The Maryland Judicial College

Orphans' Court Judges

2023 Continuing Education

Dissecting the Will

Fred Franke, Jack Beckett & Deb Howe

Franke Beckett, LLC

Annapolis, Maryland

Contents

I. Formalities

(a) Capacity

Anyone who is over 18 years of age and is "legally competent to make a will" is qualified to make a will according to Md. Code Ann. Est. & Trusts § 4-102. This rather vague standard replaced a more detailed statutory requirement that a testator must "be at the time of executing or acknowledging it, of sound disposing mind, and capable of executing a valid deed or contract." First Sub-ch of the Act of 1798, ch. 101. This change was made at the recommendation of the Henderson Commission—a commission created by the then-Governor to study and propose revisions to Maryland's testamentary laws. In its report to the Governor and the General Assembly, the Henderson Commission explained that there was so much substantive caselaw from Maryland Courts on the question of capacity to make a will, that the statute should rely on that rather than trying to restate it all.

The presumption is that everyone who is 18 or older has capacity to make a valid will. *Dougherty v. Rubenstein*, 172 Md. App. 269, 284 (2007) (citing *Wall v. Heller*, 61 Md. App. 314, 327 (1985); Sykes, Contest of Wills, § 63 (1941)). A challenger may overcome this presumption by showing, by the preponderance of the evidence, that the testator lacked capacity *when making the will*. The challenger may show that the testator was permanently incapacitated or, although not permanently incapacitated, was incapacitated at the time the will was signed. *Id.* (citing *Wall*, 61 Md. App. 326-27; *Slicer v. Griffith*, 27 Md. App. 502, 510 (1975)).

Testamentary capacity means that, at the time the testator made the will,

> [H]e had a full understanding of the nature of the business in which he was engaged; a recollection of the property of which he intended to dispose and the persons to

> whom he meant to give it, and the relative claims of the different persons who were or should have been the objects of his bounty.

Ritter v. Ritter, 114 Md. App. 99, 105 (1997) (quoting *Webster v. Larmore*, 268 Md. 153 (1973)). The three things that a testator must understand in order to have testamentary capacity are (1) the purpose and effect of a will, (2) the nature and extent of his property, and (3) the natural claims individuals have on his property.[1]

In addition to a failure to understand one of the three things above, an individual may lack testamentary capacity due to an "insane delusion." In this context, an "insane delusion" is "a type of unsoundness of mind that will invalidate his will, for lack of capacity, if the delusion produced the disposition made in the will." *Daugherty*, 172 Md. App. at 284.

Loss of capacity due to an insane delusion is rare. An eccentric or unpopular or strange disposition of assets does not mean that the testator was suffering from an insane delusion. Instead, the testator must "a belief in things impossible, or a belief in things possible, but so improbable under the surrounding circumstances that no man of sound mind could give them credence" and that belief must produce the disposition of the decedent's will. EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 6:10 n.5 (2d ed. 2022).

(b) Witnessing

MARYLAND CODE ANN. EST. & TRUSTS § 4-102(b)(3) requires that a will be "Attested and signed by two or more credible witnesses in: (i) the physical presence of the testator; or (ii) the

[1] This definition of testamentary capacity has lasted hundreds of years. In 1790, Lord Kenyon instructed the jury that "If [the testator] had a power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make a will" Greenwood v. Greenwood, 163 Eng. Rep. 930, 943 (K.B. 1790).

electronic presence of the testator, provided that an electronic will or remotely witnessed will satisfied the requirements under subsections (c) or (d) of this section."

i. In the testator's presence

The requirement is that the will be signed *or acknowledged* in both witnesses' presence. So a testator could sign a will alone and then take it to the witnesses, acknowledge his signature, and ask that the witnesses witness the will. *Truitt v. Slack*, 137 Md. App. 360 (2001), certiorari granted 364 Md. 534, affirmed 368 Md. 2.

The witnesses need not be in each other's presence, but must each witness the will in the testator's presence. *O'Neal v. Jennings*, 53 Md. App. 604, 606 (1983).

ii. Beneficiary as witness

Beneficiaries and other individual with an interest in the estate are not prohibited from witnessing a will, but the fact that they sit as a witness may be used as evidence against the will in a caveat.

iii. Witness convicted of crime

At common law, an individual convicted of an "infamous crime" could not witness a will. That is no longer the rule in Maryland. *See McGarvey v. McGarvey*, 286 Md. 19 (1979).

iv. Remote Witnessing

A will may be witnessed, relying on MARYLAND CODE ANN. EST. & TRUSTS § 4-102(b)(3)(ii), remotely. There is a procedure for the remote and/or electronic witnessing of wills. This means that the testator and witnesses do not have to be physically in each other's presence. Instead, all of them or any one of them may be in each other's *electronic* presence via audio-visual technology. The will may be signed electronically or in counterpart. Either way, the testator or

supervising attorney, as the case may be, must compile a paper record that includes the will and all the signatures and complete a certification. This will be deemed the "original will."

If there is no supervising attorney, or if the supervising attorney also acts as one of the two witnesses, there must also be a notarized acknowledgment.

Although the legislation in 2021 and 2022 modified Maryland statutory law to allow these types of electronically and/or remotely signed and witnessed wills, similar procedures were in place for a period of time under Governor Hogan's COVID-19 emergency orders.

From April 10, 2020 until July 1, 2021 Executive Order No. 20-04-10-01 permitted the remote execution of wills. Wills signed in reliance on that Order are affirmatively acknowledged as valid under Est. & Trusts § 4-102(f).

(c) Revocation Events

The methods for revoking a will are strictly controlled by statute. MARYLAND CODE ANN. EST. & TRUSTS § 4-105(b) sets out four methods for revoking a will. The first is by signing a subsequent will that revokes all prior wills (expressly or by necessary implication) or republishes a previously revoked will. The second is revocation by a physical act such as burning or tearing the will. The third is if, subsequent to the will, the testator gets married followed by the birth, adoption, or legitimation of a child. Finally, the fourth way to revoke a will is if the testator gets a divorce or annulment. In that case, only the provisions relating to a spouse are revoked.

If a will was in the testator’s possession but it cannot be found at the time of his death, there arises a rebuttable presumption that the testator destroyed the will with the intend of revoking it. *See Plummer v. Waskey*, 34 Md. App. 470 (1977) cert denied 280 Md. 734.

II. How to Read a Will

(a) The Plain Meaning Rule: Express not Presumed Intent

The goal of interpreting a will is to "ascertain and effectuate the testator's expressed intent." *Pfeufer v. Cyphers*, 397 Md. 643, 648 (2007)). Expressed intent means that "the search is not for the testator's "presumed [intention] but for his *expressed intention*." *Id.*

"Obviously, the most simple and natural way to ascertain what a testator's or grantor's intention was, is to read what he has written, because what he has written was designed by him to express his intention. Just as he has written his will, it must stand." EDGAR G. MILLER, JR., THE CONSTRUCTION OF WILLS IN MARYLAND, § 10 (The expressed not the presumed intention), 44 (1927).

What the testator wrote in the Will as the primary source of the testator's intent sounds straightforward and, at least superficially, a very common-sensed approach. "Superficially" because the words used in the Will are divorced from the context of the testator's life circumstances and those relationships that may give context to the meaning of those words. "The fallacy (of the plain meaning rule) consists in assuming that there is or ever can be *some one real* or absolute meaning. In truth there can be only *some person's* meaning; and that person, whose meaning the law is seeking, is the writer of the document.[2]

[2] 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2462 (1981).

Also: “The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.” – Sandra Day O'Connor. [3]

Because the plain meaning rule often is interpreted (wrongly) to exclude consideration of evidence of the testator's intent except what the testator has written, the Restatement (Third) of Property: Wills and Other Donative Transfers, § 10.2 cmt. a (2003), distinguishes between a testator's *actual* intent and his *attributed* intent: “The donor's intention is sometimes referred to in this Restatement as the donor's *actual* intention, in order to contrast it with the intention that is *attributed* to the donor by an applicable constructional preference or rule of construction.”

The plain meaning rule is often used to try to exclude evidence outside of the Will itself (extrinsic evidence). Why external evidence of actual intent is seen as needed to be precluded is murky. Modern justifications of the literal application of the rule include (1) a fear of evidence fabrication, (2) the possibility of fraud, (3) a concern that a decedent had relied on the language used, and (4) that such extrinsic evidence is unattested and therefore violates the Will formalities statute.

(b) The Plain Meaning to be Found Within “the Four Corners” of the Will.

One rule of construction in divining the testator’s intent from what is contained in the Will is the four corners doctrine. The testator's intent is to be gathered from the four

[3] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (O'Connor, J.). The case turned on whether nicotine is a “drug” and thereby susceptible to regulation by the federal Food and Drug Administration. The court held that it was not a drug within the context of either the statute granting the FDA regulatory authority over drugs, or other federal statutes unrelated to the FDA regulatory authority.

corners of the Will. *Pfeufer v. Cyphers*, 397 Md. 643, 648 (2007). No part of a Will is to be ignored and the order in which the provisions are located is not a limiting factor. *Castruccio v. Estate of Castruccio*, 239 Md. App. 345, 356 (2018), cert. denied 463 Md. 149 (2019). ("The testator's intention must be gathered from a consideration of all the provisions contained in [the will], without regard to the order in which those provisions occur.") (cleaned up).[4]

The *Castruccio* decision addressed the fundamental way that Wills should be considered and understood. None of these principles are new but are to be gleaned from the approach applied historically by the courts in Maryland. *See Chamberlain v. Owings*, 30 Md. 447, 451 (1869) (stating that the testator's intention is collected from the whole instrument, by comparing and considering the different parts together). The various provisions of a Will should be read together as a harmonious whole. *Veditz v. Athey*, 239 Md. 435, 448 (1965).

"[A]ttention must not be confined to particular clauses or words of the will; the whole context of the will must be considered, and force and effect must be given if possible to every material word employed in it, and the whole must be so construed as to reconcile and harmonize every word and expression used by the testator, if it can be done." Edgar G.

[4] Franke Beckett, LLC represented a legatee in this case, as well as with all of the *Castruccio* litigation. The *Castruccio* litigation involved approximately 10 Appellate Court of Maryland and 2 Supreme Court of Maryland appeals. The Appellate Court decision cited here established, or more precisely reestablished, the fundamental elements involved in how Wills should be interpreted. One of the Supreme Court of Maryland cases upheld the validity of a Will from attacks based largely on technical shortcomings related to whether the Will formality statute was followed. *Castruccio v. Estate of Castruccio,* 456 Md. 1 (2017).

Miller, Jr., The Construction of Wills in Maryland, § 11 (1927). *See also Carey v. Dykes*, 138 Md. 142, 146 (1921); *Gray v. Peter Gray Orphans' Home & Mechanical Inst. of Wash. Cnty.*, 128 Md. 592 (1916); *Albert v. Albert*, 68 Md. 352, 368 (1888); *Smithers v. Hooper*, 23 Md. 273, 285 (1865).

It is immaterial in which part of the will the testator's intention is found. *Holmes v. Mitchell*, 4 Md. 532, 535-36 (1853). All parts of a will are construed in relation to each other to form one consistent whole. *Id.* However scattered words may be, if they explain the intention of the testator, they are to be collected and put together because in many cases doing otherwise would prejudice the design of the testator. *Id.*

(c) Historically, there were at least two formal exceptions to the plain meaning rule.

First, a court can use extrinsic evidence to determine the testator's intent under the latent ambiguity exception. Second, a court may review extrinsic evidence under the surrounding circumstances exception, which is a separate and distinct exception to the plain meaning rule. Both exceptions are embodied in Maryland Law. Miller, § 43 (Admissible to show intent in cases of latent ambiguity), § 44 (Evidence of surrounding circumstances).

(d) The Latent Ambiguity Exception.

The latent ambiguity exception only applies if the ambiguity is **not** clear from what is actually written in the Will. If the Will has language that is difficult to understand, this exception does not apply.

A court may consider extrinsic evidence, and therefore contravene the plain meaning rule's bar on extrinsic evidence, when a will contains a latent ambiguity. *Emmert v. Hearn*, 309 Md. 19, 27 (1987); *Monmier v. Monmonier*, 258 Md. 387, 390 (1970); *Bradford v. Eutaw Savings Bank*, 186 Md. 127, 136 (1946); *Fersinger v. Martin*, 183 Md. 135, 138-39 (1944); *Darden v. Bright*, 173 Md. 563, 569 (1938); *Cassilly v. Devenny*, 168 Md. 443, 449 (1935).

A latent ambiguity is one where the terms of the will appear clear and without ambiguity, but those terms yield more than one meaning once the extrinsic evidence is permitted. *Emmert v. Hearn*, 309 Md. 19, 27 (1987). Once the extrinsic evidence is introduced, it shows that a description of a beneficiary or piece of property contained in the will is defective or that it applies equally to two or more persons or things. *Emmert*, 309 Md. at 27 (cleaned up). An example of a latent ambiguity would be a bequest "'to my cousin John' . . . if evidence extrinsic to the document reveals that the testator had no cousin named John when he executed the will but did then have a nephew named John and a cousin named James." Restatement (Third) of Prop.: Wills and Other Donative Transfers, § 11.1 cmt. c. (2003). Thus, a court can review extrinsic evidence to resolve a latent ambiguity in contravention of the plain meaning rule because the evidence clarifies an ambiguity that appears on its face not to be a ambiguity but indeed appears to be clear and unambiguous. *Patch v. White*, 117 U.S. 210, 213-4 (1886) (the testator's will referred to property bequeathed to his brother that the testator "did not, and never did, own.").

In contrast, if a will contains a patent ambiguity, a court is foreclosed from reviewing extrinsic evidence to directly supplement the testator's intent. *Emmert*, 309 Md. at 27 n. 4. A patent ambiguity in a will comes from an apparent contradiction within the document itself or where a term that is used in the document could yield several meanings. For example, a patent ambiguity exists in a bequest of "my money." The term "my money" raises the question as to whether the phrase was intended to apply only to the decedent's cash on hand or, more generally, to the decedent's assets. Restatement (Third) of Prop.: Wills and Other Donative Transfers, § 11.1 cmt. b. (2003). Consequently, a patent ambiguity cannot be resolved with extrinsic evidence; rather, a court must divine the testator's intent from the four corners of the will itself. *Hawman v. Thomas*, 44 Md. 30, 31 (1876).

(e) The Surrounding Circumstances Exception.

The second exception to the general prohibition of the consideration of extrinsic evidence is that evidence of the surrounding circumstances may be admitted as long as that evidence is used to explain what the testator wrote and not used to contradict that writing. *Castruccio v. Estate of Castruccio*, 239 Md. App. 345 (2018), cert. denied 463 Md. 149 (2019) ("Many, many Maryland cases have stated or applied the proposition that, to understand or explain the words that a testator has written, a court may consider evidence of the circumstances that surrounded the execution of the will").[5]

[5] As noted in footnote 3, Franke Beckett, LLC represented a legatee in all of the *Castruccio* litigation. We conceded early in the litigation that there was no latent ambiguity in the Will. The opposing party was apparently convinced

The surrounding circumstances exception to the plain meaning rule has always been part of Maryland Will interpretation law. In 1853, just twelve years after the founding of the Maryland Supreme Court,[6] stated that "any evidence is admissible, which, in its nature and effect, simply explains what the testator has written" is proper. *Walston v. White*, 5 Md. 297, 304 (1853) as quoted in *Castruccio v. Estate of Castruccio*, 239 Md. App. 345, 363 (2018). The *Walston* decision held that although extrinsic evidence may not be used to contradict the testator's words found in the will, it may be used to express or explain the meaning of those words.

As *Castruccio* makes clear, "many, many Maryland cases have stated or applied the proposition that, to understand or explain the words that a testator has written, a court may consider evidence of the circumstances that surrounded the execution of the will." *Castruccio* at 368. See the following: *Pfeufer v. Cyphers*, 397 Md. 643, 649 (2007); *LeRoy v. Kirk*, 262 Md. 276, 279 (1971) ("the testator's intention "must be gathered from the language of the entire will, particularly from the clause in dispute, read in light of the surrounding circumstances when the will was made."); *Reedy v. Barber*, 253 Md. 141, 148 (1969) (*citing* Philip Louis Sykes, Probate Law and Practice, Vol. 1, § 51 (1956) ("The intention of the testator must be gathered from the four corners of the instrument and from the pertinent circumstances surrounding the testator at the time of its execution"); *Marty v.*

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that, absent a latent ambiguity, the critical extrinsic evidence explaining the testator's peculiar provisions would not be admitted. Maryland common law, however, consistently supported using such background information to help the courts understand what a testator intended by Will provisions.

[6] Then called the Maryland Court of Appeals.

First Nat. Bank of Balt., 209 Md. 210, 217 (1956) (the "expressed intention of a testator must be gathered from the language of the entire will, particularly from the clause in dispute, read in the light of the surrounding circumstances at the time the will was made."); *Hebden v. Keim*, 196 Md. 45, 50 (1950) ("the Court should consider not only the actual words used in the will but also the situation of the testator and his relations with the object of his bounty"). The Maryland Supreme Court has always permitting extrinsic evidence so the trial court can place itself "in the traditional place, behind the armchair of the testator as he contemplated the disposition he wished to be made to the objects of his bounty." *Marty v. First Nat. Bank of Balt.,* 209 Md. 210, 218 (1956).

The surrounding circumstance exception brings context to the meaning that a testator meant by the words in the Will. It pays tribute to the fact that words should be understood as the testator would have meant those words and not read in an abstract, context-free manner. It is a broad exception with the purpose of determining the testator's intent:

> If the intention cannot be clearly made out from the language of the will, taken in its usual and proper acceptation, then the peculiar situation of the testator and the relations subsisting between him and the objects of his bounty at the time of making his will may be considered in connection with the language of the will, and it will be interpreted, with the aid of the light thus thrown upon it, in accordance with the accepted canons of construction. ***The court will put itself in the testator's place; in his armchair; will see the circumstances that he saw; appreciate his surroundings as he appreciated them; and then give to the language he has used in his will the meaning which these circumstances and these surroundings indicate he intended that language to have.*** The court will thus with more accuracy interpret the

> words of the testator and gather what he meant to say from what he did say, as viewed from the standpoint he then occupied.
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> ***All the facts and circumstances respecting persons and property to which the will relates are legitimate, and often necessary, evidence to enable the court to understand the meaning and application of the words of the testator.*** The court may put itself in the place of the testator by looking into the state of his property and the circumstances by which he was surrounded at the time of making his will; but this is done only to explain ambiguities arising out of extrinsic circumstances and not to show a different intention from that which the will discloses. ***Any evidence is admissible which in its nature and effect simply explains what the testator has written, that is, which explains the meaning of the words, or applies the language of the will to the subject matter.***

EDGAR G. MILLER, JR., THE CONSTRUCTION OF WILLS IN MARYLAND, § 12 (Surrounding circumstances: "put yourself in his place"), § 44 (Evidence of facts and circumstances) (1927) (Emphasis added).

(f) Presumption Against Intestacy

Another rule of construction is that if the Will contains a residuary clause every reasonable effort should be made to avoid intestacy: "One of the strongest presumptions of the law is that where a will contains a residuary clause, every intendment shall be made against there either being a general or a partial intestacy... It is a very extraordinary will where a residuary clause does not prevent a partial intestacy, unless some part of the residue itself be not well given." *McElroy v. Mercantile-Safe Deposit & Trust Co.*, 229 Md. 276, 283-4 (1962).

Although the rule favoring avoiding intestacy does not give free rein to courts to add words or change the plain meaning of the Will. The Will must be construed to effectuate the general

intent of the testator. There is no magic phrase, however, to set out the testator's intent to avoid intestacy. "The particular clause in the case sub judice is lacking any unmistakable verbiage such as 'all the rest and residue of my estate' or 'the residue of my estate' or 'the balance of my estate,' but there is no requirement that those stylistic forms be utilized. In this State, '(n)o particular form of expression is required to constitute a residuary clause, it being sufficient if the intent to dispose of the residue appears.'" *Murray v. Willett*, 36 Md. App. 551, 553-4 (1977).

III. What Happens Should You Fail to Say

(a) Tax Clause

In Maryland, there are two taxes that are of special relevance at death: the estate tax and then inheritance tax. The estate tax is imposed on the right to transfer whereas the inheritance tax is imposed on the privilege to receive. The default rule for these taxes is known as "apportionment."

Apportionment in the context of the estate tax means that each beneficiary bears a proportional amount of the estate tax. "The tax shall be apportioned among all persons interested in the estate. Except as otherwise provided in this subsection, the apportionment shall be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax shall be used for that purpose." MD. CODE TAX GENERAL § 7-308(b)(1). This rules applies to both the federal and Maryland estate taxes.

Apportionment in the context of the inheritance tax means that the tax is paid out of the taxable bequest prior to when the bequest is distributed. MD. CODE TAX GENERAL § 7-7-216(a)(1).

(b) Survival Clause

The general rule is that a legatee must survive the testator by at least 30 days in order to inherit. "A legatee, other than the testator's spouse, who fails to survive the testator by 30 full days is considered to have predeceased the testator[.]" MD. CODE EST. & TRUSTS § 4-401. This requirement makes sense—if a legatee dies within 30 days of the testator, he or she would never actually receive the legacy.

This 30 day survival requirement does not apply to a surviving spouse.

(c) Funeral Expenses

The default rule is that the personal representative shall pay funeral expenses up to the statutory amount – currently $15,000.00. *See* MD. CODE ANN., EST. & TRUSTS § 8-106(c). The personal representative may petition the court of authorization to pay funeral expenses above the statutory amount.

For the purpose of this section, funeral expenses include "costs of a funeral, a burial, a cremation, a disposition of the decedent's remains, a memorial, a memorial service, food and beverages related to bringing together the decedent's family and friends for a wake or prefuneral or post funeral gathering or meal. . ." MD. CODE ANN., EST. & TRUSTS § 8-106(a). Additional "reasonable expenses" may be authorized by the will.

(d) Abatement

Once all of an estate's legally enforceable debts are paid, if there are insufficient funds to satisfy all the bequests then bequests will abate. Without a contrary structure established in the will, the shares of the various legatees will abate in the following order:

(i) Property not disposed of by the will;

(ii) Residuary legacies;

(iii) General legacy, other than items (iv), (v), and (vi) of this paragraph;

(iv) General legacy to dependents of testator;

(v) General legacy to creditor of testator in satisfaction of a just debt;

(vi) General legacy to surviving spouse of testator; and

(vii) Specific and demonstrative legacies.

MD. CODE ANN., EST. & TRUSTS § 9-103(b)(1)(i-vii).

(e) Lapse

If a legatee dies after the will is signed but prior to the death of the testator, Maryland's Anti-Lapse statute sets out the default rule that the legacy be distributed directly to the beneficiaries of the legatee's estate.

> Unless a contrary intent is expressly indicated in the will, a legacy may not lapse or fail because of the death of a legatee after the execution of the will but prior to the death of the testator if the legatee is:
>
> (1) Actually and specifically named as legatee;
> (2) Described or in any manner referred to, designated, or identified as legatee in the will; or
> (3) A member of a class in whose favor a legacy is made.

MD. CODE ANN., EST. & TRUSTS § 4-403 (a)(1-3).

To overcome the presumption of the anti-lapse statute, a will must use "clear and plain language" William M. McGovern, Sheldon F. Kurtz & David M. English, *Wills, Trusts and Estates,* at 360 (4th ed.2010) (quoted by *Kelly v. Duvall*, 41 Md. 275 (2015)).

(f) Advancement

Advancement is a legal theory whereby lifetime gifts may be counted as an advance on an heir's inheritance *if the decedent died intestate*.[7] This classification of advancement as a theory applicable specifically to intestate succession is codified in Maryland law at MD. CODE ANN. EST. & TRUSTS § 3-106—part of Subtitle 1 Instate Succession—which states that "[i]f a decedent dies intestate as to part of the decedent's net estate, property which the decedent gave in the decedent's lifetime to an heir shall be treated as an advancement against the share of the latter of the net estate . . ." .

Advancement is part of the law of descent and distribution that tries to approximate how an individual would have disposed of his or her estate had he or she not died intestate. These rules are not applicable when the decedent took the affirmative step to establish an estate plan.[8] The principle of advancement may be applied to a will, but only by analogy when the testator includes a provision in his or her will stating that certain gifts were meant as advancements.[9]

The strict application of the intestacy requirement of an advancement is evident from the case of *Barron v. Janney*, which the Court of Appeals decided in 1961. In that case, parents made

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[7] "If a person dies intestate, as to a part of his or her net estate, property which the decedent gave in life to an heir is treated as an advancement against the share of the latter of the net estate if declared in writing by the decedent or acknowledged in writing by the heir to be an advancement." 8 MARYLAND LAW ENCYCLOPEDIA DESCENT AND DISTRIBUTION § 80 (2022).

[8] "In the absence of any applicable statutory provision to the contrary, the general rule is that the doctrine of advancements applies only to transfers made by donors who died wholly intestate." 83 AM. JUR. PROOF OF DECEDENT'S INTENT THAT INTER VIVOS GIFT TO HEIR CONSTITUTES ADVANCEMENT 3d 295 § 8 (2022); *Pole v. Simmons*, 45 Md. 246, 251 ("This paper was drawn by an eminent member of the legal profession, who well knew that no question as to whether or not these gifts were advancements, could be raised unless [the decedent] should die intestate . . .").

[9] "When such provisions exist, the court will apply the rules of the advancement doctrine, but the application is by analogy only and the controlling element is the will itself." 83 AM. JUR. PROOF OF DECEDENT'S INTENT THAT INTER VIVOS GIFT TO HEIR CONSTITUTES ADVANCEMENT OF FACTS 3d 295 § 8 (2022).

a lifetime transfer of real property that they held as tenants by the entireties to their daughter.[10] The son brough suit claiming that the transfer was an advancement to the daughter on her inheritance.[11] Although both parents died intestate, the Court held that the conveyance was not an advancement. The Court's conclusion was that "one of the essential elements of every advancement is that the gift must have been a part of the estate of a donor, which upon his death would descend to his heirs but for the fact that, by his act in making the gift, in had been separated from or taken out of his estate."[12] In that case, the fact that the property was held as tenants by the entirety meant that neither parent, as donor, met the "essential element" that the property would have been in his or her estate because, instead, it would have passed to the surviving tenant by the entirety by operation of law.[13]

If a decedent dies intestate as to a part of the decedent's net estate, property which the decedent gave in the decedent's lifetime to an heir shall be treated as an advancement against the share of the latter of the net estate if declared in writing by the decedent or acknowledged in writing by the heir to be an advancement. MD. CODE ANN., EST. & TRUSTS § 3-106 (a). Keep in mind that the advancement is valued at the time the heir came into possession of the property. *Id*.

To be considered an advancement, the property must be given by one parent, rather than property held by the entirety. *See Barron v. Janney*, 225 Md. 228 (1961).

Because the theory of advancement applies in intestacy, not in testate matters, the default is rule is that a lifetime gift to a legatee is not an advance on the legatee's share of the estate.

[10] *Barron v. Janney*, 225 Md. 228, 229 (1961).
[11] *Id.*
[12] *Id.* at 181.
[13] *Id.*