer of property by deed or will from one person to another.

Annexation

Incorrect. Annexation refers to personal property that has been affixed to the real property.

Adaptation

Incorrect. Adaptation refers to personal property that has been adapted to the use or purpose of the real estate.

Intention

Incorrect. Intention is generally the controlling test that determines the existence of a fixture.

3. A dishwasher is an example of a/an:
- Agricultural fixture
 - Domestic fixture
 - Trade fixture
 - Commercial fixture

ANS: B

Domestic fixture

Correct. A tenant might install a dishwasher for personal use.

Agricultural fixture

Incorrect. A dishwasher cannot be used for growing crops or raising livestock.

Trade fixture

Incorrect. A dishwasher is unlikely to be used for trade or business.

Commercial fixture

Incorrect. Trade fixtures are fixtures that relate to business.

4. Which is an example of tangible personal property?
- Stamp collection
 - Cash
 - Trademark
 - Government bond

ANS: A

Stamp collection

Correct. A stamp collection physically exists, can be touched, and is movable.

Cash

Incorrect. The paper represents the right to receive property worth a certain dollar amount.

Trademark

Incorrect. Trademarks are intangible forms of personal property.

Government bond

Incorrect. Neither government nor corporate bonds are considered tangible.

5. Which is (are) an example(s) of intangible personal property?
- Online blog
 - Cash
 - Bitcoins
 - All of the above

ANS: D

All of the above

Correct: All are intangible forms of personal property.

6. Which is an example of probate property?
- Annuity contracts with a named beneficiary
 - Property owned in tenancy
 - Money placed in a bank account as a Totten trust
 - Gain from the sale of a business

ANS: D

Gain from the sale of a business

Correct. Gain from the sale of a business is an example of probate property.

Annuity contracts with a named beneficiary

Incorrect. Such annuity contracts are probate property if the estate is named instead of a beneficiary.

Property owned in tenancy

Incorrect. Such property is nonprobate property.

Money placed in a bank account as a Totten trust

Incorrect. A Totten trust is a deposit made in a person's name as a trustee for another person.

7. Which is an advantage of joint tenancy?
- The person who creates the joint tenancy has complete control over the property.
 - Joint tenancy avoids probate.
 - All joint tenants must agree before the joint tenancy can be terminated.
 - The surviving recipient of the property previously held in joint tenancy is always the intended beneficiary.

ANS: B

Joint tenancy avoids probate.

Correct. No corresponding expenses are required for the surviving joint tenant to acquire title.

The person who creates the joint tenancy has complete control over the property.

Incorrect. Joint tenancy means that two or more people have control over the property.

All joint tenants must agree before the joint tenancy can be terminated.

Incorrect. Any individual tenant can terminate the tenancy.

The surviving recipient of the property previously held in joint tenancy is always the intended beneficiary.

Incorrect. The recipient might not be the intended beneficiary.

8. Which is NOT an example of community property?
- Property owned by the spouses in partnerships
 - Property obtained from community property income during the marriage
 - Income earned or acquired during the marriage by either spouse's employment
 - Inheritance to a single spouse during the marriage

ANS: D

Inheritance to a single spouse during the marriage

Correct. Such inheritances are excluded from community property.

Property owned by the spouses in partnerships

Incorrect. The same is true of property owned by spouses in stocks and bonds.

Property obtained from community property income during the marriage

Incorrect. Such property is considered community property.

Income earned or acquired during the marriage by either spouse's employment

Incorrect. Such income is used to benefit both parties.

9. Which is a characteristic of a life estate?
- A life estate may not last for the lifetime of the original owner.
 - A life estate cannot be created by deed.
 - Life tenants while living may convey their interest in the property by sale or gift to a third person.
 - A life estate can be transferred by will.

ANS: C

Life tenants while living may convey their interest in the property by sale or gift to a third person.

Correct. A life estate may also last for the lifetime of the estate *pur autre vie*.

A life estate may not last for the lifetime of the original owner.

Incorrect. A life estate may last for the lifetime of the person who conveys the estate.

A life estate cannot be created by deed.

Incorrect. A life estate can be created by deed or will.

A life estate can be transferred by will.

Incorrect. A fee simple estate can be transferred this way, but a life estate cannot.

10. Which does NOT apply when a life estate is created and a reversion is retained?
- The grantee is the only person entitled to a reversion.
 - The real property that reverts does not go through the probate process of the life tenant's estate.
 - The grantor can transfer the reversion by deed or will.
 - The reversion is not lost if the grantor dies before the grantee.

ANS: A

The grantee is the only person entitled to a reversion.

Correct. The grantor is the only person entitled to a reversion.

The real property that reverts does not go through the probate process of the life tenant's estate.

Incorrect. This property is also not subject to taxes or creditors' claims.

The grantor can transfer the reversion by deed or will.

Incorrect. However, the grantor must be alive to do this.

The reversion is not lost if the grantor dies before the grantee.

Incorrect. The right to the reversion can be transferred by the grantor's will to beneficiaries.

11. The few states that retain dower and curtesy agree on all of the following EXCEPT:
- Dower and curtesy rights can be released by spouses upon verbal agreement.*
 - Dower and curtesy occur only upon the death of a spouse.*
 - Dower and curtesy apply even if the decedent died testate.*
 - Dower and curtesy are exempt from the claims of creditors of the decedent spouse.*

ANS: A

Dower and curtesy rights can be released by spouses upon verbal agreement.

Correct. Dower and curtesy rights can be released by spouses only by written agreement.

Dower and curtesy occur only upon the death of a spouse.

Incorrect. Dower and curtesy do not apply in cases of divorce or separation.

Dower and curtesy apply even if the decedent died testate.

Incorrect. The surviving spouse cannot be disinherited.

Dower and curtesy are exempt from the claims of creditors of the decedent spouse.

Incorrect. The only exceptions are for liens and encumbrances.

CHAPTER 2: THE ESTATE PLAN AND THE PURPOSE AND NEED FOR A WILL

MATCHING

- a. testamentary capacity
- b. testator or testatrix
- c. real property
- d. ambulatory
- e. codicil
- f. property guardian
- g. fiduciary duty
- h. legal title of a trust
- i. principal
- j. domiciliary administration

1. *An individual or trust institution appointed by a court to care for and manage the property of a minor or an incompetent person*
2. *The capital or property of a trust, as opposed to the income, which is the product of the capital*
3. *The sanity (sound mind) requirement for any person making a valid will*
4. *Subject to change or revocation any time before death*
5. *A written amendment to a will that changes but does not invalidate the will*
6. *The form of ownership for a trust property held by the trustee, giving the trustee the right to control and manage the property for another person's benefit*
7. *A man or woman who makes and/or dies with a valid will*
8. *The administration of an estate in the state where the decedent was domiciled at the time of death*
9. *A duty or responsibility required of a fiduciary, which arises out of a position of loyalty and trust, to act solely for another person's benefit*
10. *Land, buildings, and the objects permanently attached to them*

1. ANS: F
2. ANS: I
3. ANS: A
4. ANS: D
5. ANS: E
6. ANS: H
7. ANS: B
8. ANS: J
9. ANS: G
10. ANS: C

TRUE/FALSE

1. Not everyone can legally make a will.
ANS: T
True
Correct. A testator must have testamentary capacity.
False
Incorrect. A testator must have legal capacity.
2. All wills are ambulatory.
ANS: T
True
Correct. A will takes effect only after the testator dies.
False
Incorrect. All wills are subject to change or revocation before the testator dies.
3. Copies of the letter of instructions should be given to family members.
ANS: T
True
Correct. The letter of instructions should also be kept current.
False
Incorrect. Giving family members copies ensures that the person's wishes are known.
4. The testator has no control over the determination of the source from which death taxes will be paid.
ANS: F
False
Correct. Without an apportionment clause, family members could be placed in a hardship situation.
True
Incorrect. An apportionment clause in a will overrules methods established by state statute.
5. Everyone needs a will.
ANS: T
True
Correct. If a person has no heirs, he/she may not care how the property is distributed after his/her death.
False
Incorrect. A will designates how property will be distributed, and if a person has no heirs, he/she may not care how the property is distributed after his/her death.
6. The surviving natural parent is automatically appointed the property guardian for the decedent's minor or incompetent children.
ANS: F
False
Correct. The children are typically appointed the property guardian, but not always.
True
Incorrect. The property guardian can be a legal person, such as a corporation.
7. A single person can be a settlor, trustee, and beneficiary.
ANS: T
True
Correct. Co-trustees or co-beneficiaries are more common.
False
Incorrect. However, this person cannot be the sole trustee and the sole beneficiary.

8. To acquire the authority and powers of the position, a personal representative must be appointed by the testator.
ANS: F
False
Correct. The person named by the testator is generally also appointed by the court.
True
Incorrect. The representative must be appointed by the court.
9. Anyone may dispose of property as a gift while alive.
ANS: T
True
Correct. However, this is not the same as an *inter vivos* trust.
False
Incorrect. Such a gift is known as an *inter vivos* gift.
10. Most states require that a valid will be dated.
ANS: T
True
Correct. A valid will must also be signed by the testator and two witnesses.
False
Incorrect. The date is especially important if there are multiple versions of the will.

MULTIPLE CHOICE

1. Which is NOT a reason that many people die without a valid will?
- Procrastination
 - Assumed expense
 - Reluctance to discuss property and finances with strangers
 - Request of the beneficiary
- ANS: D
Request of the beneficiary
Correct. The future beneficiary will generally want the person to have a will.
Procrastination
Incorrect. Many people procrastinate about making a will. This is especially true of people who die prematurely.
Assumed expense
Incorrect. Many people think a will is too expensive, when in fact most attorneys charge minimal fees.
Reluctance to discuss property and finances with strangers
Incorrect. Many people are reluctant to do so. However, they may not realize that other strangers may make the decisions about their property after they die.
2. When a testator signs his or her name at the bottom of the will, he/she is:
- Subscribing
 - Executing
 - Attesting
 - Witnessing
- ANS: A
Subscribing
Correct. This signature is required for a valid will.
Executing
Incorrect. Subscribing is a part of executing.

Attesting

Incorrect. Attesting is done by the witnesses.

Witnessing

Incorrect. A person generally cannot witness the execution of his/her own will.

3. The minor daughter of a decedent can generally be any of the following EXCEPT:
- Distributee
 - Executrix
 - Heir
 - Next of kin

ANS: B

Executrix

Correct. The executor or executrix most likely will be an adult.

Distributee

Incorrect. A distributee is entitled to a share of the distribution of an estate when the decedent dies intestate.

Heir

Incorrect. Children of the decedent are typically heirs.

Next of kin

Incorrect. Next of kin include the closest blood relative(s).

4. If a person preplans his/her funeral and burial arrangements, these arrangements should be included in the:
- Letter of instructions
 - Will
 - Codicil
 - Uniform Probate Code (UPC)

ANS: A

Letter of instructions

Correct. The letter of instructions is readily accessible for the testator's review and modification.

Will

Incorrect. The will directs the distribution of property after death.

Codicil

Incorrect. A codicil is an amendment to the will.

Uniform Probate Code (UPC)

Incorrect. The UPC is a law, not a personal death-related document.

5. Which would be a reason for the creation of a trust?
- To save taxes but incur probate expenses
 - To encourage spendthrift beneficiaries to deplete the trust fund
 - For religious, educational, or charitable purposes
 - To appoint a property guardian for a minor

ANS: C

For religious, educational, or charitable purposes

Correct. Such charitable trusts are called public trusts.

To save taxes but incur probate expenses

Incorrect. Trusts can reduce both tax and probate costs.

To encourage spendthrift beneficiaries to deplete the trust fund

Incorrect. Trusts can be established to prevent this from happening.

To appoint a property guardian for a minor

Incorrect. A trust can be used to avoid this practice.

6. Which is LEAST likely to be used as a substitute for a will?
- Testamentary trust
 - Joint tenancy
 - Life insurance
 - Community property agreement

ANS: A

Testamentary trust

Correct. A testamentary trust is created in a will.

Joint tenancy

Incorrect. The other owner(s) has the right of survivorship.

Life insurance

Incorrect. A person can choose his/her beneficiary for a life insurance policy.

Community property agreement

Incorrect. A community property agreement transfers ownership rights to a surviving spouse.

7. In order for a will to be valid, it must:
- Include the date of death
 - Be signed only by witnesses
 - Be witnessed by no fewer than five people
 - Be written or typed with a typewriter or word processor

ANS: D

Be written or typed with a typewriter or word processor

Correct. A will must be a printed document.

Include the date of death

Incorrect. A testator will not know his/her date of death.

Be signed only by witnesses

Incorrect. The testator must also sign his/her will.

Be witnessed by no fewer than five people

Incorrect. A will must be witnessed by at least two people.

8. If a person wants to donate his/her organs or remains, this request should be made in the:
- Letter of instructions
 - Will
 - Codicil
 - Donor card signed only by the donor

ANS: A

Letter of instructions

Correct. The letter of instructions is typically read soon after death, allowing enough time for a useful donation.

Will

Incorrect. In some cases, it takes days or weeks to find a will.

Codicil

Incorrect. A codicil is an amendment to a will.

Donor card signed only by the donor

Incorrect. Two witnesses must also sign the donor card.

9. Who is the only person a testator CANNOT disinherit?
- Surviving minor child
 - Surviving spouse
 - Surviving adult child
 - Sibling

ANS: A

Surviving spouse

Correct. The surviving spouse has a statutory right to a share of the decedent's estate.

Surviving minor child

Incorrect. It is often in the children's best interest to leave the estate entirely to the surviving spouse.

Surviving adult child

Incorrect. Children do not have an automatic right to the estate of a parent.

Sibling

Incorrect. Siblings are less likely than nuclear family members to be named heirs.

10. A testator must have all of the following EXCEPT:

- a. Executor
- b. Testamentary capacity
- c. Legal capacity
- d. Designation of property

ANS: A

Executor

Correct. The court can appoint an administrator if no executor is named.

Testamentary capacity

Incorrect. A testator must be of sound mind.

Legal capacity

Incorrect. Generally, a testator must be 18 years old or older.

Designation of property

Incorrect. A will designates the distribution of property.

CHAPTER 3: THE LAW OF SUCCESSION: DEATH TESTATE OR INTESTATE

MATCHING

- a. succession
- b. testacy
- c. statutory will
- d. legacy and bequest
- e. escheat
- f. nuncupative will
- g. holographic will
- h. living will
- i. affinity
- j. consanguinity

1. *One that is made orally*
2. *The passage of an intestate decedent's property to the state when there are no surviving blood relatives or a spouse*
3. *Related by blood through a common ancestor*
4. *Related by marriage*
5. *A fill-in-the-blank will that is created and authorized by statute in a few states*
6. *A separate document that concerns the withholding or withdrawal of life support*
7. *Replaced by the term devise under the UPC*
8. *The act of acquiring property from a decedent by will or by operation of law when the person dies intestate*
9. *One that is handwritten*
10. *Death with a valid will*

1. ANS: F
2. ANS: E
3. ANS: J
4. ANS: I
5. ANS: C
6. ANS: H
7. ANS: D
8. ANS: A
9. ANS: G
10. ANS: B

TRUE/FALSE

1. States that allow holographic wills generally require that the wills also be signed by witnesses.
ANS: F
False
Correct. Such wills might not even require dates.
True
Incorrect. Generally, such wills do not require witnesses.
2. A living will states where the decedent wishes his/her children to be raised.
ANS: F
False
Correct. A living will concerns decisions about life-sustaining treatment.
True
Incorrect. A living will concerns only the decedent.
3. Abatement can cause the gifts made in a will to be reduced or even eliminated.
ANS: T
True
Correct. Abatement is a proportional reduction of legacies and devises in a will.
False
Incorrect. Abatement involves paying the decedent's taxes, debts, and expenses.
4. If a person dies intestate, his or her property passes automatically to the state.
ANS: F
False
Correct. Property generally goes to the nearest surviving kin.
True
Incorrect. Property passes to the state only if no heirs can be found.
5. Common law computation is used to determine the degree of relationship between the decedent intestate and a potential heir.
ANS: T
True
Correct. It counts up to the decedent, and then back down to the heir.
False
Incorrect. It counts up to the decedent, and then back down to the heir.
6. When a spouse dies intestate, the surviving spouse's rights to the decedent spouse's estate are determined by state statute and by which other family members survive the intestate.
ANS: T
True
Correct. When there is no will, state statutes determine the distribution of the estate.
False
Incorrect. The surviving spouse may be granted an elective share with other relatives getting the rest.
7. In some states, if a person marries after making a will, the marriage revokes the will.
ANS: T
True
Correct. Numerous states give the omitted spouse a share of the estate.
False
Incorrect. The majority of states allow a statutory forced share.

8. A revocable living trust set up by a person for the benefit of his/her children from a prior marriage may be revoked by the second spouse upon the death of the person who set up the trust.
ANS: F
False
Correct. Such a trust is revocable only while the person is alive.
True
Incorrect. A revocable living trust becomes irrevocable upon death.
9. Only the living, natural, marital children of a man or woman have a right to his/her estate upon death.
ANS: F
False
Correct. Adopted, nonmarital, and posthumous children generally have the right to inherit.
True
Incorrect. Nonmarital, adopted, and posthumous children generally have the right to inherit.
10. In some states, a homestead allowance may be granted in place of a homestead exemption.
ANS: T
True
Correct. This allowance is not subject to creditors' claims.
False
Incorrect. The homestead allowance is a priority payment to the surviving spouse and/or minor children.

MULTIPLE CHOICE

1. Which is NOT a basic type of will?
a. Joint will
b. Holographic will
c. Statutory will
d. Living will
ANS: D
Living will
Correct. This is a separate document governing the withholding or withdrawing of life-sustaining treatment.
Joint will
Incorrect. This is the will of two persons together (usually spouses).
Holographic will
Incorrect. This is a will written in the maker's own handwriting.
Statutory will
Incorrect. This fulfills all of a state's mandatory, formal requirements for a will.
2. Which form of will is NOT made in writing?
a. Statutory will
b. Nuncupative will
c. Living will
d. Holographic will
ANS: B
Nuncupative will
Correct. This is an oral will, spoken in the presence of witnesses.
Statutory will
Incorrect. This fulfills all of a state's mandatory, formal requirements for a will.

Living will

Incorrect. A living will is a written document.

Holographic will

Incorrect. A holographic will is written in the maker's own handwriting.

3. Which is a gift of a fixed amount of money from the assets of a testator's estate?
- Specific legacy
 - Residuary legacy
 - Specific devise
 - General legacy

ANS: D

General legacy

Correct. It may also be derived from a source established in the estate by a calculated formula.

Specific legacy

Incorrect. This is a gift of a particular item or class of personal property in a will.

Residuary legacy

Incorrect. This is a gift of all the property not otherwise effectively disposed of.

Specific devise

Incorrect. This is a gift of real property in a will.

4. If a decedent left three children and five grandchildren, two of whom are the sons of a deceased daughter, and the per stirpes method of distribution is used, how much of the decedent's estate will the two children of the deceased daughter receive?
- One-eighth
 - One-fifth
 - None
 - One-fourth

ANS: A

One-eighth

Correct. Each child will get an equal share of what would have been received by their mother.

One-fifth

Incorrect. They would each get an equal share under per capita distribution.

None

Incorrect. They would have the right to their deceased mother's share.

One-fourth

Incorrect. They would have to split their mother's share.

5. When a person dies intestate and has no spouse or children, the estate then goes to:
- Lineal ascendants
 - Other lineal descendants
 - Other next of kin
 - The state

ANS: B

Other lineal descendants

Correct. These include grandchildren and great-grandchildren.

Lineal ascendants

Incorrect. An intestate decedent's estate goes to ascendants only if there are no descendants.

Other next of kin

Incorrect. Blood relatives who are not lineal or collateral relatives are usually last in the order of inheritance.

The state

Incorrect. Property is not awarded to the state unless no other relatives can be found.

6. How long would a decedent and spouse have to be married for the surviving spouse to be entitled to an elective-share percentage of 50 percent of the augmented estate?
- 15 years
 - 5 years
 - 10 years
 - 20 years

ANS: A

15 years

Correct. After 15 or more years, the surviving spouse may claim 50 percent of the estate.

5 years

Incorrect. After 5 years, the surviving spouse may claim 15 percent.

10 years

Incorrect. After 10 years, the surviving spouse is entitled to 30 percent.

20 years

Incorrect. After 15 years, the surviving spouse is entitled to 50 percent.

7. Which of the following is an advantage of a will?
- It eliminates complicated procedures
 - The probate of a will is generally quick, easy, and inexpensive.
 - It retains privacy and confidentiality about the decedent's property and beneficiaries.
 - It allows a person to leave property to someone who would not be entitled to inherit under intestate succession

ANS: D

It allows a person to leave property to someone who would not be entitled to inherit under intestate succession.

Correct. This might include close friends or special employees.

It eliminates complicated procedures.

Incorrect. A will requires complicated procedures, such as those involved in transferring property ownership.

The probate of a will is generally quick, easy, and inexpensive.

Incorrect. Probate is time consuming and expensive and adds inconvenience to the decedent's family.

It retains privacy and confidentiality about the decedent's property and beneficiaries.

Incorrect. Wills are filed in the county courthouse of the *decedent's domiciliary state* and are open to the public and the news media.

8. In orthodox terminology, which of the following refers to the recipient of personal property, other than money, according to a will?
- Beneficiary
 - Devisee
 - Legatee
 - Heir

ANS: A

Beneficiary

Correct. The term under UPC is *devisee*.

Devisee

Incorrect. This is the UPC term for a beneficiary.

Legatee

Incorrect. A legatee is the recipient of money given under the terms of a will.

Heir

Incorrect. An heir is the recipient of property of a decedent who did not have a will.

9. After execution of a will, the testator, by an intentional act of ademption, has the right to do all of the following EXCEPT:
- Add a beneficiary
 - Revoke or cancel a testamentary gift
 - Deliver the gift to the beneficiary before the testator's death
 - Substitute a different gift for the original one

ANS: A

Add a beneficiary

Correct. Ademption is the removal or cancellation of a gift in a will, not an addition.

Revoke or cancel a testamentary gift

Incorrect. Ademption is the intentional act of revoking, recalling, or canceling a gift.

Deliver the gift to the beneficiary before the testator's death

Incorrect. The testator may also give the gift to someone else, so it is no longer his/hers.

Substitute a different gift for the original one

Incorrect. Ademption gives the testator the right to substitute gifts.

10. Which is NOT a general rule of distribution under most states' intestate succession statutes?
- If an intestate decedent is survived by a spouse and children who are all born to the surviving spouse and decedent, the spouse receives a lump sum of money and/or a portion of the estate, and the children receive the remainder of the estate equally
 - If an intestate decedent is survived by a spouse and children, some of whom are not the children of the surviving spouse, the spouse receives a lump sum of money and/or a portion of the estate, and only the children born to both the decedent and the surviving spouse receive the other half of the estate.
 - If an intestate decedent has no surviving spouse or kindred relatives, the state receives the decedent's property.
 - If an intestate decedent has no surviving spouse or lineal descendants but is survived by a parent and other collateral relatives, the parent will receive the estate.

ANS: B

If an intestate decedent is survived by a spouse and children, some of whom are not the children of the surviving spouse, the spouse receives a lump sum of money and/or a portion of the estate, and only the children born to both the decedent and the surviving spouse receive the other half of the estate.

Correct. All the decedent's children get an equal share of the estate.

If an intestate decedent is survived by a spouse and children who are all born to the surviving spouse and decedent, the spouse receives a lump sum of money and/or a portion of the estate, and the children receive the remainder of the estate equally.

Incorrect. This is a generally agreed-upon practice in most states.

If an intestate decedent has no surviving spouse or kindred relatives, the state receives the decedent's property.

Incorrect. The state receives the property through escheat.

If an intestate decedent has no surviving spouse or lineal descendants but is survived by a parent and other collateral relatives, the parent will receive the estate.

Incorrect. The parent, as a lineal ascendant, is next in the order of degree of kindred relationship.

CHAPTER 4: WILLS VALIDITY REQUIREMENTS, MODIFICATION, REVOCATION, AND CONTESTS

MATCHING

- a. testamentary capacity
 - b. testamentary intent
 - c. publication
 - d. interested witness
 - e. operation of law
 - f. standing
 - g. in terrorem clause
 - h. ambulatory
 - i. attest a will
 - j. revocation by subsequent writing
-
1. *The requirement that only a person who stands to lose a pecuniary interest in a decedent's estate if a will is allowed may contest the will*
 2. *To bear witness and to affirm or verify a will as genuine*
 3. *The sound mind requirement for a person to make a valid will*
 4. *A person who is a beneficiary and a witness of the same will*
 5. *The automatic revocation or amendment of a will by state statute without the testator's knowledge of or agreement to the revocation*
 6. *Revocable and subject to change*
 7. *The requirement for a valid will that the testator must intend the instrument to operate as his or her last will*
 8. *The cancellation of a will by the writing of a new will or the adding of a codicil to the will*
 9. *A statement in a will that if a beneficiary of the will objects to probate or challenges the will's distributions, that contestant forfeits all benefits of the will*
 10. *The formal declaration of a testator at the time of signing a will that it is his/her last will and testament*
-
1. ANS: F
 2. ANS: I
 3. ANS: A
 4. ANS: D
 5. ANS: E
 6. ANS: H
 7. ANS: B
 8. ANS: J
 9. ANS: G
 10. ANS: C

TRUE/FALSE

1. For a will to be declared a legal document that can transfer a decedent's estate after death, the maker must have testamentary intent.

ANS: T

True

Correct. The testator must intend to make the will his/her final will.

False

Incorrect. Without testamentary intent, the will is not valid.

2. The most common method of creating a will today is by videotape.

ANS: F

False

Correct. Computer word-processing programs are the most common method used today.

True

Incorrect. The majority of states require a will to be a written document.

3. In states that allow nuncupative wills, the testator does not have to be legally capable of making a written will.

ANS: F

False

Correct. The person must be legally capable and also have witnesses.

True

Incorrect. A person must be legally capable to make any type of will.

4. Every page of a will should be numbered.

ANS: T

True

Correct. Also, no space on any page should be large enough for modifications.

False

Incorrect. Numbering pages helps to ensure that there is no opportunity to alter the will.

5. Today, codicils are almost obsolete.

ANS: T

True

Correct. It is most common to make changes to an existing will in a word-processing file, thereby creating a new will.

False

Incorrect. Codicils are rarely used today because of easy-to-use computer programs.

6. Once executed, a will can be revoked only by changing it or writing an entirely new will.

ANS: F

False

Correct. A will can be revoked by certain operations of law.

True

Incorrect. A will can be revoked by certain physical acts.

7. If a will is lost, it is automatically revoked.

ANS: F

False

Correct. The will may be probated if it is proven to have been properly executed and the contents are known.

True

Incorrect. Many states have statutes that allow a lost will to be probated.

8. Creditors can generally contest a will.

ANS: F

False

Correct. However, creditors must be given notice of probate proceedings so that they may pursue their claims.

True

Incorrect. Creditors can pursue their claims in a separate lawsuit.

9. Any will is open to a will contest, even if the maker of the will fulfills all requirements for a valid will.

ANS: F

False

Correct. Only a person who has standing can contest a will.

True

Incorrect. A person, other than a creditor, who stands to lose a pecuniary interest in a decedent's estate if a will is allowed can contest the will.

10. A testator may stipulate in his/her will that if a certain person contests the will, then he/she forfeits all benefits of the will.

ANS: T

True

Correct. This includes objecting to the probate of the will or challenging the dispositions.

False

Incorrect. Such a stipulation is an in terrorem clause.

MULTIPLE CHOICE

1. Which is NOT a requirement for the creation of a valid will?

- The beneficiary must be legally and mentally capable.
- The testator must intend that a document be his/her last will.
- The will must be signed by witnesses.
- The testator or a person other than the testator must sign the will or make some other written mark.

ANS: A

The beneficiary must be legally and mentally capable.

Correct. The legal and mental capacity of the testator—not the beneficiary—is required.

The testator must intend that a document be his/her last will.

Incorrect. A valid will requires testamentary intent.

The will must be signed by witnesses.

Incorrect. Witnesses' signatures are generally required to validate a will.

The testator or a person other than the testator must sign the will or make some other written mark.

Incorrect. Generally, a testator must sign his or her will, but a person other than the testator may sign the testator's name in his or her presence only at the express writer's direction of the testator.

2. Which of the following indicates that a testator lacks mental capacity?

- The testator suffers from insane delusions.
- The testator has a low level of intelligence or suffers from a mental illness or senility.
- The testator does not remember the persons who are the "natural objects of his or her bounty."
- The testator is neglectful of his/her person and makes a will containing eccentricities.

ANS: C

The testator does not remember the persons who are the “natural objects of his or her bounty.”

Correct. To be of sound mind, a testator must be able to recognize family members and close friends.

The testator suffers from insane delusions.

Incorrect. The testator could have had a lucid interval when he/she executed the will.

The testator has a low level of intelligence or suffers from a mental illness or senility.

Incorrect. These do not necessarily mean that the testator lacks testamentary capacity.

The testator is neglectful of his/her person and makes a will containing eccentricities.

Incorrect. Case law has consistently held that neither of these constitutes an unsound mind.

3. Which witness to the execution of a will is LEAST likely to have a conflict of interest?
- Paralegal working with the attorney who drafts the will
 - Beneficiary of the will
 - Attorney who drafts the will
 - Nonbeneficiary associate of the testator

ANS: D

Nonbeneficiary associate of the testator

Correct. A nonbeneficiary will not gain or lose anything from the will.

Paralegal working with the attorney who drafts the will

Incorrect. The paralegal is subject to the same ethical standards as the attorney.

Beneficiary of the will

Incorrect. Good legal practice dictates that a beneficiary not act as a witness.

Attorney who drafts the will

Incorrect. If an attorney is called as a witness, he/she will not be able to represent the estate.

4. Witnesses to the execution of a will must do all of the following EXCEPT:
- Sign in the presence of one another
 - Sign at the bottom of the will
 - Sign in the presence of the testator
 - Witness the testator’s signature or witness the acknowledgment of the signature

ANS: B

Sign at the bottom of the will

Correct. The placement of witnesses’ signatures varies by state statutes.

Sign in the presence of one another

Incorrect. The witnesses must be able to verify that the other witness(es) signed the will.

Sign in the presence of the testator

Incorrect. The witnesses must sign in the presence of the testator.

Witness the testator’s signature or witness the acknowledgment of the signature

Incorrect. The witnesses must witness the testator’s signature.

5. Which is NOT a way to accomplish revocation?
- By operation of law
 - By physical act
 - By intent
 - By subsequent writing

ANS: C

By intent

Correct. Intent is generally necessary, but revocation also requires some action to invalidate the will.

By operation of law

Incorrect. If a testator marries after executing a will, the law invalidates the will.

By physical act

Incorrect. A testator can physically destroy the will, rendering it invalid.

By subsequent writing

Incorrect. A second will or codicil can invalidate all previous wills.

6. Which is NOT an example of revocation by a physical act?
- A person uses a pen to cross out all clauses of a will, despite the testator's objections.
 - The testator burns the will.
 - A person shreds a will upon the testator's instructions in the presence of witnesses.
 - The testator tears the will in half.

ANS: A

A person uses a pen to cross out all clauses of a will, despite the testator's objections.

Correct. The testator's consent is required for the will to be legally revoked.

The testator burns the will.

Incorrect. In this case, the testator has completely destroyed the physical document.

A person shreds a will upon the testator's instructions in the presence of witnesses.

Incorrect. In this case, the testator has clearly directed the destruction of the will.

The testator tears the will in half.

Incorrect. Tearing the will revokes the will.

7. Which is NOT an example of revocation by subsequent writing?
- A single testator writes a new will.
 - The testator crosses out all clauses of the will with a pen.
 - The testator adds a codicil to the will.
 - An engaged testator writes a new will prior to marriage.

ANS: B

The testator crosses out all clauses of the will with a pen.

Correct. This is an example of revocation by a physical act.

A single testator writes a new will.

Incorrect. Executing a new will generally revokes all previous wills.

The testator adds a codicil to the will.

Incorrect. A codicil is a written amendment to a will.

An engaged testator writes a new will prior to marriage.

Incorrect. A new will made prior to marriage is still a valid will.

8. Which constitutes grounds for contesting a will?
- The testator was uninfluenced by fraud to write or change the will.
 - The will has been revoked.
 - The will has been properly executed.
 - The will is free of contradictions.

ANS: B

The will has been revoked.

Correct. If a will is revoked, it is not valid.

The testator was uninfluenced by fraud to write or change the will.

Incorrect. A testator's being influenced by fraud is grounds for contesting a will.

The will has been properly executed.

Incorrect. If the will is not properly executed, it can be challenged.

The will is free of contradictions.

Incorrect. A will containing contradictions can be challenged.

9. If a client wants to leave a monetary gift for the attorney who drafts the will, to ensure ethical practice, the attorney should:
- Ensure that the gift is the major asset of the estate
 - Draft the will as requested
 - Fully disclose the code of conduct to the client
 - Direct another attorney in the firm to draft the will

ANS: C

Fully disclose the code of conduct to the client.

Correct. The attorney should also be sure not to encourage the gift in any way.

Ensure that the gift is the major asset of the estate

Incorrect. Most courts would view this as highly suspect.

Draft the will as requested

Incorrect. It could later be assumed that the attorney pressured the client into making the gift.

Direct another attorney in the firm to draft the will

Incorrect. An attorney from a different firm should draft the will.

10. A presumption of undue influence may be raised if a contestant shows that:
- The alleged influencer actively participated in preparing the will.
 - A confidential relationship did not allow the alleged influencer an opportunity to control the testamentary act.
 - The alleged influencer will not unduly profit as a beneficiary.
 - The testator was not in a sickened or weakened condition when the will was executed.

ANS: A

The alleged influencer actively participated in preparing the will.

Correct. If the contestant actually prepared the will, he/she could misrepresent the testator's wishes.

A confidential relationship did not allow the alleged influencer an opportunity to control the testamentary act.

Incorrect. Such a relationship might exist with a doctor, an attorney, a priest, etc.

The alleged influencer will not unduly profit as a beneficiary.

Incorrect. If the alleged influencer will not profit, it is unlikely that any influence was exercised.

The testator was not in a sickened or weakened condition when the will was executed.

Incorrect. If the testator was mentally weakened, he/she might be easily deceived.

CHAPTER 5: PREPARATION TO DRAFT A WILL: CHECKLISTS AND THE CONFERENCE WITH THE CLIENT

MATCHING

- a. spendthrift
 - b. life estate
 - c. disinheritance
 - d. dividend
 - e. fair market value
 - f. homestead
 - g. receivables
 - h. life insurance
 - i. contract for deed
 - j. primary beneficiary
-
1. *Debts established in the course of business that are currently due from others*
 2. *An agreement to sell real property on an installment basis*
 3. *The family home and adjoining land*
 4. *A legally binding agreement by which one party promises to pay another a certain sum of money if the policyholder dies or suffers a disability*
 5. *One who wastes money or spends it unwisely*
 6. *The person who has a superior claim over all others to the benefits of a life insurance contract*
 7. *The monetary amount an item would bring if it were sold on the open market*
 8. *An interest in real property*
 9. *The share of profits or property to which the owners of a business are entitled*
 10. *A testator's act of specifically depriving someone who would otherwise be that testator's legal beneficiary*
-
1. ANS: G
 2. ANS: I
 3. ANS: F
 4. ANS: H
 5. ANS: A
 6. ANS: J
 7. ANS: E
 8. ANS: B
 9. ANS: D
 10. ANS: C

TRUE/FALSE

1. Checklists should be used to collect information during the initial interview.
ANS: T
True
Correct. A family tree should also be drawn at this time, identifying adopted and nonmarital children.
False
Incorrect. Checklists help ensure that the legal team does not miss important information.

2. In order to efficiently assist the attorney, the paralegal needs to develop drafting and counseling skills.
ANS: T
True
Correct. The paralegal also needs to develop interviewing and data-collecting skills.
False
Incorrect. The paralegal will likely be responsible for writing the initial draft of the will.

3. The paralegal should familiarize the client with the taxes imposed on a decedent's estate and give legal advice about how to minimize them.
ANS: F
False
Correct. Giving legal advice is always the attorney's responsibility.
True
Incorrect. A paralegal should never give legal advice.

4. Recommending periodic reviews of the will whenever the client's marital status changes constitutes improper solicitation.
ANS: F
False
Correct. Changes in domicile, the law, or the addition or loss of children also require a review of the will.
True
Incorrect. Such changes do not necessarily have to be made by the same attorney.

5. One of the paralegal's duties is to collect complete information about the client, his/her family, and the beneficiaries to be named in the will.
ANS: T
True
Correct. The paralegal should use a family data checklist when doing this.
False
Incorrect. The paralegal needs to obtain full contact information, age and marital status, and other information for each party.

6. For smaller estates, joint tenancy ownership can prevent additional administration expenses.
ANS: T
True
Correct. However, such an agreement requires the consent of both tenants to sell the property.
False
Incorrect. The property will automatically transfer to the joint tenant.

7. A spouse can be legally disinherited, but a child cannot.
ANS: F
False
Correct. A spouse cannot be completely disinherited.
True
Incorrect. A testator can choose to disinherit any and all children.
8. Witnesses must read and be informed of all contents of a will before signing.
ANS: F
False
Correct. Witnesses do not need to know the contents of the will. They must, however, testify that the testator signed it.
True
Incorrect. Witnesses may be called to testify as to whether the testator signed the will.
9. When drafting a will, simple language should be used.
ANS: T
True
Correct. The will should be drafted to make the testator's intent clearly known.
False
Incorrect. Ambiguous language could cause the will to be contested.
10. The client should receive a rough draft of the will.
ANS: T
True
Correct. This copy should not be signed and should be clearly marked "Rough Draft."
False
Incorrect. The client should review all information in the will to be sure it reflects his/her wishes.

MULTIPLE CHOICE

1. The checklist for family data should include all of the following EXCEPT:
- Tangible personal property, including personal effects and clothing of considerable value
 - Age and marital status of the testator
 - Mental and physical health of the testator and spouse
 - Full names, addresses, and phone numbers of the participants
- ANS: A
Tangible personal property, including personal effects and clothing of considerable value
Correct. Tangible personal property information is needed for the assets and liabilities checklist.
Age and marital status of the testator
Incorrect. Paralegals should also ask for the age and marital status of the beneficiaries and devisees.
Mental and physical health of the testator and spouse
Incorrect. Paralegals should also find out the mental and physical status of other beneficiaries.
Full names, addresses, and phone numbers of the participants
Incorrect. Participants include the testator, beneficiaries, executor, witnesses, etc.
2. Which type of checklist will include a "Patents" heading?
- Family data
 - Family advisers
 - Assets and liabilities
 - Life insurance data

ANS: C

Assets and liabilities

Correct. A “Patents” heading will also be found on the records or documents checklist.

Family data

Incorrect. Family data include personal information about the testator’s family.

Family advisers

Incorrect. This is a list of names, addresses, and phone numbers.

Life insurance data

Incorrect. Life insurance data include a list of companies and beneficiaries.

3. Which is an example of a liability?
- Individual retirement account (IRA)
 - Automobile loan
 - Partnership agreement
 - ATM card

ANS: B

Automobile loan

Correct. Loans and debts are liabilities to be paid.

Individual retirement account (IRA)

Incorrect. IRAs are assets.

Partnership agreement

Incorrect. Partnership agreements are business interests.

ATM card

Incorrect. However, a credit card balance is a liability.

4. Which is NOT a disadvantage of using a preprinted will form?
- Words on preprinted forms are often crossed out or deleted by ink or type.
 - A preprinted will form is easily forged.
 - A preprinted will form might not meet the special needs of the testator.
 - A preprinted will form is expensive to use.

ANS: D

A preprinted will form is expensive to use.

Correct. Preprinted will forms are generally inexpensive, which is why many people use them.

Words on preprinted forms are often crossed out or deleted by ink or type.

Incorrect. Such deletions can jeopardize the validity of the will.

A preprinted will form is easily forged.

Incorrect. Part of the form may be printed, another part may be typed, and another may be handwritten.

A preprinted will form might not meet the special needs of the testator.

Incorrect. Preprinted forms are written in generalities.

5. When drafting a will, the paralegal should:
- Make sure all copies of the will are signed
 - Use legal words and elaborate phrasing whenever possible
 - Include a residuary clause
 - Erase as many mistakes as necessary, and make any corrections needed on the final will

ANS: C

Include a residuary clause

Correct. The testator’s entire estate must be transferred.

Make sure all copies of the will are signed

Incorrect. To reduce the likelihood of will contests, only the original should be signed and dated.

Use legal words and elaborate phrasing whenever possible

Incorrect. The will must be written in simple language so that the testator's intent is clear.

Erase as many mistakes as necessary, and make any corrections needed on the final will

Incorrect. Avoid all corrections and erasures in the final will.

6. Which is a government grant that gives an inventor an exclusive right to make, use, and sell an invention?
- Copyright
 - Patent
 - Royalty
 - Receivable

ANS: B

Patent

Correct. A patent is a form of miscellaneous property.

Copyright

Incorrect. This is a government grant that gives an author an exclusive right to publish, reprint, and sell a manuscript.

Royalty

Incorrect. This is a payment made to an author, a composer, or an inventor by a company that has been licensed to publish or manufacture the individual's manuscript or invention.

Receivable

Incorrect. This is a debt established in the course of business that is currently due from a person or due within a certain period.

7. What is an annuity?
- A fixed sum to be paid at regular intervals to an insurance policyholder for either a certain or indefinite period
 - The cash reserve that increases each year an insurance policy remains in force as a minimum savings feature
 - An annual sum that the insured pays to an insurance company as consideration for the insurance contract
 - An alternative that a party to an insurance contract agrees to follow to discharge the agreement

ANS: A

A fixed sum to be paid at regular intervals to an insurance policyholder for either a certain or indefinite period

Correct. An annuity may be paid for a stated number of years or for life.

The cash reserve that increases each year an insurance policy remains in force as a minimum savings feature

Incorrect. This is the cash surrender value of an ordinary life insurance policy.

An annual sum that the insured pays to an insurance company as consideration for the insurance contract

Incorrect. This is the premium.

An alternative that a party to an insurance contract agrees to follow to discharge the agreement

Incorrect. This is a settlement option.

8. An agreement or contract to sell real property on an installment basis is:
- A promissory note
 - A mortgage
 - An installment purchase
 - A contract for deed

ANS: D

A contract for deed

Correct. With a contract for deed, on payment of the last installment, the title to the property is transferred by delivery of the deed to the purchaser.

A promissory note

Incorrect. This is a promise in writing to pay a certain sum of money at a future time to a specific person.

A mortgage

Incorrect. This is a contract by which a person pledges property to another as security so as to obtain a loan.

An installment purchase

Incorrect. This is a purchase of goods on credit whereby the purchaser pays for the goods over a period of time.

9. A condition or specific event that must occur before an agreement or obligation becomes binding is:
- A condition precedent
 - A condition subsequent
 - A defeasance
 - An advancement

ANS: A

A condition precedent

Correct. A condition precedent is one in which a specified event must occur before the estate or interest vests in (passes to) the named devisee.

A condition subsequent

Incorrect. This is a condition that will continue or terminate an existing agreement or duty if the condition does or does not occur.

A defeasance

Incorrect. This is the termination of a vested estate by the happening or nonhappening of an event.

An advancement

Incorrect. This is money or property given by a parent to a child in anticipation of the share that the child will inherit from the parent's estate.

10. Which is tangible personal property?
- Cash
 - Stocks and bonds
 - A vacation home
 - Automobiles

ANS: D

Automobiles

Correct. Automobiles are items of personal property that have a physical existence.

Cash

Incorrect. Cash is personal property but it is intangible.

Stocks and bonds

Incorrect. Stocks and bonds are personal property, but they are intangible.

A vacation home

Incorrect. Real estate is real property, not personal property.

CHAPTER 6: FINAL DRAFT AND EXECUTION OF A VALID WILL

MATCHING

- a. exordium clause
 - b. residuary clause
 - c. conservator
 - d. delay clause
 - e. simultaneous death clause
 - f. principal
 - g. attestation clause
 - h. medical power of attorney
 - i. nondurable power of attorney
 - j. springing power of attorney
-
1. *A person who directs an agent to act for the principal's benefit subject to the principal's direction and control*
 2. *A statement in a will that determines the distribution of property in the event there is no evidence as to the priority of time of death of the testator and another, usually the testator's spouse*
 3. *The authority of a person to act on behalf of the principal that is triggered by the occurrence of a specified anticipated event*
 4. *The authority of a person to act on behalf of the principal that ends when a specified event occurs*
 5. *The guardian and manager of property left to minor or incompetent children*
 6. *The authority of a person appointed by a patient to make decisions about his/her medical care when he/she becomes incapacitated and unable to make such decisions*
 7. *A requirement of most states that a person must survive the first decedent by at least 120 hours to qualify as a surviving beneficiary*
 8. *The beginning or introductory clause of a will*
 9. *A statement by the witnesses in a will that they have attested and subscribed the testator's signature*
 10. *A statement in a will that disposes of the remaining assets of the decedent's estate after all debts and gifts in the will are satisfied*
-
1. ANS: F
 2. ANS: E
 3. ANS: J
 4. ANS: I
 5. ANS: C
 6. ANS: H
 7. ANS: D
 8. ANS: A
 9. ANS: G
 10. ANS: B

TRUE/FALSE

1. A safe deposit box in the name of the testator is the preferred choice for storage of the will.
ANS: F
False
Correct. The bank generally seals the box upon notice of the decedent's passing.
True
Incorrect. A safe deposit box makes the will less accessible and may delay probate proceedings.

2. The durable power of attorney for health care document gives the designated agent the right to obtain and disclose the principal's medical records.
ANS: T
True
Correct. The document also gives the agent the right to select the health care facility for the principal.
False
Incorrect. The document also gives the agent the right to employ and discharge health care personnel.

3. The Patient Self-Determination Act requires health care providers who work with Medicaid and Medicare to provide each patient or authorized surrogate written information about the patient's right to be informed, upon admission by the health care facility, of policies that concern patients' rights.
ANS: T
True
Correct. Information about the patient's right to make decisions about life-sustaining treatment must also be provided.
False
Incorrect. Health care providers must enable a patient to provide informed consent.

4. The United States Supreme Court has ruled that a constitutional right to die exists.
ANS: T
True
Correct. The United States Supreme Court ruled that a competent person can refuse medical treatment if his/her wishes are known and clear.
False
Incorrect. This ruling was made in *Cruzan v. Director, Missouri Dept. of Health*.

5. Some states allow an option for self-proving a will.
ANS: T
True
Correct. Self-proving wills do not require the witnesses to testify in court.
False
Incorrect. The testator and witnesses can sign in the presence of a notary public in some states.

6. The testimonium clause generally introduces new information.
ANS: F
False
Correct. The clause states that the will has been freely signed.
True
Incorrect. In most situations, this clause merely repeats what was stated in the opening paragraph.

7. A delay clause is used to prevent an estate from being taxed twice in the event of simultaneous death.
ANS: T
True
Correct. If the beneficiary does not survive for 120 hours, the beneficiary does not receive the property.
False
Incorrect. A person must generally live for five days after the decedent to be a surviving beneficiary.
8. A surviving natural parent will usually be denied custody of a child if the decedent was the custodial parent and named another person to be appointed as guardian.
ANS: F
False
Correct. A natural parent cannot usually be denied custody.
True
Incorrect. The surviving parent will usually receive custody unless he/she is proven unfit.
9. A decedent's wish to donate his/her body to science will be denied if the nearest relatives object.
ANS: F
False
Correct. Any person 18 or older may also donate organs via a donor card.
True
Incorrect. The Uniform Anatomical Gift Act provides for the donation of any or all body parts.
10. In most states, a prior will is automatically revoked when the testator writes, dates, and signs a new will.
ANS: T
True
Correct. A revocation clause helps ensure the revocation of previous wills.
False
Incorrect. Only a few states require the inclusion of a general revocation clause.

MULTIPLE CHOICE

1. Which is NOT a standard clause or provision of a will?
- Specific testamentary gifts
 - Provision for residue of estate
 - Testator's signature
 - Power of attorney
- ANS: D
Power of attorney
Correct. Power of attorney is a separate written document.
Specific testamentary gifts
Incorrect. Specific testamentary gifts dictate how individual assets will be distributed.
Provision for residue of estate
Incorrect. This provision directs the disposal of the remainder of the assets after debts and gifts have been satisfied.
Testator's signature
Incorrect. The signature of the testator is required for a valid will.

2. Which is related to, but NOT part of, a standard will?
- General revocation clause
 - Appointment of personal representative
 - Letter of instructions
 - Appointment of personal and/or property guardian

ANS: C

Letter of instructions

Correct. The letter of instructions explains where the will and important records can be found.

General revocation clause

Incorrect. This clause revokes any and all previous wills.

Appointment of personal representative

Incorrect. This appointment dictates the testator's choice for the person who will perform the fiduciary duties of managing the estate.

Appointment of personal and/or property guardian

Incorrect. This appointment dictates whom the testator has chosen to care for his/her minor or incompetent children.

3. The purpose of the exordium clause is to declare to the public all of the following EXCEPT:
- Identity of the attorney
 - The testator's intent and capacity to create a will
 - The testator's intent to make this document the last will
 - The location of the testator's principal residence or domicile

ANS: A

Identity of the attorney

Correct. The exordium clause declares the identity of the testator.

The testator's intent and capacity to create a will

Incorrect. The testator's intent and capacity are important introductory information.

The testator's intent to make this document the last will

Incorrect. The general revocation clause revokes all previous wills.

The location of the testator's principal residence or domicile

Incorrect. Location information helps the personal representative determine which state has the authority to tax the testator's property.

4. Which person is generally NOT automatically covered when the term *children* is used in a will?
- Natural, marital child
 - Stepchild
 - Nonmarital child
 - Adopted child

ANS: B

Stepchild

Correct. A separate provision is required to include stepchildren.

Natural, marital child

Incorrect. A natural, marital child is generally assumed to be the decedent's child.

Nonmarital child

Incorrect. A nonmarital child is a blood relative of the decedent.

Adopted child

Incorrect. A person adopted by the decedent is legally his/her child.

5. Which part of a will names the person whom the testator wishes to care for his/her children in the event of the testator's death?
- Appointment of personal and/or property guardian
 - Testamentary trust clause
 - Testimonium clause
 - Provision for residue of estate

ANS: A

Appointment of personal and/or property guardian

Correct. Unless found to be unfit, a single parent cannot exclude the other natural parent.

Testamentary trust clause

Incorrect. This clause creates a trust to pay for the care of the children.

Testimonium clause

Incorrect. This clause states that the testator freely signs the will.

Provision for residue of estate

Incorrect. This provision transfers the remainder of the estate that has not been given specifically to beneficiaries.

6. A Letter of instructions is preferred to include which clause?
- Exordium clause
 - Provision for payment of debts and funeral expenses
 - Instructions for funeral and burial
 - Specific testamentary gifts clause

ANS: C

Instructions for funeral and burial

Correct. Unlike the will, copies of the letter of instructions go to family members.

Exordium clause

Incorrect. This clause is the beginning of the will.

Provision for payment of debts and funeral expenses

Incorrect. This provision generally directs the personal representative to pay all debts with estate funds.

Specific testamentary gifts clause

Incorrect. The specific testamentary gifts clause identifies what property goes to whom.

7. Which grants another person the right to act legally on behalf of the person who authorizes and grants the power?
- Living will
 - Power of attorney
 - Letter of instructions
 - Self-proving affidavit

ANS: B

Power of attorney

Correct. The principal grants power of attorney to the agent or attorney in fact.

Living will

Incorrect. Living wills are the instructions that govern life-sustaining treatment for terminal conditions.

Letter of instructions

Incorrect. The letter of instructions explains where the will and important assets are located.

Self-proving affidavit

Incorrect. This affidavit is sometimes used to replace the traditional attestation clause.

8. Which is the LEAST desirable place for a will to be kept?
- With the testator
 - In the lawyer's office vault
 - With the clerk of the appropriate probate court
 - In a safety deposit box

ANS: D

In a safety deposit box

Correct. A will kept in a personal safe deposit box makes the will less accessible, and probate proceedings may be delayed.

With the testator

Incorrect. This is the most common option today.

In the lawyer's office vault

Incorrect. Keeping a will in the lawyer's office vault was the traditional practice and is still occasionally done.

With the clerk of the appropriate probate court

Incorrect. Filing with the clerk is an option in a few states.

9. What is the first priority in drafting a will under an attorney's supervision?
- Understanding the client's objectives
 - Reviewing the selected draft with the client
 - Gathering data from the client
 - Analyzing the information

ANS: A

Understanding the client's objectives

Correct. The client's objectives should be addressed during the initial interview.

Reviewing the selected draft with the client

Incorrect. Preliminary drafts must be prepared before they can be reviewed.

Gathering data from the client

Incorrect. Paralegals use checklists to gather data after the client's objectives are understood.

Analyzing the information

Incorrect. Paralegals must first obtain the information before it can be analyzed.

10. Which is NOT an example of a specific testamentary gift?
- Devise
 - Bequest
 - Legacy
 - Memorandum

ANS: D

Memorandum

Correct. A memorandum is a list of property.

Devise

Incorrect. A devise is a gift of real property.

Bequest

Incorrect. A bequest is a gift of personal property.

Legacy

Incorrect. A legacy is a gift of money.

CHAPTER 7: THE PARTICIPANTS AND THE PROPER COURT

MATCHING

- a. Letters Testamentary
- b. tickler system
- c. registrar
- d. probate (of a will)
- e. jurisdiction
- f. *in rem* jurisdiction
- g. disbursements
- h. venue
- i. residence
- j. domicile

1. *Expenses and debt payments*
2. *The dwelling in which one temporarily lives or resides*
3. *The authority of the court over the decedent's property*
4. *The particular place, city or county, where a court has authority to hear and decide a case*
5. *The formal document of authority and appointment given to a personal representative by the court to administer a decedent's estate according to the terms of a will*
6. *The legal home where a person has a true, fixed, and permanent place of dwelling and to which the person intends to return when absent*
7. *The authority by which a particular court is empowered by statute to decide a certain kind of case and to have its decision enforced*
8. *A chronological list of all the important steps and dates in the stages of the administration of a decedent's estate*
9. *The procedure by which a document is presented to the court to confirm it is a valid will*
10. *A person designated by a judge to perform the functions of the court in informal proceedings*

1. ANS: G
2. ANS: I
3. ANS: F
4. ANS: H
5. ANS: A
6. ANS: J
7. ANS: E
8. ANS: B
9. ANS: D
10. ANS: C

TRUE/FALSE

1. A personal representative is obligated to act in good faith solely for the benefit of another person.
ANS: T
True
Correct. This is referred to as the personal representative's fiduciary duties.
False
Incorrect. The representative serves in a position of trust and loyalty.
2. If a personal representative is a man, he is referred to as an executrix.
ANS: F
False
Correct. A female personal representative is an executrix.
True
Incorrect. A male personal representative is an executor.
3. A personal representative has a duty to commence a civil lawsuit for claims on behalf of the estate when necessary.
ANS: T
True
Correct. A personal representative also defends the estate against claims when necessary.
False
Incorrect. A personal representative serves to act on behalf of the estate in all matters.
4. A personal representative does not have to be appointed by the court if the will clearly states who the decedent wished to serve as the personal representative.
ANS: F
False
Correct. A personal representative must always be appointed by the court.
True
Incorrect. The court generally, but not always, appoints the person whom the decedent requested.
5. A personal representative generally handles all the estate administration duties on his/her own.
ANS: F
False
Correct. A personal representative generally hires an attorney to assist in estate administration.
True
Incorrect. A personal representative generally lacks the knowledge and expertise needed.
6. An attorney or paralegal should never solicit or suggest that he/she be made personal representative if hired to draft a will.
ANS: T
True
Correct. He/She should also not recommend being named as the attorney who aids the personal representative.
False
Incorrect. Such an appointment would constitute a conflict of interest.

7. Paralegals handle many of the time-consuming details of administering a decedent's estate.
ANS: T
True
Correct. This reduces the cost of legal services.
False
Incorrect. A paralegal's work frees up the attorney to focus on other matters.
8. Residence determines venue.
ANS: F
False
Correct. Domicile determines venue.
True
Incorrect. Residence is the dwelling where a person temporarily resides.
9. A decedent's will must be entered into probate only in his/her domiciliary state even if he/she owns property in other states.
ANS: F
False
Correct. Ancillary administration is used to dispose of property in foreign states.
True
Incorrect. The will must be entered into probate in each state in which property is owned.
10. A personal representative can act as the ancillary administrator in all states.
ANS: F
False
Correct. This is allowed in some, but not all, states.
True
Incorrect. Many states require ancillary administrators to be residents of those states.

MULTIPLE CHOICE

1. Who is NOT involved in the preparation of wills and trusts and the administration of a decedent's estate?
- a. Probate court
 - b. Personal representative of the estate
 - c. Paralegal
 - d. Beneficiary
- ANS: D
Beneficiary
Correct. The beneficiary is the person to whom the decedent's property is given.
Probate court
Incorrect. The probate court appoints the personal representative.
Personal representative of the estate
Incorrect. The personal representative administers the estate of the decedent.
Paralegal
Incorrect. The paralegal works with the attorney and often prepares drafts of documents.

2. Which is a responsibility of the personal representative?
- Administering oaths in court
 - Preparing a preliminary draft of the will
 - Publishing a notice to creditors to submit their claims by a specific date
 - Keeping records and acting on behalf of the court

ANS: C

Publishing a notice to creditors to submit their claims by a specific date

Correct. The personal representative must also pay appropriate taxes and approved creditor claims.

Administering oaths in court

Incorrect. The court clerk administers oaths.

Preparing a preliminary draft of the will

Incorrect. Preparing a preliminary draft is generally a paralegal's responsibility.

Keeping records and acting on behalf of the court

Incorrect. The registrar performs these duties.

3. Which is the responsibility of a court clerk?
- Authenticating and certifying copies of documents
 - Keeping records and acting on behalf of the court
 - Executing the final draft of a will
 - Collecting, protecting, preserving, and managing the probate estate of the decedent

ANS: A

Authenticating and certifying copies of documents

Correct. The court clerk also administers oaths in court.

Keeping records and acting on behalf of the court

Incorrect. The registrar performs these duties.

Executing the final draft of a will

Incorrect. The attorney executes the final draft.

Collecting, protecting, preserving, and managing the probate estate of the decedent

Incorrect. The personal representative performs these duties.

4. Which is the responsibility of a paralegal?
- Distributing the remaining assets to the beneficiaries named in the will
 - Assisting in the execution of the final draft of a will
 - Ensuring that the personal representative properly administers the estate
 - Keeping records and acting on behalf of the court

ANS: B

Assisting in the execution of the final draft of a will

Correct. The attorney is ultimately responsible for the final draft.

Distributing the remaining assets to the beneficiaries named in the will

Incorrect. This is the responsibility of the personal representative.

Ensuring that the personal representative properly administers the estate

Incorrect. This is the responsibility of the probate court.

Keeping records and acting on behalf of the court

Incorrect. The registrar performs these duties.

5. Which circumstance would NOT make the personal representative's job more difficult?
- Creditors cannot be found.
 - Heirs cannot be found.
 - Someone contests the will.
 - Someone contests the representative's payment to creditors.

ANS: A

Creditors cannot be found.

Correct. If creditors cannot be found and do not respond, they may not have to be paid.

Heirs cannot be found.

Incorrect. The search for heirs can be costly and time consuming.

Someone contests the will.

Incorrect. If the will is contested, the personal representative must work to see that the will is enforced.

Someone contests the representative's payment to creditors.

Incorrect. Challenges to distributions to beneficiaries can also make the personal representative's job more difficult.

6. Which is a pre-probate duty of the personal representative?
- Opening an estate checking account
 - Helping to find and review any existing will
 - Notifying the surviving spouse and/or minor children of their rights
 - Appraising all assets by value at the time of the decedent's death

ANS: B

Helping to find and review any existing will

Correct. The representative should also assist with anatomical gifts and funeral arrangements.

Opening an estate checking account

Incorrect. An estate checking account is opened during the process of administering the estate.

Notifying the surviving spouse and/or minor children of their rights

Incorrect. This notification is performed prior to appointment as personal representative.

Appraising all assets by value at the time of the decedent's death

Incorrect. Assets can be appraised only during the course of administering the estate.

7. Which is NOT an aspect of the personal representative's duties to protect, collect, and preserve assets?
- Finding and reviewing all documents, records, and papers concerning the decedent's financial affairs
 - Taking possession of all personal property not set aside for the spouse and/or minor children
 - Locating and notifying witnesses of the testator's death
 - Determining whether the decedent gave any gifts that would require a gift tax return

ANS: C

Locating and notifying witnesses of the testator's death

Correct. Locating and notifying witnesses is a pre-probate duty of the personal representative.

Finding and reviewing all documents, records, and papers concerning the decedent's financial affairs

Incorrect. The representative notifies banks of the death and requests information about accounts.

Taking possession of all personal property not set aside for the spouse and/or minor children

Incorrect. Taking such possession would include transferring cash into the new estate checking account.

Determining whether the decedent gave any gifts that would require a gift tax return

Incorrect. If a gift requires making a gift tax return, the representative must see that the gift tax return is filed.

8. Which is NOT a probate task of the paralegal?
- Filing legal documents
 - Maintaining records of all collected assets
 - Helping to locate the will, if requested
 - Handling communication with parties holding assets, creditors, beneficiaries, and heirs

ANS: C

Helping to locate the will, if requested

Correct. Locating the will is a pre-probate task.

Filing legal documents

Incorrect. All documents, from the original petition to the final account, must be filed.

Maintaining records of all collected assets

Incorrect. The paralegal maintains asset records, including filing documents, creditors' claims, etc.

Handling communication with parties holding assets, creditors, beneficiaries, and heirs

Incorrect. Paralegals do make such communications but must be careful not to give legal advice during any of these communications.

9. Jurisdiction is generally determined by the decedent's:

- a. Residence
- b. Domicile
- c. Will
- d. Venue

ANS: B

Domicile

Correct. The domicile is the decedent's permanent place of dwelling.

Residence

Incorrect. A residence is a temporary place of dwelling.

Will

Incorrect. A court has jurisdiction over decedents who were permanent residents in its authority.

Venue

Incorrect. The venue is the location where the court with jurisdiction hears and decides the case.

10. Ancillary administration in the foreign state generally includes all of the following procedures EXCEPT:

- a. Transfer of the decedent's personal property to persons entitled to the property according to the foreign state's intestate succession statute
- b. Payment of taxes imposed by the foreign state to that state
- c. Acceptance by the foreign state court of the will admitted to probate in the decedent's domiciliary state
- d. Issuance of letters of authority that permit the real property to be transferred to the designated devisee named in the will

ANS: A

Transfer of the decedent's personal property to persons entitled to the property according to the foreign state's intestate succession statute

Correct. Property is passed on according to domiciliary state statutes.

Payment of taxes imposed by the foreign state to that state

Incorrect. Such taxes would not be paid to the domiciliary state.

Acceptance by the foreign state court of the will admitted to probate in the decedent's domiciliary state

Incorrect. The foreign court generally accepts the will if it is approved in another state.

Issuance of letters of authority that permit the real property to be transferred to the designated devisee named in the will

Incorrect. Letters of authority go to the ancillary administrator.

CHAPTER 8: PERSONAL REPRESENTATIVES: TYPES, PRE-PROBATE DUTIES, AND APPOINTMENT

MATCHING

- a. special administrator
 - b. administrator *cum testamento annexo*
 - c. administrator *de bonis non*
 - d. public administrator
 - e. ancillary administrator
 - f. Letters Testamentary
 - g. Letters of Administration
 - h. surety bond
 - i. Decree of Distribution
 - j. final account
 - k. disclaimer
-
1. *A court order appointing an administrator of an estate when the decedent died intestate*
 2. *A court order recognizing that all allowed claims and expenses of an estate have been paid and that all heirs are named and the share of the decedent's property to which they are entitled is listed*
 3. *A court order admitting a will as valid and authorizing the executor named in the will to handle the administration of the decedent's estate*
 4. *A certificate in which an individual or corporation promises to pay the probate court a certain amount of money if the personal representative fails to faithfully perform the duties of administering the decedent's estate*
 5. *A personal representative appointed temporarily by a probate court to handle certain immediate needs of an estate*
 6. *A list made by an executor or administrator of an estate that includes all estate assets that he/she has collected as well as all receipts and disbursements*
 7. *A person appointed by the court to oversee the administration of a decedent's estate that is located in a foreign state*
 8. *A personal representative appointed by the court when a will maker does not name an executor or the named executor cannot serve*
 9. *A public official appointed by the court to administer the property of an intestate who has left no person entitled to apply for appointment as personal representative and Letters of Administration*
 10. *A personal representative appointed by the court when a previous personal representative begins but fails to complete administration*
 11. *A petition filed with the court by a beneficiary who wishes to surrender any interest in a will*

1. ANS: G
2. ANS: I
3. ANS: F
4. ANS: H
5. ANS: A
6. ANS: J
7. ANS: E
8. ANS: B
9. ANS: D
10. ANS: C
11. ANS: K

TRUE/FALSE

1. Court judges are prohibited from being personal representatives.
ANS: T
True
Correct. Noncitizens of the United States and nonresidents of the domiciliary state may be disqualified as being unsuitable to be personal representatives.
False
Incorrect. Convicted felons and minors are also prohibited from being personal representatives.
2. The personal representative is responsible for discovering, collecting, and preserving all probate assets of any value.
ANS: T
True
Correct. The personal representative must also manage the probate estate if it includes real estate.
False
Incorrect. Although the personal representative must make a list of nonprobate assets, he/she is not responsible for discovering, collecting, or preserving them.
3. If a personal representative does not possess adequate skills to discover, collect, and preserve digital assets, he/she should hire someone who has the requisite knowledge.
ANS: T
True
Correct. If the personal representative is not competent to handle this portion of the estate, he/she should hire a third party who can assist him/her.
False
Incorrect. If a personal representative is not technology competent, he/she could be held liable for mismanagement of the estate.
4. When a will has been discovered, copies of the will should be prepared for the beneficiaries and devisees.
ANS: T
True
Correct. A summary of the contents of the will should also be included.
False
Incorrect. The original will must be given to the probate court.

5. The attorney is likely to be called in to assist in sorting out a decedent's estate before the funeral arrangements are complete.
ANS: F
False
Correct. Copies of the death certificate are obtained from the funeral director after the attorney has been employed.
True
Incorrect. The funeral director obtains the necessary burial permits and death certificate.
6. Only family members should be invited to the family conference.
ANS: F
False
Correct. All persons named in a will, or heirs, if there is no will, should be invited to attend.
True
Incorrect. Nonfamily members may be named in the will.
7. Property in joint tenancy is a probate asset and should be included in the list of assets subject to probate.
ANS: F
False
Correct. Property in joint tenancy is nonprobate property.
True
Incorrect. Property in joint tenancy passes directly to the joint tenant.
8. During the family conference, the paralegal should ask whether the decedent made any advancements to any beneficiaries or heirs.
ANS: T
True
Correct. Such advancements could have direct bearing on the estate.
False
Incorrect. This is true in all cases.
9. The requirements for a bond and surety vary from state to state.
ANS: T
True
Correct. State statutes may or may not require bonds.
False
Incorrect. Some states require a bond for all personal representatives.
10. Witnesses to a will must appear in court to testify to the validity of the will.
ANS: F
False
Correct. A signed affidavit may be used to prove a will.
True
Incorrect. A self-proved will removes the need for witness testimony.

11. Letters of Authority must be presented to have the decedent's mail forwarded to the personal representative.

ANS: T

True

Correct. Letters of Authority are also required to withdraw funds from the decedent's bank accounts.

False

Incorrect. Letters of Authority show that the personal representative is the authorized representative of the estate.

MULTIPLE CHOICE

1. While in the process of administering the estate of his deceased brother, Larry, John also died, and his sister, Sue, having been appointed the new personal representative, is now the:

- Administratrix *cum testamento annexo*
- Public administratrix
- Administratrix *de bonis non*
- Special administratrix

ANS: C

Administratrix de bonis non

Correct. *De bonis non* means "administrator of goods not administered."

Administratrix cum testamento annexo

Incorrect. This might have been true if John had been unqualified to serve.

Public administratrix

Incorrect. A public administrator is not a blood relative.

Special administratrix

Incorrect. A special administratrix is a temporary administrator of the estate.

2. A paralegal working with a personal representative might be responsible for all of the following EXCEPT:

- Notifying appropriate parties of the decedent's death
- Providing certified copies of the death certificate to the funeral director
- Searching for and obtaining the will and other personal business records
- Setting a date for the family conference

ANS: B

Providing certified copies of the death certificate to the funeral director

Correct. The paralegal will obtain copies of the death certificate from the funeral director.

Notifying appropriate parties of the decedent's death

Incorrect. The paralegal might need to research the locations of all appropriate parties so as to notify them.

Searching for and obtaining the will and other personal business records

Incorrect. The paralegal will work with the personal representative to gain access as needed.

Setting a date for the family conference

Incorrect. The paralegal will set the date after contacting the appropriate persons.

3. Which is a legal obligation of financial institutions with which the decedent did business?

- To close any demand accounts held by the decedent
- To encourage those who hold accounts with the decedent to withdraw funds to avoid death taxes
- To cancel all credit card debts
- To present safe deposit box contents whenever requested

ANS: A

To close any demand accounts held by the decedent

Correct. Demand accounts include all checking accounts.

To encourage those who hold accounts with the decedent to withdraw funds to avoid death taxes

Incorrect. Banks should prevent this from happening.

To cancel all credit card debts

Incorrect. However, credit cards should be canceled so that no new debts are incurred.

To present safe deposit box contents whenever requested

Incorrect. Such contents must be in safekeeping until otherwise directed by the court.

4. During the family conference, the paralegal or the supervising attorney should:
- Provide family members with a list of personal debts
 - Assume no family members were owed a debt by the deceased
 - Provide family members with the names of the deceased's financial advisers
 - Discuss the need for appointing fiduciaries

ANS: D

Discuss the need for appointing fiduciaries

Correct. The paralegal or the supervising attorney should ask if any trustees named in a testamentary trust are willing to serve.

Provide family members with a list of personal debts

Incorrect. The paralegal or the supervising attorney should request a list of personal debts from the family.

Assume no family members were owed a debt by the deceased

Incorrect. The paralegal or the supervising attorney should explain that any creditors will need to file a claim.

Provide family members with the names of the deceased's financial advisers

Incorrect. The paralegal or the supervising attorney should ask for the contact information of the deceased's financial advisers.

5. The personal representative will generally NOT need to file a bond if:
- A corporation is appointed personal representative
 - There is no will
 - The testator requested a bond in the will
 - A bond is required by state statute

ANS: A

A corporation is appointed personal representative

Correct. Such a corporation will likely be a bank or trust company.

There is no will

Incorrect. A bond usually is required if there is no will, especially if minor children survive the intestate.

The testator requested a bond in the will

Incorrect. A bond might not be required if the testator stated that the representative may serve without bond.

A bond is required by state statute

Incorrect. Some states require bonds for all personal representatives.

6. The court may require the subscribing witnesses to testify in court to all of the following EXCEPT:
- That they watched the testator sign the will
 - That they knew the testator and that he/she was legally capable and competent
 - That a self-proved will is valid
 - That the testator declared the document to be the will

ANS: C

That a self-proved will is valid

Correct. A self-proved will must be witnessed in the presence of a notary public.

That they watched the testator sign the will

Incorrect. Witnesses might also have to testify that they saw the testator initial all the pages.

That they knew the testator and that he/she was legally capable and competent

Incorrect. Witnesses will have to state that the testator was legally capable and of sound mind.

That the testator declared the document to be the will

Incorrect. Witnesses will also have to testify that they were asked by the testator to be witnesses to his/her will.

7. Certified copies of the Letters Testamentary or Letters of Administration are needed to do all of the following EXCEPT:
- Open an account in the name of the estate
 - Open the decedent's safe deposit box
 - Withdraw money from existing savings accounts of the decedent
 - Obtain the Letters of Authority

ANS: D

Obtain the Letters of Authority

Correct. The Letters Testamentary and Letters of Administration are both Letters of Authority.

Open an account in the name of the estate

Incorrect. The Letters prove that the person is the authorized representative of the estate.

Open the decedent's safe deposit box

Incorrect. The bank will not release the contents without these papers.

Withdraw money from existing savings accounts of the decedent

Incorrect. The Letters show that the person has the power to withdraw funds.

8. What would cause a person applying for Letters Testamentary to be deemed unsuitable?
- A misdemeanor record
 - Residency in the domiciliary state
 - Being a minor
 - No history of mental illness

ANS: C

Being a minor

Correct. A minor may not enter into a binding contract.

A misdemeanor record

Incorrect. However, a felony record would cause a person to be deemed unsuitable.

Residency in the domiciliary state

Incorrect. However, residency outside of the domiciliary state could disqualify a person.

No history of mental illness

Incorrect. Mental illness could be a disqualifying factor.

9. Which is NOT performed by an ancillary administrator?
- Providing a petition to prove the will
 - Collecting assets in a foreign state
 - Paying any creditors in a foreign state
 - Transferring the balance of the estate to the domiciliary representative

ANS: A

Providing a petition to prove the will

Correct. This petition establishes the court's jurisdiction over the estate.

Collecting assets in a foreign state

Incorrect. The ancillary administrator handles out-of-state property.

Paying any creditors in a foreign state

Incorrect. The ancillary administrator also pays taxes due in the foreign state.

Transferring the balance of the estate to the domiciliary representative

Incorrect. Transferring this balance is the final duty of the ancillary administrator.

10. Which is NOT a duty of the personal representative in closing the estate after the distribution of assets?
- a. Signing and filing a petition for settlement and distribution
 - b. Paying the law firm's fee
 - c. Proving that the remaining assets of the estate have been distributed
 - d. Submitting a final account that contains a list of all assets collected

ANS: B

Paying the law firm's fee

Correct. The law firm's fee must be paid before assets are distributed.

Signing and filing a petition for settlement and distribution

Incorrect. The court will then issue an order setting a hearing on the final account.

Proving that the remaining assets of the estate have been distributed

Incorrect. In addition, these assets must correspond to the actual inventory.

Submitting a final account that contains a list of all assets collected

Incorrect. This list must include all probate assets.

CHAPTER 9: PROBATE AND ESTATE ADMINISTRATION

MATCHING

- a. interested parties
- b. independent administration
- c. “qualified small estate”
- d. summary administration
- e. petition for administration
- f. citation
- g. federal employer identification number
- h. inventory
- i. cause of action
- j. appraisal

1. *A court order that fixes a date, time, and place for hearing the petition to prove a will or for administration; the petitioner is required to give notice of the hearing to all interested persons*
2. *The right of a person to commence a lawsuit*
3. *Beneficiaries or heirs and creditors of the decedent*
4. *A form of administration that is generally limited to small estates that have survivors, which include a spouse and minor children, and insufficient assets to pay all creditors*
5. *A filing with the court that a person seeking appointment as personal representative uses when there is no will*
6. *A complete physical check of all probate assets owned by the decedent and a detailed listing of these and their estimated fair market value at the time of the decedent’s death*
7. *A form of estate administration used in a few states that is essentially free of court supervision or intervention*
8. *A market-based valuation of a decedent’s real or personal property by a recognized expert*
9. *An identification of the fiduciary responsible for preparing the fiduciary income tax return and for paying any tax due*
10. *An estate that consists entirely of statutorily exempt property or allowances and funeral and administration expenses and is within a certain limited monetary value*

1. ANS: F
2. ANS: I
3. ANS: A
4. ANS: D
5. ANS: E
6. ANS: H
7. ANS: B
8. ANS: J
9. ANS: G
10. ANS: C

TRUE/FALSE

1. Probate and estate administration are the only methods of settling an estate.
ANS: F
False
Correct. Small estate settlement and administration is an alternative to probate.
True
Incorrect. Some states allow heirs or devisees to collect, divide, and distribute assets in small estates.
2. Summary Administration is allowed for certain small estates.
ANS: T
True
Correct. Summary Administration is shorter and simpler than regular estate administration.
False
Incorrect. Many states allow both a collection by affidavit and a Summary Administration procedure.
3. Under the Uniform Probate Code (UPC), formal probate is conducted under the supervision of a judge without notice to interested persons.
ANS: F
False
Correct. Informal probate does not require notice to interested persons.
True
Incorrect. Interested persons must be given notice for formal probate.
4. All states are required to adopt the Uniform Probate Code (UPC).
ANS: F
False
Correct. States may adopt the UPC, but they are not required to do so.
True
Incorrect. Many states continue to use more traditional methods of estate administration.
5. Prior to a hearing, a paralegal might be asked to assemble data on nonprobate property.
ANS: T
True
Correct. The paralegal may also be asked to send copies of the will to the appropriate beneficiaries.
False
Incorrect. Taxes may still be due on nonprobate property.
6. Creditors can contest a will, but they cannot challenge the appointment of a personal representative.
ANS: F
False
Correct. Creditors can challenge the appointment of a personal representative.
True
Incorrect. Creditors cannot contest a will.
7. A personal representative is required to file for a Federal Employer Identification Number.
ANS: T
True
Correct. This number is required before a Notice Concerning Fiduciary Relationship can be filed.
False
Incorrect. This number is required on fiduciary income tax returns.

8. If a decedent leaves real property in another state, the paralegal will need to check the foreign state's statutes to determine the qualifications and residency requirements of the ancillary administrator.
ANS: T
True
Correct. The paralegal should check to see if the domiciliary personal representative qualifies.
False
Incorrect. The ancillary administrator will administer out-of-state property.
9. When transferring real estate assets, it is the responsibility of the paralegal to prepare the Report of Sale of Land at Private Sale Under Order for Sale.
ANS: T
True
Correct. This report should be filed with the court.
False
Incorrect. Preparing documents is an important paralegal duty.
10. If an estate includes digital assets and the decedent has left instructions on how to access those assets, the personal representative may still be precluded from doing so because of state and/or federal law.
ANS: T
True
Correct. Issues relating to accessing and transferring digital assets may be barred by federal and state law and the ISP's terms of service.
False
There could be penalties if a personal representative accesses digital assets without proper authority.
11. The personal representative may personally profit from estate transactions.
ANS: F
False
Correct. Profit taking violates the fiduciary duty to the estate.
True
Incorrect. The representative is not allowed to buy or sell estate property while retaining a personal interest.

MULTIPLE CHOICE

1. The probate court has the power and authority to do all of the following EXCEPT:
- Determine and verify the statutory rights of a spouse
 - Create a will if none exists
 - Supervise the guardianship of minors
 - Establish the validity of a will and appoint a personal representative
- ANS: B
Create a will if none exists
Correct. The probate court appoints an administrator if there is no will.
Determine and verify the statutory rights of a spouse
Incorrect. Courts have the authority.
Supervise the guardianship of minors
Incorrect. If found incompetent, a guardian can be removed.
Establish the validity of a will and appoint a personal representative
Incorrect. The court can also appoint an administrator if there is no will.

2. Estate administration may NOT be needed if:
- There is property in registered form
 - The decedent has individually owned property in the possession of a third party
 - There are outstanding creditors' claims
 - An estate is classified as a small estate

ANS: D

An estate is classified as a small estate

Correct. Estate administration may not be needed if all assets consist entirely of exempt property with a limited monetary value.

There is property in registered form

Incorrect. Registered property includes deeds and certificates for securities.

The decedent has individually owned property in the possession of a third party

Incorrect. Letters of Authority are needed to transfer such property.

There are outstanding creditors' claims

Incorrect. However, estate administration might not be needed if the decedent has no debts.

3. When settling a small estate, Collection by Affidavit is generally allowed in all of the following situations EXCEPT:
- When two days have passed since the death of the decedent
 - When the value of the entire estate does not exceed the state's maximum limit
 - When the claiming beneficiary is legally entitled to inherit the decedent's estate
 - When no application or petition for the appointment of a personal representative is pending or has been granted

ANS: A

When two days have passed since the death of the decedent

Correct. The minimum number of days that must pass is generally 30 to 45.

When the value of the entire estate does not exceed the state's maximum limit

Incorrect. However, if the value exceeds the limit, the estate might not qualify as a small estate.

When the claiming beneficiary is legally entitled to inherit the decedent's estate

Incorrect. However, if the claiming beneficiary is not legally entitled, lengthier probate procedures will be needed.

When no application or petition for the appointment of a personal representative is pending or has been granted

Incorrect. Such an application would involve a lengthier probate process, and the estate might not qualify as a small estate.

4. The primary purpose of the Uniform Probate Code (UPC) is to:
- Make estate administration more expensive
 - Increase the time required to administer an estate
 - Provide an alternate system that establishes uniform law
 - Make the laws more complex so that administration is more involved

ANS: C

Provide an alternate system that establishes uniform law

Correct. Such a system needs to be adopted by the states.

Make estate administration more expensive

Incorrect. The UPC was created to make administration less expensive.

Increase the time required to administer an estate

Incorrect. The UPC was created to reduce the time required for administration.

Make the laws more complex so that administration is more involved

Incorrect. The UPC was created to simplify and clarify administration procedures and laws.

5. Which is NOT a way that the paralegal assists the personal representative?
- Petitioning for probate when no will exists
 - Arranging for publication of the Notice of Order for Hearing and Affidavit of Mailing Notice to all interested persons
 - Identifying and reviewing objections and arranging for the appearance of witnesses
 - Mailing a notice of rights to the spouse and minor children

ANS: A

Petitioning for probate when no will exists

Correct. The paralegal petitions for administration when no will exists.

Arranging for publication of the Notice of Order for Hearing and Affidavit of Mailing Notice to all interested persons

Incorrect. All interested persons include creditors.

Identifying and reviewing objections and arranging for the appearance of witnesses

Incorrect. This is a common paralegal duty in any type of case.

Mailing a notice of rights to the spouse and minor children

Incorrect. This notice also involves preparing an Affidavit of Mailing.

6. To establish jurisdiction, the petition to prove a will must generally include:
- The decedent's place of birth
 - The estimated value of the real and personal nonprobate assets
 - The amount of debts paid prior to the death of the decedent
 - The original will

ANS: D

The original will

Correct. The original will is not needed only if that will has already been filed with the court.

The decedent's place of birth

Incorrect. However, the decedent's domicile and place of death are required information.

The estimated value of the real and personal nonprobate assets

Incorrect. Only the value of the probate assets is required.

The amount of debts paid prior to the death of the decedent

Incorrect. Such debts would cease to be debts when they were paid.

7. When petitioning for administration when no will exists, which of the following is a duty of the paralegal?
- Ensuring that the petition and death certificate are filed
 - Filing the Affidavit of Publication
 - Collecting all information needed to complete and execute the petition for probate of will
 - Arranging for witnesses to appear in court to testify on behalf of the testator

ANS: A

Ensuring that the petition and death certificate are filed

Correct. Either the paralegal or the personal representative can file the petition.

Filing the Affidavit of Publication

Incorrect. This is filed when arranging for the publication of the Notice of Order for Hearing.

Collecting all information needed to complete and execute the petition for probate of will

Incorrect. If there is no will, it cannot be probated.

Arranging for witnesses to appear in court to testify on behalf of the testator

Incorrect. If there is a testator, there is a will.

8. Checks from the estate checking account do all of the following EXCEPT:
- Act as creditors' admissions of payment
 - Establish a record of all payments and distributions
 - Serve as evidence and verification of payment of taxes
 - Act as a credit account until estate funds are released

ANS: D

Act as a credit account until estate funds are released

Correct. Estate funds are used to create the account.

Act as creditors' admissions of payment

Incorrect. The signature of the creditor shows admission of payment.

Establish a record of all payments and distributions

Incorrect. This is why the estate account should only include estate funds.

Serve as evidence and verification of payment of taxes

Incorrect. The cancelled checks act as receipts.

9. Which procedure occurs during the final account and closing of the estate phase?
- The hearing on creditors' claims and payment of allowed or approved claims
 - The computation and filing of a state inheritance tax return or waiver
 - The opening of the safe deposit box
 - Notice to creditors

ANS: B

The computation and filing of a state inheritance tax return or waiver

Correct. A copy of the order allowing the final account is filed.

The hearing on creditors' claims and payment of allowed or approved claims

Incorrect. This hearing takes place during the distribution of the decedent's estate.

The opening of the safe deposit box

Incorrect. The safe deposit box must be opened before estate distribution.

Notice to creditors

Incorrect. Creditors receive notice prior to the appointment of trustees and guardians.

10. Which will NOT be issued by the court during the special administration process?
- Inventory and Appraisal of the personal property of the decedent
 - Order Approving the Final Account and Report of the Special Administrator
 - Letters of Special Administration
 - Order Granting Special Administration

ANS: A

Inventory and Appraisal of the personal property of the decedent

Correct. The Inventory and Appraisal will be filled out and filed by the special administrator.

Order Approving the Final Account and Report of the Special Administrator

Incorrect. This order allows the final account and discharges the special administrator.

Letters of Special Administration

Incorrect. These Letters are issued by the court to confer appropriate powers upon the administrator.

Order Granting Special Administration

Incorrect. This order essentially appoints the special administrator.

CHAPTER 10: INFORMAL PROBATE ADMINISTRATION

MATCHING

- a. in and out method
 - b. formal proceedings
 - c. informal proceedings
 - d. registrar
 - e. commencement of informal probate
 - f. demand to be notified of petitioner's application for informal probate or informal appointment
 - g. closing statement
 - h. valid but undischarged claim
 - i. Statement of Informal Probate
 - j. court order closing an estate
-
1. *An affidavit signed by the personal representative at the end of informal probate proceedings to close the estate and to be discharged*
 2. *A court document that accepts an application for informal proceedings*
 3. *A filing with the court by any persons who have an interest in the estate*
 4. *A claim by a creditor of the estate that was not paid during the distribution of assets*
 5. *Settlement of an estate in which some proceedings may be handled by the probate court but most of the administration takes place informally, out of the court*
 6. *Terminates administration*
 7. *An applicant who seeks to be appointed personal representative submits a completed application for informal probate and informal appointment*
 8. *Administration conducted before a judge with notice to interested persons*
 9. *An officer of the court who is authorized to act in place of a judge in informal probate*
 10. *Administration conducted without notice to interested persons by an officer of the court*
-
1. ANS: G
 2. ANS: I
 3. ANS: F
 4. ANS: H
 5. ANS: A
 6. ANS: J
 7. ANS: E
 8. ANS: B
 9. ANS: D
 10. ANS: C

TRUE/FALSE

1. Informal probate generally extends the time required to complete the administration of a decedent's estate.
ANS: F
False
Correct. Informal probate requires fewer documents to be filed with the court than does formal probate.
True
Incorrect. Informal probate requires fewer steps than does formal probate.
2. Informal probate requires the appraisal of estate assets.
ANS: F
False
Correct. Appraisal is not required, but it may be necessary.
True
Incorrect. Formal probate requires the appraisal of estate assets.
3. The surviving spouse who is a devisee of the decedent has the highest priority for consideration as the personal representative in informal probate proceedings.
ANS: F
False
Correct. The person named as representative in the will has the highest priority.
True
Incorrect. Formal and informal proceedings use the same criteria for representative selection.
4. When applying for the informal probate of a will, an applicant must affirm that he/ she is unaware of any instrument that revokes the will.
ANS: T
True
Correct. The applicant must also affirm that he/she believes that the will was validly executed.
False
Incorrect. The applicant must also believe that the submitted instrument is the last will.
5. A person applying for informal appointment does not need to notify any other parties who might have a right to be personal representative.
ANS: F
False
Correct. He/She must notify anyone with a superior right to be appointed.
True
Incorrect. People with an inferior right to appointment do not have to be notified.
6. A person applying for informal probate of a will does not need to notify parties interested in the estate unless they have filed a written demand to be notified.
ANS: T
True
Correct. Interested parties would need to be notified for formal—not informal—probate.
False
Incorrect. Informal probate, by definition, does not require notice to be given.

7. If the registrar denies an application for informal proceedings, this usually results in the commencement of formal proceedings.
 ANS: T
True
 Correct. Applications are often rejected because they do not qualify for informal proceedings.
False
 Incorrect. Informal proceedings are allowed only for uncomplicated wills or estates.
8. Any party that has an interest of \$100 or more in an estate may demand that the personal representative post a bond.
 ANS: F
False
 Correct. The court may require a bond if it is demanded by a party with an interest equal to or greater than \$1,000 in the estate.
True
 Incorrect. The minimum amount of interest required in an estate is \$1,000.
9. A person who has a financial or property interest in an estate must file a demand for notice of any order or filing related to the estate within 120 hours of the passing of the decedent.
 ANS: F
False
 Correct. Such a demand may be filed any time after the death of a decedent.
True
 Incorrect. An application for informal proceedings may not be submitted until 120 hours after the decedent's death.
10. The personal representative is required to give personal notice of informal proceedings to all creditors.
 ANS: F
False
 Correct. The representative is not obligated to give notice, but he/she should do so.
True
 Incorrect. Personal notice is required only when a creditor has filed a demand.

MULTIPLE CHOICE

1. Who has the highest priority for consideration as personal representative of a decedent's estate?
 a. Other heirs of the decedent
 b. Non-devisee surviving spouse of the decedent
 c. Devisee of the decedent other than the spouse
 d. Creditor of the decedent
 ANS: C
Devisee of the decedent other than the spouse
 Correct. Only the devisee spouse or the person named as representative in the will has higher priority.
Other heirs of the decedent
 Incorrect. Devisees have priority over other heirs.
Non-devisee surviving spouse of the decedent
 Incorrect. The surviving spouse has priority only if he/she is a devisee.
Creditor of the decedent
 Incorrect. A creditor is least likely of this group to be named personal representative.

2. Which of the following is NOT required on applications for informal probate of a will or informal appointment?
- Statement that the time limit for informal probate has expired
 - Interest of the applicant in the decedent's estate
 - Statement indicating the county or city where the proceedings are to take place
 - Decedent's personal information, including name, date of death, domicile, and so on.

ANS: A

Statement that the time limit for informal probate has expired

Correct. If the time limit has expired, informal probate is unlikely to be possible.

Interest of the applicant in the decedent's estate

Incorrect. Such interest is required.

Statement indicating the county or city where the proceedings are to take place

Incorrect. This statement is necessary when the decedent was not domiciled in the state upon his/her death.

Decedent's personal information, including name, date of death, domicile, and so on.

Incorrect. Information about family members and other beneficiaries is also required.

3. The registrar will examine the forms submitted for informal proceedings for all of the following EXCEPT:
- Evidence that other wills exist
 - Confirmation that two weeks have elapsed since the decedent's death
 - Compliance of the application with the Uniform Probate Code (UPC)
 - Evidence that all who have demanded notice of proceedings have been notified

ANS: B

Confirmation that two weeks have elapsed since the decedent's death

Correct. The UPC requires that only 120 hours must elapse before an application for informal proceedings can be submitted.

Evidence that other wills exist

Incorrect. If the applicant indicates that another will might still exist, the application will be refused.

Compliance of the application with the Uniform Probate Code (UPC)

Incorrect. If the requirements of the UPC are not met, the application can be rejected.

Evidence that all who have demanded notice of proceedings have been notified

Incorrect. All who demand notice of proceedings must be notified before the process can move forward.

4. Which is an acceptable method for giving notice of a hearing on a petition to an interested party?
- Personally delivering a copy of the notice 14 days prior to the hearing
 - Publishing the notice in the newspaper every other week for a month if the identity of interested parties is unknown
 - Mailing a copy of the notice at least seven days before the time set for the hearing
 - Publishing the notice in the newspaper at least once, 14 days prior to the hearing

ANS: A

Personally delivering a copy of the notice 14 days prior to the hearing

Correct. This provides an interested party with adequate notice.

Publishing the notice in the newspaper every other week for a month if the identity of interested parties is unknown

Incorrect. If the identity of interested parties is unknown, a notice must be published for three consecutive weeks.

Mailing a copy of the notice at least seven days before the time set for the hearing

Incorrect. A copy must be mailed at least 14 days prior to the hearing.

Publishing the notice in the newspaper at least once, 14 days prior to the hearing

Incorrect. A published notice must appear three times.

5. Which is NOT a duty of the personal representative during informal probate?
- Providing a final account
 - Paying creditors' claims
 - Holding and managing the estate
 - Obtaining court approval for every item distributed

ANS: D

Obtaining court approval for every item distributed

Correct. Obtaining court approval is required for formal probate, not informal probate.

Providing a final account

Incorrect. A list of the decedent's probate assets is needed to close the estate.

Paying creditors' claims

Incorrect. Valid creditors' claims must be paid after the four-month notification period.

Holding and managing the estate

Incorrect. The representative has the same power over title that the decedent had.

6. Within the time set by state statute, the personal representative must prepare an inventory that includes all of the following EXCEPT:
- A valuation of the assets at fair market value
 - All real and personal property owned by the decedent at the time of death
 - Administration expenses
 - Identify any encumbrances on assets

ANS: C

Administration expenses

Correct. These expenses are not assets, and they are included in the final account.

A valuation of the assets at fair market value

Incorrect. The personal representative usually may hire independent appraisers to assist in valuation.

All real and personal property owned by the decedent at the time of death

Incorrect. This list must be mailed to a surviving spouse and all other interested persons who request it.

Identify any encumbrances on assets

Incorrect. The amount of any encumbrances must also be included.

7. Which can an informally appointed personal representative choose as a means of closing an estate informally and being discharged?
- A filing of the final account with the court
 - A closing statement
 - A formal closing
 - A notice of final distribution of assets

ANS: B

A closing statement

Correct. A personal representative may use this method if the administration has not been continuously supervised by the court.

A filing of the final account with the court

Incorrect. After the final account is filed, the personal representative must then distribute the remaining assets to those entitled to receive them.

A formal closing

Incorrect. If the administration has been continuously supervised by the court, a formal closing is required.

A notice of final distribution of assets

Incorrect. Distribution of assets is the last duty of the personal administrator, but he/she must then file a closing statement.

8. The affidavit signed by the personal representative at the end of informal probate proceedings to close the estate and to be discharged must verify all of the following EXCEPT:
- All assets of the estate have been distributed in full to the persons entitled to them.
 - All federal and state taxes have been paid.
 - A notice to creditors was published more than six months before the date of the affidavit.
 - A copy of the affidavit was mailed to all distributees of the estate.

ANS: A

All assets of the estate have been distributed in full to the persons entitled to them.

Correct. If distribution has not been completed, the reasons for partial distribution must be explained in the affidavit.

All federal and state taxes have been paid.

Incorrect. Verification that all creditors' and successors' claims have also been paid is also required.

A notice to creditors was published more than six months before the date of the affidavit.

Incorrect. Six months is considered an adequate amount of time for a creditor to file a claim.

A copy of the affidavit was mailed to all distributees of the estate.

Incorrect. A copy must also have been mailed to all creditors who have made themselves known.

9. When is the personal representative's appointment for informal proceedings terminated?
- When the formal closing ends
 - Automatically upon closing of the estate
 - When the personal representative has completed all duties that he/she is required to perform
 - One year after the closing statement is filed, if no proceedings involving the personal representative are pending in the court

ANS: D

One year after the closing statement is filed, if no proceedings involving the personal representative are pending in the court

Correct.

When the formal closing ends

Incorrect. A formal closing is required only when the administration has been continuously supervised by the court.

Automatically upon closing of the estate

Incorrect. The Uniform Probate Code provides a one-year grace period for the resolution of unforeseen business.

When the personal representative has completed all duties that he/she is required to perform

Incorrect. The one-year grace period allows for the personal representative to resolve unforeseen matters that may arise.

10. Which of the following would necessitate the reopening of an estate?
- The location of additional omitted property of the decedent after the estate has been closed and discharged
 - A creditor seeking to collect a valid but undischarged claim
 - The personal representative committed fraud or inadequate disclosure to a creditor related to the settlement of the decedent's estate
 - A claim against a decedent's estate that arose before the decedent's death is presented six months after the date of the first publication of notice to creditors

ANS: A

The location of additional omitted property of the decedent after the estate has been closed and discharged

Correct. Proper disposition of these assets will necessitate reopening the estate.

A creditor seeking to collect a valid but undischarged claim

Incorrect. The creditor must press the claim in a judicial proceeding against one or more of those who received the assets.

The personal representative committed fraud or inadequate disclosure to a creditor related to the settlement of the decedent's estate

Incorrect. The creditor has the right to recover from the personal representative, but the estate will not be reopened.

A claim against a decedent's estate that arose before the decedent's death is presented six months after the date of the first publication of notice to creditors

Incorrect. Such claims are barred against the estate if notice was given in compliance with the Uniform Probate Code.

CHAPTER 11: TAX CONSIDERATIONS IN THE ADMINISTRATION OF ESTATES

MATCHING

- a. estate tax
- b. income tax
- c. gift tax
- d. 1997 Taxpayer Relief Act
- e. Uniform Transfers to Minors Act
- f. Form 1040
- g. Form 4868
- h. Form 709
- i. Form 706
- j. Form 4768

1. *The United States Individual Income Tax Return*
2. *The United States Estate Tax Return*
3. *Tax levied on an estate for the transfer of property upon death*
4. *A law that replaced the unified credit with an applicable credit amount*
5. *A law that allows any kind of real or personal property to be transferred to a custodianship as a gift to a minor*
6. *The United States Gift Tax Return*
7. *Tax levied on wages, rents, pensions, annuities, royalties, alimony, and dividends*
8. *The Application for Extension of Time to File a Return and/or Pay United States Estate Taxes*
9. *The Application for Automatic Extension of Time to File a United States Individual Income Tax Return*
10. *Tax levied on a donee who transfers property during life*

1. ANS: F
2. ANS: I
3. ANS: A
4. ANS: D
5. ANS: E
6. ANS: H
7. ANS: B
8. ANS: J
9. ANS: G
10. ANS: C

TRUE/FALSE

1. Trust income is not subject to federal income tax.
ANS: F
False
Correct. Personal income, corporate income, and trust income are taxable.
True
Incorrect. Trust income is a form of personal income.
2. Estate tax is a type of death tax.
ANS: T
True
Correct. Federal and (some) state governments impose estate tax.
False
Incorrect. State inheritance taxes are the other type of death tax.
3. The personal representative is generally responsible for paying all taxes out of estate assets.
ANS: T
True
Correct. The will may specify that devisees pay the inheritance tax out of their legacies.
False
Incorrect. If the representative distributes the estate and cannot pay the taxes, he/she is personally liable.
4. Death tax payments are assessed against all income brackets, from the poor to the wealthy.
ANS: F
False
Correct. Small estates are no longer required to file federal estate tax returns.
True
Incorrect. Death tax payments are assessed only against the wealthy and moderately wealthy.
5. After a decedent's death, his/her estate is a new legal entity.
ANS: T
True
Correct. The legal existence of the decedent has terminated.
False
Incorrect. The estate is the taxpayer.
6. Any state in which a decedent held property may impose estate tax on the decedent's estate.
ANS: F
False
Correct. However, property held in other states may be taxed.
True
Incorrect. Only the state of the decedent's domicile may impose estate tax.
7. The gross estate is the taxable estate.
ANS: F
False
Correct. Deductions can be taken from the gross estate to determine the taxable estate.
True
Incorrect. The entire value of the gross estate is rarely completely taxable.

8. The federal unified gift and estate tax rate is a progressive and cumulative tax.
ANS: T
True
Correct. For a gift to qualify, it must be intended and given by the donor.
False
Incorrect. Once the unified credit is used, it is terminated.
9. All states have adopted the Uniform Transfers to Minors Act.
ANS: F
False
Correct. Vermont, for example, has not adopted the act.
True
Incorrect. South Carolina, for example, has not adopted the act.
10. Every transferor is allowed a lifetime exemption from the generation-skipping transfer tax.
ANS: T
True
Correct. A valid will must also be signed by the testator and two witnesses.
False
Incorrect. The date is especially important if there are multiple versions of the will.

MULTIPLE CHOICE

1. Which is NOT a reason that many people die without a valid will?
a. Inheritance tax
b. Estate tax
c. Gift tax
d. Income tax
ANS: A
Inheritance tax
Correct. However, many states impose an inheritance tax.
Estate tax
Incorrect. Many states also impose an estate tax.
Gift tax
Incorrect. Many states also impose a gift tax.
Income tax
Incorrect. The federal government and most states impose an income tax.
2. A testator's estate is entitled to the marital deduction if:
a. There is a surviving spouse and the decedent leaves all or a portion of the estate to him/her.
b. There is a surviving heir other than the spouse, and the decedent leaves all or a portion of the estate to the surviving heir.
c. There is no surviving spouse, but had there been, the decedent would have left all or a portion of the estate to him/her.
d. The marital deduction is not allowed because it has been repealed.
ANS: A
There is a surviving spouse and the decedent leaves all or a portion of the estate to him/her.
Correct. Both requirements must be met.
There is a surviving heir other than the spouse, and the decedent leaves all or a portion of the estate to the surviving heir.
Incorrect. The marital deduction only applies to spouses.

There is no surviving spouse, but had there been, the decedent would have left all or a portion of the estate to him/her.

Incorrect. The marital deduction only applies when there is a surviving spouse.

The marital deduction is not allowed because it has been repealed.

Incorrect. The marital deduction can be a substantial tax-saving device for an estate.

3. Which of the following states imposes an inheritance tax on successors?
- Wyoming
 - Minnesota
 - South Carolina
 - Kentucky

ANS: D

Kentucky

Correct. Kentucky imposes an inheritance tax on the person receiving the property.

Wyoming

Incorrect. Wyoming has no income tax, inheritance tax, or generation-skipping transfer tax.

Minnesota

Incorrect. Minnesota does not have an inheritance tax or a generation-skipping transfer tax.

South Carolina

Incorrect. South Carolina has a generation-skipping transfer tax but not an inheritance tax.

4. Bob and Mary have a son, Steven, and a granddaughter, Kelly. If Bob made a transfer of interest in property to Kelly, who would be the skip person?
- Mary
 - Bob
 - Kelly
 - Steven

ANS: C

Kelly

Correct. The skip person is the party who receives the transferred property.

Mary

Incorrect. Mary is essentially irrelevant to the transaction.

Bob

Incorrect. Bob is the transferor.

Steven

Incorrect. Steven is the non-skip person.

5. Which does the personal representative NOT have to file?
- Federal Individual Income Tax Return
 - State Estate Tax Return
 - Federal Sales Tax Return
 - State Individual Income Tax Return

ANS: C

Federal sales tax return

Correct. There is no federal sales tax.

Federal Individual Income Tax Return

Incorrect. The estate must pay income tax for the year the decedent died.

State Estate Tax Return

Incorrect. The State Estate Tax Return is imposed on the decedent's privilege of transferring property.

State Individual Income Tax Return

Incorrect. The estate must pay income tax for the year the decedent died.

6. A joint federal tax return can be filed for the decedent ONLY if:
- The surviving spouse agrees to file a joint return.
 - The surviving spouse remarried before the close of the year.
 - The surviving spouse lives in a different state.
 - The decedent was employed prior to his/her death.

ANS: A

The surviving spouse agrees to file a joint return.

Correct. However, the surviving spouse may decide to file a separate, individual return.

The surviving spouse remarried before the close of the year.

Incorrect. A surviving spouse who remarries before the close of the year may not file a joint return with the decedent.

The surviving spouse lives in a different state.

Incorrect. Domicile is irrelevant to federal income tax.

The decedent was employed prior to his/her death.

Incorrect. There are other forms of income in addition to employment wages.

7. Which is an example of a Qualified Terminable Interest Property (QTIP) property?
- A life insurance policy with a one-time lump sum payment to the surviving spouse
 - An automobile
 - A homestead
 - A trust with a life interest to the surviving spouse and remainder to the children

ANS: D

A trust with a life interest to the surviving spouse and remainder to the children

Correct. The surviving spouse has a qualified income interest for life.

A life insurance policy with a one-time lump sum payment to the surviving spouse

Incorrect. A QTIP property must provide income for life.

An automobile

Incorrect. An automobile will depreciate in value and provide no income.

A homestead

Incorrect. A homestead does not provide income.

8. Which state has a state income tax?
- New York
 - Nevada
 - Washington
 - Florida

ANS: A

New York

Correct. New York is one of the 43 states with some form of income tax.

Nevada

Incorrect. Nevada does not have a state income tax.

Washington

Incorrect. Washington does not have a state income tax.

Florida

Incorrect. Florida does not have a state income tax.

9. Which does NOT generally have to be filed by April 15?
- Federal Income Tax Return
 - Federal Estate Tax Return
 - Federal Gift Tax Return
 - Most state income tax returns

ANS: B

Federal Estate Tax Return

Correct. The Federal Estate Tax Return must be filed within nine months of the decedent's death.

Federal Income Tax Return

Incorrect. The Federal Income Tax Returns must be postmarked by April 15.

Federal Gift Tax Return

Incorrect. Such a return will be due on or before April 15.

Most state income tax returns

Incorrect. Most states have the same income tax filing date as the IRS.

10. Which CANNOT be subtracted from the gross estate to determine the taxable estate?

- a. Certain expenses, liens, and encumbrances
- b. Charitable deductions
- c. The lessening of the value of estate assets
- d. Marital deduction

ANS: C

The lessening of the value of estate assets

Correct. This would not qualify as a deductible loss during the handling of the estate.

Certain expenses, liens, and encumbrances

Incorrect. These are examples of specific deductible items.

Charitable deductions

Incorrect. Charitable deductions include any transfer of assets for public, charitable, educational, and literary purposes.

Marital deduction

Incorrect. The marital deduction is potentially the most valuable deduction that can be taken.

CHAPTER 12: INTRODUCTION TO TRUSTS MATCHING

- a. legal title
- b. *cestui que* trust
- c. equitable title
- d. testamentary trust
- e. trust agreement
- f. principal
- g. income
- h. Restatement of the American Law of Trusts
- i. Uniform Trust Code
- j. parol evidence

1. *The monetary gain that is generated from the principal of a trust*
2. *A uniform law available for adoption by states to provide a uniform codified law on trusts*
3. *The capital or property of a trust*
4. *The authority on trust law in most states*
5. *The form of ownership of trust property held by the trustee and giving him/her the right to control and manage the property for another's benefit*
6. *Oral testimony or written evidence*
7. *A contract, made between and signed by the settlor and trustee, that creates a trust*
8. *The person who has the enjoyment and benefit of trust property*
9. *A trust included in a will*
10. *The right of the beneficiary to receive the benefits of the trust*

1. ANS: G
2. ANS: I
3. ANS: F
4. ANS: H
5. ANS: A
6. ANS: J
7. ANS: E
8. ANS: B
9. ANS: D
10. ANS: C

TRUE/FALSE

1. The trust instrument must either specifically describe the trust property or clearly define the procedure to be followed in identifying the trust property.
ANS: T
True
Correct. The court cannot enforce the trust unless the trust property exists.
False
Incorrect. The validity of a trust depends on its enforceability.
2. Any transferable interest in an object of ownership may become trust property.
ANS: T
True
Correct. This includes ownership of real or personal property.
False
Incorrect. A business interest could serve as trust property.
3. A single trust may have only one beneficiary.
ANS: F
False
Correct. The settlor may choose to make the beneficiaries joint tenants.
True
Incorrect. Multiple beneficiaries usually hold the property as tenants in common.
4. Beneficiaries of a trust must be defined by name.
ANS: F
False
Correct. Beneficiaries may be defined by class designation.
True
Incorrect. A trust can be set up, for example, “for the benefit of my grandchildren.”
5. An infant may be a beneficiary of a trust.
ANS: T
True
Correct. A guardian would generally be required to act as the beneficiary for an infant.
False
Incorrect. Any person capable of owning property may be a beneficiary.
6. Trustees must generally be paid.
ANS: T
True
Correct. However, family members acting as trustees may decline compensation.
False
Incorrect. Trustees perform work for the trust when they buy, sell, and invest property.
7. After the creation of a trust, title to property placed in the trust passes to at least two persons with the trustee receiving the equitable title and the beneficiary receiving the legal title.
ANS: F
False
Correct. The beneficiary receives the equitable title.
True
Incorrect. The trustee receives the legal title.

8. A settlor may cancel a trust if a property transfer is accomplished through duress.
ANS: T
True
Correct. Fraud or undue influence would also be grounds for voiding a trust.
False
Incorrect. Such a trust would be voidable.
9. The settlor's retention of control over the trust arrangement exposes the settlor to tax liability for the trust income.
ANS: T
True
Correct. The power to revoke the trust exposes the settlor to this liability.
False
Incorrect. This is one reason why the settlor may choose to make the trust irrevocable.
10. If there are two trustees, one may make a determination to take action without the other's consent.
ANS: F
False
Correct. If there are only two trustees, they must agree on any action concerning trust property.
True
Incorrect. This is usually only true if there are more than two trustees and the trustee taking action is also the settlor.

MULTIPLE CHOICE

1. Which is NOT an essential element of a trust?
a. A sale or gift of property
b. One or more beneficiaries
c. Real or personal property
d. One or more trustees
ANS: A
A sale or gift of property
Correct. A trust differs from other legal property transactions, such as a sale or gift of property.
One or more beneficiaries
Incorrect. Beneficiaries receive benefits and enforce the trust.
Real or personal property
Incorrect. Real or personal property is transferred to the trust.
One or more trustees
Incorrect. Trustees administer and manage the trust. The settlor, who creates the trust, is another essential element of a trust.
2. To be a settlor, a person must meet all of the following requirements EXCEPT:
a. Own a transferable interest in property
b. Have the right or power to dispose of a property interest
c. Act as the beneficiary
d. Have contractual capacity
ANS: C
Act as the beneficiary
Correct. The settlor is allowed, but not required, to be the beneficiary.
Own a transferable interest in property
Incorrect. The settlor must own a transferable interest in property.

Have the right or power to dispose of a property interest

Incorrect. Without this right, property cannot legally be transferred.

Have contractual capacity

Incorrect. Settlers may not be insane, a minor, or intoxicated at the time of the creation of a trust.

3. The court may appoint or replace a trustee in all of the following circumstances EXCEPT:
- The trustee is incompetent
 - The named trustee declines the position.
 - The trustee dies.
 - The named trustee is also a co-beneficiary.

ANS: D

The named trustee is also a co-beneficiary.

Correct. The trustee can be a co-beneficiary, but not the sole beneficiary.

The trustee is incompetent.

Incorrect. If a trustee's incompetence is shown, the court can appoint a replacement trustee.

The named trustee declines the position.

Incorrect. The court will not allow a trust to fail for lack of a trustee.

The trustee dies.

Incorrect. If the trustee dies, a new trustee must be named.

4. Which is an invalid trust combination?
- The settlor, trustee, and beneficiary are three different people.
 - The settlor is also a co-trustee and a co-beneficiary.
 - The settlor is also the trustee and beneficiary.
 - The settlor is also the beneficiary, and another person is the trustee.

ANS: C

The settlor is also the trustee and beneficiary.

Correct. The settlor may be the trustee or the beneficiary, but not both.

The settlor, trustee, and beneficiary are three different people.

Incorrect. This is a common trust combination.

The settlor is also a co-trustee and a co-beneficiary.

Incorrect. This is legal as long as the settlor is not the sole beneficiary or trustee.

The settlor is also the beneficiary, and another person is the trustee.

Incorrect. The settlor may be a beneficiary or a trustee, but not both.

5. Which is NOT considered valid grounds for the removal of a trustee?
- Lack of capacity
 - Resignation of the trustee
 - Commission of a crime
 - Showing favoritism to one or more beneficiaries

ANS: B

Resignation of the trustee

Correct. If the trustee resigns, there is no need for court removal.

Lack of capacity

Incorrect. A trustee must have legal capacity.

Commission of a crime

Incorrect. This is especially valid when the crime involves dishonesty.

Showing favoritism to one or more beneficiaries

Incorrect. The beneficiaries must be treated equally.

6. The trustee in the trust instrument is granted the power to do all of the following EXCEPT:
- Delegate the performance of personal duties
 - Hire attorneys and stockbrokers
 - Subdivide or exchange real property
 - Lend or borrow money

ANS: A

Delegate the performance of personal duties

Correct. The trustee acts as the fiduciary.

Hire attorneys and stockbrokers

Incorrect. The trustee can also hire accountants and insurance agents.

Subdivide or exchange real property

Incorrect. The trustee can also develop or improve real property.

Lend or borrow money

Incorrect. The trustee can lend or borrow money and pledge or mortgage the trust property.

7. Which is NOT a trustee's duty?
- Duty to account
 - Duty of performance and due care
 - Duty to make payments of income and principal to the named beneficiaries
 - Duty to prevent the investment of the trust property

ANS: D

Duty to prevent the investment of the trust property

Correct. The trustee is required to invest the property in enterprises that will yield income.

Duty to account

Incorrect. The trustee must keep accurate records to account for expenditures, investments, and other actions.

Duty of performance and due care

Incorrect. The trustee's main duty is to carry out the terms and purpose of the trust.

Duty to make payments of income and principal to the named beneficiaries

Incorrect. The beneficiaries may be income beneficiaries or remainder beneficiaries.

8. Which duty prohibits a trustee from personally profiting from his/her position as trustee (other than the compensation allowed by contract or law)?
- Duty to take possession of and preserve trust property
 - Duty of loyalty
 - Duty to prevent the investment of the trust property
 - Duty to make payments of income and principal to the named beneficiaries

ANS: B

Duty of loyalty

Correct. The loyalty duty applies to all persons in a fiduciary capacity.

Duty to take possession of and preserve trust property

Incorrect. The trustee must protect the property from loss or damage.

Duty to prevent the investment of the trust property

Incorrect. The trustee is required to invest the property in enterprises that will yield income.

Duty to make payments of income and principal to the named beneficiaries

Incorrect. The beneficiaries may be income beneficiaries or remainder beneficiaries.

9. Which is an example of remainder beneficiary expenses?
- Royalties
 - Depreciation
 - Stock splits
 - Costs incurred in the sale or purchase of principal

ANS: D

Costs incurred in the sale or purchase of principal

Correct. Such costs are an extraordinary expense.

Royalties

Incorrect. Royalties are an income beneficiary receipt.

Depreciation

Incorrect. Depreciation is an ordinary expense.

Stock splits

Incorrect. Stock splits are a remainder beneficiary receipt.

10. Which judicial remedy can a beneficiary use to be compensated monetarily (either directly or through the trust) for a trustee's breach of trust?
- Civil lawsuit to compel the trustee to reimburse the trust for any loss or depreciation in value of the trust property
 - Removal of the trustee and appointment of a new trustee
 - An injunction to compel the trustee to do or refrain from doing the act that would constitute the breach of trust
 - Suing for specific performance

ANS: A

Civil lawsuit to compel the trustee to reimburse the trust for any loss or depreciation in value of the trust property

Correct. The trustee would be required to repay the trust.

Removal of the trustee and appointment of a new trustee

Incorrect. A trustee can be removed for misconduct, such as failure to invest the property.

An injunction to compel the trustee to do or refrain from doing the act that would constitute the breach of trust

Incorrect. Such an injunction would not directly result in a payment to either the trust or beneficiary.

Suing for specific performance

Incorrect. This would compel the trustee to perform the duties created by the trust.

CHAPTER 13: CLASSIFICATION OF TRUSTS, THE LIVING TRUST, AND OTHER SPECIAL TRUSTS

MATCHING

- a. active trust
 - b. *inter vivos* trust
 - c. purchase-money resulting trust
 - d. failed trust
 - e. excessive endowment trust
 - f. spendthrift trust
 - g. sprinkling trust
 - h. Totten trust
 - i. declaration of trust
 - j. irrevocable living trust
-
1. *A trust that provides a fund for the maintenance of a beneficiary while safeguarding the fund against the beneficiary's extravagance or inexperience in spending money*
 2. *A trust made when a settlor retains title to property and simply declares himself/herself trustee of the property for the benefit of another person*
 3. *An express trust that can be either private or charitable*
 4. *A trust that is declared void for reasons other than that it has an illegal objective*
 5. *A trust that is established when the value of property exceeds the amount needed for the purpose of a private express trust*
 6. *A savings account in which money is deposited in the depositor's name as trustee for another person named as beneficiary and is payable upon the death of the depositor*
 7. *A trust made between living persons*
 8. *A trust that may not be amended, revoked, or canceled after its creation*
 9. *A trust for which the trustee has the authority and discretion to accumulate or distribute trust income or principal, or both, among the trust beneficiaries in varying amounts*
 10. *A resulting trust in which property is purchased and paid for by one person, at whose direction the seller transfers possession and title to another person*
-
1. ANS: F
 2. ANS: I
 3. ANS: A
 4. ANS: D
 5. ANS: E
 6. ANS: H
 7. ANS: B
 8. ANS: J
 9. ANS: G
 10. ANS: C

TRUE/FALSE

1. All trusts must be either express or implied.
ANS: T
True
Correct. Express trusts are declared in explicit terms.
False
Incorrect. Implied trusts are based on the assumed intent of the person holding legal title to property.
2. Charitable trusts, as public trusts, must benefit the general public.
ANS: F
False
Correct. Trusts that limit funds to named individuals must be private.
True
Incorrect. A charitable trust can benefit a reasonably large indefinite class of persons within the public.
3. The law will permit a public trust to end if the beneficiary no longer exists.
ANS: F
False
Correct. An equity court will name a charity whose purpose is as near as possible to the designated charity as the new beneficiary.
True
Incorrect. The courts will apply the doctrine of *cy-pres*.
4. If a settlor wishes to see how well a trust operates while he/she is alive, a testamentary trust should be established.
ANS: F
False
Correct. A testamentary trust is a gift made after the death of the settlor under the terms of a will.
True
Incorrect. An *inter vivos* trust is a gift made while the settlor is living.
5. The Rule Against Perpetuities places a time limit on how long a private noncharitable trust may exist.
ANS: T
True
Correct. The Rule Against Perpetuities holds that a valid trust must take effect at some time in the future.
False
Incorrect. "Perpetuity" means ongoing indefinitely or, essentially, forever.
6. Courts frequently use resulting trusts to settle legal disputes.
ANS: T
True
Correct. An excessive endowment trust returns the amount not needed to the settlor or to his/her successors.
False
Incorrect. A purchase-money resulting trust can give a payor equitable title to property.

7. The money in a Totten trust is a probate asset.
 ANS: F
False
 Correct. The money in a Totten trust is a nonprobate asset.
True
 Incorrect. The money in a Totten trust is not part of the depositor's estate.
8. A trust that provides income payments to a person whose spouse has died only until the person remarries opposes public policy.
 ANS: F
False
 Correct. Courts generally uphold trusts that require the beneficiary to lose an interest in a trust if he/she remarries.
True
 Incorrect. Such a trust restrains remarriage, not marriage.
9. On the death of the settlor, a revocable living trust becomes irrevocable.
 ANS: T
True
 Correct. Many people now use a revocable living trust in place of a will.
False
 Incorrect. A revocable living trust is revocable only by the settlor.
10. A living trust can decrease income taxes.
 ANS: F
False
 Correct. A living trust can decrease federal estate taxes but not income taxes.
True
 Incorrect. A living trust can decrease federal estate tax in appropriate trusts.

MULTIPLE CHOICE

1. Which is NOT a subcategory of express trusts?
- Inter vivos* or testamentary trusts
 - Private or public trusts
 - Active or passive trusts
 - Implied or nonimplied trusts
- ANS: D
Implied or nonimplied trusts
 Correct. An implied trust is not created by the settlor's express terms.
Inter vivos or testamentary trusts
 Incorrect. An *inter vivos* trust is established and administered by the settlor's express terms.
Private or public trusts
 Incorrect. Public trusts are created under a settlor's express terms.
Active or passive trusts
 Incorrect. Active and passive trusts are categorized based on whether or not the trustee has active duties to perform.

2. Which is NOT an essential element of an express trust?
- A charitable purpose must be expressly designated.
 - The settlor must transfer sufficiently identified property to the trust.
 - The settlor must intend to create a private trust.
 - A beneficiary of the trust must be named.

ANS: A

A charitable purpose must be expressly designated.

Correct. This is an essential element of a public trust.

The settlor must transfer sufficiently identified property to the trust.

Incorrect. The property should be identified clearly so that it may be transferred.

The settlor must intend to create a private trust.

Incorrect. Without clear intent, the trust will not be valid.

A beneficiary of the trust must be named.

Incorrect. A trust requires a beneficiary.

3. Which is NOT a requirement for an express public trust to be valid?
- The settlor must intend to create a public trust.
 - It must benefit the general public or an indefinite class of persons.
 - It must limit the distribution of its fund to named individuals.
 - A charitable purpose must be expressly designated.
 - A trustee must be named to administer the trust.

ANS: C

It must limit the distribution of its fund to named individuals.

Correct. These limitations would make the trust a private trust.

The settlor must intend to create a public trust.

Incorrect. Intent is required for the trust to be valid.

It must benefit the general public or an indefinite class of persons.

Incorrect. An indefinite class of persons must be a reasonably large group of people within the general public.

A charitable purpose must be expressly designated.

Incorrect. The purpose that benefits the general public or an indefinite class of persons must be designated.

A trustee must be named to administer the trust.

Incorrect. All trusts require a trustee.

4. Which is NOT a type of resulting trust?
- Failed trust
 - Purchase-money resulting trust
 - Implied trust
 - Excessive endowment trust

ANS: C

Implied trust

Correct. A resulting trust is an implied trust, but implied trusts are not necessarily resulting trusts.

Failed trust

Incorrect. A failed trust is a trust declared void for reasons other than having an illegal objective.

Purchase-money resulting trust

Incorrect. A purchase-money resulting trust is, by definition, a resulting trust.

Excessive endowment trust

Incorrect. An excessive endowment trust is created when the property value exceeds the amount needed for the trust's purpose.

5. Which of the following is a type of implied trust?

- a. Testamentary trust
- b. Private trust
- c. Active trust
- d. Constructive trust

ANS: D

Constructive trust

Correct. A constructive trust is imposed by the court to accomplish justice and prevent unjust enrichment.

Private trust

Testamentary trust

Incorrect. A testamentary trust is an express active trust.

Incorrect. A private trust is created expressly for the benefit of one or more named beneficiaries.

Active trust

Incorrect. An active trust expressly grants the trustee power to act as the manager of the trust.

6. Which trust is in the form of a savings account?

- a. Totten trust
- b. Sprinkling trust
- c. Spendthrift trust
- d. Constructive trust

ANS: A

Totten trust

Correct. A Totten trust account will pass to the beneficiary when the depositor dies.

Sprinkling trust

Incorrect. A sprinkling trust gives a trustee the authority to accumulate or distribute trust income and/or principal among the trust beneficiaries in varying amounts.

Spendthrift trust

Incorrect. A spendthrift trust allows the beneficiary only a limited amount of funds at any one time.

Constructive trust

Incorrect. A constructive trust is used to recover property from someone who has improperly obtained rights to it.

7. Which of the following is NOT a feature of a revocable living trust?

- a. On the death of the settlor, the living trust becomes irrevocable.
- b. It can be used as a device for saving estate taxes
- c. It allows the settlor to manage and retain full control over the assets of the trust.
- d. It allows the settlor to name himself/herself as trustee.

ANS: B

It can be used as a device for saving estate taxes.

Correct. Only an irrevocable trust offers this additional tax benefit.

On the death of the settlor, the living trust becomes irrevocable.

Incorrect. When the settlor dies, the trust property is distributed according to the terms of the trust.

It allows the settlor to manage and retain full control over the assets of the trust.

Incorrect. It also allows the settlor to receive the income from the trust during his/her lifetime.

It allows the settlor to name himself/herself as trustee.

Incorrect. If the settlor is married, the settlor and the settlor's spouse can act as co-trustees.

8. Which of the following is generally a pre-death task in the administration of a trust?
- Filing the annual individual income tax returns
 - Opening a checking account for the trust
 - Preparing a schedule of property held outside the trust
 - Requesting discharge as trustee

ANS: A

Filing the annual individual income tax returns

Correct. Form 1040 must be filed annually with the settlor's Social Security number.

Opening a checking account for the trust

Incorrect. A checking account is set up after the death of the settlor to deposit and disburse funds.

Preparing a schedule of property held outside the trust

Incorrect. This is done after the death of the testator.

Requesting discharge as trustee

Incorrect. This is the last task of the trustee and is performed after the settlor has died.

9. Which is NOT an advantage of using a revocable living trust as a substitute for a will?
- The need for court-appointed guardians for minors is eliminated.
 - Publicity is avoided.
 - The settlor maintains ownership of assets.
 - A living trust is not under the control or supervision of the probate court.

ANS: C

The settlor maintains ownership of assets.

Correct. The trust—not the settlor—owns all the assets except for life insurance and retirement benefits.

The need for court-appointed guardians for minors is eliminated.

Incorrect. A living trust can provide for specific individuals.

Publicity is avoided.

Incorrect. A will is a public document and can be examined by anyone.

A living trust is not under the control or supervision of the probate court.

Incorrect. Wills—not living trusts—must go through probate.

10. Which function CANNOT be performed by a pour-over will?
- It can allow the testator to name a personal guardian for minor children.
 - It can dispose of property that the testator neglected to add to the trust before death.
 - It can dispose of property acquired by the testator through gifts, inheritance, or good fortune shortly before death.
 - It can be used independently as a substitute for a will.

ANS: D

It can be used independently as a substitute for a will.

Correct. A pour-over will must be used in conjunction with an existing living trust.

It can allow the testator to name a personal guardian for minor children.

Incorrect. A pour-over will also allows the testator to name a property guardian for minor children.

It can dispose of property that the testator neglected to add to the trust before death.

Incorrect. A pour-over will directs the residue of the estate into an existing living trust.

It can dispose of property acquired by the testator through gifts, inheritance, or good fortune shortly before death.

Incorrect. A pour-over will directs the residue of the estate into an existing living trust.

CHAPTER 14: ESTATE PLANNING

MATCHING

- a. marital deduction
 - b. charitable remainder
 - c. gift splitting
 - d. present interest
 - e. legal life estate
 - f. stepped-up basis
 - g. general power of appointment
 - h. term life insurance
 - i. disclaimer
 - j. bypass trust
-
1. *An increase in the income tax of appreciated property, which is valued on the date of the donor's death or the alternate valuation date*
 2. *The right of a beneficiary or heir to refuse a gift by will, trust, or inheritance without any adverse tax consequences*
 3. *An unlimited amount of a decedent's gross estate that may be given to the surviving spouse without being subject to federal estate tax*
 4. *An immediate and unrestricted interest in real or personal property*
 5. *An estate created by operation of law and not directly by the parties themselves*
 6. *The least expensive form of life insurance, which provides pure protection without cash surrender or loan value*
 7. *A trust in which the settlor or named beneficiary can retain income from the trust, usually for life, and after death, the trust property goes to a qualified charity*
 8. *An estate planning device whereby a portion of a deceased spouse's estate passes to a trust instead of directly to the surviving spouse*
 9. *The right to pass on an interest in property to whomever a donee chooses, including himself/herself, the estate, creditors, or creditors of the estate*
 10. *A practice available to spouses to join in annual gifts and combine their individual gifts to donees to avoid gift taxes*
-
1. ANS: F
 2. ANS: I
 3. ANS: A
 4. ANS: D
 5. ANS: E
 6. ANS: H
 7. ANS: B
 8. ANS: J

9. ANS: G

10. ANS: C

TRUE/FALSE

1. Only attorneys are qualified to give estate-planning advice.

ANS: F

False

Correct. Accountants, investment advisers, financial planners, and others are qualified to do so.

True

Incorrect. Trust officers at banks often give such advice.

2. When it is designed appropriately, an estate plan should meet all the testator's objectives and provide him/her with a comfortable retirement income.

ANS: T

True

Correct. The estate plan should also provide financial protection for the testator's family.

False

Incorrect. The estate plan should also involve a minimum of taxes and expenses throughout its implementation.

3. After it is established, an estate plan does not need to be reviewed again until the testator's death.

ANS: F

False

Correct. Changes in family relationships may require a review of the estate plan.

True

Incorrect. Changes in tax laws also may require a review of the estate plan.

4. A charitable remainder annuity trust allows for additional contributions to be made to the trust property.

ANS: F

False

Correct. Such a trust does not allow for additional contributions.

True

Incorrect. A charitable remainder unitrust allows for additional contributions.

5. Gifts of future interests do not qualify for the annual gift tax exclusion.

ANS: T

True

Correct. Gifts of future interests are not immediate.

False

Incorrect. The annual gift tax exclusion is available only for present interests.

6. Estate planning must always take place before the death of a testator.

ANS: F

False

Correct. Postmortem estate planning is often used for tax-saving purposes.

True

Incorrect. Postmortem estate planning might, for example, include the disclaiming of an inheritance.

7. If a same-sex couple has a legally recognized civil union in their home state, they qualify for the federal marital deduction.
 ANS: F
False
 Correct. Partners of civil unions and domestic partnerships do not qualify for the marital deduction.
True
 Incorrect. This deduction is limited to married couples.
8. If a husband gives his wife a gift of \$500,000, neither party has to pay federal gift tax.
 ANS: T
True
 Correct. Nor must either party pay estate tax.
False
 Incorrect. Outright transfers between spouses by gift are not subject to federal gift and estate taxes.
9. An elderly beneficiary may choose to disclaim an inheritance.
 ANS: T
True
 Correct. Age, health, and financial security are common reasons for disclaiming an inheritance.
False
 Incorrect. Anyone can legally disclaim an inheritance.
10. Estate administration expenses can be used as a deduction for estate tax purposes.
 ANS: T
True
 Correct. These expenses may alternately be used as a deduction for income tax purposes.
False
 Incorrect. These expenses can be used as a final postmortem tax-saving method.

MULTIPLE CHOICE

1. Which is NOT a potentially adverse factor that could diminish any estate?
 a. Administration expenses
 b. Trusts that transfer property after the deaths of both spouses
 c. Forced liquidation
 d. Termination of employment
 ANS: B
Trusts that transfer property after the deaths of both spouses
 Correct. Such trusts are not subject to estate taxes.
Administration expenses
 Incorrect. These expenses must be paid from the assets of the decedent's estate and may substantially lessen its value.
Forced liquidation
 Incorrect. The personal representative may be forced to sell assets to pay legitimate expenses.
Termination of employment
 Incorrect. Such termination creates a substantial loss of income to the estate.
2. As part of an estate plan, a will allows the testator to:
 a. Protect a spendthrift child
 b. Preserve privacy
 c. Appoint both personal and property guardians for minor children
 d. Provide a lifetime income for the surviving spouse

ANS: C

Appoint both personal and property guardians for minor children

Correct. A single person may be appointed for both positions, if the testator so desires.

Protect a spendthrift child

Incorrect. A spendthrift trust protects a spendthrift child.

Preserve privacy

Incorrect. A will is a public document.

Provide a lifetime income for the surviving spouse

Incorrect. A will allows the testator to leave an entire estate to a surviving spouse, but the property of the estate must be invested separately.

3. Which is NOT a way in which an estate planner can use trusts to benefit family members?
- Identify the estate assets and the beneficiaries who are to receive them.
 - Diminish problems such as will contests.
 - Reduce federal and state death taxes.
 - Avoid probate.

ANS: A

Identify the estate assets and the beneficiaries who are to receive them.

Correct. This is a provision of a will, not a trust.

Diminish problems such as will contests.

Incorrect. Trusts cannot be contested in court.

Reduce federal and state death taxes.

Incorrect. Trusts can be used to increase the marital and charitable deductions.

Avoid probate.

Incorrect. Wills—not trusts—must be probated.

4. Which is NOT a common method of reducing the gross estate?
- Life insurance
 - Trusts that do not avoid multiple taxation
 - Gifts made during the donor's lifetime
 - Special power of appointment

ANS: B

Trusts that do not avoid multiple taxation

Correct. Trusts that avoid multiple taxation or qualify for the marital deduction reduce the estate.

Life insurance

Incorrect. Life insurance payments can be used to pay debts and expenses.

Gifts made during the donor's lifetime

Incorrect. A gift made before the donor's death reduces the estate by the value of the gift.

Special power of appointment

Incorrect. This excludes the value of the property appointed for being included in the gross estate of the spouse, who is the beneficiary.

5. Which is NOT a major type of life insurance?
- Universal life insurance
 - Whole life insurance
 - Term life insurance
 - Custodial life insurance

ANS: D

Custodial life insurance

Correct. Custodial life insurance is not a classification of life insurance.

Universal life insurance

Incorrect. Universal life insurance covers a specific period and builds the cash value of the policyholder.

Whole life insurance

Incorrect. Whole life insurance combines lifetime protection with a minimum savings feature called cash value.

Term life insurance

Incorrect. Term life insurance is pure protection without savings.

6. To qualify for the charitable deduction, a gift cannot be made to a(n):
- Private school
 - Religious charity
 - Individual
 - Library

ANS: C

Individual

Correct. A charity cannot be an individual.

Private school

Incorrect. The charitable deduction applies to gifts made for educational purposes.

Religious charity

Incorrect. The charitable deduction does not discriminate on the basis of religious beliefs of an organization.

Library

Incorrect. Gifts made to provide a literary benefit qualify for this deduction.

7. Which of the following is NOT a benefit of a charitable remainder trust?
- It acts as a form of life insurance that benefits the settlor's children.
 - It reduces income tax.
 - It increases current income by providing life income for the settlor.
 - It reduces federal estate tax liability.

ANS: A

It acts as a form of life insurance that benefits the settlor's children.

Correct. When the settlor dies, the money goes to a charity.

It reduces income tax.

Incorrect. It allows the settlor-donor an income tax deduction for the gift.

It increases current income by providing life income for the settlor.

Incorrect. It provides a life income for the settlor by using property that currently does not provide income.

It reduces federal estate tax liability.

Incorrect. Gifts to charities, in general, are exempt from federal estate tax.

8. Which of the following is a feature of a Charitable Remainder Annuity Trust?
- It is revocable.
 - Payments to the beneficiary vary annually.
 - It counteracts the effects of inflation.
 - Additional contributions cannot be made to the trust property.

ANS: D

Additional contributions cannot be made to the trust property.

Correct. Additional contributions can be made to a Charitable Remainder Unitrust but not to a

It is revocable.

Incorrect. A Charitable Remainder Annuity Trust is irrevocable.

Charitable Remainder Annuity Trust.

Payments to the beneficiary vary annually.

Incorrect. This is a feature of a Charitable Remainder Unitrust.

It counteracts the effects of inflation.

Incorrect. This is a feature of a Charitable Remainder Unitrust.

9. The practice of gift splitting is available only between:
- Spouses
 - A parent and a natural child
 - A parent and an adopted child
 - Siblings

ANS: A

Spouses

Correct. Spouses can give up to \$26,000 together to a donee.

A parent and a natural child

Incorrect. Gift splitting can be done only between spouses.

A parent and an adopted child

Incorrect. Gift splitting can be done only between spouses.

Siblings

Incorrect. Gift splitting can be done only between spouses.

10. A QTIP trust must:

- Be in the form of a testamentary trust
- Give the surviving spouse the right to all the income from the trust property for life
- Allow the trustee to use any amount of the trust principal for any purpose
- Give the surviving spouse a general power of appointment

ANS: B

Give the surviving spouse the right to all the income from the trust property for life

Correct. This income must be payable at least annually.

Be in the form of a testamentary trust

Incorrect. The QTIP trust can be a testamentary or living trust.

Allow the trustee to use any amount of the trust principal for any purpose

Incorrect. Some of the trust principal must be used only for the surviving spouse's health, education, support, or maintenance.

Give the surviving spouse a general power of appointment

Incorrect. The settlor-spouse determines the trust property distribution after the death of the surviving spouse through the trust.

CHAPTER 15: LONG-TERM CARE

MATCHING

- a. nursing home
- b. assisted living facility
- c. Social Security
- d. Supplemental Security Income
- e. Medicare
- f. Medicaid
- g. long-term care insurance
- h. inflation protection
- i. nonforfeiture benefit
- j. waiver of premium payment
- k. elimination period

1. *A form of public assistance that provides medical aid for people who have income and assets below a certain level*
 2. *A federal program that provides hospital and medical insurance for people age 65 and older*
 3. *A provision in a long-term care insurance policy that allows the insured to stop paying premiums once benefits are received*
 4. *A feature that returns a portion of the premiums if the insured cancels the insurance policy or allows it to lapse*
 5. *A federal program that provides benefits for eligible workers when they retire*
 6. *An option that provides for increases in benefit amounts to help pay for expected future increases in the costs of long-term care services*
 7. *A federal program that makes monthly payments based on need to people age 65 or older who have low income and few assets*
 8. *A residential institution that provides care and services for the elderly or infirm*
 9. *A policy that pays a fixed monetary benefit, usually per day, for a designated benefit period during which the insured generally receives care at home or in a nursing home*
 10. *A community residential living arrangement that provides individual personal care and health services for people who need help with activities of daily living*
 11. *The time that people must wait from the date they are certified as chronically ill until the date on which benefit payments for covered services begin*
-
1. ANS: F
 2. ANS: E
 3. ANS: J
 4. ANS: I
 5. ANS: C

6. ANS: H
7. ANS: D
8. ANS: A
9. ANS: G
10. ANS: B
11. ANS: K

TRUE/FALSE

1. An agent is required to help with the purchase of long-term care insurance.
ANS: F
False
Correct. Long-term care insurance can be purchased by mail.
True
Incorrect. Long-term care insurance can also be purchased by phone.
2. Most insurance companies pay benefits to family members who care for loved ones at home.
ANS: F
False
Correct. Usually, benefits are paid only for care provided in a facility or by a home health care aide.
True
Incorrect. Most insurance companies only pay benefits when the insured receives professional care.
3. People with high incomes and assets generally have no need for long-term care insurance.
ANS: T
True
Correct. It is people who have moderate income and assets who can afford to buy long-term care insurance and thereby protect their estate assets.
False
Incorrect. Such people have the ability to pay for long-term care if needed.
4. Medicaid Part A pays for outpatient hospital care.
ANS: F
False
Correct. Without an apportionment clause, family members could be placed in a hardship situation.
True
Incorrect. An apportionment clause in a will overrules methods established by state statute.
5. The government pays for all nursing home care expenses.
ANS: F
False
Correct. Payments for nursing home care come from a combination of several sources.
True
Incorrect. The person will be held responsible, at least in part, for paying for his/her nursing home care.
6. Since baby boomers are generally wealthier and better educated than their counterparts of today, there will be far less need for them to plan for long-term care.
ANS: F
False
Correct. These baby boomers are also living longer.
True
Incorrect. The need for long-term planning will likely increase.

7. Reverse mortgages are recommended for most people to help pay for long-term care.
ANS: F
False
Correct. Reverse mortgages are complicated and require special counseling for retirees at HUD-approved agencies.
True
Incorrect. Reverse mortgages are not financially suitable or appropriate for all homeowners because of various cost and risk factors.
8. If a person wants to buy long-term care insurance, he/she should buy a policy that covers both in-home and nursing home care.
ANS: T
True
Correct. In addition, the policy should last for at least five years.
False
Incorrect. A person is most likely to need both types of services at the end of life.
9. A long-term care insurance policy can include an option to notify a third party if the policy is about to lapse for nonpayment.
ANS: T
True
Correct. Another option is the premium refund upon death.
False
Incorrect. This is known as the third-party notification.
10. One purpose of long-term care insurance is to leave an inheritance to the family.
ANS: T
True
Correct. Long-term care insurance helps protect the funds that will be passed on to family members after the insured's death.
False
Incorrect. Long-term care insurance pays costs that would otherwise drain the family's resources.

MULTIPLE CHOICE

1. Which is a Medicare qualified facility that specializes in skilled care or rehabilitation services under the supervision of licensed nurses and based on a doctor's orders?
a. Nursing home
b. Skilled nursing facility
c. Assisted living facility
d. Continuing care retirement community
ANS: B
Skilled nursing facility
Correct. In the United States, many nursing homes provide custodial or personal care only and are not skilled nursing facilities.
Nursing home
Incorrect. Nursing homes provide only custodial or personal care.
Assisted living facility
This is a community residential living arrangement that provides individual personal care and health services for people who need help with activities of daily living.

Continuing care retirement community

Incorrect. This is a campus-style community that provides a combination of housing, services, and nursing care to meet the various needs of residents as they grow older.

2. All of the following are features of Social Security EXCEPT:
- Social Security pays benefits based on financial need.
 - It is funded by taxes paid by workers, employers, and self-employed people.
 - It provides benefits to retired workers, people who are disabled, and dependents of deceased and disabled workers.
 - At the end of 2027, the retirement age with full benefits will rise to 67 years of age.

ANS: A

Social Security pays benefits based on financial need.

Correct. Benefits are paid to eligible workers based on their earnings.

It is funded by taxes paid by workers, employers, and self-employed people.

Incorrect. These taxes are paid throughout people's working lives.

It provides benefits to retired workers, people who are disabled, and dependents of deceased and disabled workers.

Incorrect. Benefits are also available to former spouses who were married to eligible workers for at least 10 years.

At the end of 2027, the retirement age with full benefits will rise to 67 years of age.

Incorrect. In 2003, the full benefit retirement age began to rise from 65 and will continue rising until the end of 2027.

3. To receive a Supplemental Security Income (SSI) basic monthly benefit, a person must:
- Be 62 years old or older
 - Have contributed to Social Security by working throughout their adult lives
 - Not be eligible for food stamps, Medicaid, or Social Security
 - Be a U.S. resident

ANS: D

Be a U.S. resident

Correct. Nonresidents do not qualify for benefits.

Be 62 years old or older

Incorrect. A person must be at least 65 years old to qualify for benefits.

Have contributed to Social Security by working throughout their adult lives

Incorrect. The program is financed from the general revenue funds of the U.S. Treasury, not from Social Security taxes.

Not be eligible for food stamps, Medicaid, or Social Security

Incorrect. Most people receiving SSI benefits are eligible for food stamps and Medicaid, and some are also eligible for Social Security.

4. Which of the following is NOT covered by Medicare?
- Physician services
 - Hospice care
 - Prescription drugs
 - Long-term care expenses in a nursing home or at home

ANS: D

Long-term care expenses in a nursing home or at home

Correct. This is the kind of long-term care most elderly people need, but it is not paid for by Medicare.

Physician services

Incorrect. Medicare Part B covers physician services, including diagnostic tests.

Hospice care

Incorrect. Medicare Part A pays for this care, which is for the terminally ill.

Prescription drugs

Incorrect. This coverage is optional and available if Medicare coverage is in effect.

5. Which is the LEAST reliable and complicated way to pay for long-term care?
- Buying long-term care insurance
 - Using a reverse mortgage on the home owned by the person needing care
 - Accelerating the death benefits from life insurance
 - Borrowing from the cash value of a whole life insurance policy

ANS: B

Using a reverse mortgage on the home owned by the person needing care

Correct. Reverse mortgages are complicated, involve fees and risks, and are not appropriate for all homeowners.

Buying long-term care insurance

Incorrect. Long-term care insurance is a reliable method of paying for long-term care.

Accelerating the death benefits from life insurance

Incorrect. However, such acceleration will reduce the amount paid out when the insured dies.

Borrowing from the cash value of a whole life insurance policy

Incorrect. The cash value is also referred to as the cash surrender value.

6. Which of the following is NOT one of the six activities of daily living?
- Continence
 - Dressing
 - Reading
 - Transferring

ANS: C

Reading

Correct. The six activities of daily living are bathing, dressing, eating, toileting, continence, and transferring.

Continence

Incorrect. Continence is the ability to control bowel and bladder function.

Dressing

Incorrect. Dressing is an activity of daily living.

Transferring

Incorrect. Transferring is moving in and out of a bed, chair, or wheelchair.

7. What was the amount of monthly checks for an individual receiving the basic SSI monthly benefit in 2015?
- About \$300
 - About \$1,000
 - About \$733
 - About \$1,300

ANS: C

About \$733

Correct. The amount was \$733.

About \$300

Incorrect. This is less than half of the amount for an individual in 2015.

About \$1,000

Incorrect. The amount for a couple was \$1,100.

About \$1,300

Incorrect. This is more than the amount for a couple in 2015.

8. Medicare Part A would pay for which of the following?
- Prescription medications
 - Inpatient care in a skilled nursing facility following a required three-day hospital stay
 - Medicare Advantage Plans
 - Outpatient hospital care

ANS: B

Inpatient care in a skilled nursing facility following a required three-day hospital stay

Correct. Medicare Part A is a hospital insurance program.

Prescription medications

Incorrect. These would be partially covered by Medicare Part D.

Medicare Advantage Plans

Incorrect. Those who have Medicare Parts A and B can join Medicare Advantage Plans under Medicare Part C.

Outpatient hospital care

Incorrect. This is covered by Medicare Part B.

9. Which of the following is NOT covered by Medicare Part B?
- Diagnostic tests
 - Durable medical equipment
 - Hospice care
 - Necessary ambulance services

ANS: C

Hospice care

Correct. Hospice is covered by Medicare Part A.

Diagnostic tests

Incorrect. Medicare Part B covers diagnostic tests as well as doctors' services.

Durable medical equipment

Incorrect. Medicare Part B is a medical insurance program and pays for this equipment.

Necessary ambulance services

Incorrect. Medicare Part B covers such services.

10. Medicare Advantage Plans that are available in all states include all of the following EXCEPT:
- Medicare Cost Plans
 - Health maintenance organizations
 - Preferred provider organizations
 - Private fee-for-service plans

ANS: A

Medicare Cost Plans

Correct. These are available only in limited parts of the country.

Health maintenance organizations

Incorrect. All participants who have Medicare Parts A and B may join these plans.

Preferred provider organizations

Incorrect. All participants who have Medicare Parts A and B may join these plans.

Private fee-for-service plans

Incorrect. All participants who have Medicare Parts A and B may join these plans.