

Wills



Key principle #1: intestate succession

- **Bar Exam Essay Tip:** Intestate succession is applicable when the decedent dies without a will, or if the will is invalid in whole or in part, or does not make a total distribution. This frequently comes up with omitted child and omitted spouse problems.
- **Share for surviving spouse**
 - **Community property:** If the decedent is married, the spouse will receive one-half of community property and one-half of quasi-community property acquired by the decedent. (The spouse had already owned his or her one-half of the community property.) Thus, this means that the spouse will receive *all of the community property* and *quasi-community property*. (J2022, J2021)
 - **Separate property** (J2021, F2018, F2017, F2007, F2006, J2004)
 - Spouse gets *everything* if the decedent *did not leave issue, parent, brother, sister, or issue of a deceased brother or sister*.
 - Spouse gets *one-half* of the separate property if the decedent is survived by one lineal descendant or by a parent or issue of a parent.
 - Spouse gets *one-third* of the decedent's separate property if the decedent is survived by more than one lineal descendant.
- **Share for children**
 - In California, if there is no surviving spouse, the entire estate passes to the decedent's surviving issue. If the issue are of the same generation, they take equally (per capita). If they are not of the same generation, they take per capita with representation. (J2012, F2012, F2010, F2007)
 - Note also that adopted children are children for purposes of intestate succession. (F2011, J2004)

Note: Wills questions virtually always test California law.



Key principle #2: execution of valid will

- **Prerequisite to executing will: Mental capacity.** In order to execute a will, a testator must have mental capacity. A testator meets this requirement if the testator knows the *nature and extent* of his property; the *persons* who are related to him, such as spouses and parents, and those whose interests are affected by the will; and the *nature of the testamentary act*. (F2019, F2015, F2011)
- **Execution** (J2021, F2019, F2017, F2015, J2013, F2011, J2006, J2004, F2003)
 - In California, the will must be in *writing, signed* by the testator in the *joint presence* of two witnesses who *understand* that the instrument they sign is the testator's will. The testator also must be *18 years old or older* and *intend* that the document is his will.
 - **Interested witnesses:** In California, a will is valid if it is signed by an interested witness. However, unless there are two disinterested witnesses present, there is a *presumption of duress, menace, fraud, or undue influence* if the will makes a gift to the interested witness. If the presumption is not rebutted, then the witness may not take more than he would have received had the testator died intestate. (J2022, J2013, J2004)
 - **Holographic wills:** a will is recognized as a holographic will if it is *signed* and (according to many states, including California) the *material portions* are in the *testator's handwriting*. (J2022, F2017, J2013, J2012, F2011, J2008, F2007, J2006, F2003)
 - **Harmless error:** California law states that a will may still be admitted to probate if the proponent establishes by *clear and convincing evidence* that the testator intended the document to be her will. (J2022, J2021, J2006) **Bar Exam Essay Tip:** if you see a will that does not follow the formal requirements for executing a will under California law but may be valid as a holographic will or otherwise valid, first always discuss the formal requirements for will creation before discussing the requirements for a holographic will or the harmless-error rule.
- **Incorporation by reference:** A writing that is not valid as a will may be incorporated by reference into a will if the *will manifests an intent* to incorporate the writing and the writing is *identified with reasonable certainty*. This writing *must exist* at the time the will is *executed*. (Note that California also allows a testator to make a tangible list of personal property which may be prepared before or after the execution of the will.) (J2013, J2012)

Key principle #3: codicils

- A codicil is a supplement to a will that modifies it, adds to it, explains it, or revokes it. A codicil must generally be executed in the same manner as a will. A codicil is said to republish any will that it refers to. When republication takes place, that republished will is deemed to be executed on the same day as the codicil. In California, a codicil can also remedy any issues with the initial will (such as an interested witness problem) as it can be treated as the will and incorporate by reference the will that was not properly executed. (F2019, J2013, J2012, F2011, J2008, F2007, J2003)
- Further, to the extent that the codicil is inconsistent with the will, the codicil controls.

Key principle #4: revocation

- **Revocation can take place by physical act or operation of law.** A will may be revoked by the **execution of a new will** or by some other **physical act**, such as cancellation or other writings on the will. This must be done with the **intent** to revoke the will. The **testator** or someone acting at the testator's direction and in the testator's **presence** and by the testator's **direction** may revoke the will. Revocation may also occur by operation of law due to changed circumstances such as divorce or annulment of a marriage (F2017, F2015, J2012, F2011, J2008, F2007, F2006 J2003, F2003)
- **Revival:** if a testator wrote two wills and revokes the second one, revocation of the second will does not revive the earlier will unless it is evident that the testator intended the previous will to take effect as executed. (J2012, J2003)

Key principle #5: antilapse statute

- All states have antilapse statutes. Under California law, if a beneficiary dies before the testator and was "**kindred of**" (**related by blood to**) the testator within a certain degree of relationship and **had issue** who survived the testator, the gift to the deceased beneficiary is **saved** from lapse and the beneficiary's issue will take in lieu of the deceased beneficiary. In California, the antilapse statute applies if the gift is to the kindred of the testator's spouse or domestic partner, but it will not save a gift to a spouse. (F2018, F2011, J2003)

Key principle #6: share of afterborn or pretermitted child (omitted child)

- **Definition:** A pretermitted child is one that is not named in the testamentary instrument because the child was not yet born at the time the will or testamentary instrument was written. In California, this also covers a child who the testator believed was dead or if the testator was unaware of the child's birth. (J2022, J2021, F2018, F2012, F2010, F2006)
- **If the testator had no children when the will was executed,** the child is generally entitled to whatever share of the testator's estate the child would have received if the testator had died intestate. Exceptions to this are as follows:
 - **All assets to other parent:** an after-born child is denied a share of the decedent's estate if the decedent gave all or substantially all of his estate to the child's other parent. (F2007, J2004)
 - **Intentionally omitted child:** if the omission was intentional, the child is not treated as an omitted child. (J2012, F2011, F2008, J2004)
 - **Other assets given to child:** if the testator provided for the child by transfers outside of the will with the intent that it would be in place of a gift given by will, the child will not take a portion of the decedent's estate.

Key principle #7: ademption

- If **specifically devised** property (i.e., property that is specifically described in the will) is not in the testator's estate when the testator dies, the bequest **adeems**—that is, the gift fails. In California, the testator's intent is critical in determining whether a gift adeems, and extrinsic evidence is admissible. Ademption is **not** favored in California, and generally the beneficiary will recover replacement property if the original gift is no longer in the estate. (F2017, J2008, J2003)