WILLS

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I. INTRODUCTION

A. HISTORICAL BACKGROUND

Historically, real property and personal property were treated differently (the law relating to real property originated with the common law courts, while the law relating to personal property originated with the ecclesiastical courts). The modern trend is to eliminate any differences in the treatment of real and personal property, but some distinctions still exist in many jurisdictions. The vocabulary of intestate succession and wills also has a historical basis.

B. TERMINOLOGY

Although the distinctions between many of these terms have now been blurred (*e.g.,* any dispository clause in a will may be termed a "devise"), the following list of terms is helpful in understanding any discussion of the passing of property at death.

1. When property passes by ***intestate succession:***

    a. The decedent is the "intestate";

    b. The person entitled to property is the "heir" (who takes by "descent");

    c. "Issue" and "descendants" are synonymous, both referring to all ***lineal descendants*** and including adopted offspring; and

    d. The personal representative is the "administrator."

2. When property passes by ***will:***

    a. The decedent is the "testator";

    b. The clause directing disposition of land is the "devise";

    c. The person entitled to land is the "devisee";

    d. The clause directing disposition of personal property is a "legacy" as to money and a "bequest" as to other personal property;

    e. The person entitled to personal property is the "legatee"; and

    f. The personal representative is the "executor," where named in the will (otherwise, the "administrator cum testamento annexo," *i.e.,* administrator with the will annexed).

II. INTESTATE SUCCESSION

A. IN GENERAL

Intestate succession is the statutory method of distributing assets that are not disposed of by will. Property may pass by intestate succession where:

(i) The decedent dies ***without having made a will***;

(ii) The decedent's will is ***denied probate*** (*e.g.,* due to improper execution or successful will contest);

(iii) The decedent's will ***does not dispose of all of his property*** (resulting in "partial intestacy") either because a gift has failed or because the will contains no residuary clause; or

(iv) The decedent's will ***specifies*** that his property should pass according to the laws of intestate succession.

At common law, all real property passing by intestate succession went to the decedent's children (the surviving spouse was entitled only to dower or curtesy). Personal property went one-third to the surviving spouse and two-thirds to the surviving children. Today, the distribution of an intestate decedent's property is governed by state statute.

B. INTESTATE SHARE OF SURVIVING SPOUSE

1. Descendants Also Survive

If the decedent is survived by a spouse and by descendants, in most states the surviving spouse takes ***one-third or one-half of the estate***. Some states give the surviving spouse a specific dollar amount plus the one-third or one-half of the estate. In some states (*e.g.*, states adopting the Uniform Probate Code ("UPC")), however, the surviving spouse takes the entire estate if the decedent is survived by descendants who are all descendants of the surviving spouse. [UPC §2-102]

2. No Descendants Survive

If the decedent is survived by a spouse but no descendants, in most states the surviving spouse takes the ***entire estate***. In UPC states, the spouse takes the entire estate only if the decedent is not survived by descendants or parents. [UPC §2-102(1)]

Example: W dies, survived by her husband H and her parents, M and D. In most states, H would inherit the entire estate.

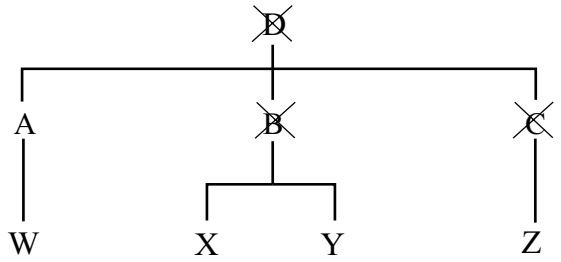
C. INTESTATE SHARE OF CHILDREN AND OTHER DESCENDANTS

The portion of the estate that does not pass to the surviving spouse, or the entire estate if there is no surviving spouse, passes to the decedent's children and descendants of deceased children. Parents and collateral kin never inherit if the decedent is survived by children or more remote descendants.

1. Majority Rule—Per Capita with Representation

In most states, the decedent's issue take their shares per capita with representation. Under this pattern of distribution, the property is divided into equal shares at the first generational level at which there are living takers. Each living person at that level takes a share, and the share of each deceased person at that level passes to his issue by right of representation.

Examples: 1) D, a widow, dies intestate survived by: (i) child A, who has a son, W; (ii) X and Y, grandchildren by D's deceased child B; and (iii) grandchild Z, the daughter of D's deceased child C.



Because there is a living heir at the first generational level, D's estate is divided into three equal shares at that level. A takes one-third. The one-third that B would have inherited had he survived D passes by right of representation to his children, X and Y (one-sixth each). Similarly, Z takes a one-third share. W takes nothing even though he is D's issue because his mother A is alive to inherit.

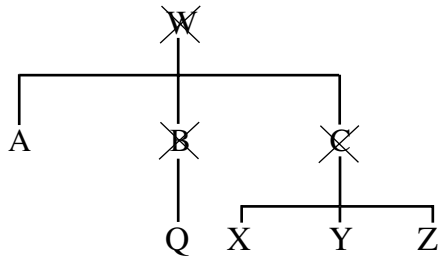
2) Same family tree as above, except that A also predeceased D. Because there are no living takers at the first generational level, the shares are determined at the second generational level. Each grandchild takes a one-fourth share.

This type of distribution is often called a ***"per stirpes"*** distribution. Note, however, that this is different from a "strict per stirpes" distribution (followed by only a few states), under which the stirpital shares are determined at the first generational level beyond the decedent even if there are no living takers.

2. Modern Trend—Per Capita at Each Generational Level

The modern trend is to replace the above scheme with a rule under which the distribution is per capita at each generation. Under this scheme, the initial division of shares is made at the first generational level at which there are living takers, but the shares of deceased persons at that level are combined and then divided equally among the takers at the next generational level. Thus, persons in the same degree of kinship to the decedent always take equal shares.

Examples: 1) W, a widow, dies intestate survived by: (i) her son A; (ii) grandchild Q (the child of her deceased son B); and (iii) grandchildren X, Y, and Z (the children of her deceased daughter C).



Under a ***per capita with representation distribution***, A would take one-third; Q would take one-third; and X, Y, and Z would take one-ninth each, taking by representation the share of their deceased parent. In effect X, Y, and Z were penalized because they came from a larger family than their cousin Q. Under the ***per capita at each generational level*** scheme, A takes one-third