



Wills

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WILLS

I. INTRODUCTION

A. TERMINOLOGY

Although the distinctions between many of these terms have now been blurred (e.g., any dispositive 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 fiduciary of the will is the “personal representative” in Wyoming.

II. INTESTATE SUCCESSION

A. IN GENERAL

Intestate succession is the statutory method of distributing assets that are not disposed of by the 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.

B. INTESTATE SHARE OF SURVIVING SPOUSE

1. Descendants Also Survive

In Wyoming, if the decedent is survived by a spouse and issue (children or grandchildren), the spouse takes **one-half** of the estate.

2. No Descendants Survive

If there are no surviving issue, the spouse takes the **entire** estate.

C. INTESTATE SHARE OF CHILDREN AND OTHER DESCENDANTS

Wyoming is among the minority of states to follow a **strict per stirpes** pattern of distribution. *In re: Estate of Fosler, 13 P.3d 686 (Wyo.2000)* Thus, the shares are determined according to the statute regardless of whether there are living takers at the first level of relatives named in the statute.

THIS IS A RULE THAT IS PECULIAR TO WYOMING, AND CAN LEAD TO ODD RESULTS, SO IT'S ANOTHER REASON TO ENCOURAGE ESTATE PLANNING!

D. SHARES OF OTHER HEIRS

If the decedent is not survived by a spouse or issue, the estate passes **in equal shares** to the decedent's **parents AND brother, and sisters** or their descendants. The oddity of this is that **parents and siblings get an equal share, even though they are in different generations.** If there are no surviving parents, brothers, or sisters or their descendants, the estate passes in equal shares to the decedent's **grandparents AND uncles, and aunts** or their descendants.

E. SPECIAL CASES

1. Adopted Children

a. As to Adopting Family – Adopted Child Treated Same as Natural Child

b. As to Natural Parents-All Inheritance Rights Remain

Unlike most states, in Wyoming an adopted **child continues to inherit** from and through his natural parents. The converse, however, is not true – the natural parents and their kin have **no right to inherit** from or through the adopted child. *In re Estate of Kirkpatrick, 77 P.3d 404 (Wyo.2003)*

2. Stepchildren and Foster Children

a. General Rule-No Inheritance Rights

b. Exception- Adoption by Estoppel

Under the right facts, the equitable Adoption by Estoppel doctrine permits a stepchild or foster child to inherit from or through his stepparents or foster stepchild or foster parents as though legally adopted. The doctrine is invoked where stepparents or foster parents gain custody of a child under an **agreement with the natural parent** that they will adopt the child. Just as the stepparent or foster parent would be estopped from denying the existence of a valid adoption, so also are those claiming under him on his intestate death.

3. Posthumous Children

Generally, one cannot claim as an heir of another person unless he was alive at the other person's death, but an exception is made for a posthumous child. A child in gestation at the decedent's death inherits as if born during the decedent's lifetime.

4. Nonmarital Children

In Wyoming, a nonmarital child can inherit from the father only if:

- i. The father's paternity is irrebuttably presumed by statute;
- ii. The father has acknowledged paternity in a signed writing;
- iii. There was an adjudication of the father's paternity;
- iv. The father adopted the child; or
- v. The father consented to assisted reproduction by his wife, which resulted in the birth of the child.

a. Inheritance from Nonmarital Child

If a nonmarital child dies intestate, her estate is distributed as follows:

- (i) One-half to the surviving spouse and one-half to the surviving children; or
- (ii) If no surviving children or their descendants, to the surviving spouse; or
- (iii) If no surviving spouse or descendants, one-half to her mother and one-half to her mother's children and their descendants; or
- (iv) If no surviving heirs, to the mother's next of kin in the same manner as provided in D., *supra*, for distribution of a marital child's estate.

4. No Distinction Between Half Bloods and Whole Bloods

Half bloods are brothers and sisters who have only one common parent. Wyoming has abolished all distinctions between siblings of the half blood and those of the whole blood.

III. SUBSIDIARY PROBLEMS COMMON THE INTESTACY AND WILLS

A. SIMULTANEOUS DEATH

1. Uniform Simultaneous Death Act – Property Passes as Though Owner Survived

2. USDA Applies to All Types of Transfers

The USDA applies to distributions of property *by any means* (intestacy, will, joint tenancy with right of survivorship, life insurance contract, etc.).

3. USDA Applies Unless Instrument Provides Otherwise

The presumption raised by the USDA does not apply if the decedent's will or other instrument makes a different provision regarding survival.

4. Evidence of Simultaneous Death

The USDA applies only if there is "no sufficient evidence" of survival.

a. 120-Hour Rule Not Adopted

Wyoming has adopted the Uniform Simultaneous Death Act, but **has not adopted the 120-hour rule.**

b. Time-of-Survival Clause in Will

In drafting wills, the technique most commonly used to cover the contingency of simultaneous deaths, or deaths in quick succession, is to make all gifts (other than marital deduction gifts) contingent on surviving the testator by a certain number of days.

B. DISCLAIMERS

1. Disclaimed Interest Passes as Though Disclaimant Predeceased Decedent

No one can be compelled to receive a gift. Therefore, a beneficiary or heir may disclaim any interest that otherwise would pass to the person from the decedent of the decedent's estate, with the consequence that the interest passes as though the disclaiming party predeceased the decedent. Disclaimers are made primarily for tax reasons.

2. Must Be in Writing, Irrevocable, and Filed Within Nine Months

To be effective for federal estate and gift tax purposes, the disclaimer of a gift by will, an intestate share, or life insurance or death benefit proceeds must be (i) in writing, (ii) irrevocable, and (iii) filed within nine months of *the decedent's death*.

a. Beneficiary Under Age Twenty-One

A beneficiary who is under age 21 has until nine months after her 21st birthday to make a disclaimer under the federal statute.

b. Joint Tenants

Under federal law and the UPC, the period in which a surviving joint tenant may disclaim the portion of the tenancy acquired by right of survivorship is nine months *from the other joint tenant's death*.

c. Future Interests

While some states allow disclaimer of a future interest within nine months of its vesting in possession (i.e., after the life tenant's death), to avoid federal gift tax, the interest must be disclaimed within nine months of its *creation*.

3. Disclaimer May Be Made on Behalf of Infant, Incompetent, or Decedent

A disclaimer may be made by a guardian or personal representative on behalf of an infant, incompetent, or decedent, but the court having jurisdiction of the estate of the incapacitated person or decedent must find that it is in the *best interests* of those interested in the estate of the beneficiary and is not detrimental to the best interests of the beneficiary.

4. Estoppel If Any Benefits Accepted

An interest cannot be disclaimed if the heir or beneficiary has accepted the property or any of its benefits.

5. Creditors' Claims

A disclaimer can be used to defeat creditors' claims.

6. Disclaimer of Life Estate Accelerates Remainder

Because the disclaimed interest passes as though the disclaimant predeceased the decedent, upon disclaimer of a life estate, the remainder is accelerated.

C. DECEDENT'S DEATH CAUSED BY HEIR OR BENEFICIARY

Most courts hold that one who feloniously and intentionally brings about the death of a decedent forfeits any interest in the decedent's estate. The property passes as though the killer predeceased the victim. This result is usually accomplished either through the operation of a specific statute or the imposition of a constructive trust.

1. Rule Applies to All Forms of Transfer and Benefits

2. Joint Ownership-Right of Survivorship Severed

3. Proof of Killing-Evidentiary Standard

A final judgment of conviction of murder in any degree is conclusive for purposes of this type of statute. However, in the absence of a conviction of murder in any degree, the court may determine by a *preponderance of the evidence* whether the killing was unlawful or intentional.

D. ADVANCEMENT OF INTESTATE SHARE

An advancement is a lifetime gift made to an heir **with the intent** that the gift be applied against any share the heir inherits from the donor's estate.

1. Common Law-Lifetime Gift to Child Presumptively an Advancement

At common law, it was presumed that an intestate desired to treat all of his children equally. Consequently, when an intestate made a substantial gift to one child and not to others during his lifetime, the gift was held to be an "advancement" (i.e., an advance payment) of the child's intestate share upon the parent's death.

2. Modern Law-Common Law Presumption Reversed

Wyoming follows the modern rule, which requires written evidence of an intent to make an advancement.

3. Procedure If Advancement Found

Once it has been determined that an advancement was made, the amount advanced is computed with the net value of the estate for purposes of distribution. Thus, an heir who has received an advancement has his share reduced by the amount of the advancement. However, if the advancement is greater than the heir's intestate share, he is not responsible for returning the excess.

4. Advancee Predeceases Intestate

Generally, an advancement is binding upon those who succeed to the estate of the advancee in the event the advancee predeceases the intestate.

5. Advancement Valued at Time of Gift

The value of an advancement is determined as of the time the gift was made, and any fluctuations in the value of the advanced property will not affect the position of the next of kin.

E. SATISFACTION OF LEGACIES

The same rules apply to lifetime gifts to will beneficiaries as to intestate heirs. Under modern law, a testamentary gift may be satisfied in whole or in part by an inter vivos transfer from the testator to the beneficiary subsequent to the execution of the will, **if the testator intends the transfer to have that effect.**

1. Value of Gifts in Satisfaction

Generally, if a gift is found to be in satisfaction of a testamentary provision, the value of the gift must be determined as of the time that gift was made.

2. Gift of Specifically Bequeathed Property to the Beneficiary

There is one situation in which satisfaction of a bequest can occur even if not proved to have been so intended. If the testator gives the specifically described property to the beneficiary, there is both a satisfaction of the legacy and an ademption.

IV. EXECUTION OF WILLS

A. WHAT CONSTITUTES A WILL

A will is an instrument, executed with certain formalities, that usually directs the disposition of a person's property at death. A will is revocable during the lifetime of the testator and only operative at his death. Thus, an instrument that is operative during the testator's lifetime (as by presently transferring an interest in property) cannot be a will.

1. Codicil

A codicil is a **supplement** to a will that alters, amends, or modifies the will.

B. TESTAMENTARY INTENT

For a will to be valid, the testator must intend that the particular instrument operate as his will.

1. Present Intent Required

The intention required is a present testamentary intent.

C. TESTAMENTARY CAPACITY-MUST BE EIGHTEEN AND OF SOUND MIND

In nearly all states, a person who has attained age 18 has the right and power to make a will.

D. EXECUTION OF ATTESTED WILLS

For a will to be valid and admissible to probate, the testator must meet the formal requirements of due execution imposed by the statutes of the appropriate state. **If the statutory requirements are not met, the will is void (not merely voidable), and cannot be admitted to probate even if there is no objection.** The formalities required for execution of a will vary from state to state. Most states require the following formalities:

- i. The will or codicil must be ***signed by the testator***, or by another person at the testator's direction and in her presence.
- ii. There must be ***two attesting witnesses***.
- iii. The testator must sign the will (or acknowledge her previous signature or acknowledge the will) ***in each of the witnesses' presence***.
- iv. The witnesses must sign in the ***testator's presence***.
- v. Wyoming does ***not*** require that the testator sign at the end of or publish the will or that the witnesses sign in each other's presence. *In re Estate of Carey*, 504 P.2d 793 (Wyo. 1972).

1. Testator's Signature

a. What Constitutes a Signature

Any mark affixed by the testator, with the intent that the mark operate as the testator's signature, satisfies the signature requirement.

b. Contemporaneous Transaction Doctrine-Order of Signing Not Critical

The exact order of signing is not material, as long as all of the signings occurred as part of a single, contemporaneous transaction.

2. Witnesses

Most states require that a will be attested by two competent witnesses.

a. Competency

All jurisdictions require that witnesses be competent. Competency for this purpose generally means that, at the time the will is executed, the witness is mature enough and of sufficient mental capacity to understand and appreciate the nature of the act she is witnessing and her attestation, so that she could testify in court on these matter if necessary.

b. Interested Witnesses

Wyoming follows the majority rule purging the gift to a subscribing witness unless the witness is a supernumerary or the witness would have been an heir had there been no will. In the latter event, the witness takes the lesser of (i) the gift in the will, or (ii) his intestate share.

3. Attestation Clause

A well-drafted will contains an attestation clause.

4. Self-Proving Affidavit

Wyoming permits a will to be made self-proving at the time it is executed. The testator and the attesting witnesses sign the will, and then sign a sworn affidavit before a notary public reciting that the testator declared to the witnesses that the instrument was her will, and that the testator and the witnesses all signed in the presence of each other.

a. Substitutes for Court Testimony of Attesting Witnesses

The self-proving affidavit serves the same function as a deposition or interrogatory. It is a method by which the witnesses' sworn testimony can be secured at the time the will is executed, eliminating the need to track down the witnesses and arrange for their testimony in probate court after the testator's death. Self-proved wills may be admitted to probate without further proof.

E. HOLOGRAPHIC WILLS

A holographic will is one **that is entirely in the testator's handwriting and has no attesting witnesses**. Because of the handwriting requirement, a tape recorded statement cannot be admitted to probate as a holographic will. *In re Estate of Reed*, 672 P.2d 829 (Wyo. 1983). Also, a third party's notations, even if made with the testator's knowledge and consent, may render a holographic will invalid. *In re Estate of Dobson*, 708 P.2d 422 (Wyo. 1985).

1. Interlineations

Most states that recognize holographic wills give effect to handwritten changes, such as substituting beneficiaries, made by the testator after the holographic will is completed. By contrast, these types of interlineations are generally not given effect if made to an attested will (unless the changes themselves are sufficient to constitute a holographic codicil and the jurisdiction recognizes such codicils).

F. ORAL WILLS

Oral wills are **not recognized** in Wyoming. *In re Estate of Reed, supra*.

G. CONFLICT OF LAWS ISSUES

1. Real Property

To the extent that a will disposes of real property, its validity and effect are determined by the law of the state where the *property is located*.

2. Personal Property

With respect to dispositions of personal property, the law of the testator's **domicile at the time of her death** controls the validity and effect of the will.

3. Foreign Will

A will is admissible to probate in a jurisdiction if it has been executed in accordance with:

- i. The law of that jurisdiction;
- ii. The law of the state where the will was executed;
- iii. The law of the testator's domicile at the time the will was executed; or
- iv. The law of the testator's domicile at death.

V. COMPONENTS OF A WILL

A. CODICIL

A codicil is a later testamentary instrument that amends, alters, or modifies a previously executed will. A codicil must be executed with the same testamentary formalities as a will. In some cases, it may be important to establish the date on which a will is deemed to have been executed. Under the doctrine of **republishing by codicil**, a will is treated as having been executed ("republished") on the date of the last validly executed codicil thereto.

B. INCORPORATION BY REFERENCE

In most states, an extrinsic document (not present at the time the will was executed) may be incorporated into the will by reference so that it is considered a part of the will. To incorporate a document by reference, three requirements must be met:

- (i) The document must be *in existence* at the time the will was executed;
- (ii) The language of the will must *sufficiently describe* the writing to permit its identification; and
- (iii) The will must *manifest an intent to incorporate* the document.

1. Document Must Be in Existence at Time of Execution of Will

a. Exception for List Disposing of Items of Tangible Personal Property

In Wyoming, a will may refer to a written statement or list disposing of items of tangible personal property if the list (i) is dated, (ii) is in the testator's handwriting or signed by the testator, and (iii) includes a reasonable certain description of the items. The list may be prepared before or after execution of the will and may be altered by the testator at any time as long as the alterations are signed and dated.

2. Identification of Extrinsic Document

The language of the will must refer to the extrinsic document in such a way as it may be reasonably identified, and the document must correspond to the description given in the will.

C. ACTS OF INDEPENDENT SIGNIFICANCE

Under the "acts of independent significance" doctrine (sometimes called the doctrine of "nontestamentary acts"), a will may dispose of property by reference to acts and events that have significance apart from their effect on the dispositions made by the will. Even though the identification of a beneficiary or the amount of a bequest will be determined by some future unattested act, the bequest is nonetheless valid if the act has some lifetime significance other than providing for the testamentary gift.

1. Identification of Beneficiaries

The future act may relate to the identification of the beneficiaries.

2. Identification of Property

This doctrine also permits identification of the property that is to be the subject matter of a bequest.

3. Acts of Third Persons

The doctrine of independent significance has been used with regard to acts of third persons as well as to acts of the testator. The usual situation is where a testator directs that his property be distributed in accordance with the will of another person. If the will is executed, and the other requirements of incorporation are met, the other person's will can be incorporated by reference.

D. NONPROBATE ASSETS CANNOT BE DISPOSED OF BY WILL

Only property owned by the decedent at death and not otherwise disposed of can be disposed of by will.

1. **Property Passing by Contract-Life Insurance Proceeds and Employee Benefits**
2. **Joint Tenancy property with right of survivorship**
3. **Payable on Death (P.O.D.) and Transfer on Death (T.O.D.) designations**
4. **Assets distributed by trust**

VI. REVOCATION OF WILLS

A. REVOCATION BY OPERATION OF LAW

In Wyoming, divorce or annulment is the only change of circumstances that revokes a will by operation of law, and only as to provisions in the will that benefit the former spouse (e.g., dispositions of property; powers of appointment; nomination as executor, trustee, conservator, or guardian). Such provisions are revived by the testator's remarriage to the former spouse.

1. Marriage Following Execution of Will – Omitted Spouse

In most states, marriage following execution of a will has *no effect* on the earlier will, even though it makes no provision for the new spouse, on the theory that the new spouse is given adequate protection by the state's elective share statute (or, in community property states, by the community property system).

2. Divorce or Annulment Revokes All Provisions in Favor of Former Spouse

- a. **Statutes Do Not Apply to Life Insurance Policies**
- b. **Statutes Apply Only to Divorce or Annulment by Testator or Settlor**

3. Pretermitted Children

Wyoming has no pretermitted heir statute.

C. REVOCATION BY WRITTEN INSTRUMENT

1. Instrument of Revocation Must Be Executed with Testamentary Formalities

A will or any part thereof may be revoked or altered by a subsequently written will, codicil, or other writing declaring such revocation, as long as there is a present intent to revoke and the instrument is executed with the same formalities as are required for the execution of a will.

In states that recognize holographic wills, a valid holographic will may revoke a type written, attested will.

2. Revocation by Implication-Inconsistent Provisions

Suppose that a testator executes a second testamentary instrument that does not contain any express language of revocation of an earlier will. To the extent possible, the two instruments are read together; i.e., the second instrument is treated as a codicil to the will. However, the second instrument revokes the first to the extent of any inconsistent provisions. A Wyoming case did not allow an inconsistent will to revoke a pre-existing revocable trust where will did not refer to trust revocation specifically.

D. REVOCATION BY PHYSICAL ACT

1. Revocation by Proxy Permitted

In Wyoming a will may be revoked by physical act by a person other than the testator, provided that the revocation is (i) *at the testator's direction*, and (ii) in the testator's *presence*.

2. Partial Revocation

Wyoming recognizes partial, as well as total, revocation by physical act.

3. Effect of Revocation on Other Testamentary Instruments

a. Revocation of Will

The revocation of a will revokes all codicils to that will.

b. Destruction of Duplicate Will

Where a will has been executed in duplicate (both original and duplicate are signed and witnessed), an act of revocation performed by the testator upon **either** copy revokes the will. Both signed copies of the will are of the same legal stature.

c. Revocation of Codicil

A physical act of revocation performed on a codicil **revokes only the codicil**, not the prior will. In the absence of evidence to the contrary, it is presumed that in revoking the codicil the testator intended to reinstate the will provisions changed by the codicil as though the codicil had never been executed.

4. Lost or Destroyed Will-Contents Must Be Clearly and Distinctly Proved

All states permit probate of a lost or destroyed will provided that the following three elements can be proved: (i) **valid execution**; (ii) the **cause of nonproduction** (*i.e.*, that revocation is not the reason for nonproduction); and (iii) the **contents** of the will. The contents are usually proved by the testimony of at least two witnesses or by production of a copy of the will.

E. REVIVAL OF REVOKED WILL

A will, once revoked, is not revived unless it is reexecuted or republished by codicil. Wyoming follows the Uniform Probate Code ("UPC") and minority view in holding that the testator's intent controls in revival issues. *May V. Estate of McCormick*, 769 P.2d 395 (Wyo. 1989)

F. DEPENDENT RELATIVE REVOCATION

1. Mistake of Law or Fact as to Validity of Another Disposition

Dependent relative revocation ("DRR") is an equity-type doctrine under which a *court may disregard a revocation* if it determines that the act of revocation was premised on a mistake of law or fact and would not have occurred but for the testator's mistaken belief that another disposition of her property was valid. If the other disposition is ineffective for some reason, the revocation accompanying the attempted disposition also fails and the will remains in force. Necessary to application of DRR is that the disposition that results from disregarding the revocation comes closer to effectuating what the testator tried (but failed) to do than would an intestate distribution.

VII. CONTRACTS RELATING TO WILLS; JOINT WILLS

A. CONTRACT TO MAKE A GIFT BY WILL

1. Contract Law Governs

Assuming the usual requirements of a valid contract are met, a contract to make, not to make, or not to revoke a will is valid. Problems in this area are controlled by contract law and not by the law of wills.

2. Consideration

The promise does not have any enforceable contract rights unless she provided some consideration for the testator's promise to name her as a will beneficiary.

3. Formal Requirements

As a general rule, a contract to make a will or a gift by will need not be in writing unless land is involved. Many states have, however, enacted statutes requiring all such contracts to be in writing.

VIII. CHANGES IN BENEFICIARIES AND PROPERTY AFTER WILL'S EXECUTION

A. LAPSED GIFTS AND ANTI-LAPSE STATUTES

1. Gift Lapses If Beneficiary Predeceases Testator

If a will beneficiary dies during the testator's lifetime, the gift to him lapses; i.e., it fails.

2. Anti-Lapse Statutes

Wyoming's anti-lapse statute applies when the predeceasing beneficiary (i) was a grandparent or lineal descendant of a grandparent of the testator, and (ii) left issue who survived the testator.

3. Anti-Lapse Statute Does Not Apply If Contrary Provision in Will

4. Statute Applies Only to Gifts by Will

5. Lapse in the Residuary Gift

Majority Rule-Surviving Residuary Beneficiaries Take

Wyoming has replaced the common law "no residue of a residue" rule with a statutory rule under which the surviving residuary beneficiaries take the deceased residuary beneficiary's share.

6. Class Gifts

a. Class Gift Rule – Class Members Who Survive Testator Take Gift

If a will makes a gift to a class of persons ("children," "brothers and sisters," etc.) and a class member dies during the testator's lifetime, those class members who survive the testator take the gift (absent a contrary will provision).

b. Exception If Anti-Lapse Statute Applies

As with the "surviving residuary beneficiaries rule," the "class gift rule" gives way to the anti-lapse statute when the predeceasing class member was within the scope of that statute *and* left descendants who survive the testator. The anti-lapse statute applies whether the class member's death occurred before or after the execution of the will.

B. ADEMPTION

Under the doctrine of ademption, when **specifically** bequeathed property is not in the testator's estate at death (*e.g.*, it was destroyed, sold, given away, or lost), the bequest is

adeemed; *i.e.* it fails. Ademption applies because the property that was to have satisfied the bequest was not owned by the testator at her death.

1. Applies to Specific Devises and Bequests

2. Partial Ademption

Partial ademption applies when, e.g., the testator devises a large tract of land, then sells a portion of the tract. Ademption applies to the portion of the property not in the estate, but the remaining portion in the estate at death passes to the beneficiary.

3. Ademption Does Not Apply to General or Demonstrative Legacies

4. Testator's Intent

a. Statutory Modifications

Wyoming has adopted the following statutory modifications to the ademption rule. Thus, the beneficiary is entitled to:

- (i) A general pecuniary devise equal to the net sale price if the property is sold by a conservator, or equal to the condemnation award or insurance proceeds if paid to a conservator for the loss of the property;
- (ii) Any balance of the purchase price together with any security interest owing from a purchaser to the testator at death by reason of sale of the property;
- (iii) Any amount of a condemnation award for the taking of the property unpaid at death;
- (iv) Any casualty insurance proceeds for the loss of the property unpaid at death; and
- (v) Property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

IX. RESTRICTIONS ON POWER OF TESTATION – PROTECTION OF THE FAMILY

A. PROTECTION OF THE SURVIVING SPOUSE – ELECTIVE SHARE STATUTES

1. Amount of Elective Share

In Wyoming, a surviving spouse is entitled to an elective share of: (i) one-fourth of the net probate estate if the surviving spouse is not the parent of any surviving issue of the decedent, or (ii) one-half if there are no surviving issue of the decedent or if the surviving spouse is also a parent of any of the surviving issue of the decedent.

2. Property Subject to Election

In most states, the share is calculated from the decedent's net estate, which is the probate estate minus the payment of expenses and creditors' claims.

3. Notice Must Be Filed

The election must be in writing, acknowledged, and filed within the later of: (i) three months after admission of the will to probate, or (ii) 30 days after being advised by the judge personally of the right of election.

4. Right to Election Is Personal to Spouse

5. Effect of Election on Testamentary Plan

The elective share is paid in the manner causing the least disruption to the testator's testamentary plan.

6. Lifetime Transfers to Defeat Elective Share

In Wyoming, a revocable inter vivos trust may not be subject to the spouse's right of election. *Briggs v. Wyoming National Bank*, 836 P.2d 263 (Wyo.1992)

B. PROTECTION OF CHILDREN – PRETERMITTED CHILD STATUTES

Wyoming does not have a pretermitted child statute. Thus, children omitted from the will have no right to inherit.

C. HOMESTEAD, FAMILY ALLOWANCE, AND EXEMPT PERSONAL PROPERTY

1. Homestead

A surviving spouse and minor children have a **right to possess the family home** until letters of administration are granted and an inventory is returned. Additionally, the surviving spouse is entitled to have a **\$30,000 homestead exemption** amount set aside as her absolute property. If the decedent did not have a homestead or if it did not amount to \$30,000, the surviving spouse is entitled to the value of the exemption in money or other property. If there are minor children of which the surviving spouse is not the parent, the spouse is entitled only to one-half of the homestead and exempt personal property and the other one-half goes to the decedent's minor children.

a. Exception-Surviving Spouse Is Owner of Homestead

The surviving spouse may not be entitled to claim the homestead exemption if she already owns the homestead (e.g., by right of survivorship). *Wambeke v. Hopkin*, 372 P.2d 470 (Wyo. 1962)

2. Family Allowance

A decedent's spouse and minor children may seek a support allowance for reasonable living expenses during the period of administration. The allowance and its amount are in the court's discretion.

3. Exempt Personal Property

A surviving spouse and minor children are entitled to have the following items set aside: (i) wearing apparel up to \$2,000; (ii) spouse's own wedding ring; (iii) the family Bible, pictures, and school books; (iv) a cemetery lot; (v) household articles up to \$4,000 per owner; (vi) a car up to \$5,000; and (vii) tools of the trade or professional library, implements, or instruments up to \$4,000.

D. TESTAMENTARY GIFTS TO CHARITY

Wyoming does not place any restrictions on charitable devises and bequests.

X. WILL CONTESTS

A. GROUNDS FOR CONTEST – IN GENERAL

A will contest challenges whether the document offered for probate is a valid will. The contestant may raise any matter tending to show that the will is not valid and should be denied probate. A will may be contested on any of the following grounds:

- (i) **Defective execution** (e.g., only one witness when two are required);
- (ii) The will offered has been validly **revoked**;
- (iii) The testator **lacked testamentary capacity**;
- (iv) The testator **lacked testamentary intent**;
- (v) The will or a gift therein is a product of **undue influence**;
- (vi) The will or a gift therein is a product of **undue influence**;
- (vii) The document was executed or a gift was made as the result of a **mistake**.

B. TESTAMENTARY CAPACITY

1. Must be Age Eighteen to Make a Will

In Wyoming, a person must be 18 years of age or older to make a will.

2. Mental Capacity

The capacity required for making a will is a different and lower standard of capacity than that required to make a contract. To have mental capacity to make a will, the testator must have sufficient capacity to be able to understand:

- (i) The nature of her **act** – *i.e.*, she must actually know that she is executing a will;
- (ii) The **nature and extent of her property**;
- (iii) The persons who are the **natural objects of her bounty**; and
- (iv) The **nature of the disposition** she is making, *i.e.*, a general understanding of the practical effect of the will as executed.

a. Testator's Capacity Determined at Time of Will's Execution

It is at the making of the will, not at death, that the mental capacity must exist.

b. Testator with Physical Ailments or Drug Addiction

The fact that the testator was very old, physically frail or ill, that she possessed a failing memory, or was a habitual drinker or addicted to drugs, does *not necessarily* mean that she lacked the requisite mental capacity and was unable to comprehend the nature of her act.

c. Testator Adjudicated Insane

A person who has been adjudicated insane or for whom a guardian or conservator has been appointed does not necessarily lack testamentary capacity. While such an adjudication is **evidence** of a lack of the required mental capacity, it is **not conclusive** and can be overcome by showing that the testator still met the specific standards set out above.

3. Burden of Proof as to Mental Capacity on Contestant

Whether the testamentary disposition is rational or irrational, many states recognize a presumption that the testator was competent.

C. UNDUE INFLUENCE

A will (or a gift in a will) is invalid if it is obtained through the exercise of undue influence. However, mere pleading, cajoling, nagging, or threatening the testator does not constitute undue

influence. Influence is not undue unless the free will of the testator, is destroyed and the resulting testamentary disposition reflects the desires, not of the testator, but of the party exerting undue influence.

1. Requirements

To establish that a will was executed under undue influence, the plaintiff must establish four elements: (i) the relation between the person charged with exercising undue influence and the decedent afforded the person an opportunity to control the testamentary act; (ii) the decedent's condition was such to permit subversion of his freedom of will; (iii) there was activity on the part of the person charged with exercising undue influence; and (iv) such person unduly profited as a beneficiary under the will. *In re Estate of Loomis*, 810 P.2d 126 (Wyo.1991)

2. Circumstantial Evidence Does Not, By Itself, Establish Undue Influence

- a. Mere Opportunity to Exert Influence
- b. Mere Susceptibility to Influence Due to Age or Physical Condition
- c. "Unnatural Disposition" that Favors Some Relative Over Others

3. Presumption of Undue Influence

A presumption of undue influence may be created by the following facts:

- (i) A **confidential relationship** existed between the testator and the beneficiary who was alleged to have exercised undue influence;
- (ii) The **beneficiary participated** in some way in procuring or drafting the will or in some other significant activity relating to the execution of the will; and
- (iii) The provisions of the will appear to be **unnatural** and favor the person who allegedly exercised undue influence.

Once these elements appear, the *burden shifts* to the proponent of the will to prove that it was not induced by his undue influence.

D. FRAUD

Where the execution of a will or the inclusion therein of a particular gift is the result of fraud, the will or the particular gift is invalid.

E. MISTAKE

1. Mistake in Execution of Will

- a. **Mistake as to Nature of Instrument-Extrinsic Evidence Admissible** Extrinsic evidence is admissible to show that the testator was unaware of the nature of the instrument she signed (e.g., she believed it to be a power of attorney).

2. Mistake in Inducement-No Relief Granted

3. Mistake as to Contents of Will

4. Latent or Patent Ambiguity-Extrinsic Evidence Admissible to Cure Ambiguity

F. NO-CONTEST CLAUSES

A no-contest clause (sometimes called an *in terrorem* clause) provides that a beneficiary who contest the will forfeits his interest under the will. Such a clause is enforceable in Wyoming.

G. WYOMING WILL CONTESTS

Wyoming case law leads to the conclusion that it is quite difficult to successfully contest a will unless there is a smoking gun. The burden of proof is high on the contestant.

XI. PROBATE AND ESTATE ADMINISTRATION

A. TERMINOLOGY AND OVERVIEW

“Probate” refers to the proceeding in which an instrument is judicially determined to be the duly executed last will of the decedent (or, if there is no will, the proceeding in which the decedent’s heirs are judicially determined). At the probate proceeding, a ***personal representative*** is appointed to carry out the estate administration.

B. PERSONAL REPRESENTATIVE

1. Appointment of Personal Representative

Any person who has ***capacity to contract*** may serve as personal representative.

a. How Executor or Administrator Is Appointed

If an “executor” is named in the will, he will be appointed as personal representative unless subject to a particular disqualification. If no executor is named in the will or if the executor named cannot serve, an “administrator cum testament annexo” will be appointed as personal representative. If the decedent dies intestate, an “administrator” will be appointed as personal representative.

b. Preference of Appointment

The Wyoming statutory preference for appointment of the personal representative is: (i) the person designated in the will; (ii) any beneficiary named in the will (or the beneficiaries’ nominee); (iii) creditors (or their nominee); and (iv) any other qualified person.

c. Authority of Representative

The authority of the personal representative is derived from his court appointment, and he serves as an officer of the court.

d. Bond Required for Issuance of Letters Testamentary

The personal representative must file a bond with sureties to secure the faithful performance of his duties, unless the testator has provided in his will that no bond shall be required. When the personal representative has filed the required bond, “letter testamentary” (for an executor or administrator cum testament annexo) or “letters of administration” (for an administrator) are issued certifying his authority to act on behalf of the estate.

2. Powers and Duties of the Personal Representative

The personal representative has functions generally analogous to those of a receiver of a defunct corporation or a trustee in bankruptcy, and must take whatever steps are

necessary to wind up the decedent's affairs. In that respect, the primary functions of the personal representative are to:

- (i) **Give notice** to devisees, heirs, and claimants against the estate;
- (iii) **Discover and collect the decedent's assets** and file an inventory;
- (iii) **Manage** the assets of the estate during administration;
- (iv) **Pay expenses** of administration, claims against the estate, and taxes; and
- (v) **Distribute** the property.

3. Compensation of Personal Representative

The personal representative is entitled to compensation for his services rendered on behalf of the estate. Approximately 2% of probate estate is paid in Wyoming unless a different amount is agreed to.

C. CREDITORS' CLAIMS

1. Notice

One of the personal representative's first tasks is to give notice to the creditors of the estate, advising them of the pendency of the administration and when and where claims must be filed. Notice may be accomplished by publication, but the personal representative must mail or personally deliver the notice to creditors who are known or are reasonably ascertainable.

2. Nonclaim Statutes

Once a claim has been received, the personal representative has 30 days after the expiration of the three-month limit for filing claims to allow or reject the claim. The allowance or rejection must be in writing and filed with the clerk. In addition, when a claim is rejected in whole or in part, the personal representative must notify the claimant by certified mail. The claimant has 30 days after a claim is rejected to file an action in district court. Where notice of a rejected claim is not given by certified mail, the 30-day period does not begin to run, and a subsequent judicial action is not barred. *Hanson v. Estate of Belden*, 668 P.2d 1331 (Wyo.1983).

3. Priority of Claims

In Wyoming, claims are to be paid in the following order:

- (i) Court costs;
- (ii) Other administration expenses;
- (iii) Reasonable funeral and burial expenses;
- (iv) Homestead and family allowances;
- (v) All debts and taxes having preference under federal law;
- (vi) Reasonable and necessary expenses of the last illness;
- (vii) All taxes having preference under state law;

- (viii) All debts owing to employees for labor performed during the 90 days preceding the decedent's death;
- (ix) All claims for repayment of public assistance; and
- (x) All other claims.

D. ABATEMENT

Abatement is the process of reducing testamentary gifts in cases where the estate assets are not sufficient to pay all claims against the estate and satisfy all bequests and devises. The testator may set out an order of abatement in the will. If there are no contrary provisions in the will, Wyoming estates abate in the following order:

- (i) Property passing by intestacy;
- (ii) The residuary estate, except property devised to a surviving spouse;
- (iii) General devises, except property devised to a surviving spouse;
- (iv) Specific devises, except property devised to a surviving spouse; and
- (v) Property devised to a surviving spouse.

E. EXONERATION OF LIENS

In Wyoming, specifically devised property passes subject to any indebtedness on the property, regardless of a general directive in the will to pay all of the testator's debts.

F. GUIDELINES WHEN WILL AMBIGUOUS

It is commonly stated that where the language of a will is clear and unambiguous, there is no need for either interpretation or construction. The directions in the will must be followed. Where there is some ambiguity, the court will interpret the will and consider any admissible extrinsic evidence to determine the testator's intent. Only where there is no evidence of the testator's intent is it necessary to use a rule of construction as a presumption concerning that intent. Of course, inevitably the existence of rules of construction will influence a court when it sets out to interpret a will.

1. Interpretation-Testator's Actual Intent

- a. **Will Clear-Extrinsic Evidence Inadmissible**
- b. **Will Ambiguous-Extrinsic Evidence Admissible**
 - 1. **Testimony Regarding Surrounding Circumstances Permitted**
 - 2. **Declarations of Testator Not Admissible Because Unreliable**
- c. **Intent as of Time of Execution of Will Governs**

2. Rules of Construction

When there is no evidence of the actual intent of the testator, the court must resort to rules of construction such as those noted below:

- a. Favor those who **would take intestate**.
- b. Favor the construction **that avoids intestacy**.
- c. Favor the construction that is **consistent with the perceived "plan"** of disposition.

- d. **Every portion** of the will should be given effect if possible.
- e. Between totally inconsistent clauses, the ***latter is most likely the final intent***.

G. DISPENSING WITH FORMAL ADMINISTRATION

Under certain circumstances, the decedent's probate estate (not including nonprobate transfers such as life insurance and survivorship bank accounts) may qualify for an informal administration.

1. Probate by Affidavit For Smaller Estates

If 30 days have elapsed since the decedent's death and no administration is pending, any distributee of the estate may obtain an affidavit showing: (i) that the value of the estate does not exceed \$200,000 (exclusive of liens and encumbrances); (ii) that the requisite 30 days have elapsed; (iii) that no application for appointment of a personal representative is pending or has been granted in any jurisdiction; (iv) the facts establishing the applicant's right to the property; and (v) a description of the property in the estate. If after publication of the notice of application once a week for two consecutive weeks it appears that the facts stated therein are not in dispute, the court will enter a decree establishing the right and title to the property.

2. Determination of Heirship

When more than two years have elapsed since the decedent's death and no administration is pending, any heir may petition the court for a determination of the heirs of the deceased, the degree of kinship, and the right of descent of the deceased's real property.

XII. WILL SUBSTITUTES

A. LIFE INSURANCE

B. BANK ARRANGEMENTS

- 1. Totten Trusts
- 2. Joint or Survivor Accounts
- 3. Payable on Death Designations

C. DEEDS

D. CONTRACTS

E. TRANSFER ON DEATH DESIGNATIONS ON SECURITIES

F. TRUSTS

MISCELLANEOUS

- A. Wyoming has an old-fashioned probate code that is very paper and deadline intensive, costly and public. As a result, estate planning to avoid probate is very popular in Wyoming.
- B. The probate code requires careful reading, as it contains provisions that are easy to miss.

Practitioners and their paralegals should read the entire code once, and refer to it frequently, regardless of experience levels, since there are many obscure provisions that may apply to a specific situation that the practitioner or paralegal has not confronted before.

- C. Knowledge of the small estate processes is critical, particularly for assets like mineral interests. The use of such procedures, however, can lead to issues like not having letters testamentary issued by the court to prove the personal representative is authorized to sign third-party documents.