CHAPTER 3

A Bundle of Rights

CHAPTER OUTLINE

§ 3.1 A Bundle of Rights
§ 3.2 Probate Property
§ 3.3 Nonprobate Property

CHAPTER OUTCOMES

- Describe the “bundle of rights” concept of property.
- Define probate property and explain its importance in the estate settlement process.
- Distinguish between real property and personal property.
- Describe the different kinds of nonprobate property, and explain its importance in the estate settlement process.

JOB COMPETENCIES

- Be able to discuss with clients the difference between probate and nonprobate property.
- Be able to differentiate between probate property and nonprobate property when completing an estate inventory and an estate tax return.
A DAY AT THE OFFICE . . .

The phone rang at the desk of Maude Sanders, a paralegal in the office of Cummings & Goyngs. “Good morning,” Maude answered.

“Good morning, Maude.” The receptionist was on the line. “Ms. Ryan is here. She wants to see an attorney, and there’s no one here. Can you talk to her?”

“Sure. I’ll come right out.” Maude went out to the waiting room, greeted Ms. Ryan, introduced herself as a paralegal, and ushered Ms. Ryan into her office.

“My brother passed away last week, and his wife wants everything that was in my brother’s safe-deposit box,” Ms. Ryan sputtered angrily.

“Oh, I’m sorry to hear that,” Maude replied in a comforting tone. “Were they married long?”

“Three weeks,” Ms. Ryan replied. “My brother was a bachelor for 75 years. He died on his honeymoon at a campground on St. John in the Virgin Islands.”

“How terrible!”

“His wife’s trying to get everything he owned, and it was all joint with me,” Ms. Ryan continued. “The house, all the bank books, the stock certificates—they were all in my name and his.”

“Do you have a key to the safe-deposit box?” Maude asked.

“No. That’s the only thing that was not joint. He didn’t want me to know what was in that. He always said it was personal.”

“Did he have any life insurance?”

“Yes. But my mother was the beneficiary of the policy, and she died five years ago.”

“Did he leave a will?” Maude inquired.

“Yes,” Ms. Ryan answered, “I have his will, but I know he didn’t know what he was doing when he wrote it. He made it out just before they went on the honeymoon, and he left everything to her. I have a good mind to tear it up.”

“You had better not do that,” Maude counseled. “I’ll make an appointment for you to see Attorney Cummings as soon as possible. Are you free at 4:00 this afternoon?”

Queries:

1. Who will have access to the safe-deposit box?
2. Who will be the beneficiary of the life insurance policy?
3. Are the house, the bank books, and the stock certificates part of the decedent’s estate?
4. Why did Maude counsel Ms. Ryan against tearing up the will?
§ 3.1 A BUNDLE OF RIGHTS

Paralegals need a basic understanding of property in its various forms—bank accounts, stock certificates, life insurance, and so on—because property is the basic element underlying wills, estates, and trusts. Without property, there would be nothing to give anyone in a will, nothing to plan about, and nothing to put in a trust.

Property is generally considered anything that people own, such as houses, cars, furniture, bank accounts, stocks, bonds, and money. Indeed, property is sometimes defined as everything that is the subject of ownership. In a legal sense, however, property is not considered to be the item itself. More correctly, it consists of the various rights or interests that people have in the item. Thus, property, in the eyes of the law, is considered to be a “bundle of rights.”

The bundle of rights can be considerable and can be spread among various people. For example, many people may have rights to a house and the land that goes with it. The owner (there is often more than one) has the exclusive right to possess the property unless it is leased to someone else, along with the right to bring a trespass action against a trespasser. If someone else has a life estate in the property (discussed later), that person has the exclusive right to possession for his lifetime, and a third person may have a future interest—the right to possession when the life tenant dies. The bank that holds a mortgage on the property has the right to prevent the person in possession from committing waste, that is, damaging the property. The bank also has the right to take the property or sell it if the owner does not pay the mortgage. An attaching creditor who wins a suit against a property owner may have the right to have the property sold by a sheriff in order to obtain the amount of the judgment. Cities and towns have similar rights to sell private property to satisfy liens for overdue taxes.

If the property is leased to a tenant, the tenant has the exclusive right to possession as well as the sole right to bring a trespass action against a trespasser—even against the landlord who owns the property. However, the landlord regains the right to possession once the lease terminates. The holder of an easement over the property has the right to use the property according to the terms of the easement. The holder of a license given by the owner has the right to do whatever the license allows, such as the right to place an advertising billboard on the property. The holder of a profit à prendre has the right to go on the property and extract minerals or timber.

Traditionally, things such as wild animals in their natural state, air, running water, and sunlight could not be the subject of ownership and were not considered property, because no one had the exclusive right to possess them. In modern times, however, with increased water shortages and the expanded use of solar energy, state laws give certain property rights even in these areas.
These varied rights that people may have make up the bundle of rights that is usually referred to as real property. Similar rights relating to personal property are also applicable. When people die owning such rights, the rights pass to others according to the law that you are about to study.

§ 3.2 PROBATE PROPERTY

When an estate is settled, the probate court deals only with what is commonly referred to as probate property or the probate estate. This is real and personal property that was owned by the decedent either solely or with others as a tenant in common (discussed later). Title to real property owned by a decedent vests in (accrues to) the decedent’s heirs immediately upon death, but is subject to divestiture (being taken away) to pay debts of the estate. The probate process is necessary to prove the heir’s title. As opposed to real property, title to personal property owned by a decedent passes to the personal representative (executor or administrator) of the decedent’s estate; the probate process is necessary to have the executor or administrator appointed and to safeguard the rights of all interested parties.

Real Property

Real property is the ground and anything permanently affixed to it. Land, buildings on the land, trees and perennial plants growing on the land, as well as the airspace above the land, are all considered to be real property. People can own real property either solely or concurrently with others as tenants in common, joint tenants, or, in some states, as tenants by the entirety. To determine the type of ownership that a decedent had in real property, it is necessary to examine the decedent’s deed to the property. If the decedent inherited the property, it is necessary to examine the probate court records to determine the decedent’s extent of ownership.

Real property that was owned severally, that is, apart from others or solely by the decedent, is part of the probate estate and must be included in the list of probate assets. Similarly, the decedent’s interest in real property that was owned with others as a tenant in common is also part of the probate estate. Tenants in common are two or more persons who own an undivided interest in property in such a way that each owner’s interest passes to his heirs upon death rather than to the surviving co-owners. Thus, if a decedent and one other person owned a parcel of real property as tenants in common, the decedent’s one-half undivided interest in the property would be included among the assets of the decedent’s estate. If, instead, a decedent and five other people owned a parcel of real property as tenants in common, the decedent’s one-sixth undivided interest in the property would be included among the assets of the decedent’s estate.
People become tenants in common when they are deeded or willed property in that manner (see Exhibit 3–1) or when they inherit property under the law of intestate succession.

As the Evans case illustrates below, when co-owners of real property are tenants in common, they have unity of possession. This means that each cotenant is entitled to the possession of the entire premises rather than to a part of it.

**Personal Property**

**Personal property** is everything that can be owned that is not real property. Coins and paper currency, for example, are personal property. **Tangible property** is property that has substance and can be touched. Motor vehicles, household furniture, jewelry, silverware, china, crystal, books, televisions, personal effects, tools, and coin and stamp collections are examples of tangible personal property that are commonly part of decedents’ estates. Certificates of title must usually be examined to determine the decedent’s title to automobiles, boats, and motor homes.

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CASE STUDY  
**Evans v. Covington**

795 S.W.2d 806 (TX)

**FACTS:** When J. R. Scott died, his surviving spouse inherited a one-half undivided interest and his children inherited a one-half undivided interest in his real property. James Evans purchased the children’s interest, took possession of the property, enclosed it with a chain-link fence, and used it for many years. Scott’s surviving spouse conveyed her interest in the property to Roberta Covington. Evans claims that Covington was not a tenant in common with him because she did not use the property during the years that he possessed it.

**LEGAL ISSUE:** Does a person who purchases several cotenants’ interests in property become a tenant in common with the remaining cotenant?

**COURT DECISION:** Yes.

**REASON:** When a party claims title under a deed that conveys an interest in an existing tenancy relationship, he becomes a tenant in common with the other co-owners. The surviving spouse and children became co-owners of the property when Mr. Scott died. Thus, when Evans purchased the undivided interest of the children, he entered into an existing tenancy, first with Mrs. Scott and later with Roberta Covington. Each cotenant has a right to enter upon the common estate and a corollary right to possess and use the entire estate.
**Quitclaim Deed**

I, ELIZABETH L. HOLLAND, surviving spouse of EZRA S. HOLLAND, deceased, of Salem, Essex County, Massachusetts, for consideration paid, and in full consideration of $118,300.00 grant to PEARL M. KLINE and WALTER P. MARINO, both of 34 Gallows Hill Rd., Salem, Massachusetts, as tenants in common, with QUITCLAIM COVENANTS

the land with the buildings and improvements thereon, located at 34 Gallows Hill Rd., Salem, Massachusetts, described as follows:

That certain parcel of land on Gallows Hill Rd. in said Salem and shown as Lot One Hundred Seventy-Eight (178) on a plan of land entitled "Plan of Land of Gallows Hill, Salem, Mass.,," dated December, 1913, and recorded with Essex South District Registry of Deeds in Plan Book 21, Plan 42; said Lot 178 being more fully described as follows:

Bounded

SOUTHWESTERLY and SOUTHERLY on a curved line by said Gallows Hill Rd., ninety-one (91) feet;

NORTHWESTERLY by Lot 177 as shown on said plan, seventy-seven and 20/100 (77.20) feet;

NORTHEASTERLY by Lot 186 as shown on said plan, twenty-four and 83/100 (24.83) feet; and

EASTERLY by Lot 179 as shown on said plan, seventy-two and 15/100 (72.15) feet.

Being the same premises conveyed to my late husband and me by my deed dated December 9, 1981 and recorded with Essex South District Registry of Deeds in Book 7763, page 129.

Witness my hands and seal this 3rd day of January, 2002.

Elizabeth L. Holland

**Commonwealth of Massachusetts**

Essex, ss. January 3, 2002

Then personally appeared the above-named Elizabeth L. Holland and acknowledged the foregoing instrument to be her free act and deed before me.

______________________________
Notary Public
Intangible property is property that is not susceptible to the senses and cannot be touched. Such things as stocks, bonds, negotiable instruments (checks, drafts, and promissory notes), patents, copyrights, and trademarks are examples of intangible personal property. They are evidence of the right to property but not the property itself. For example, a stock certificate is evidence of one’s ownership in a corporation, and a promissory note is evidence of the right to receive money from a debtor. It is interesting to note that a lease of real property is considered to be an item of intangible personal property.

The legal name for an item of intangible personal property is a chose in action. This is a personal right not reduced to possession but recoverable by a suit at law. Other examples of choses in action that are sometimes owned by estates include bank accounts, stocks, copyrights, "goodwill" of a business, etc.

**Intangible property**

- Property that is really a right, rather than a physical object; for example, bank accounts, stocks, copyrights, “goodwill” of a business, etc.

**chose in action**

- A right to recover a debt or to get damages that can be enforced in court. These words also apply to the thing itself that is being sued on; for example, an accident, a contract, stocks, etc.

**SIDEBAR**

Pearl M. Kline and Walter P. Marino each own a one-half undivided interest in the property as tenants in common. If either one dies, his or her share passes to his or her heirs rather than to the surviving co-owner.

**THE DEATH OF A PRINCESS**

DIANA PRINCESS OF WALES

The will of Diana, Princess of Wales (1961–1997), who died following a tragic car accident, illustrates how little the United States has strayed from its English roots in the drafting of wills. The exordium clause (opening paragraph) reads like a will drawn in the United States:

I DIANA PRINCESS OF WALES of Kensington Palace London W8 HEREBY REVOKE all former Wills and testamentary dispositions made by me AND DECLARE this to be my last Will which I made this First day of June One thousand nine hundred and ninety three.

In the same way, the testimonium clause reads:

IN WITNESS whereof I have hereunto set my hand the day and year first above written.

What differs in Princess Diana’s will is the common use of the word chattels. Present-day lawyers in the United States have replaced that term with such terms as personal property and goods.
are lawsuits that survive death and that were initially brought by the decedent; rights to collect money due for debts or damages; royalty rights; and the proceeds of life insurance policies and pension benefits when the decedent’s estate is named as the beneficiary. Documents such as stock certificates, bond certificates, promissory notes, bank books, insurance policies, and written contracts may be used to prove title to intangible personal property.

§ 3.3 NONPROBATE PROPERTY

Even though all estates need to be entered into probate, not all things that people own are part of their estate. Such nonprobate property includes jointly owned property, transfer-on-death (TOD) accounts, community property, life insurance with named beneficiaries, money in Totten trust accounts (discussed

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**FROM THE DETAILED WILL OF LILLIAN HELLMAN**

In her will, Lillian Hellman, one of the most influential playwrights of the twentieth century, reveals her characteristic attention to detail in the precise descriptions of the items designated for her friends. The document reads like an inventory of personal property.

... to MIKE NICHOLS, the Toulouse Lautrec poster in the hall of my New York apartment ...

... to MAX PALEVSKY, the Spanish table presently in the study of my New York apartment ... the framed Russian altar cloth presently over the fireplace in the living room, given to me by Pudovkin, the movie director, as it was executed by a member of his family in 1796 ... and the two chairs against the wall near the sofa in the living room of my New York apartment, made by unknown cabinet makers in Bohemia or possibly France and exchanged by these amateurs one to the other in the early nineteenth century ...

... to ROBERT POIRIER ... the three-step library ladder in the study of my New York apartment; the three (3) Russian china doves, the French secretary and two electrified brass lamps with tulip bulbs in the living room of my New York apartment; and the rare 18th century Biblio bookcase in the bedroom of my New York apartment ...

... to HOWARD BAY, the Forain drawing and the wooden birdcage hanging from the ceiling in the living room of my New York apartment ...

... to WILLIAM ABRAHAMS, the box in the guest bathroom of my New York apartment that has the little foxes on it ...
in Chapter 9), property held in a living trust, pension plan distributions, and individual retirement accounts (IRAs) with named beneficiaries. Although these items pass outside of probate directly to the surviving joint owner or beneficiary, they are part of the decedent’s gross estate for estate tax purposes.

As part of their work, paralegals often assist the attorney in gathering the information needed to settle an estate and to complete tax returns. A detailed list of nonprobate property, together with its value, must be obtained by the personal representative of the estate to determine whether the estate is large enough that an estate tax return must be filed. The varied tasks that the paralegal may perform when assisting the personal representative are discussed in Chapter 11.

### Jointly Owned Property

Real property that was owned by a decedent and another as joint tenants is not part of the decedent’s probate estate. Joint property remains the property of the surviving joint owner or owners when one of the owners dies (see Exhibit 3–2). **Joint tenants** are two or more persons holding one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. This form of ownership is sometimes referred to as joint tenancy with the right of survivorship. A similar form of ownership, but which can be held only by a husband and wife, is a tenancy by the entirety. **Tenants by the entirety** are a husband and wife who hold title as joint tenants, modified by the common law doctrine that gives the husband the exclusive rights of possession and profits with protection against being taken by creditors and alienation by one spouse alone. This form of ownership is popular because of its protection against attachment by creditors, and some states have modernized the law to give husbands and wives equal rights to possession and profits in property owned as tenants by the entirety (see Exhibit 3–3).

Under the law of some states, such as Massachusetts, ownership of real property by a husband and wife as joint tenants or as tenants by the entirety automatically changes to ownership as tenants in common if the couple is divorced. Thus, after a divorce in Massachusetts, if one marriage partner dies before changing the title to the property, the decedent’s interest in the property automatically passes to his heirs rather than to the former spouse. Other states do not follow this rule. In Montana, for example, a divorce does not change a joint tenancy into a tenancy in common.

Another form of ownership that causes property to pass outside of probate is tenancy in partnership. **Tenancy in partnership** is a form of co-ownership of property belonging to members of a partnership. Like a joint tenancy, when one partner dies, the surviving partners, rather than the estate of the decedent, own the partnership property.
Bank accounts, stocks, bonds, and automobiles are commonly owned by two or more people as joint tenants. Unless it can be shown that a bank account was opened in joint names only for convenience purposes, the account will pass to the surviving depositor when one depositor dies, and will not be part of the decedent’s estate. The Parker case illustrates this point.

EXHIBIT 3–2 Affidavit—Death of a Joint Tenant

Bank accounts, stocks, bonds, and automobiles are commonly owned by two or more people as joint tenants. Unless it can be shown that a bank account was opened in joint names only for convenience purposes, the account will pass to the surviving depositor when one depositor dies, and will not be part of the decedent’s estate. The Parker case illustrates this point.
Some states have statutes providing that money in a joint bank account belongs to the joint depositor only when both depositors have signed an agreement to that effect. For example, Texas Probate Code ch. 11, § 439(a), provides:

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent if, by a written agreement signed by the party who dies, the interest of such deceased party is made to survive to the surviving party or parties. A survivorship agreement will not be inferred from the mere fact that the account is a joint account.

Sometimes a question arises as to whether the contents of a safe-deposit box held in joint names belong to the surviving joint owner when one owner dies. Some courts hold that unless there is an express written agreement saying that the contents of the box belong to the joint owner, the contents of the box belong to the estate of the decedent. The Kulbeth case provides an example of such an agreement.

Frequently, husbands and wives put all of their property in joint names except an automobile, and the estate of the first spouse to die must be probated for the sole purpose of clearing the title to the automobile. Massachusetts has
addressed the issue by enacting Gen. Laws ch. 90D, § 15A, which treats a solely owned automobile as joint property of the husband and wife, avoiding the need for probate:

Upon the death of a married resident owner of a motor vehicle registered as a pleasure vehicle in the Commonwealth, and unless otherwise provided in a will, said motor vehicle, if used for such purposes shall be deemed to have been jointly held property with right of survivorship and the interest of said decedent shall pass to the surviving spouse ... .

Pay-on-Death Accounts

A pay-on-death (POD) account, also known as a Totten trust (see Chapter 9), is a savings account in the name of the depositor as trustee for another person called a beneficiary. The depositor may withdraw money from the account at any time during the depositor's lifetime. When the depositor dies, however, the money in the account belongs to the beneficiary. If the beneficiary dies before the depositor, the trust terminates and the money belongs to the depositor. Totten trust accounts are not part of the depositor's estate. Instead, they pass directly to the beneficiary, not to the estate of the depositor, unless the trust was revoked by the depositor prior to the depositor's death.

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<thead>
<tr>
<th>CASE STUDY</th>
<th>Parker v. Peavey</th>
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<tbody>
<tr>
<td>FACTS:</td>
<td>In addition to establishing certificates of deposit in his own name, Bennie Parker established one in the amount of $86,887 jointly with his wife of one year, Sallie Parker. When he died two years later, his first wife, to whom he had been married 49 years, and his two adult children (who were named in his will) claimed that the joint certificate of deposit was part of his estate.</td>
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<tr>
<td>LEGAL ISSUE:</td>
<td>Does a certificate of deposit that is in the name of two people jointly belong to the estate of the first to die?</td>
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<tr>
<td>COURT DECISION:</td>
<td>No.</td>
</tr>
<tr>
<td>REASON:</td>
<td>Sums remaining on deposit at the death of a party of a joint account belong to the surviving party as against the estate of the decedent, unless there is clear and convincing evidence of a different intention at the time the account is created. This right of survivorship vests at the death of a party to a joint account.</td>
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- **pay-on-death (pod) account**
  A trust created by putting money into a bank account in your name as trustee for another person. You can take it out when you want, but if you do not take it out before you die, it becomes the property of that other person.

- **totten trust**
  A savings account in the name of the depositor as trustee for another person called a beneficiary.
The Uniform Nonprobate Transfer on Death Act is a law that addresses many of the problems that arise when people own bank accounts, securities, and other items in multiple names. The entire act is actually Article VI of the Uniform Probate Code (see Appendix E). Part 2 of the act deals with multiple-person bank accounts; Part 3 covers transfers of securities (stocks and bonds) on death.

CASE STUDY  
Kulbeth v. Purdom  
805 S.W.2d 622 (AR)

FACTS: Ivan C. Wright leased a safe-deposit box jointly with Pearl Purdom. When Wright died, the box was opened and found to contain $266,150 in cash. The special administrator of Wright’s estate claimed the money as an asset of the estate, pointing out that Wright’s will bequeathed $100,000 to Purdom. Wright and Purdom had signed the following joint-tenancy agreement when they initially obtained the safe-deposit box:

In addition to agreeing to the foregoing provisions of safe-deposit box lease which are hereby made a part of this paragraph, the undersigned agree that each, or either of them is joint owner of the present and future contents of said box and said Bank is hereby authorized to permit access to said box by either of the undersigned and that in the event of the death of either of the undersigned the survivor shall have the right to withdraw said contents and upon said withdrawal said Bank shall be automatically relieved of any further obligation or responsibility to the heirs, legatees, devisees or legal representatives of the deceased.

LEGAL ISSUE: Do the contents of a jointly owned safe-deposit box pass to the co-owner’s estate when a co-owner dies when an agreement has been signed by the co-owners that either may withdraw the box’s contents?

COURT DECISION: No.

REASON: The clause clearly and unequivocally denotes a joint-tenancy agreement with right of survivorship between the lessees, as it contains specific references to the joint ownership of the contents of the box and the right of withdrawal of the contents after the death of either party. The money in the safe-deposit box is not an asset of Wright’s estate; it belongs to the co-owner, Purdom.

Uniform Nonprobate Transfer on Death Act

The Uniform Nonprobate Transfer on Death Act is a law that addresses many of the problems that arise when people own bank accounts, securities, and other items in multiple names. The entire act is actually Article VI of the Uniform Probate Code (see Appendix E). Part 2 of the act deals with multiple-person bank accounts; Part 3 covers transfers of securities (stocks and bonds) on death.
Uniform Multiple-Person Accounts

Problems can arise when depositors own bank accounts jointly. This is because there can be a variety of reasons for placing another person’s name on an account. The depositor may wish to provide lifetime ownership to all joint owners, or to pass the money to others at death, or simply to allow others to use the account for convenience with no ownership interest. Determining which of these reasons apply to a particular account can lead to litigation when a depositor dies. Part 2 of the Uniform Nonprobate Transfer on Death Act addresses this problem by allowing depositors to establish multiple-person accounts that clearly state the rights of all parties in interest. The states of Alabama, Alaska, Arizona, Colorado, Florida, Montana, Nebraska, New Mexico, and North Dakota have adopted (with some variations) Part 2 of the Act.

Transfers of Securities on Death

Part 3 of the Uniform Nonprobate Transfer on Death Act allows owners of securities to register the title of their securities in transfer-on-death (TOD) form. When this is done, brokers and transfer agents can transfer securities directly to the designated transferees when the owner dies. In contrast with joint ownership, TOD ownership gives no rights to the transferee until the owner dies, leaving the owner in full control of the securities. Every state except Louisiana, Missouri, North Carolina, New York, Tennessee, and Texas has adopted Part 3 of the Act, some with slight modifications.

Community Property

A form of ownership by spouses, called community property, is used in nine states in the United States (see Exhibit 3–4). The primary historical source of our community property laws comes to us from Mexico, which, in turn, inherited the concept from Spain. Originally, the intent was to protect rich women from loosing all their assets if they had a wasteful husband. Community property is property (except a gift or inheritance) that is acquired by the personal efforts of either spouse during marriage and which, by law, belongs to both spouses equally. In community property states, a spouse can leave his half of the community property by will to whomever he chooses. Alaska is an opt-in community property state. That is, couples may choose community property ownership by executing a community property agreement or through a community property trust.
Example

Community Property

I declare that all of the property of my estate which is bequeathed and devised by this will is my one-half interest in the community property of myself and my _________ [husband or wife], _________ [name].

In some community property states, when a spouse dies intestate, all of the community property passes to the surviving spouse (see Exhibit 3–5). In such a situation, the surviving spouse retains his half-interest and inherits the deceased spouse’s half-interest, obtaining full title to the entire property. California law mandates an equal splitting of community property. In Texas, a divorce decree may call for an “equitable distribution” of the community property. States may treat community debts differently than community property. California, for example, requires an equal sharing of community property but requires an equitable sharing of community debt.

A number of factors are looked at by the courts in determining an equitable distribution of community property. First, if one spouse has considerably more nonmarital property than the other, the courts may give the spouse with lesser
property more marital property in order to leave both spouses with adequate resources. Next, courts may look at the earning powers of the spouses. If one has much greater earning power, then the spouse with the lesser earning power may get more property. Also, if one spouse wasted or dissipated assets during the marriage, then he may receive less community property. In addition, the age and health of the parties may impact community property distributions. Another factor is the tax consequence of the division. Courts would like to minimize the tax burdens of both parties, if possible. Lastly, of course, premarital agreements can predetermine the division of community property assets, such that the courts need not deal with the issue. In truth, courts are able to consider any and all factors to determine an equitable distribution.

The following are not considered to be community property: (1) property owned by either spouse before marriage; (2) property either spouse received as a gift or inherited during marriage; and (3) income, such as rents or interest, earned from the separate property of either spouse. If they wish to do so, spouses can agree to treat separately owned property as community property or vice versa. Determining what is or is not community property is a constant source of dispute in community property states. Here is an example of just such a dispute.

### CASE STUDY: In the Matter of the Marriage of Joyner

196 S.W.3d 883 (Tx)

**FACTS:** On May 29, 2001, Belinda Joyner filed for divorce from her husband, Thomas Joyner. The couple signed a mediated settlement agreement on April 7, 2003, which partitioned most of their property. On July 2, 2003, the couple had a final hearing in court to argue ownership of those few items in dispute. On July 3, 2003, Thomas purchased a winning lottery ticket worth $2,080,000. On June 28, 2004, the court signed their divorce decree.

**LEGAL ISSUE:** Was the lottery ticket purchased on July 3, 2003, community property?

**COURT DECISION:** No.

**REASONS:** Even though the court did not make a final determination on some small property items, the appeals court viewed the decision as to whether the trial court had granted the divorce as having been made. Although the trial court never specifically used the words “rendered the divorce” in open court, the trial judge did state, on July 2, 2003, that the divorce was granted. In addition, he referred to Belinda as Thomas’s “former wife.” The appeals court felt the trial court had clearly and unambiguously rendered a decision to grant the divorce on July 2, 2003, and that the signed divorce decree simply memorialized that fact. Therefore, the winning lottery ticket was not community property.
EXHIBIT 3–5a This Spousal Property Petition was filed by Bo Derek in the settlement of the estate of her husband, John Derek.
EXHIBIT 3–5b  This Spousal Property Petition was filed by Bo Derek in the settlement of the estate of her husband, John Derek
FACTS TO SUPPORT PROPERTY PASSING TO OR BEING CONFIRMED TO SURVIVING SPOUSE

Decedent, JOHN DEREK, and surviving spouse, BO DEREK, were married on June 10, 1976 in Las Vegas, Nevada and since that date were continuously married to each other until the death of JOHN DEREK on May 22, 1998. At the time of marriage neither party owned any assets of any value and neither inherited assets thereafter from any person. All assets owned by the parties were acquired from their earnings while residing in the State of California and were the community property of the parties.

No agreement defining the rights of the parties in assets, marital or otherwise, was entered into by the parties, either before or after their marriage.

Further, each interest in the properties listed in Attachments 6a and 6b were held in the names of JOHN DEREK and BO DEREK, husband and wife, as community property.

Therefore surviving spouse’s interest in each of said properties should be confirmed to her, and decedent’s interest in each of said properties should pass to surviving spouse.

PROPERTY PASSING TO SURVIVING SPOUSE

Decedent’s community property interest in assets as follows:

1. Undivided one-half interest in real property located in the County of Santa Barbara, State of California and described as follows:

   PARCEL ONE:
   Lot 1 of Tract No. 11572 in the County of Santa Barbara, State of California, as shown on map filed in Book 90, Pages 39 to 41, inclusive, in the Office of the County Recorder of said County.

   PARCEL TWO:

   Excepting therefrom those portions lying within the boundaries of Parcel One above.

   [A.P.N. 135-320-71]

2. Undivided one-half interest in real property located in the County of Santa Barbara, State of California and described as follows:

   PARCEL ONE:
   Parcel B of Parcel Map No. 12422, in the County of Santa Barbara, State of California, as per map recorded in Book 18, Pages 97 and 98 of Parcel Maps in the Office of the County Recorder of said County.

   PARCEL TWO:

   Excepting therefrom those portions lying within the boundaries of Parcel One above.

   [A.P.N. 135-320-72 and 135-320-76]

Attachment 6a

EXHIBIT 3 –5c This Spousal Property Petition was filed by Bo Derek in the settlement of the estate of her husband, John Derek
Life Insurance and IRAs with Named Beneficiary

A life insurance policy with a named, living beneficiary is not part of the probate estate of the decedent. The proceeds of the policy are paid directly to the beneficiary, bypassing probate altogether. Like jointly owned property, however, life insurance owned by a decedent is part of the decedent’s gross estate for estate tax purposes, and must be included on the estate tax return.

In contrast, when decedents name the estate as the beneficiary on life insurance policies, or when the named beneficiary predeceases the insured, the proceeds of the life insurance policy are part of the probate estate and must be listed on the probate inventory.

Individual retirement accounts (IRAs) also contain provisions for selecting beneficiaries. These provisions take precedence over subsequent testamentary dispositions—that is, dispositions by will. To illustrate, Massachusetts Gen. Laws. ch. 167D, § 30, provides:

Any designation of any beneficiary in connection with and as provided by an instrument intended to establish a pension, profit-sharing, or other deferred compensation or retirement plan, trust or custodial account ... shall be effective according to its terms, notwithstanding any purported testamentary disposition allowed by statute, by operation of law or otherwise to the contrary.
Living Trusts

A living trust, also known as an inter vivos trust, is a trust that becomes effective during the lifetime of the person who establishes it. Living trusts can provide for property to be transferred, after a person’s death, to those people designated by the trust maker. During the maker’s lifetime the maker maintains control over the trust assets. Living trusts can accomplish the same distributions accomplished by a will, without the need for probate.

Distributions done by a living trust can be done much more quickly than distributions done by a will. Additionally, as the living trust does not pass through the probate court, the trust document does not become part of the public record, as opposed to a probated will, which, like most court documents, can be accessed by the public. It should be carefully noted, though, that even though the trust assets pass outside a will, there is no tax advantage to the use of a living trust; all the trust assets are subject to the same estate taxes imposed on assets passed by a will.

Living trusts work as follows: first, the maker (also called a grantor or settler) executes a written trust document establishing a revocable living trust in which he names himself as trustee. He also names himself as trust beneficiary, with his family members, or others, as trust beneficiaries after his death. Assets are then transferred to the trust. Almost anything can be transferred into the trust, including bank accounts, stocks, bonds, and real estate. The maker, as trustee and trust beneficiary, maintains full control over and has the full benefits from the trust assets during his lifetime. Upon his death, the assets transfer to the family members, or others, designated to be the contingent beneficiaries by the trust document.

Although living trusts do save time and do maintain privacy, when comparing them to wills, living trusts are more costly to accomplish. While the cost of a will may start at $250 or $300, the cost for a living trust may start at $2,000. In addition, the establishment of a living trust will incur additional costs to transfer the ownership of the property from the maker personally to the trust itself.

The maker of the living trust still needs a will. The will ensures that property acquired after the trust or property not transferred to the trust initially will transfer as the testator wishes.

To quote Oliver Wendell Holmes, “Put your trust not in money, but put your money in trust.” For those who desire living trusts, these are words to live by. Trusts are discussed in more detail in Chapters 8 and 9.
A STINGY PRESIDENT?

LYNDON BAINES JOHNSON

Lyndon Baines Johnson (1908–1973), 36th president of the United States, is shown here in front of the White House in Washington, DC, with First Lady Lynda “Lady Bird” Johnson and their two daughters, Luci and Lynda, with a child.

What is striking about the will of President Lyndon B. Johnson is his apparent lack of concern for his wife. After generously providing for his children and siblings, he designates only minor items—kitchen furniture, musical instruments, books, and jewelry—for his wife. The explanation is that the will was written in the “community state” of Texas: by law a wife is recognized as 50-percent owner of a couple’s entire community property. Therefore, Johnson could not will his wife what was legally hers: in this case, half of his more than $10 million estate.

CASE STUDY Fitzpatrick v. Small

564 N.E.2d 1035 (MA)

FACTS: Leo Fitzpatrick established six individual retirement accounts (IRAs) naming his brother, Francis, as beneficiary of 100 percent of the benefits at Leo’s death. Later, Leo executed a will leaving the same IRA accounts in equal shares to his brother, Francis, and his sister, Claire. Leo died before he changed the beneficiary designation on the IRAs.

LEGAL ISSUE: Does a designation of beneficiary form executed pursuant to an IRA take precedence over a later testamentary disposition directing the distribution of the same IRA proceeds?

COURT DECISION: Yes.

REASON: IRAs are retirement plans governed by statute, which provides that a person who establishes an IRA is free to change the designation of beneficiary under that IRA and that, so long as he does so in the manner specified by the IRA plan, the change will have controlling effects. Although free to change or revoke his designation of beneficiary under his IRAs, the decedent failed to comply with the IRA plans under which he established his IRAs and, instead, apparently sought to change his designation by his will.
Life Estates

A life estate is an ownership interest that is limited in duration to either the life of the owner or the life of another person. When the life tenant dies, the property belongs to whoever owns the remainder interest, without the necessity of probate. Life estates have become popular in recent years as a device to save capital gain taxes. This is because, unlike a life tenant, the donee of an outright gift of real property must use the donor’s basis (cost plus improvements) when the property is sold, often resulting in a large capital gain. However, if the donor retains a life estate in the property, the donee’s basis is the value of the property at the time of the donor’s death, usually resulting in a much smaller capital gain. The life tenant’s estate, however, will be subject to the federal estate tax if the estate reaches the taxable amount including the life estate property. Estate taxes are discussed in more detail in Chapter 13.

Table 3–1 summarizes the categorization of types of property. Probate property is any property that reverts to the estate of someone who has died; nonprobate property passes outside the estate.

<table>
<thead>
<tr>
<th>Table 3–1 Items Typically Considered to Be Probate Property and Nonprobate Property</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Probate Property</strong></td>
</tr>
<tr>
<td>Real and personal property owned solely by the decedent</td>
</tr>
<tr>
<td>Interests in property held as a tenant in common</td>
</tr>
<tr>
<td><strong>Nonprobate Property</strong></td>
</tr>
<tr>
<td>Property owned in joint tenancy</td>
</tr>
<tr>
<td>Community property</td>
</tr>
<tr>
<td>Life insurance with named beneficiaries</td>
</tr>
<tr>
<td>Pension plan distributions and individual retirement accounts with named beneficiaries</td>
</tr>
<tr>
<td>Money held in pay-on-death accounts</td>
</tr>
<tr>
<td>Property held in a living trust</td>
</tr>
</tbody>
</table>

SUMMARY

In its legal sense, property is the foundation of wills and consists of a bundle of rights—the various rights or interests that people have in the item.
Probate property is real and personal property that was owned either solely by the decedent or with others as a tenant in common. Tangible personal property is property that has substance and can be touched. Intangible personal property is not susceptible to the senses and cannot be touched.

Nonprobate property includes jointly owned property, community property, life insurance and IRAs with named beneficiaries, money in Totten trust accounts, property held in a living trust, pension plan distributions, and individual retirement accounts with named beneficiaries.

**REVIEW QUESTIONS**

1. Why is it essential for paralegals working in the field of wills, estates, and trusts to have a fundamental understanding of the meaning of property, the various kinds of property, and how it relates to this specialized area of law?

2. In the eyes of the law, what is property considered to be? Why is this so?

3. Name some rights that different persons have to a house and the land that goes with it.

4. When property is leased to a tenant, who has the sole right to bring a trespass action? Against whom may the action be brought?

5. Traditionally, what could not be the subject of ownership and was not considered property? How has this changed?

6. When does title to real property owned by a decedent vest in the decedent’s heirs?

7. To whom does title to personal property owned by a decedent pass?

8. What real property owned by a decedent is included among the probate assets?

9. What is the difference between tangible and intangible personal property?

10. What are five kinds of property that are not part of the probate estate?

**CASES TO DISCUSS**

1. In the course of settling an estate, the probate court ordered that costs of administration be paid out of assets, which included a Totten trust account. Is a Totten trust account an asset of the depositor’s estate from which costs of administration may be paid? Explain. *Nahar v. Nahar*, 576 So. 2d 862 (FL).

2. Laura Mitchell’s will left all of her property to her illegitimate son. When she died, however, Mitchell’s attorney did not think the will was valid in form and decided not to present the will to the court. Instead, the attorney began an intestate succession proceeding. Was the attorney correct in making that decision? Explain. *Succession of Mitchell*, 574 So. 2d 500 (LA).

3. Howard and Mary Sander, who were married to each other, purchased land in Montana as joint tenants. They were later divorced but did nothing about the Montana property. Ten years later, when Howard died, his then wife, Jean, claimed the Montana land as an asset of Howard's estate. Mary claimed that it belonged to her after Howard died. How would you decide? Why? *Matter of Estate of Sander*, 806 P.2d 545 (MT).
RESEARCH ON THE WEB

1. In the opening “Day at the office” scenario, Maude Sanders, a paralegal, talks with a client. What ethical issues should be of concern to Maude? You may find some assistance at <http://www.legalethics.com>.

2. Paralegals are often called upon to conduct legal research on the Internet. Practice your research skills by looking up some information about a topic discussed in this chapter. Try using some of these specialized search engines: <http://www.yahoo.com/Law>, <http://www.catalaw.com>, <http://www.law.cornell.edu/>

SHARPENING YOUR PROFESSIONAL SKILLS

1. Obtain a copy of the deed to your house or that of your parent, relative, or friend. Attach to it a statement as to how the property is owned (either severally, or as tenants in common, joint tenants, or tenants by the entirety). Then state who will own the property if the sole owner or one of the co-owners dies.

2. Under the law of your state, does the dissolution of a marriage change the couple’s ownership of real property as joint tenants into ownership as tenants in common? When you find the answer, write down the reference to the statute or the citation to the case in which you found it.

3. Refer to a law dictionary and write the meaning of the term in specie as it is used in Item II of the will of Elvis Presley (reproduced in Appendix B).

4. Review paragraph FIRST of the will of Jacqueline K. Onassis (reproduced in Appendix B), and list five items of tangible personal property, two items of intangible personal property, and the legatees of each.

5. Review paragraph THIRD (B) of the will of Jacqueline K. Onassis (reproduced in Appendix B). Under the will, who inherited the real property in Gay Head and Chilmark, Martha’s Vineyard, Massachusetts? Explain the meaning of the term tenants in common as used in the will.

6. How does ARTICLE TWO (B) of the will of Richard M. Nixon, (reproduced in Appendix B) dispose of his personal diaries?

7. Read ARTICLE ONE (i) of the will of Richard M. Nixon (reproduced in Appendix B) with respect to the decision of the United States Court of Appeals. Then, in the law library, look up the case of Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992). State the principal legal issue that was decided by the court, give the court’s opinion as to that legal issue, and explain why the case was mentioned in Nixon’s will.

8. Refer to the will of Doris Duke (reproduced in Appendix B). Make a chart with the following headings: Paragraph No., Real Property, and Devisee. Then list each item of real property mentioned in the will, name the devisee of that real property, and enumerate the paragraph of the will in which it is devised.
SHARPENING YOUR LEGAL VOCABULARY

On a separate sheet of paper, fill in the numbered blank lines in the following anecdote with legal terms from this list:

beneficiary
bundle of rights
chose in action
community property
divesting
intangible personal property
inter vivos trust
joint tenants
joint tenants with the right of survivorship
life estate
living trust
pay-on-death (POD)
personal property
probate estate
probate property
profit à prendre
property
real property
severally
tangible personal property
tenancy in partnership
tenants by the entirety
tenants in common
testamentary
disposition
Totten trust
Uniform Nonprobate Transfer on Death Act
unity of possession
vested
When Aaron died, the personal representative of his estate, that is, the executrix, made a detailed list of the (1) that was owned (2) (solely, apart from others) by Aaron. In the eyes of the law, it is considered a(n) (3). It was referred to as the (4) or (5). It included (6) (that is, the ground and anything permanently affixed to it) and (7) (that is, other things that can be owned). The former (8) in (accrued to) the heirs immediately upon Aaron’s death, subject to (9), that is, being taken away; the latter passed to the executrix of the estate. In addition to an automobile, which was (10) property, Aaron owned some corporate stock, which was (11) and legally considered a(n) (12). He also had a savings bank account in his name as trustee for his niece, Sharon. The account was a(n) (13) account, which is sometimes called a(n) (14). Aaron had co-owned a parcel of land with his sister, Karen, as (15)—sometimes referred to as (16)—which meant that when Aaron died, Karen owned the land outright. Had they owned the land as (17), Aaron’s interest would have passed to his heirs, who would have had (18), which means that each cotenant is entitled to the possession of the entire premises. Had Aaron and Karen been husband and wife instead of brother and sister, they could have owned the property as (19) and received protection against having the property taken by creditors. They might also have been able to consider the land as (20), which, in eight states, is property acquired by the personal efforts of either spouse during marriage but which belongs to both spouses equally.

**KEY TERMS**

- chose in action
- community property
- divestiture
- intangible property
- joint tenants
- life estate
- living trust
- pay-on-death (pod) account
- personal property
- probate estate
- probate property
- profit à prendre
- severally
- tangible property
- tenancy in partnership
- tenants by the entirety
- tenants in common
- testamentary dispositions
- toten trust
- vests

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