Chapter 1

An Introduction to the Law of Wills, Trusts, and Estates

CHAPTER OBJECTIVES

After reading this chapter and completing the assignments, you should be able to:

- Understand how the law of wills, trusts, and estates interrelates to other areas of the law.
- Understand the duties paralegals are often called upon to perform in a firm that deals with wills, trusts, and estates.
- Identify potential ethical issues that might be faced in the law office.
- Understand some of the unique challenges associated with the terminology used in wills, trusts, and estates.

estate
Assets and liabilities of decedent at the time of his or her death.

probate
The court process of determining will validity, settling estate debts, and distributing assets.

codicil
A provision that amends or modifies an existing will.

will
A document representing the formal declaration of a person's wishes for the manner and distribution of his or her property upon death.

decedent
The deceased.

domicile
The place where a person maintains a physical residence with the intent to permanently remain in that place; citizenship; the permanent home of the party.

Wills, trusts, and estates law—the very name has a rather formal and pretentious sound to it. Rather dull when compared to the likes of criminal law or civil litigation. After all, when is the last time they made a television show or movie about an estate attorney? It is certainly an area of law that most paralegal students usually have low on their list of courses they are looking forward to taking.

Surprisingly, however, students really enjoy the study of this area of the law once they start the course. Why? Because it involves some of the most important things in everyone's lives. It impacts our loved ones and friends. It involves our property and how we maximize our assets, both while we are alive and after our death. It even may involve charitable institutions that have a special meaning in our lives. It could be the American Cancer Society, a university that the student graduated from, or the student's church.

The reality is that wills, trusts, and estates law is one of the most interesting areas of the law for students to study because it presents countless real-world applications to which everyone can relate. Maybe a student's uncle died without a will and the student saw the problems that created for his family. Or, maybe it was the arguments within a student's own family when granddad passed away without a will, leaving her family to argue about who granddad wanted to have what property. As paralegal students read the chapters in this textbook they will see examples of what happens when people, even those who have little in the way of material things, fail to plan for their future.

Chapter 1 introduces the student to some of the terminology used in wills, trusts, and estates; reviews its interrelationship with other areas of the law; explains some of the duties that a paralegal working in a wills, trusts, and estates firm will be called upon to complete; and discusses some of the ethical issues a paralegal might face when working in this field.

Case Fact Pattern

Client Interview Cathy Wilson was named as the personal representative of her late aunt's **estate**. After checking on the qualifications of a number of attorneys in her area, Cathy selected Irvin Comfort, who specialized in estate matters and **probate**, to serve as the attorney for the estate. Mr. Comfort had previously assisted in adding a **codicil** to her aunt's **will** a few months before her death. After a brief introductory meeting with Mr. Comfort, in which he welcomed her as a client and had her sign the employment contract, Mr. Comfort introduced Cathy to Jane Jones, his paralegal. Cathy followed Jane to her office. Jane let Cathy know that she had been Mr. Comfort's secretary for almost 20 years and assured her that she was very familiar with the procedures and laws that would be involved in the probate of her aunt's estate. In fact, she would be the one to prepare all of the documents that would be filed in this case. Cathy was told to call Jane anytime she had a question.

WHY "AN INTRODUCTION TO THE LAW OF WILLS, TRUSTS, AND ESTATES" IS IMPORTANT TO THE PARALEGAL STUDENT

trust
A process by which ownership is split into legal and equitable title. The trustee of the trust has the legal title to the property of the trust but holds it for the beneficiary, who owns the equitable title.

settlor
The person who creates a trust. Also know as *trustor.*

The law of wills, trusts, and estates often intimidates paralegal students. This is due to a lot of different factors. There are many new words to learn, some of which still use Latin and French phrases that are difficult to spell and pronounce. It is a reminder that the language of the law is often one of the hardest barriers for paralegal students to overcome in their study of the law. There are also many statutes, court rules of procedure, and cases that can seem overwhelming at first.

Chapter 1 is intended to give a basic understanding of some of the key concepts and terms that will be covered in this textbook in an attempt to show that the law of wills, trusts, and estates is far more accessible than it might first appear. This will include a discussion of some of the key legal principles involved with this area of the law, an introduction to its key terminology, the role played by the paralegal, and also words of caution relating to the ethical issues that may be faced by a paralegal working in a wills, trusts, and estates firm.

INTRODUCTION TO TERMINOLOGY USED IN WILLS, TRUSTS, AND ESTATES

legal title
A title that indicates legal ownership but not necessarily a beneficial interest.

trustee
The person who oversees the assets of a trust.

beneficiary
The person named in a will to receive the testator's assets.

equitable title
A title that shows a beneficial interest in property.

Uniform Probate Code
A uniform law intended to modernize the laws relating to decedents' estates and trusts.

It is often said that the study of the law is like learning a foreign language. There is no question that the law uses a complex array of words. In fact, Latin terms are still in use despite efforts to simplify legal terminology. The words used in the title to this book are a good place to start to learn more about the terminology used in this field.

A will is a written declaration of the intended distribution of property upon a person's death. While it is one of the most important documents that a person will ever execute, the actual formalities required are few and are set out by the laws of the state in which the **decedent** is **domiciled**.

A **trust** is one of the many methods used to help clients provide for their loved ones or, in some case, charities. It is a process by which ownership is split into legal and equitable title. The **settlor** (the person who is creating the trust) transfers the **legal title** to the trustee. The **trustee** holds the property for the **beneficiary**, who owns the **equitable title**.

An estate is the property a decedent had either prior to the distribution to a trust or owned at the time of his death.

As with most areas of the law, a wide range of terms and phrases are used in wills, trusts, and estates law. It also adds a level of complexity that is somewhat unique. There is still a great divide between the states on what terminology to use. Traditional terms related to wills, trusts, and estates are used in many states. Other states have made an attempt to simplify the terminology that is used in this area of the law by adopting the **Uniform Probate Code**.

The Uniform Probate Code (UPC) is one of the numerous proposed statutes drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The NCCUSL is made up of commissioners who are lawyer-legislators, attorneys in private practice, state and

CYBER TRIP

To view the complete text of the Uniform Probate code visit: http://www.law.upenn.edu/bll/ulc/upc/final2005.htm

federal judges, law professors, and legislative staff attorneys. The NCCUSL promotes uniformity in state laws in areas such as probate law. Uniform laws do not actually become law until they are adopted by the state. Each state can adopt all or part of the version proposed by the NCCUSL and can also change the proposed statute. Visit NCCUSL's Web site (www.nccusl.org) for more information on uniform laws.

Traditionally, wills, trusts, and estates law terminology has included distinctions based on the sex of the person, whether real property or personal property is involved, and whether a person dies with a will (**testate**) or without a will (**intestate**).

The phrase **last will and testament** is an example of how terminology was based on the type of property that was being disposed of in a will. Almost all of us have heard that phrase. Traditionally a will was an instrument that disposed of real property and a testament was an instrument that disposed of personal property. The law no longer makes such a distinction. Today, if you look up testament, you will probably find it defined as a will.

In many states there are words that still retain their connection to whether an item being referred to is personal property or real property. These states are those that have not adopted the Uniform Probate Code. For example, a **devise** is a gift of real property in a will. A **legacy** is a gift of personal property in a will. In states that have adopted the UPC, a devise is a gift of either real or personal property.

testate
The state of having died with a valid will.

intestate
The state of having died without a will.

last will and testament
The phrase traditionally used as the written declaration of intended distribution of both real and personal property upon a person's death.

devise
A disposition of real property by will.

Terminology is often based on the sex of the person who is being referred to. The reason for this is largely historical and relates to differing rights women and men had in the legal system. Today those distinctions have been removed, but some of the terminology remains. A good example of this are the terms **testator** and **testatrix**. Testator traditionally referred to a man who makes a will, but now generally is used to refer to either a man or a woman who makes a will. Testatrix refers to a woman who makes a will. In general, words ending in "or" refer to a man. Those that end with "ix" refer to a woman.

Terminology may also vary based on whether the deceased died testate or intestate. For example, in states that have adopted the UPC, the term *personal representative* is used when referring to anyone who is authorized to administer an estate, while in states using traditional terminology, the person appointed by a court to administer an estate without a will is called an **administrator** or **administratrix** and a person named in the deceased's will to be a personal representative is referred to as an **executor** or **executrix**.

FIGURE 1.1
UPC versus Traditional Terminology

	UPC	Traditional
Person appointed in a will to administer an estate	Personal representative	Executor if man Executrix if woman
Person appointed by court to administer an estate with no will	Personal representative	Administrator if a man Administratrix if a woman
Gift of money by will	Devise	Legacy
Gift of personal property by will	Devise	Bequest
Gift of real property by will	Devise	Devise
Person who receives a gift of money by will	Devisee	Legatee
Person who receives a gift of personal property by will	Devisee	Beneficiary
Person who receives a gift of real property by will	Devisee	Devisee
Person entitled to receive real property under intestate succession	Heir	Heir/heir at law

FIGURE 1.2
States That Have Adopted the Uniform Probate Code

The following states have adopted some version of the Uniform Probate Code. The UPC was initially created in 1969 and has been amended numerous times over the years. Many states have also adopted changes to the UPC.

Alaska	Maine	North Dakota
Arizona	Michigan	South Carolina
Colorado	Minnesota	South Dakota
Florida	Montana	Utah
Hawaii	Nebraska	
Idaho	New Mexico	

legacy
A gift made in a will. Traditionally referred to a gift of money made under a will.

Figure 1.1 compares the terminology used by the UPC with traditional terminology. Figure 1.2 provides a list of the states that have adopted the UPC.

Additional terminology will be introduced in subsequent chapters of this textbook. Paralegals must also make sure that they are familiar with the terminology that is used in their state as part of their preparation for working in the legal field.

OTHER AREAS OF THE LAW THAT AFFECT WILLS, TRUSTS, AND ESTATES

testator/testatrix
The person who writes a will.

administrator
A male personal representative appointed by the court to administer the estate when there is no will.

administratrix
A female personal representative appointed by the court to administer the estate when there is no will.

executor
A male administrator of the estate.

executrix
A female administrator of the estate.

blended family
A family made up of one or more parents having been previously married and having children of that previous marriage. Sometimes referred to as a stepfamily.

living will
A document that expresses a person's wish to be allowed to die without being kept alive by artificial means. It is not a will, but rather an expression of a person's desires.

organ donation
Donation of organs or tissues to another person.

The way law is studied makes it difficult for the student to fully understand how each area of the law interrelates with other areas of the law. Whether students are in law school or studying to be a paralegal, they take courses in specific areas of the law. This creates the impression that the law is divided up into nice, neat categories. While there really is no other way to study the law because of its complexity, it is important to keep in mind that these areas of the law are all interrelated. All areas of the law share common legal principles because they all share a common history.

Wills, trusts, and estates law is a perfect example of how interrelated the law really is. Areas of the law impacted by wills, trusts, and estates are as follows.

Family Law

Families have always been concerned about planning for the future. Traditionally, this has meant drafting a will to provide for their loved ones after death and the purchase of a life insurance policy. That is still true for many people today.

However, the traditional family has changed dramatically in recent years. Divorce is one of the main reasons for this change. Few families have been left untouched by divorce and exposure to the challenges of **blended families**. Stepchildren, half brothers or sisters, and ex-spouses are common members of our society's increasingly complex relationships. It is estimated that one-third of all children will live in a blended family before they reach the age of 18.

Wills, trusts, and estates have become increasingly important to more and more people, whether rich, middle class, or poor, to help them plan for their future and their loved ones. Failure to plan may result in situations that are contrary to the decedent's desires. For example, if the decedent's family included stepchildren for which she desired to provide for after her death, failure to include those desires in her will would result in the stepchildren receiving nothing from her estate under the laws of most states. A will is a way to make sure that the decedent's desires are carried out.

Elder Law

This is a relatively new area of the law. Traditionally the law merely treated the elderly as it did all people, without any recognition of the special needs of the elderly. That has changed. People are living longer, and with an increasingly older population there has been an increased need for laws relating to the elderly. Many of those changes have impacted the law of wills, trusts, and estates. **Living wills**, **organ donations**, **health care proxies**, and other **advance directives** are examples of documents that are now increasingly important as the baby boomer generation is aging. Paralegals are often called upon to draft many of these documents if they work in a wills, trusts, and estates law firm.

health care proxy
A document that expresses the maker's desires as to medical care in the event that he or she is unable to do so. Also referred to as a health care surrogate or durable medical power of attorney.

advance directives
A term used to describe a variety of legal documents that allow people to express their desires about end-of-life care ahead of time, including a living will, durable power of attorney, and health care proxy.

Medicaid
A government program that provides medical and long-term care to those who cannot afford it and is funded by a partnership between the federal and state governments.

prenuptial agreement
An agreement made by parties before marriage that controls certain aspects of the relationship, such as management and ownership of property.

elective share
The statutory right of the surviving spouse to elect to take a share of the deceased spouse's estate rather than taking what was provided for by the deceased spouse's will. (Also called *forced share*.)

Many firms that specialize in elder law also are called upon to assist clients in what is sometimes referred to as **Medicaid** planning. A Google search of "Medicaid planning" results in a long list of Web sites providing information on the topic from law firms throughout the country. As our population ages, there is a growing concern over the need for long-term nursing home care and how the cost of that care will reduce the estate individuals will be able to leave to their loved ones upon their death. The goal of Medicaid planning is to assist the client in transferring assets in such a way that it allows the client to take advantage of Medicaid while preserving his assets for the benefit of his loved ones.

Contract Law

Everyone comes into contact with contract law on a regular basis. Contracts are formed when a person is doing grocery shopping or buying something at the mall. Contracts are involved with the purchase and use of cell phones. Acquiring and using credit cards involve contracts. In fact, the list of contracts that may be involved in the average person's life is almost endless.

The law of wills, trusts, and estates is no exception! While a will is usually not a contract, many contracts are involved relating to this area of the law. Contracts with attorneys, appraisers, and other professionals will often be involved in the planning and administration of estates. There are contractual agreements between settlors and trustees.

Prenuptial agreements, also called ante nuptial or premarital agreements, are another great example of how interrelated the law really is. A prenuptial agreement is a contract that is entered into prior to marriage. Marriage is a central topic in the study of family law. One aspect that is often included in many people's prenuptial agreements is the **elective share**. Most states grant a surviving spouse the right to elect a percentage share of his or her deceased spouse's estate if they are unhappy with the provisions of the will. Needless to say, wills are a major topic in the study of wills, trusts, and estates law. So even a cursory review of the areas of law that impact a prenuptial agreement reveals at least three: contract law; family law; and wills, trusts, and estates law. Other areas of the law may also be involved!

Research and Writing

While this may not technically be a separate area of the law, it is usually a separate course taken by all paralegal students. Legal research and writing is more appropriately referred to as a skill. It is a skill that paralegals will use no matter what area of the law that they work in. Paralegals in a wills, trusts, and estates law firm will need to be able to locate, read, and understand statutes, rules of court, case law, forms, and other documents in order to fulfill their role in the law firm. Using the prenuptial agreement as an example, paralegals may be called upon to research what can and cannot be included in the agreement under the laws of their state.

RESEARCH THIS!

Hands-on Assignment Traditionally, prenuptial agreements have been used by individuals with substantial financial assets. The agreements allow them to continue to control those assets after marriage and protect them from claims of their spouse in the event of a divorce. Today, because of the increase in blended families, many people use prenuptial agreements as a way to protect their assets for the benefit of children from a previous marriage.

Most states require that the parties disclose their financial assets prior to entering into a prenuptial agreement. States differ, however, as to requiring disclosure in a prenuptial agreement that waives the right to an elective share upon the death of one of the spouses.

Find the statute in your state that sets out the disclosure requirements for a prenuptial agreement that waives a spouse's right to claim an elective share.

Find a case in your state that interprets or explains the statute and disclosure requirements for prenuptial agreements in which a spouse waives his or her right to claim an elective share.

Tort Law

tort
A civil wrongful act, committed against a person or property, either intentional or negligent.

undue influence
Using a close personal or fiduciary relationship to one's advantage to gain assent to terms that the party otherwise would not have agreed to.

duress
Unreasonable and unscrupulous manipulation of a person to force him or her to agree to terms of an agreement that he or she would otherwise not agree to.

A **tort** is a civil wrong, as compared to a criminal act, that does not include breach of contract. This is a very broad area of the law. In this day of lawyers advertising on TV and radio, in newspapers, and even on the sides of buses, most people are aware of one part of tort law—personal injury law. Tort law's scope is much wider and does impact the law of wills, trusts, and estates. Some torts that are often associated with this area of the law include **undue influence** and **duress**. So, how could tort law be involved with a prenuptial agreement? The prenuptial agreement's validity might be questioned if one of the parties' signatures was obtained through undue influence.

Criminal Law

The acts that constitute undue influence and duress also are criminal acts. Other criminal acts which can be involved in wills, trusts, and estates, as well as elder law, include abuse, neglect, fraud, conversion, and a variety of other financial crimes. In fact, some sources indicate that financial abuse is one of the more common crimes committed against the elderly and these crimes are often committed by family members or other people trusted by the victim. [See, e.g., National Center on Elder Abuse, National Elder Abuse Incidence Study: Final Report (1998) and www.elderabusecenter.org.] Like tort law, undue influence is a crime that may impact not only the validity of the contract itself, but also whether criminal charges will be brought against the party who exerted undue influence to obtain the signature of the other person.

Tax Law

Perhaps the most disliked three letters of the alphabet, at least when they are put together, are IRS. The importance of taxes in the law of wills, trusts, and estates cannot be overstated. As the old saying, often attributed to Ben Franklin, puts it: *There is nothing certain but death and taxes!* The truth of this statement will be clear as estate planning is dealt with in later chapters of this textbook. In fact, taxation, or the avoidance of taxation, is one of the prime reasons people consult attorneys and other financial professionals to assist them in estate planning.

Civil Litigation

Civil litigation is the means for people to resolve civil disputes through the use of the legal system. Conflicts arise for a wide variety of reasons. One that is often associated with wills, trusts, and estates involves will contests. A will contest arises when a person, who would otherwise have an interest in the decedent's estate, feels that his interest was somehow improperly interfered with by another person.

For example, Janet is a nurse's aid who works in an assisted living facility for the elderly. Janet has a lot of contact with her patients, more contact than even the patients' relatives have. One of her patients, John, suddenly changes his will just prior to his death to leave everything he owns to Janet. John's only child, Nigel, feels that Janet exercised undue influence over him. Nigel could contest the will on this basis.

Ethics

Like research and writing, ethics is involved in every area of the law. Paralegals and others working in a firm that deals with the law of wills, trusts, and estates are confronted with many situations that can create ethical dilemmas. Attorneys and paralegals operate in a position of trust with their clients, and they must take every reasonable step possible not to violate, or even appear to violate, that trust. A number of cases involving ethical issues are set out in the Real World Discussion Topics section at the end of this chapter, and specific ethical issues are discussed in more detail in the Ethical Problems Presented in the Wills, Trusts, and Estates Law Firm section of this chapter.

sole proprietor
A person who individually owns all assets and is personally responsible for all liabilities of a business operated as a sole proprietorship.

partner
One of two or more people who operate a business as a partnership.

Business Entities

Many people have worked hard at accomplishing the dream of owning or being part of a successful business. They may be a **sole proprietor** who owns a popular pizza restaurant, a **partner** in a law firm, or the owner of a small corporation. Whatever the situation, these people will have to take steps to plan for the future, including drafting a will and using trusts and other estate planning tools to make sure that their estate passes in a manner that is consistent with their desires and with the least possible impact of estate taxes.

Real Property Law

For most people, the most valuable asset that they own is their home. And, in a more general sense, real property is one of the major categories of wealth in the United States. This increases the need for careful planning on how to best provide for the passage of real property to those who the client wishes to receive it. As will be seen in Chapter 2 and later chapters, this can be done while the client is still alive, for example, by selecting the form of ownership that will accomplish the goals of the client, or at the client's death by means of a will or trusts.

THE ROLE OF THE PARALEGAL IN THE WILLS, TRUSTS, AND ESTATES LAW FIRM

The paralegal working in a wills, trusts, and estates law firm performs a wide variety of tasks. Some of them include:

1. Interviewing clients—both for wills and for estate planning. The paralegal will often be responsible for gathering the critical information needed to prepare the client's will or other documents. The paralegal will use a questionnaire, sometimes referred to as a checklist, to ensure that all the necessary information is obtained to complete the documents being prepared on behalf of the client.
2. Maintain attorney's calendar. (Note: Probate and other matters relating to wills, trusts, and estates firms are very time sensitive.)
3. Maintain records such as wills, vault inventories, and powers of attorney. Maintain a **tickler system**. Even a quick review of this list of possible duties indicates that the paralegal plays a vital role in the operation of a wills, trusts, and estates law firm. These duties, combined with the numerous time requirements set out by state law in probate proceedings, mean that memory alone is not enough to make sure that everything is taken care of in a timely manner. That is why a tickler system must be used. It, combined with filing checklists, helps ensure that all necessary documents are completed and filed on time.

tickler system
A method of keeping track of important dates and filing of documents.

4. Legal research on issues relating to the laws of wills, trusts, and estates. The laws relating to wills, trusts, and estates vary from state to state. Paralegals will often have to research the laws of their state as they relate to a particular issue. This could include locating the state laws setting out what must be done to execute a valid will or finding cases that interpret those statutes. There are also times paralegals may need to find laws of other states, such as when the decedent owned property in another state at the time of her death.
5. Act as notary public on documents such as the testator's will. To perform this duty paralegals will have to meet the requirements for becoming a notary in their state. The process usually requires making an application, paying a fee, and taking an oath. Some states also require the person to post a bond, take classes, and take a test. Information on the requirements for becoming a notary in all 50 states can be found at www.nationalnotary.org/howto/.
6. Discuss the proposed contents of the will—including tax considerations, identification of assets, beneficiaries under the will, and other items relating to the fulfillment of the testator's wishes. Great care must be taken by paralegals when discussing topics such as these with the client. Paralegals should not give the impression that they are giving legal advice. Giving legal advice constitutes the practice of law, which is a violation of professional ethics and the law.
7. Drafting wills and trusts. Paralegals will often prepare the first draft of wills and trusts for review by their supervising attorney. A wide variety of sample clauses for use in completion of this task are available to the paralegal. These include online resources, such as Westlaw and Lexis, as well as forms on CD-ROM.
8. Witness wills and other documents associated with wills and trusts.
9. Assist in the **execution** of the final draft of the will. Once paralegals assist the attorney in the completion of the client's will, they will usually be involved in its execution. These duties would include providing the client with the final draft for review, making any last-

execution
Validation of a will.

minute corrections, and helping supervise the signing of the will. Paralegals may also act as a witness to the testator's signing of the will, and they should be cognizant of the testator's **testamentary capacity** when performing this task.

testamentary capacity
The ability to understand and have the legal capacity to make a will.

10. Drafting documents associated with the creation of trusts. These include trust agreements, declaration of trusts, living trusts, and testamentary trusts. As with drafting wills, paralegals will prepare the first draft for review by their supervising attorney and assist in making needed revisions.
11. Assist in the location of the will at the time of administration. One of the first things that must be done when a person dies is to locate his will. A family member or the personal representative of the state often does this. Occasionally the paralegal will need to assist in obtaining the will. For example, if the will was located in the decedent's safe deposit box, the paralegal may draft a petition to have the safe deposit box opened. See Figure 1.3 for a sample petition and order to open a safe deposit box.

FIGURE 1.3
Michigan Petition and Order to Open Safe Deposit Box

Approved, SCAO — OSM CODE: DBP, DBO

STATE OF MICHIGAN PROBATE COURT COUNTY OF	PETITION AND ORDER TO OPEN SAFE DEPOSIT BOX TO LOCATE WILL OR BURIAL DEED	FILE NO.

Estate of _____

PETITION

1. I am an interested person as _____ (Heir, devisee, etc.) of decedent, who died _____ (Date).
2. _____ (Name of bank, trust company, or safe deposit company), as lessor, leased to decedent, alone or jointly, safe deposit box number _____, located at _____ (Branch) in _____ (City or township) in this county, and the safe deposit box may contain decedent's will or a deed to a burial plot in which the decedent is to be interred.
3. **I REQUEST** that this court issue an order directing the lessor to permit _____ (Name) to examine the contents of the safe deposit box in the presence of an officer or other authorized employee of lessor for the purpose of locating and removing a will and deed to a burial plot only.

I declare under the penalties of perjury that this petition has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

_____ Date

Attorney signature	Petitioner signature
Name (type or print) Bar no.	Name (type or print)
Address	Address
City, state, zip Telephone no.	City, state, zip Telephone no.

ORDER

IT IS ORDERED:

4. The above petition is granted and the lessor is ordered to permit _____ to examine the above described safe deposit box in the presence of an officer or other authorized employee of the lessor. Only a will of the decedent and a deed to a burial plot shall be removed from the box and shall be delivered by the above named person to the probate register or deputy register of this court.
5. At the time of the opening of the safe deposit box, all persons in attendance shall execute a written statement certifying whether a will or deed to a burial plot was found and that no other items were removed from the safe deposit box. The person named above shall file that written statement with the probate register or deputy register of this court within 7 days of opening the box.

_____ Date — _____ Judge Bar no.

Do not write below this line - For court use only

MCL 700.2517; MSA 27.12517

PC 551 (6/00) **PETITION AND ORDER TO OPEN SAFE DEPOSIT BOX TO LOCATE WILL OR BURIAL DEED**

12. Assist in the collection and maintenance of an estate's assets. Once a person dies her estate goes into a state of limbo. The decedent's will and the laws of her domicile state will determine when and how that property is transferred. Assets must be collected and protected. This is primarily the duty of the personal representative, but the paralegal may be called upon to assist in the completion of this task. Firms that specialize in estate work sometimes provide storage for valuable items until the probate procedure is completed. The paralegal may be required to inventory and secure these items.
13. Set up a family conference after the death of the decedent, if needed. While movies and TV shows often include a family conference where the attorney solemnly reads the contents of the decedent's will, such conferences are not required. However, there are circumstances in which its use is appropriate.
14. Filing appropriate papers to initiate probate proceedings.
15. Assist in all steps that must be performed in formal probate administration. These include obtaining death certificates, depositing the original will with the appropriate court, filing the petition for probate, mailing notice of probate to interested parties, notifying the decedent's creditor, and filing the petition for final discharge.
16. Locate beneficiaries under the will. In today's mobile society, families are spread out all over the country. People fall out of touch with family members and other loved ones. The paralegal may be called upon to locate the beneficiaries under a deceased's will, or **heirs at law**. The Internet has opened up many new ways of locating individuals. There are also probate genealogy firms that can aid the paralegal in locating beneficiaries and possible heirs.
17. Send notice of probate proceeding to beneficiaries and heirs at law. While states vary on when and how notice of probate is completed, paralegals are often required to prepare and mail forms that notify individuals that they were named in a will as a beneficiary, or to notify the heirs at law who would inherit if there was no valid will.
18. Aid in opening an estate checking account.
19. Record payments of debts.
20. Prepare an inventory of the assets of the estate.
21. Assist in the appraisal of assets. Placing a value on the decedent's estate at the time of death is an important part of the probate processes. Paralegals will often assist the personal representative of an estate in getting help in establishing the value. Some items, such as cash in a bank account, are easily established. Others, such as works of art or antiques, present more of a challenge. Paralegals may need to provide the name of reputable appraisers in those situations.
22. Speak with banks and other institutions and professionals such as stockbrokers and CPAs. The probate process involves the use of a number of professionals. For example, a CPA may be used to prepare the necessary tax forms for an estate, or a stockbroker may be needed to assist in the transfer of stock according to the terms of the will. Paralegals will often coordinate the work that needs to be done with these other professionals and act as the main contact person for the law firm.
23. Organize data relating to the tax implications of the estate.
24. Prepare preliminary federal and state death tax returns.
25. Assist in tasks normally associated with a litigation firm. While most people do not think of probate as litigation, it does involve filing of documents with the court and court hearings. If the will is contested for whatever reason, then the case becomes an adversarial case and is handled much like any other litigation matter.

State law largely determines what a paralegal can ethically and legally do. Paralegals must take great care to avoid activities that may be considered the practice of law. The ethical problems discussed later in this chapter include an example of how careful paralegals must be to avoid potential problems.

heirs at law
Heirs that would inherit if the decedent had died intestate.

CYBER TRIP

Visit these sites to learn more about wills, trusts, and estates:

Crash course in wills and trusts: www.mtpalermo.com/

Wills and estate planning: www.nolo.com/resource.cfm/catID/FD1795A9-8049-422 C-9087838F86A2BC2B/309/

Estate planning: www.law.cornell.edu/wex/index.php/Estate_Planning

CASE BRIEF ASSIGNMENT

Read and brief the *Ohio State Bar Assn. v. Cohen* case on page 11. (See Appendix A for information on how to brief cases.)

CASE IN POINT

UNAUTHORIZED PRACTICE OF LAW

Supreme Court of Ohio
Ohio State Bar Association
v.
Cohen
No. 2004-2164.
Submitted June 15, 2005.
Decided Nov. 23, 2005.

Per Curiam.

On April 26, 2004, relator, Ohio State Bar Association, charged that respondent, Randy Cohen, had engaged in the unauthorized practice of law by rendering and receiving payment for a variety of legal services while doing business as DocuPrep USA. The Board on the Unauthorized Practice of Law considered the cause on the parties' stipulations of fact and waiver of notice and hearing. See Gov.Bar R. VII(7)(H). Accepting these filings, the board made the following findings of fact, conclusions of law, and recommendation.

Respondent conducted business at DocuPrep USA, part of a nationwide chain advertised as independently operated paralegal offices. For his particular operation, respondent advertised that he would help customers "prepare and file the important documents of [their] life without the services and expense of a lawyer." More specifically, respondent offered to prepare wills and living trusts, as well as the documents necessary for divorces, name changes, stepparent adoptions, evictions, immigration, and bankruptcies, and to establish corporations, among "other uncontested legal procedures."

Respondent is not and never has been an attorney admitted to the practice of law, granted active status, or certified to practice law in the state of Ohio pursuant to Gov.Bar R. I, II, VI, IX, or XI. Yet on numerous occasions, respondent drafted and completed documents, including several wills, a dissolution pleading and related orders, and many bankruptcy petitions, all of which affected or determined others' legal rights. He also gave advice and counsel to people about their legal rights, all the while charging for his services.

During his deposition, respondent testified that when customers came to him, they did not know what type of legal document was required to accomplish their objective, and respondent would choose for them by using official forms and software programs. By selecting the causes of action and legal instruments he thought might protect his customers' interests, however, respondent was engaged in the unlicensed practice of law; he just did not realize it. In fact, although he did know that his customers were relying on the documents he prepared to protect their legal rights in court and elsewhere, respondent described himself as merely a document preparer.

Based on this conduct, respondent conceded and the board found that he had engaged in the unauthorized practice of law while doing business as DocuPrep USA. The board recommended that we issue an order finding that respondent engaged in the unauthorized practice of law and enjoining him from engaging in such practices in the future.

On review of the record, we adopt the findings, conclusions, and recommendation of the board. Section 2(B)(1)(g), Article IV of the Ohio Constitution confers on this court original jurisdiction over all matters related to the practice of law. With few exceptions, see, e.g., *Cleveland Bar Assn. v. Pearlman,* 106 Ohio St.3d 136, 2005-Ohio-4107, 832 N.E.2d 1193 (allowing a nonlawyer to prepare and file a complaint for another in small claims court under certain circumstances), the unauthorized practice of law consists of rendering legal services and includes the preparation of legal pleadings and other papers for another without the supervision of an attorney licensed in Ohio. *Richland Cty.* January Term, 2005; *Bar Assn. v. Clapp* (1998), 84 Ohio St.3d 276, 278, 703 N.E.2d 771; *Cleveland; Bar Assn. v. Coats*, 98 Ohio St.3d 413, 2003-Ohio-1496, 786 N.E.2d 449, ¶ 3.

Respondent is therefore enjoined from preparing legal documents for others and from any other conduct constituting the unauthorized practice of law. Costs are taxed to respondent. Judgment accordingly.

MOYER, C.J., RESNICK, LUNDBERG STRATTON, O'CONNOR and LANZINGER, JJ., concur.

PFEIFER and O'DONNELL, JJ., concur but would also impose a $10,000 civil penalty.

ETHICAL PROBLEMS PRESENTED IN THE WILLS, TRUSTS, AND ESTATES LAW FIRM

Paralegals are confronted with ethical issues on a daily basis. While the mention of *legal ethics* often draws snickers from even lawyers, the reality is professional ethics are very important, although sometimes confusing.

Some of the confusion, and the snickers, come from the fact that most people equate morality to ethics. Legal ethics, like other professional ethics, are not necessarily morality based. In fact, some legal ethics seem to conflict with morality. An example of this is the duty of attorneys to do their best in a criminal case even when they know that the client is guilty. Instead, legal ethics focuses on the duties legal professionals owe to others in their profession, to the courts, and to their clients.

Paralegals who work in a firm that deals with wills, trusts, and estates law will be faced with numerous situations in which they may be confronted with ethical dilemmas. The following are examples of ethical issues that a paralegal may face.

Unlicensed Practice of Law

It is very common for a paralegal to be the client's main contact in the law office. This is especially true with wills, trusts, and estates cases. Much of the document preparation will be done by the paralegal, and many paralegals have a very good working knowledge of the law associated with their area of practice.

For example, Jane from the Client Interview has worked for Mr. Comfort for almost 20 years. During that time she has probably prepared the paperwork for countless wills and trusts and been actively involved in the probate of hundreds of wills. Mr. Comfort has grown to rely on her knowledge and expertise. In fact, Jane may have a better working knowledge of the laws and procedure that are part of the probate process than her boss does!

CYBER TRIP

Visit these sites to learn more about legal ethics:

ABA Center for Professional Responsibility: www.abanet.org/cpr/mrpc/mrpc_toc.html

NALA standards—Model Standards and Guidelines for Utilization of Legal Assistants: www.nala.org/98model.htm

While it is certainly good that Jane is competent and does a professional job, this situation presents a number of potential ethical dilemmas. Notice that Jane has pointed out to Cathy Wilson (1) that she will be preparing most of the documents associated with the probate of the estate, (2) that she has knowledge of the laws and procedures involved, and (3) that Cathy should call her whenever she had a question.

Jane is correct; she will probably be preparing most of the forms associated with the probate. That's what probate paralegals do. What she left out was that she was preparing them under the supervision and review of her supervising attorney, Mr. Comfort. Failing to inform the client of this fact gives the impression that Jane is handling the legal work, even though she is not a licensed attorney. The unlicensed practice of law is not only an ethical issue; it may also be a crime!

Jane was probably just trying to reassure the client that she was qualified and was there to help. Her comments, however, could be seen as encouraging the client to unduly rely on her expertise. Cathy certainly can call Jane with questions such as whether the initial papers are ready to review. If the questions involve answers relating to the law, Mr. Comfort must answer them.

It is important that paralegals inform the client of their status as a paralegal at the time of the initial meeting. Paralegals should also inform the client of what paralegals can and can't do and remind the client of those limitations as often as needed.

Mr. Comfort must also be careful in this situation. He may be overrelying on Jane's expertise and no longer reviewing her work as carefully as he has in the past. He may also allow her to answer too many of the client's questions because of the constraints of his own schedule. This reliance on Jane's skills could be viewed as facilitating the unauthorized practice of law by his employee.

Undue Influence

Undue influence was previously mentioned in the discussion of torts. It occurs where a person is able to take advantage of another because of a relationship based on trust and confidence. It sometimes becomes an issue with wills and probate because the testator may have executed his will while under the influence of a trusted person, such as a family member. The testator may not use the same kind of diligence in protecting his interests because of this relationship of trust. A will contest can result if other family members discover this abuse.

Attorneys and paralegals have such a relationship with their clients. Many of the people coming to an attorney to have their will drawn up are elderly and with no family close by. These clients can form a friendship with the attorneys and staff of the law office. Use of this relationship to acquire an interest in the testator's estate by the paralegal or attorney must never occur. Even the appearance of impropriety can create ethical issues for the attorney and the paralegal. (See also the Conflict of Interest section later in this chapter.)

Ethics Alert

Paralegals should be vigilant in watching for signs of possible undue influence by the testator's family members or other people who have gained the testator's trust. These signs include: substantial changes to a will that favors a particular family member or a caregiver in a manner inconsistent with the client's previous desires, nonfamily caregiver living with the client, a particular family member or caregiver being present at all important meetings and not letting the client speak for herself, and unwarranted reliance on a particular family member or caregiver. It is sometimes difficult to distinguish between a well-meaning family member or caregiver and one who is trying to exert undue influence over the client for his personal benefit. If the paralegal feels that undue influence might be present, she should report it to her supervising attorney immediately.

Breach of Confidentiality

All members of the legal staff owe a duty of confidentiality to their clients. While there are some exceptions to this duty, the best approach to confidentiality is simple—what happens at the office stays at the office. Paralegals should avoid discussing clients' cases with people outside of the office or even people in the office who do not have a need to know.

Keep in mind that a paralegal will know many things about the client's personal life, family relationships, and financial matters in order to assist the client in planning his estate, drafting his will, or probating an estate. This information should be respected and not disclosed to anyone who does not have a right to know it, even if it may seem relatively unimportant.

Paralegals should not try to be clever to get around the duty of confidentiality owed to the client. Changing the names of the client is not enough nor is assuming that since the paralegal is in another town from that of the client, the paralegal can discuss the case without regard to confidentiality.

Here are two real-world examples of how clever paralegals violated their duty:

Clever Approach 1: Not Mentioning the Name of the Parties

Jim was a paralegal in a family law firm that was located in a fairly good size city. He and other paralegals often met after work on Fridays at a local bar and grill. They all knew they should not be talking about their cases but figured that by not mentioning the names of the parties everything would be OK. That Friday night Jim told his friends of a very nasty divorce. It involved a prominent local doctor who had filed for divorce from his long-time wife so that he could marry the nurse who worked for his office. He included all the juicy details of the case, just as the client, the husband, had relayed them to the attorney just days before. All the paralegals enjoyed the story and had a great time discussing the case and laughing about the client's activities. What Jim was not aware of was that a woman sitting in the booth next to him was a good friend of the client's family. She did not need to know the names of the parties in order to understand the case Jim was discussing. The next day, she told the doctor what she had heard and, in turn, the doctor called his attorney. Jim was unemployed shortly thereafter.

Clever Approach 2: Don't Worry about Confidentiality When You Are out of Town

Sharon was a paralegal who worked in a law firm in upstate New York. One day, while she was on a shopping trip to New York City, Sharon was riding on a city bus when she heard an interesting conversation between two people seated in front of her. It turns out that the two people were paralegals from a firm in the same town in which Sharon lived and worked. What's more, the case they were discussing involved a case in which her firm was representing the other party! This shows that it is truly a small world and also demonstrates that what happens in the office should stay in the office.

CASE BRIEF ASSIGNMENT

Read and brief the *Sisson v. Jankowski* case on page 14. (See Appendix A for information on how to brief cases.)

Conflict of Interest

An attorney should not accept a client in a situation where it would conflict with the interest of another client or where the representation would be limited by the attorney's duties to a client, a former client, or a person of interest to the attorney.

Conflicts of interest can occur in a variety of ways. The American Bar Association is a voluntary organization that includes as one of its functions the drafting of Model Rules of Professional

NEGLIGENCE

Supreme Court of New Hampshire
Thomas K. Sisson
v.
Shari Jankowski, Esq. & a.
No. 2002-0129
Submitted: July 26, 2002
Opinion Issued: November 15, 2002

BROCK, C.J. The United States District Court for the District of New Hampshire (McAuliffe, J.) has certified the following question of law, see *Sup. Ct. R.* 34:

> Whether, under New Hampshire law and the facts as pled in plaintiff's verified complaint, an attorney's negligent failure to arrange for his or her client's timely execution of a will and/or an attorney's failure to provide reasonable professional advice with respect to the client's testamentary options (e.g., the ability to cure a draft will's lack of a contingent beneficiary clause by simply inserting a hand-written provision), which failure proximately caused the client to die intestate, gives rise to a viable common law claim against that attorney by an intended beneficiary of the unexecuted will.

For the reasons stated below, we answer the certified question in the negative. Because this question arose in the context of a motion to dismiss and absent a copy of the plaintiff's complaint, we assume the truth of the factual allegations recited by the court in its certification order, and construe all inferences in the light most favorable to the plaintiff. *Hungerford v. Jones*, 143 N.H. 208, 209 (1998).

In December 1998, the decedent, Dr. Warren Sisson, retained the defendants, Attorney Jankowski and her law firm, Wiggin & Nourie, P.A., to prepare his will and other estate planning documents. According to the plaintiff, Thomas K. Sisson, the decedent informed Attorney Jankowski that he was suffering from cancer, did not want to die intestate, and, therefore, wished to prepare a will that would pass his entire estate to the plaintiff, his brother. The decedent told Attorney Jankowski that he was particularly interested in ensuring that none of his estate pass to his other brother, from whom he was estranged. The record, however, does not reflect any request by the decedent that the will be executed by a date certain.

Attorney Jankowski prepared a will and other estate planning documents and, in mid-January 1999, mailed them to the decedent for his review and execution. The decedent was injured in mid-January, however, and, therefore, did not receive the documents until January 22, 1999, when a neighbor delivered them to him at a nursing home. Three days later, the plaintiff contacted Attorney Jankowski to tell her that the decedent wanted to finalize his estate planning documents quickly because of his deteriorating condition.

On February 1, 1999, Attorney Jankowski and two other law firm employees visited the decedent in the nursing home to witness his execution of the estate planning documents. The decedent executed all of the documents except his will. After Attorney Jankowski asked him whether the will should include provisions for a contingent beneficiary, the decedent expressed his desire to insert such a clause, thereby providing that his estate would pass to a charity in the event the plaintiff predeceased him.

According to the plaintiff, the decedent's testamentary intent was clear as of the end of the February 1, 1999 meeting: the unexecuted will accurately expressed his intent to pass his entire estate to the plaintiff. Nevertheless, rather than modifying the will immediately to include a hand-written contingent beneficiary clause, modifying it at her office and returning later that day for the decedent's signature, or advising the decedent to execute the will as drafted to avoid the risk of dying intestate and later drafting a codicil, Attorney Jankowski left without obtaining the decedent's signature to the will.

Three days later, Attorney Jankowski returned with the revised will. The decedent did not execute it, however, because Attorney Jankowski did not believe he was competent to do so. She left without securing his signature and told him to contact her when he was ready to sign the will.

The plaintiff twice spoke with a Wiggin & Nourie attorney "to discuss Attorney Jankowski's inaction regarding the will." The attorney told him that he had spoken to other firm members about the situation. Nevertheless, after February 4, 1999, Attorney Jankowski made no attempt to determine whether the decedent regained sufficient testamentary capacity to execute his will.

The decedent died intestate on February 16, 1999. His estate did not pass entirely to the plaintiff as he had intended, but instead was divided among the plaintiff, the decedent's estranged brother, and the children of a third (deceased) brother. The plaintiff brought legal malpractice claims against the defendants, alleging that they owed him a duty of care because he was the intended beneficiary of their relationship with the decedent.

For the purposes of this certified question, there is no dispute as to the decedent's testamentary intent: he wanted to avoid dying intestate and to have his entire estate pass to the plaintiff. Nor does the plaintiff claim that the defendants frustrated the decedent's intent by negligently preparing his will. Rather, the plaintiff asserts that the defendants were negligent because they failed to have the decedent execute his will promptly and to advise him on February 1 of the risk of dying intestate if he did not execute the draft presented at that meeting.

The narrow question before us is whether the defendants owed the plaintiff a duty of care to ensure that the decedent executed his will promptly. Whether a duty exists is a question of law. *Hungerford*, 143 N.H. at 211. A duty generally arises out

of a relationship between the parties. *See MacMillan v. Scheffy*, 147 N.H. 362, 364 (2001). While a contract may supply the relationship, ordinarily the scope of the duty is limited to those in privity of contract with one another. *Id*. We have, in limited circumstances, recognized exceptions to the privity requirement where necessary to protect against reasonably foreseeable harm. *See Hungerford*, 143 N.H. at 211. "[N]ot every risk of harm that might be foreseen gives rise to a duty," however. *Id*. (quotation and brackets omitted). "[A] duty arises if the likelihood and magnitude of the risk perceived is such that the conduct is unreasonably dangerous." *Id*. (quotation and brackets omitted).

"When determining whether a duty is owed, we examine the societal interest involved, the severity of the risk, the likelihood of the occurrence, the relationship between the parties, and the burden upon the defendant." *Id*. Ultimately, whether to impose a duty of care "rests on a judicial determination that the social importance of protecting the plaintiff's interest outweighs the importance of immunizing the defendant from extended liability." *Walls v. Oxford Management Co.*, 137 N.H. 653, 657 (1993).

In *Simpson v. Calivas*, 139 N.H. 1, 4 (1994), we recognized an exception to the privity requirement with respect to a will beneficiary and held that an attorney who drafts a testator's will owes a duty to the beneficiaries to draft the will non-negligently. In *Simpson*, a testator's son sued the attorney who drafted his father's will, alleging that the will failed to incorporate his father's actual intent. *Id*. at 3. The will left all real estate to the plaintiff, except for a life estate in "our homestead," which was left to the plaintiff's stepmother. *Id*. The probate litigation concerned whether "our homestead" referred to all of the decedent's real property, including a house, over one hundred acres of land and buildings used in the family business, or only to the house, and perhaps limited surrounding acreage. *Id*. The plaintiff argued that the decedent intended to leave him the buildings used in the family business and the bulk of the surrounding land in fee simple. *Id.* at 4. The plaintiff lost the will construction action, and then brought a malpractice action against the drafting attorney, arguing that the decedent's will did not accurately reflect his intent. *Id.* at 3.

We held that the son could maintain a contract action against the attorney, as a third-party beneficiary of the contract between the attorney and his father, and a tort action, under a negligence theory. *Id.* at 7. With respect to the negligence claim, we concluded that, "although there is no privity between a drafting attorney and an intended beneficiary, the obvious foreseeability of injury to the beneficiary demands an exception to the privity rule." *Id.* at 5-6.

Simpson is consistent with the prevailing rule that a will beneficiary may bring a negligence action against an attorney who failed to draft the will in conformity with the testator's wishes. *See generally* R. Mallen & J. Smith, *Legal Malpractice* § 32.4, at 735 (5th ed. 2000); *Stowe v. Smith*, 441 A.2d 81 (Conn. 1981); *Lucas v. Hamm*, 364 P.2d 685, 688-89 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962); *Succession of Killingsworth*, 292 So. 2d 536, 542 (La. 1973); *Hare v. Miller, Canfield, Paddock & Stone*, 743 So. 2d 551 (Fla. Dist. Ct. App. 1999).

Simpson is not dispositive of the certified question, however. The duty in *Simpson* was to draft the will non-negligently, while the alleged duty here is to ensure that the will is executed promptly. Courts in several jurisdictions have declined to impose a duty of care where the alleged negligence concerns the failure to have the will executed promptly. *See Krawczyk v. Stingle*, 543 A.2d 733 (Conn. 1988); *Miller v. Mooney*, 725 N.E.2d 545 (Mass. 2000); *Charia v. Hulse*, 619 So. 2d 1099 (La. Ct. App. 1993); *Radovich v. Locke-Paddon*, 35 Cal. App. 4th 946 (Ct. App. 1995); *Babcock v. Malone*, 760 So. 2d 1056, 1056-57 (Fla. Dist. Ct. App. 2000). The majority of courts confronting this issue have concluded that imposing liability to prospective beneficiaries under these circumstances would interfere with an attorney's obligation of undivided loyalty to his or her client, the testator or testatrix.

In *Krawczyk*, 543 A.2d at 733-34, for instance, the decedent had met with his attorney approximately ten days before he died and informed her that he was soon to have open heart surgery and wanted to arrange for the disposition of his assets without going through probate. Accordingly, he directed the attorney to prepare two trust documents for his execution. *Id.* at 734. Completion of the trust documents was delayed, and by the time they were ready for execution, the decedent was too ill to see his attorney. He died without signing them. *Id.*

The Connecticut Supreme Court concluded that imposing liability to third parties for negligent delay in executing estate planning documents would contravene a lawyer's duty of undivided loyalty to the client. *Id.* at 736. As the court explained:

> Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. These potential conflicts of interest are especially significant in the context of the final disposition of a client's estate, where the testator's testamentary capacity and the absence of undue influence are often central issues.

Id.

The Massachusetts Supreme Judicial Court has similarly reasoned that:

> [I]n preparing a will[,] attorneys can have only one client to whom they owe a duty of undivided loyalty. A client who engages an attorney to prepare a will may seem set on a particular plan for the distribution of her estate. . . . It is not uncommon, however, for a client to have a change of heart after reviewing a draft will. . . . If a duty arose as to every prospective beneficiary mentioned by the client, the attorney-client relationship would become unduly burdened. Attorneys could find themselves in a quandary whenever the client had a change of mind, and the results would hasten to absurdity. The nature of the attorney-client relationship that arises from the drafting of a will necessitates against a duty arising in favor of prospective beneficiaries.

Miller, 725 N.E.2d at 550-51 (quotation, ellipses and brackets omitted).

We have recently reaffirmed the importance of an attorney's undivided loyalty to a client. *See MacMillan*, 147 N.H. at 365. In *MacMillan*, we declined to extend *Simpson* to permit the buyers in a real estate transaction to sue the sellers' attorney who prepared a deed, which failed to include a restrictive covenant. We ruled that there was no evidence that the primary purpose of employing the attorney to draft the deed was to benefit or influence the buyers. *Id*. Accordingly, we held that the buyers

were not the intended beneficiaries of the attorney's services. *Id*. Moreover, we held that it was imprudent to impose liability upon the attorney under these circumstances because doing so would "interfere with the undivided loyalty which the attorney owes his client and would detract from achieving the most advantageous position for his client." *Id*. (quotation omitted).

Both parties cite compelling policy considerations to support their arguments. The plaintiff asserts that there is a strong public interest in ensuring that testators dispose of their property by will and that recognizing a duty of an attorney "to arrange for the timely execution of a will" will promote this public interest. He further argues that "[t]he risk that an intended beneficiary will be deprived of a substantial legacy due to delay in execution of testamentary documents" requires the court to recognize the duty he espouses. The defendants counter that recognizing a duty to third parties for the failure to arrange for the timely execution of a will potentially would undermine the attorney's ethical duty of undivided loyalty to the client.

After weighing the policy considerations the parties identify, we conclude that the potential for conflict between the interests of a prospective beneficiary and a testator militates against recognizing a duty of care. "It is the potential for conflict that is determinative, not the existence of an actual conflict." *Miller*, 725 N.E.2d at 550. Whereas a testator and the beneficiary of a will have a mutual interest in ensuring that an attorney drafts the will non-negligently, a prospective beneficiary may be interested in the will's prompt execution, while the testator or testatrix may be interested in having sufficient time to consider and understand his or her estate planning options. As the Massachusetts Supreme Judicial Court recognized:

> Confronting a last will and testament can produce complex psychological demands on a client that may require considerable periods of reflection. An attorney frequently prepares multiple drafts of a will before the client is reconciled to the result. The most simple distributive provisions may be the most difficult for the client to accept.

Id. at 551.

Creating a duty, even under the unfortunate circumstances of this case, could compromise the attorney's duty of undivided loyalty to the client and impose an untenable burden upon the attorney-client relationship. To avoid potential liability, attorneys might be forced to pressure their clients to execute their wills summarily, without sufficiently reflecting upon their estate planning options.

On balance, we conclude that the risk of interfering with the attorney's duty of undivided loyalty to the client exceeds the risk of harm to the prospective beneficiary. For these reasons, we join the majority of courts that have considered this issue and hold that an attorney does not owe a duty of care to a prospective will beneficiary to have the will executed promptly. Accordingly, we answer the certified question in the negative.

Remanded.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Conduct. These rules include a specific provision that addresses the potential conflict of interest created when an attorney is a beneficiary under a will.

testamentary gift
A gift made in a will.

Rule 1.8 (c) of the ABA Model Rules of Professional Conduct prohibits an attorney from soliciting gifts, including **testamentary gifts**, from a client and from drafting an instrument, such as a will, in which the attorney receives a gift. Exceptions are allowed in a situation where the attorney is related to the client.

The attorney is not the only one who needs to be concerned with this possible conflict of interest. A failure of paralegals to follow this rule could expose their employer to disciplinary action by the state bar association and a possible lawsuit.

Sometimes it is difficult to determine who is the client in wills, trusts, and estates cases. *Sisson v. Jankowski* is an example of this problem.

Falsely Attesting to an Affidavit, Such as When a Paralegal Is a Notary

Paralegals, who may also be notary publics, are often asked to witness or attest to the execution of a will or other legal document prepared in the law firm. They should only do so if they are actually present at the time the document is signed. In the hectic routine of many law offices, it is all too tempting to ask someone to notarize a document that the person did not see signed. This can become an issue if the will is contested and the paralegal is called to testify as to what occurred.

Improper Handling of Client Funds and Assets

During the course of representing a client or the probating of an estate, a law firm will often be in possession of funds or other property of the client or the estate. Commingling of the client's funds with those of the law office is improper and must be avoided at all cost. Other items being held for the client must be properly inventoried and stored in an appropriate manner.

Summary

The law of wills, trusts, and estates impacts a wide variety of other areas of the law that presents both a challenge and an opportunity for the paralegal who works in this area of the law. One of the challenges is to develop adequate professional skills to perform the many duties the paralegal will be called upon to perform. Another is the need to understand the terminology used in this field of law. The terms and phrases are in a process of change, with many states eliminating distinctions in terms based on whether a decedent died testate or intestate, or based on the sex of the person. The Uniform Probate Code is an example of the fact that the legal system recognizes a need to simplify the terminology associated with wills, trusts, and estates. The law is not stagnant; it changes as society changes, and paralegals must do their best to keep abreast of them. To do so presents the opportunity to work in one of the most interesting fields of law.

Paralegals must be mindful of the many ethical dilemmas that will be present as they perform their duties in the law office. Examples of areas of ethical concern include: unlicensed practice of law, undue influence, conflict of interest, breach of confidentiality, conflict of interest, falsely attesting to an affidavit, and the improper handling of client funds and assets. Care should be taken to avoid even the appearance of impropriety when dealing with the day-to-day work of the law office. The cases and the Real World Discussion Topics demonstrate how important it is to comply with professional ethics.

Key Terms

Administrator
Administratrix
Advance directives
Beneficiary
Blended families
Codicil
Decedent
Devise
Domicile
Duress
Elective share
Equitable title
Estate
Execution
Executor
Executrix
Health care proxy
Heirs at law
Intestate
Last will and testament
Legacy
Legal title
Living will
Medicaid
Organ donation
Partner
Prenuptial agreement
Probate
Settlor
Sole proprietor
Testamentary capacity
Testamentary gift
Testate
Testator
Testatrix
Tickler system
Tort
Trust
Trustee
Undue influence
Uniform Probate Code
Will

Review Questions

1. List the areas of the law that interrelate with wills, trusts, and estates, and give an example of each.
2. When should paralegals identify their status as a paralegal in the law firm to the client?
3. List five duties paralegals may be called upon to perform in a wills, trusts, and estates law firm.
4. Why should paralegals be careful not to violate any rules of professional ethics?
5. Discuss and compare undue influence and duress.
6. What is a tickler system, and why is it important in a wills, trusts, and estates law firm?
7. Compare the traditional meaning of the term *last will and testament* to its modern meaning.
8. Discuss the changes in terminology brought about by the Uniform Probate Code.

were not the intended beneficiaries of the attorney's services. *Id*. Moreover, we held that it was imprudent to impose liability upon the attorney under these circumstances because doing so would "interfere with the undivided loyalty which the attorney owes his client and would detract from achieving the most advantageous position for his client." *Id*. (quotation omitted).

Both parties cite compelling policy considerations to support their arguments. The plaintiff asserts that there is a strong public interest in ensuring that testators dispose of their property by will and that recognizing a duty of an attorney "to arrange for the timely execution of a will" will promote this public interest. He further argues that "[t]he risk that an intended beneficiary will be deprived of a substantial legacy due to delay in execution of testamentary documents" requires the court to recognize the duty he espouses. The defendants counter that recognizing a duty to third parties for the failure to arrange for the timely execution of a will potentially would undermine the attorney's ethical duty of undivided loyalty to the client.

After weighing the policy considerations the parties identify, we conclude that the potential for conflict between the interests of a prospective beneficiary and a testator militates against recognizing a duty of care. "It is the potential for conflict that is determinative, not the existence of an actual conflict." *Miller*, 725 N.E.2d at 550. Whereas a testator and the beneficiary of a will have a mutual interest in ensuring that an attorney drafts the will non-negligently, a prospective beneficiary may be interested in the will's prompt execution, while the testator or testatrix may be interested in having sufficient time to consider and understand his or her estate planning options. As the Massachusetts Supreme Judicial Court recognized:

> Confronting a last will and testament can produce complex psychological demands on a client that may require considerable periods of reflection. An attorney frequently prepares multiple drafts of a will before the client is reconciled to the result. The most simple distributive provisions may be the most difficult for the client to accept.

Id. at 551.

Creating a duty, even under the unfortunate circumstances of this case, could compromise the attorney's duty of undivided loyalty to the client and impose an untenable burden upon the attorney-client relationship. To avoid potential liability, attorneys might be forced to pressure their clients to execute their wills summarily, without sufficiently reflecting upon their estate planning options.

On balance, we conclude that the risk of interfering with the attorney's duty of undivided loyalty to the client exceeds the risk of harm to the prospective beneficiary. For these reasons, we join the majority of courts that have considered this issue and hold that an attorney does not owe a duty of care to a prospective will beneficiary to have the will executed promptly. Accordingly, we answer the certified question in the negative.

Remanded.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Conduct. These rules include a specific provision that addresses the potential conflict of interest created when an attorney is a beneficiary under a will.

testamentary gift
A gift made in a will.

Rule 1.8 (c) of the ABA Model Rules of Professional Conduct prohibits an attorney from soliciting gifts, including **testamentary gifts**, from a client and from drafting an instrument, such as a will, in which the attorney receives a gift. Exceptions are allowed in a situation where the attorney is related to the client.

The attorney is not the only one who needs to be concerned with this possible conflict of interest. A failure of paralegals to follow this rule could expose their employer to disciplinary action by the state bar association and a possible lawsuit.

Sometimes it is difficult to determine who is the client in wills, trusts, and estates cases. *Sisson v. Jankowski* is an example of this problem.

Falsely Attesting to an Affidavit, Such as When a Paralegal Is a Notary

Paralegals, who may also be notary publics, are often asked to witness or attest to the execution of a will or other legal document prepared in the law firm. They should only do so if they are actually present at the time the document is signed. In the hectic routine of many law offices, it is all too tempting to ask someone to notarize a document that the person did not see signed. This can become an issue if the will is contested and the paralegal is called to testify as to what occurred.

Improper Handling of Client Funds and Assets

During the course of representing a client or the probating of an estate, a law firm will often be in possession of funds or other property of the client or the estate. Commingling of the client's funds with those of the law office is improper and must be avoided at all cost. Other items being held for the client must be properly inventoried and stored in an appropriate manner.

documents to Ohio residents. TEP, which was owned by Henry W. Abts III, associated with companies and individuals, known as advisors, who marketed and sold its products. Most of the advisors were not lawyers, and none of the advisors in these cases were licensed attorneys in Ohio. Advisors were under contract with TEP, were trained by TEP, and were required to adhere to a sales and marketing manual that instructed them how best to market TEP products. Typically, a transaction began with advisors developing prospects through telemarketing, followed by a sales presentation in the prospective customer's home. The advisors used TEP products to assist the prospective customer in determining what type of living trust or other estate plan was appropriate. When a prospect agreed to purchase a TEP living trust or estate plan, the advisor procured a signed purchase agreement from the customer and two checks. One check was payable to the advisor; the other was payable to the review attorney, who had been selected by the advisor from a list provided by TEP. The review attorney, who was typically under contract with TEP, would enter the customer's information into a TEP computer software program, usually without having had contact with the customer. TEP would then prepare the requested documents and return them directly to the advisor, who would deliver the documents to the customer.

Did the acts of the advisors and TEP constitute the unauthorized practice of law? Did it matter that the trusts were actually prepared by an attorney? Why was it relevant that the attorney used the TEO software? Why was it relevant that the attorney did not have contact with the customer? Research the laws of your state as needed to discuss these questions. See *Cleveland Bar Assn. v. Sharp Estate Serv., Inc.,* 107 Ohio St.3d 219, 837 N.E.2d 1183 (Ohio, 2005).

Portfolio Assignment

Research the law relating to undue influence and conflict of interest as they relate to the law of wills, trusts, and estates. Write a one-page summary of the results of the research.

Possible Web resources that can be used for research purposes include:

Find Law: www.findlaw.com

Stetson College of Law: www.law.stetson.edu/law/default.htm

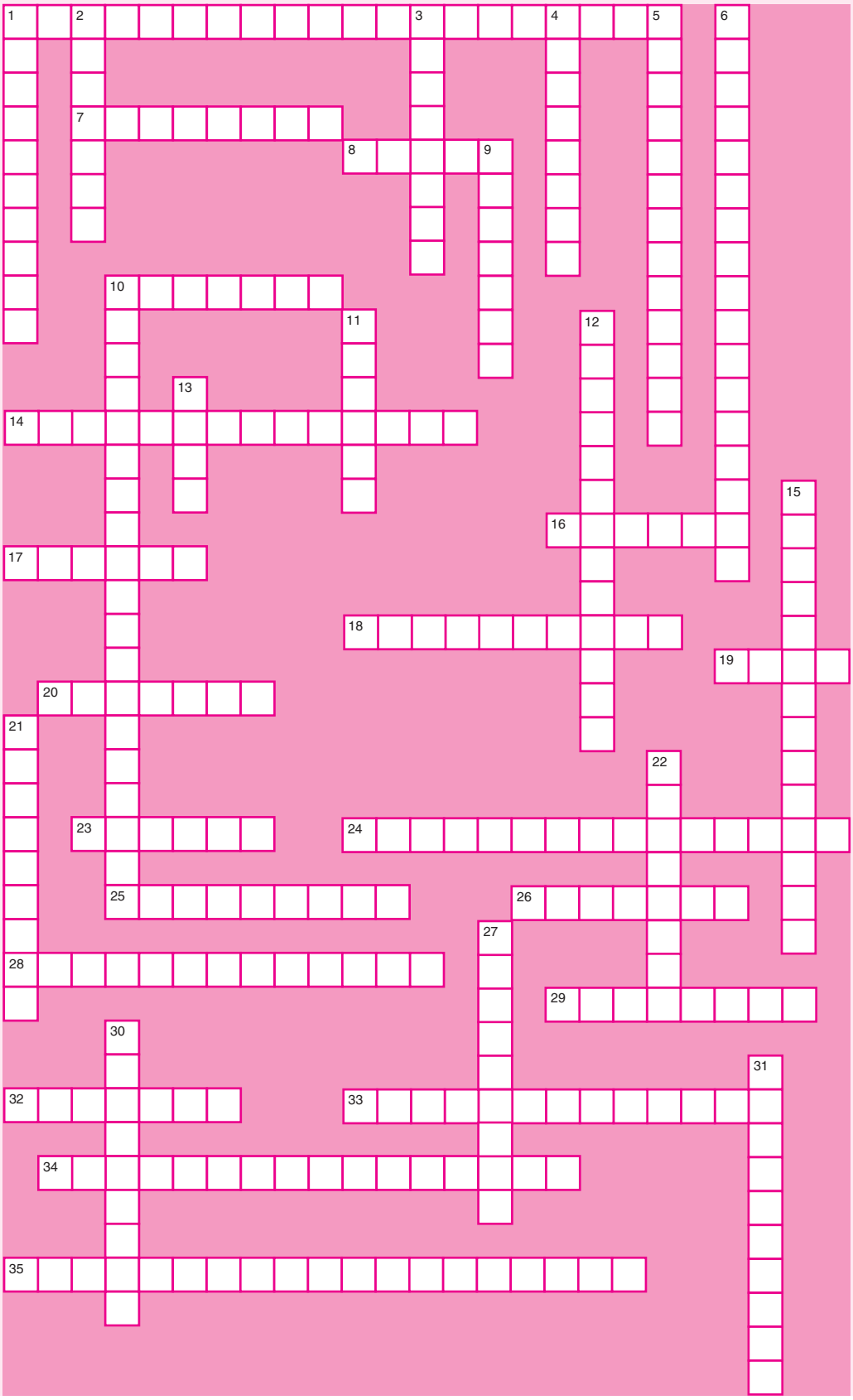
LexisOne: www.lexisone.com/caselaw/freecaselaw?action=FCLDisplayCaseSearchForm

(This site provides free limited access to the Lexis computer databases with registration.)

Abraham Nievod, Ph.D., J.D., "Undue Influence in Contract and Probate Law": www.csj.org/infoserv_articles/nievod_abraham_undue_influence_law.htm

Important note: Web sites are notorious for their impermanence, so you may have to use reliable search engines to aid in locating information on this topic.

Vocabulary Builders



Vocabulary Builders

ACROSS

1. The phrase traditionally used as the written declaration of intended distribution of both real and personal property upon the person's death
7. A man who makes a will
8. A process by which ownership is split into legal and equitable title. The trustee of the trust has the legal title to the property of the trust but holds it for the beneficiary, who owns the equitable title
10. The court process of determining will validity, settling estate debts, and distributing assets
14. Using a close personal or fiduciary relationship to one's advantage to gain assent to terms that the party otherwise would not have agreed to
16. Assets and liabilities of decedent at the time of his or her death
17. Gift made in a will
18. A male personal representative appointed by the court to administer the estate when there is no will
19. A civil wrongful act, committed against a person or property, either international or negligent
20. One of two or more people who operate a business as a partnership
23. Traditionally referred to a gift of money made under a will
24. A family made up of one or more parents having been previously married and having children of that previous marriage. Sometimes referred to as a step-family
25. A woman who makes a will
26. A provision that amends or modifies an existing will
28. Donation of organs or tissues to another person
29. The deceased
32. The state of having died with a valid will
33. The statutory right of the surviving spouse to elect to take a share of the deceased spouse's estate rather than taking what was provided for by the deceased spouse's will
34. Gift made in a will
35. The ability to understand and have the legal capacity to make a will

DOWN

1. A document that expresses a person's wish to be allowed to die without being kept alive by artificial means. It is not a will, but rather an expression of a person's desires
2. The person who creates a trust
3. A male administer of the estate
4. A government program that provides medical and long-term care to those who cannot afford it and is funded by a partnership between the federal and state governments
5. A method of keeping track of important dates and filing of documents
6. Documents that express the maker's desires as to medical care in the event that he or she is unable to do so. Also referred to as a health care surrogate or durable medical power of attorney
9. The person who oversees the assets of a trust
10. An agreement made by parties before marriage that controls certain aspects of the relationship, such as management and ownership of property
11. Unreasonable and unscrupulous manipulation of a person to force him or her to agree to terms of an agreement that he or she would otherwise not agree to
12. A female personal representative appointed by the court to administer the estate when there is no will
13. A document representing the formal declaration of a person's wishes for the manner and distribution of his or her property upon death
15. A person who individually owns all assets and is personally responsible for all liabilities of a business operated as a sole proprietorship
21. Validation of a will.
22. The place where a person maintains a physical residence with the intent to permanently remain in that place; citizenship; the permanent home of the party
27. A female administer of the estate
30. The state of having died without a valid will
31. Heirs that would inherit if the decedent had died intestate.