

Probate: Misconceptions, Mistakes & Myths



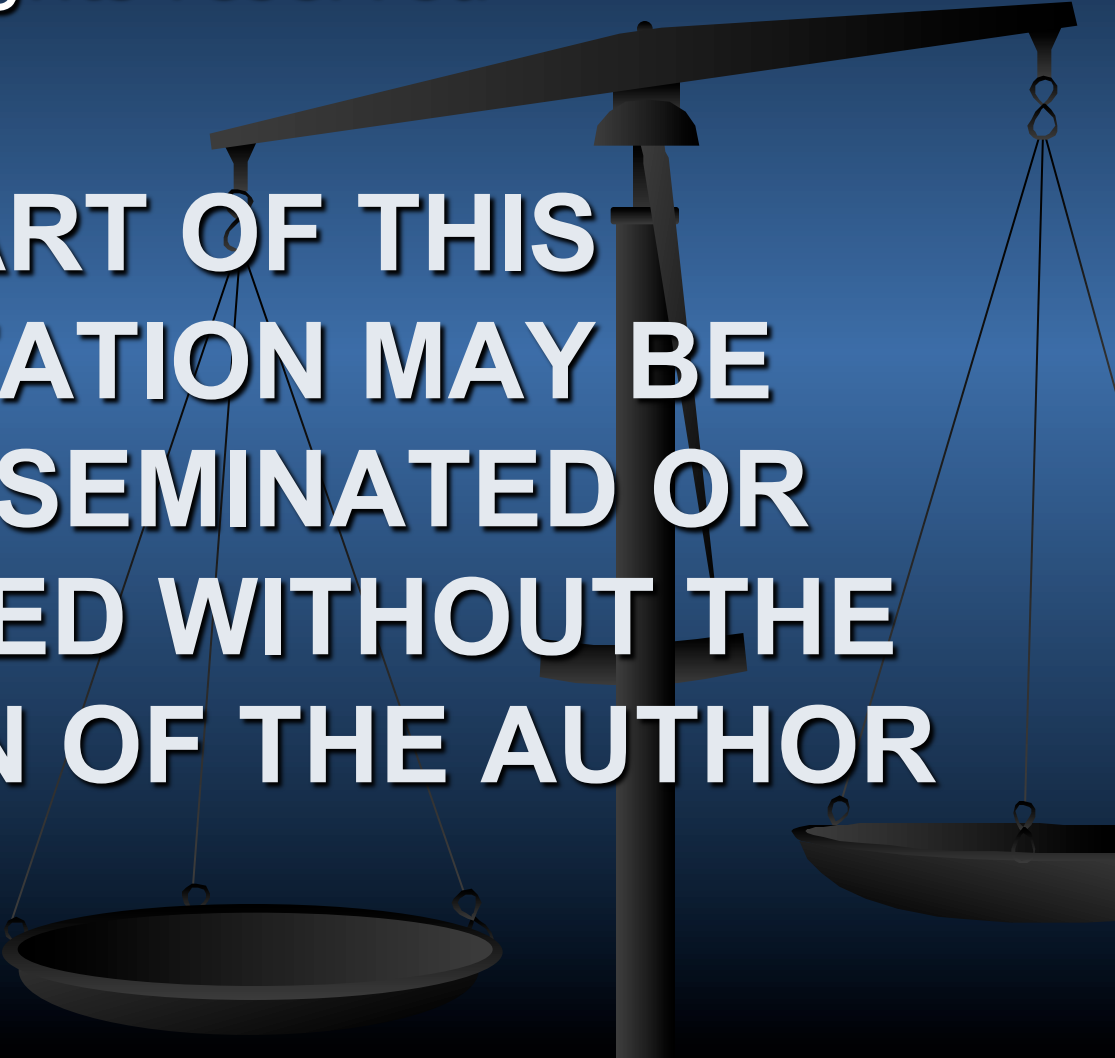
Domenick N. Calabrese, Judge

Region 22 Probate District

Bethlehem • Oakville • Oxford • Roxbury
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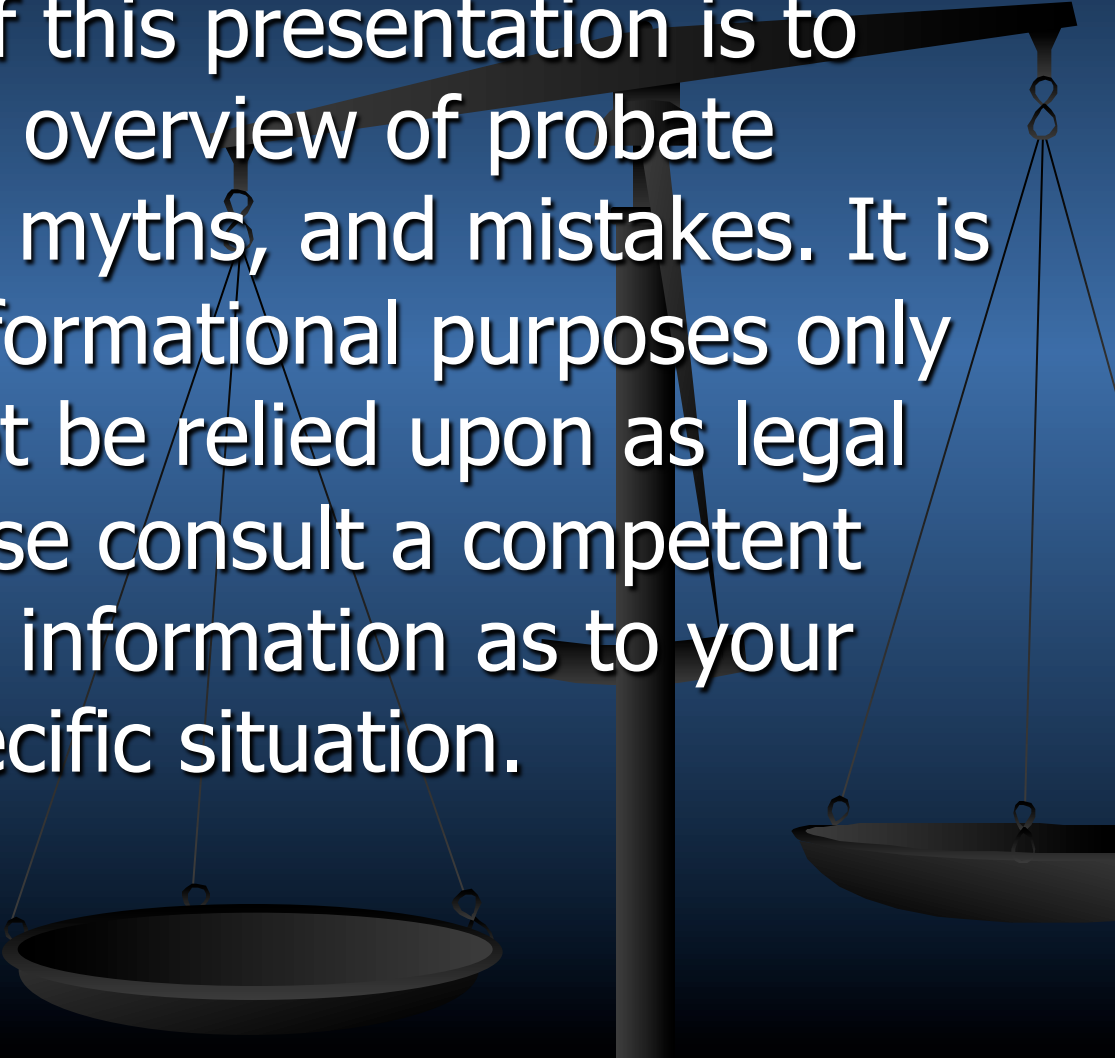
SEMINARS

- Living Trusts
- Real Estate & Probate
- Probate & Unclaimed Property
- Wills in Connecticut
- Pet Trusts
- Conservatorships
- Legal Incapacity, Conservatorships & the Probate Court
- Estate Taxes in Connecticut
- Guardianships



DISCLAIMER

The purpose of this presentation is to provide an overview of probate misconceptions, myths, and mistakes. It is intended for informational purposes only and should not be relied upon as legal advice. Please consult a competent attorney for information as to your specific situation.



AGENDA

- Misconceptions
- Myths
- Mistakes
- Summary
- Questions

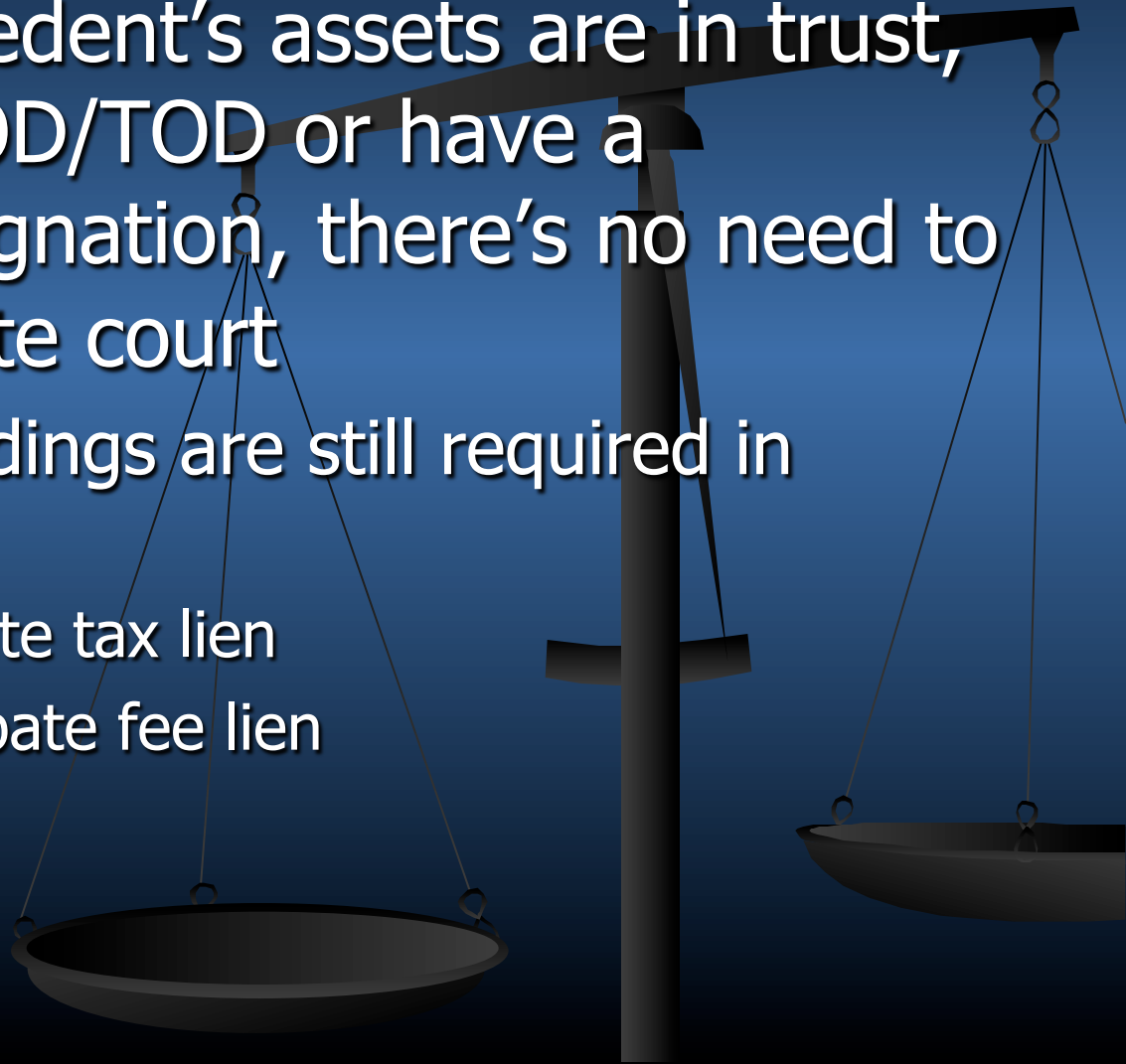


MISCONCEPTIONS



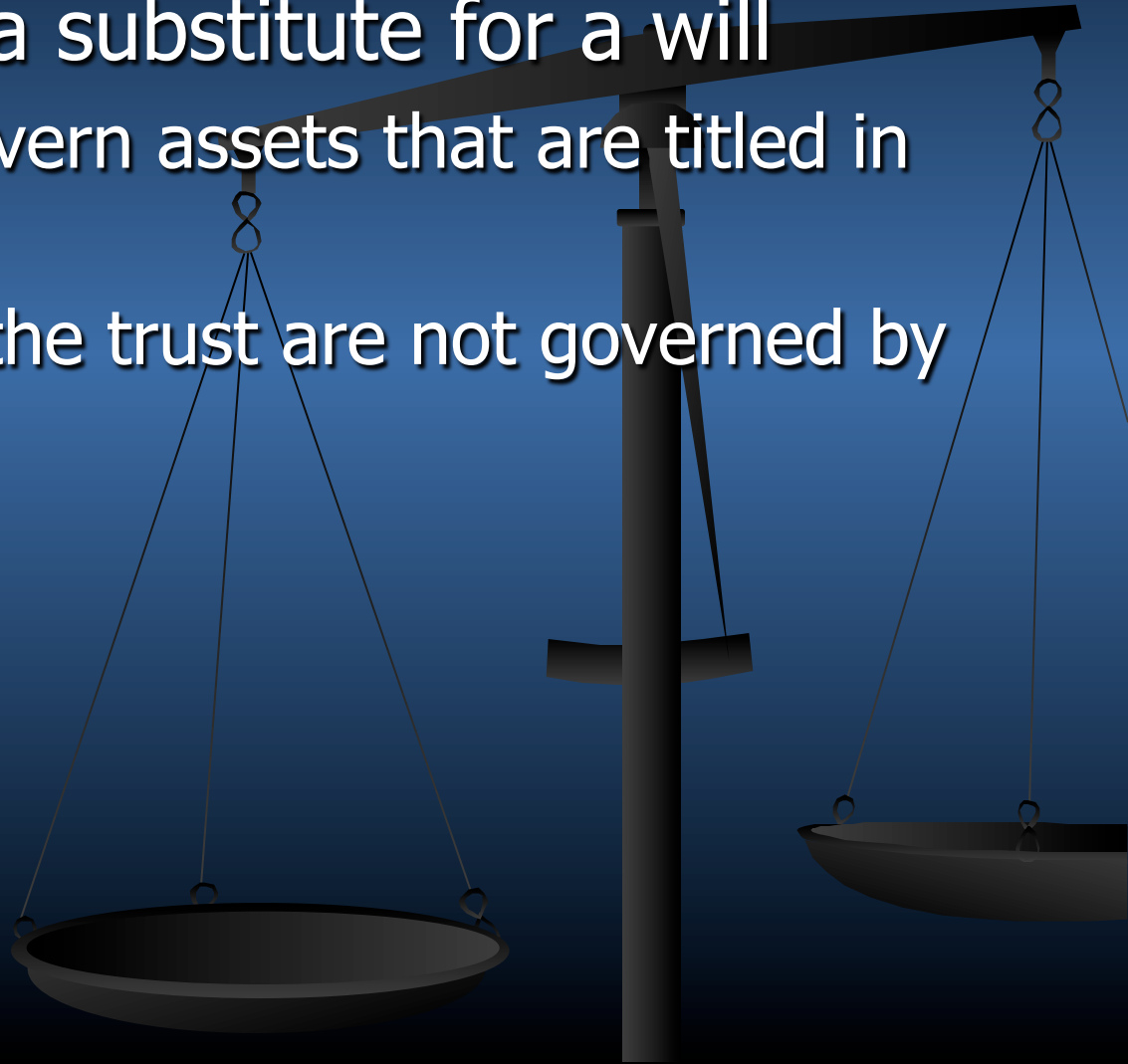
Misconceptions

- If all of the decedent's assets are in trust, survivorship, POD/TOD or have a beneficiary designation, there's no need to go to the probate court
 - Probate proceedings are still required in Connecticut!
 - Release of estate tax lien
 - Release of probate fee lien



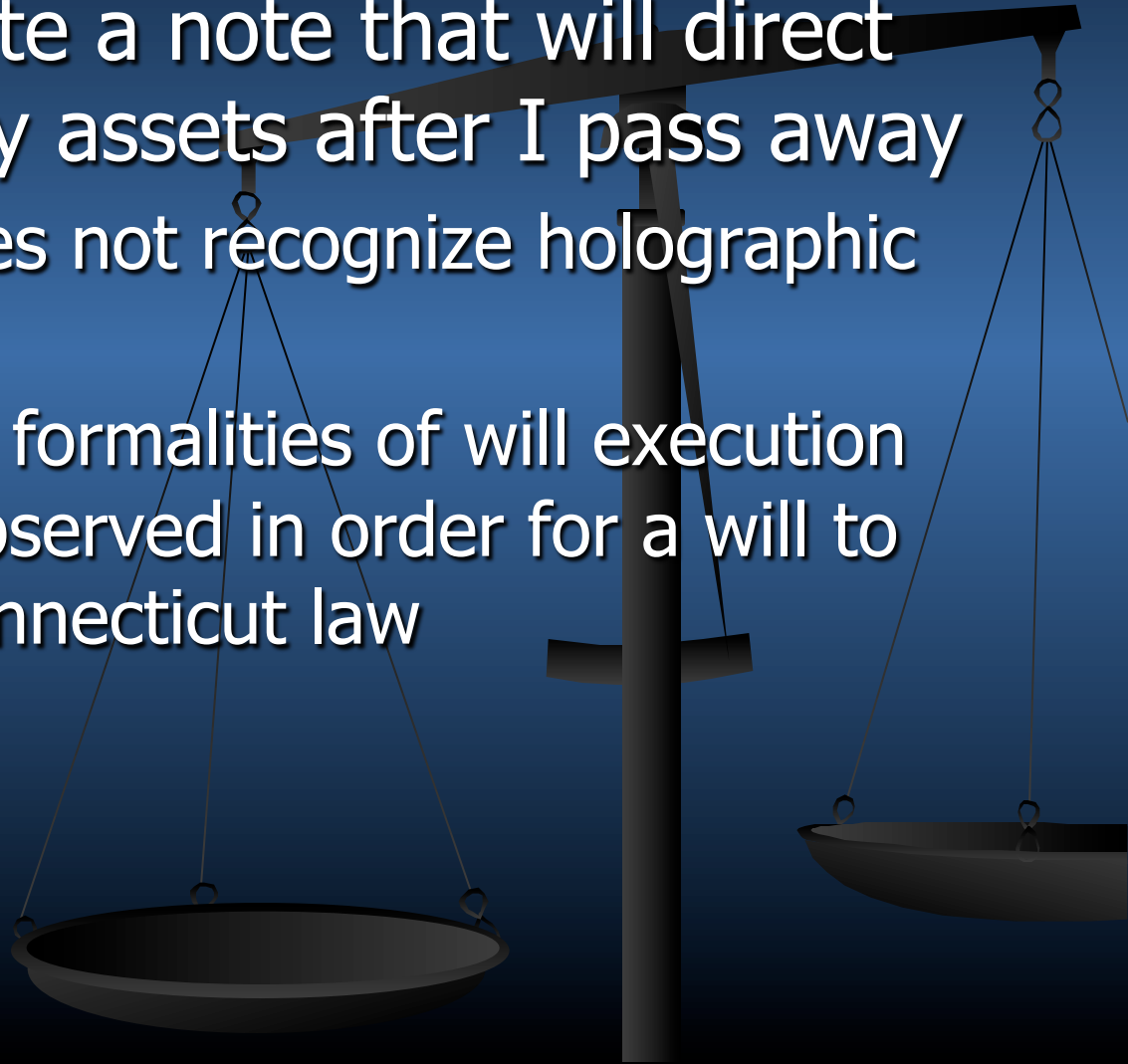
Misconceptions (cont'd)

- A living trust is a substitute for a will
 - Living trusts govern assets that are titled in the trust
 - Assets outside the trust are not governed by the trust



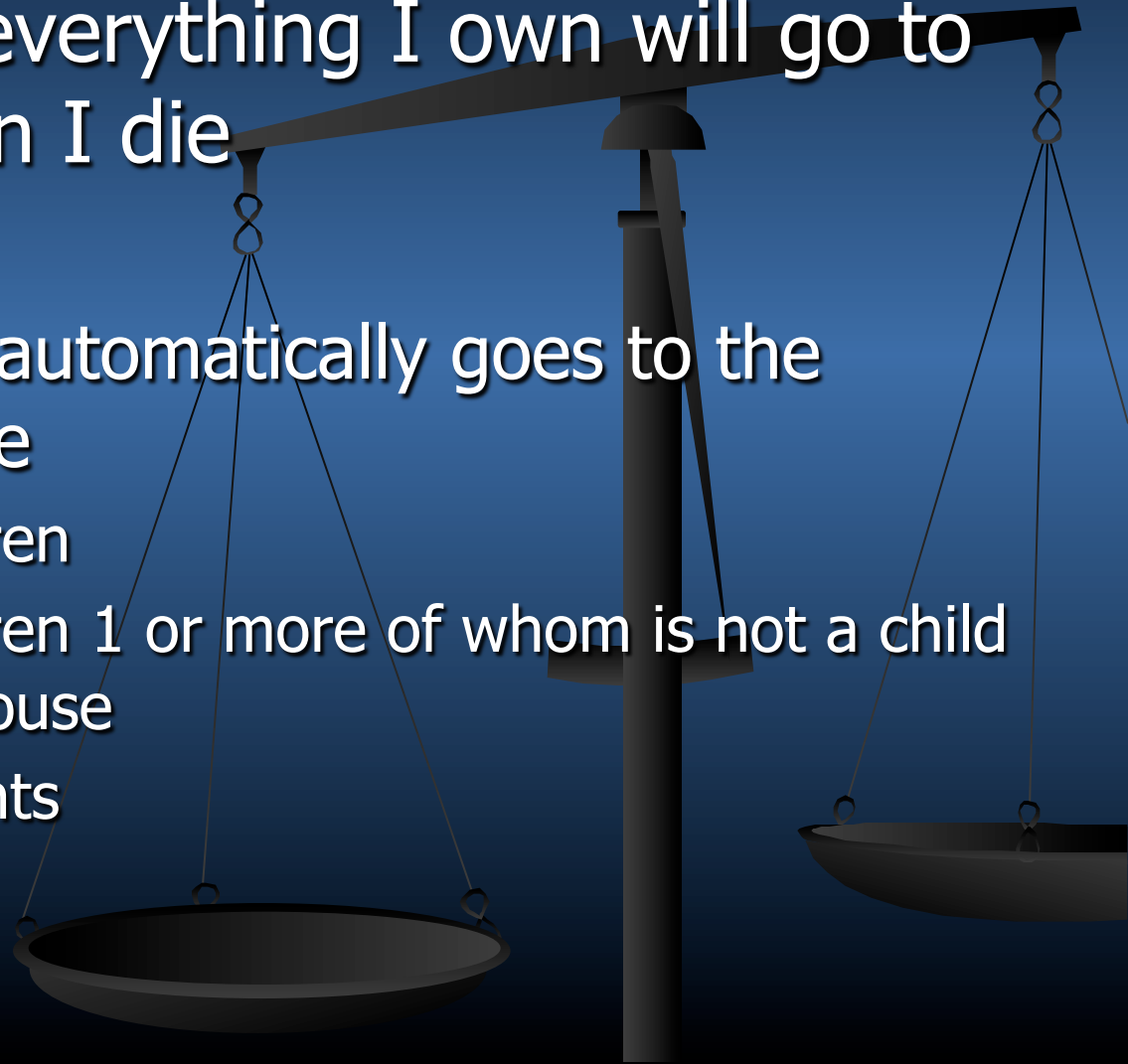
Misconceptions (cont'd)

- I can simply write a note that will direct who receives my assets after I pass away
 - Connecticut does not recognize holographic wills
 - There are strict formalities of will execution that must be observed in order for a will to comply with Connecticut law



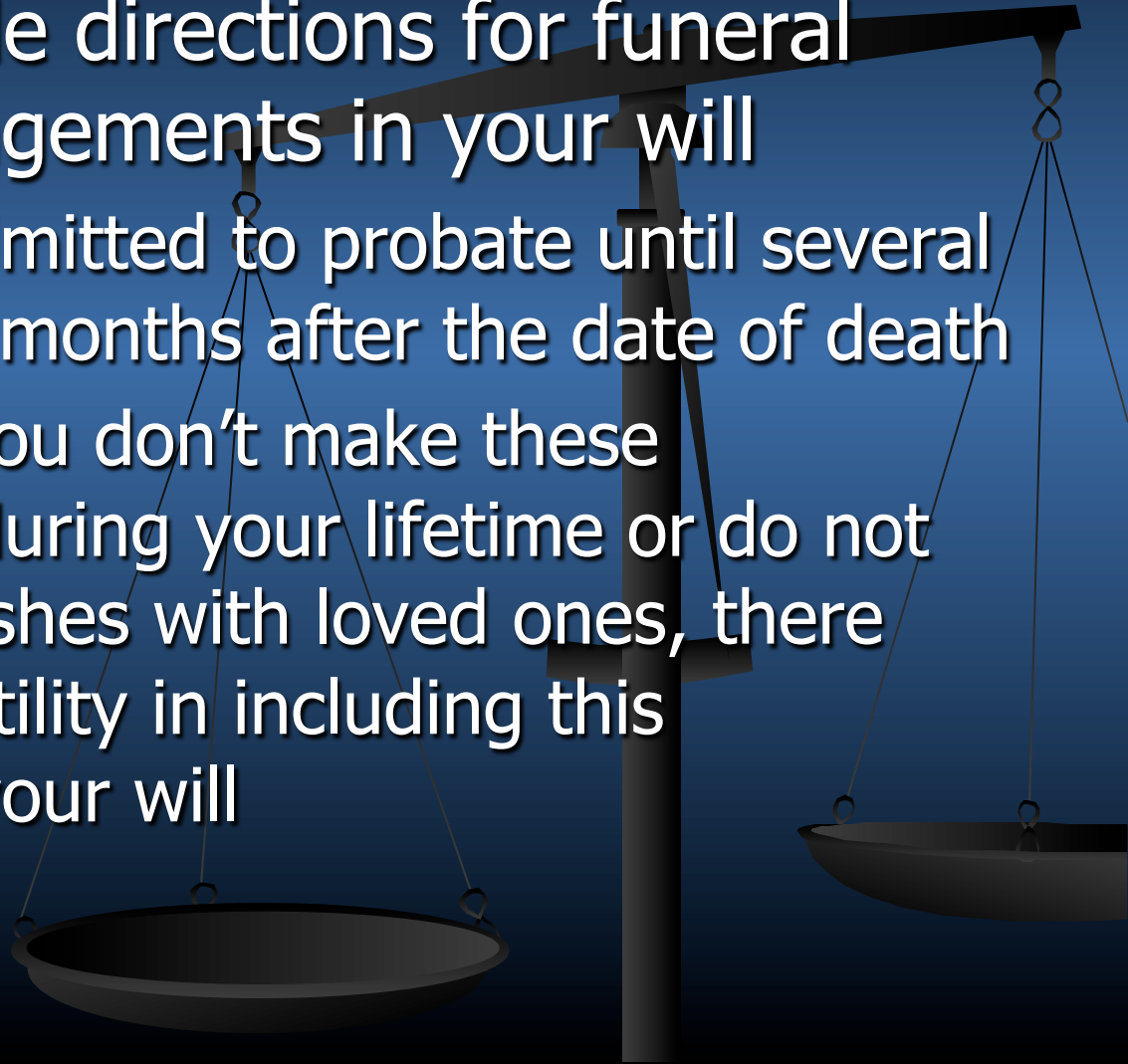
Misconceptions (cont'd)

- Without a will, everything I own will go to my spouse when I die
 - Fact specific
 - Not everything automatically goes to the surviving spouse
 - Surviving children
 - Surviving children 1 or more of whom is not a child of surviving spouse
 - Surviving parents



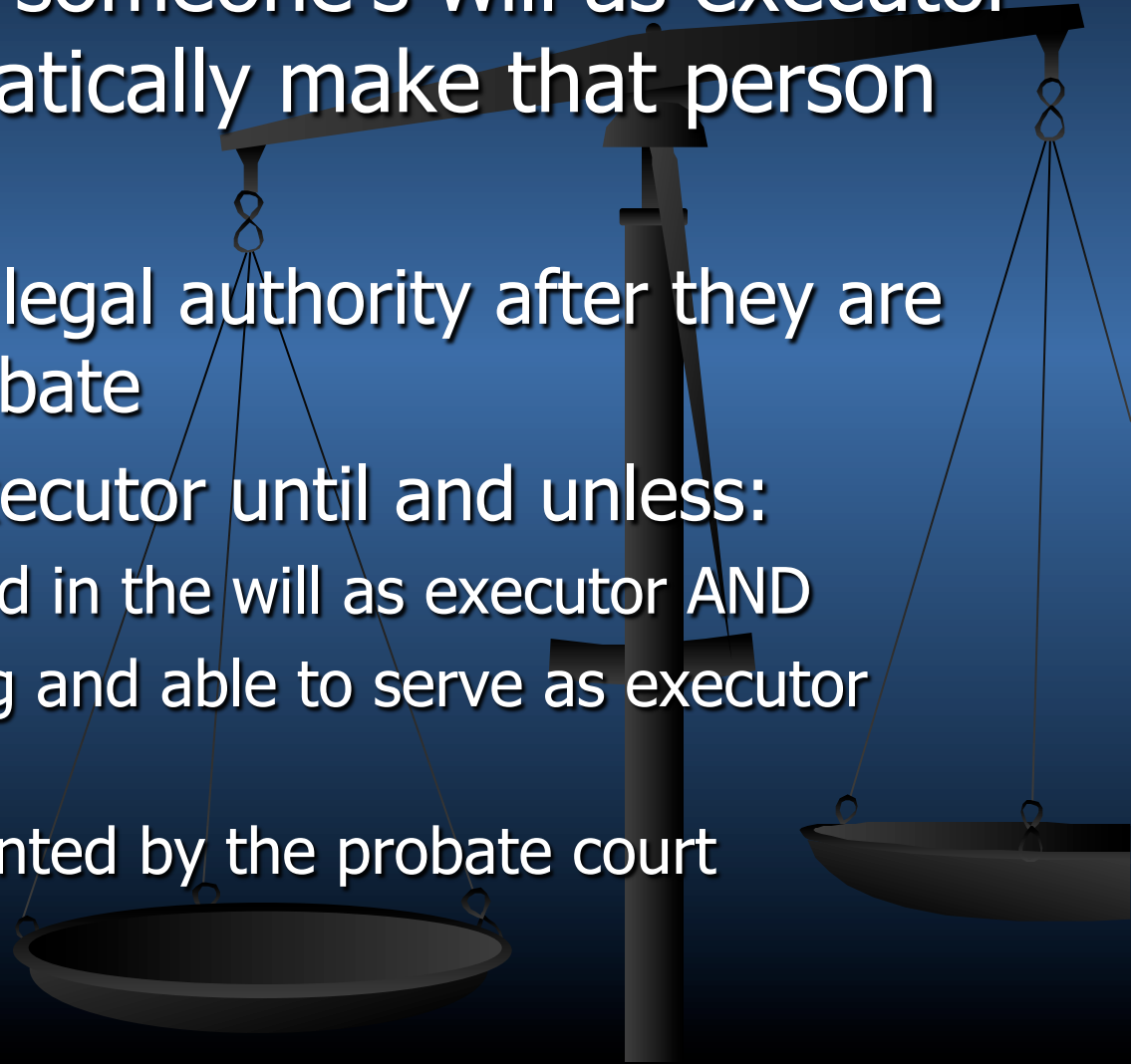
Misconceptions (cont'd)

- You must include directions for funeral and burial arrangements in your will
 - Wills are not admitted to probate until several days, weeks or months after the date of death
 - Conversely, if you don't make these arrangements during your lifetime or do not discuss your wishes with loved ones, there may be some utility in including this information in your will



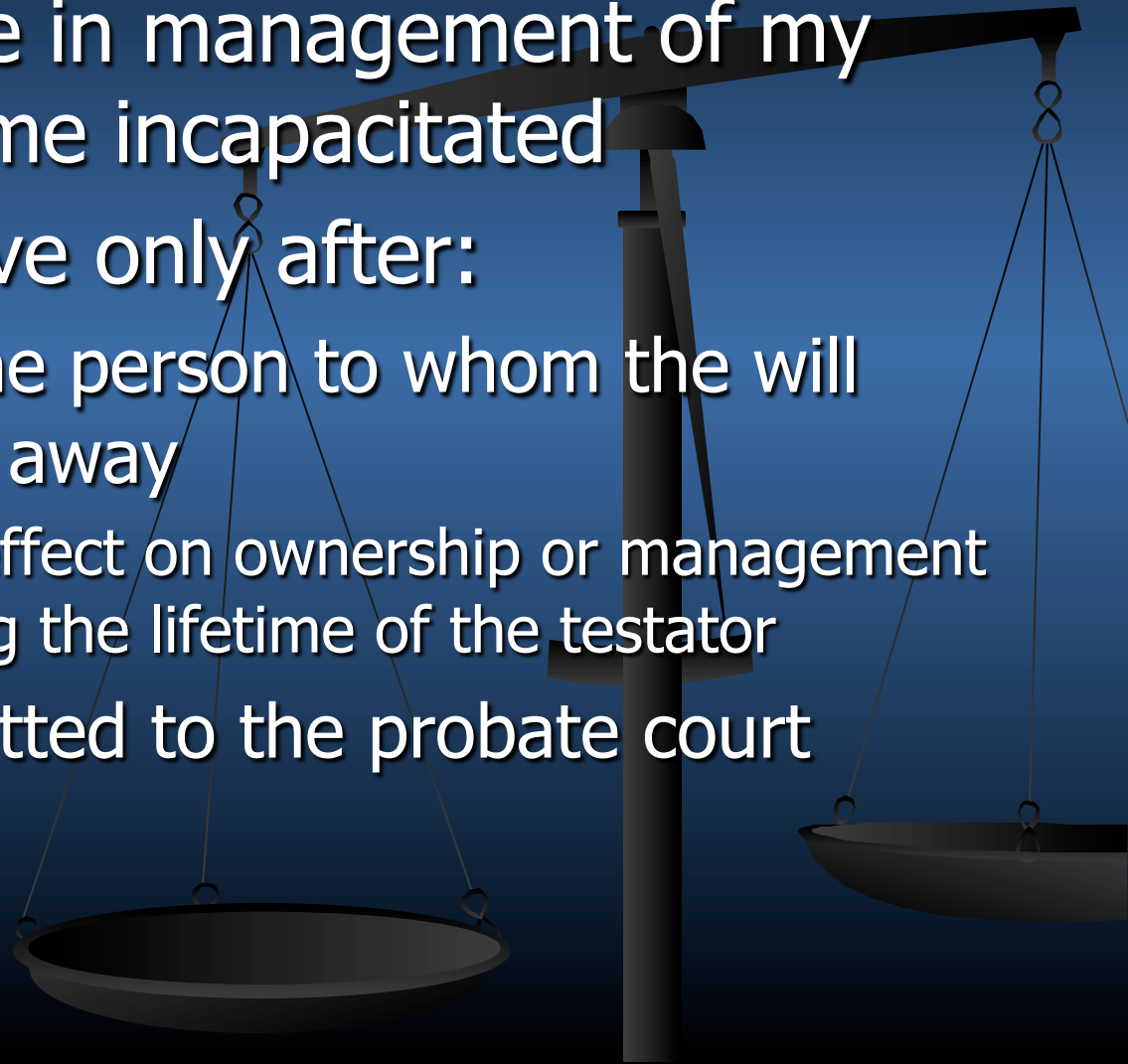
Misconceptions (cont'd)

- Being named in someone's will as executor does not automatically make that person executor
 - Wills only have legal authority after they are admitted to probate
 - No one is an executor until and unless:
 - They are named in the will as executor AND
 - They are willing and able to serve as executor AND
 - They are appointed by the probate court



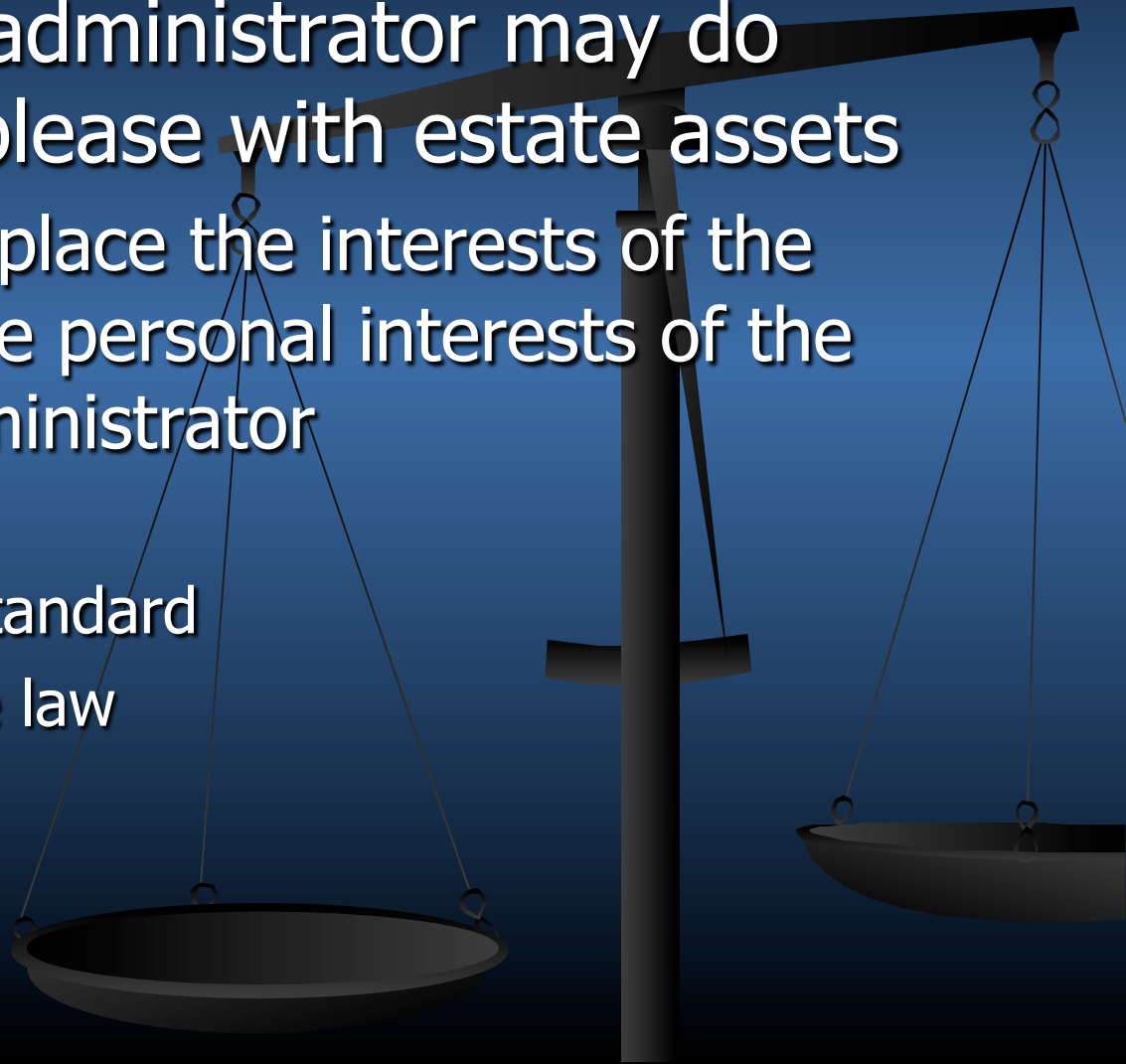
Misconceptions (cont'd)

- Wills have a role in management of my assets if I become incapacitated
- Wills are effective only after:
 - The testator (the person to whom the will applies) passes away
 - Wills have no effect on ownership or management of assets during the lifetime of the testator
 - The will is admitted to the probate court



Misconceptions (cont'd)

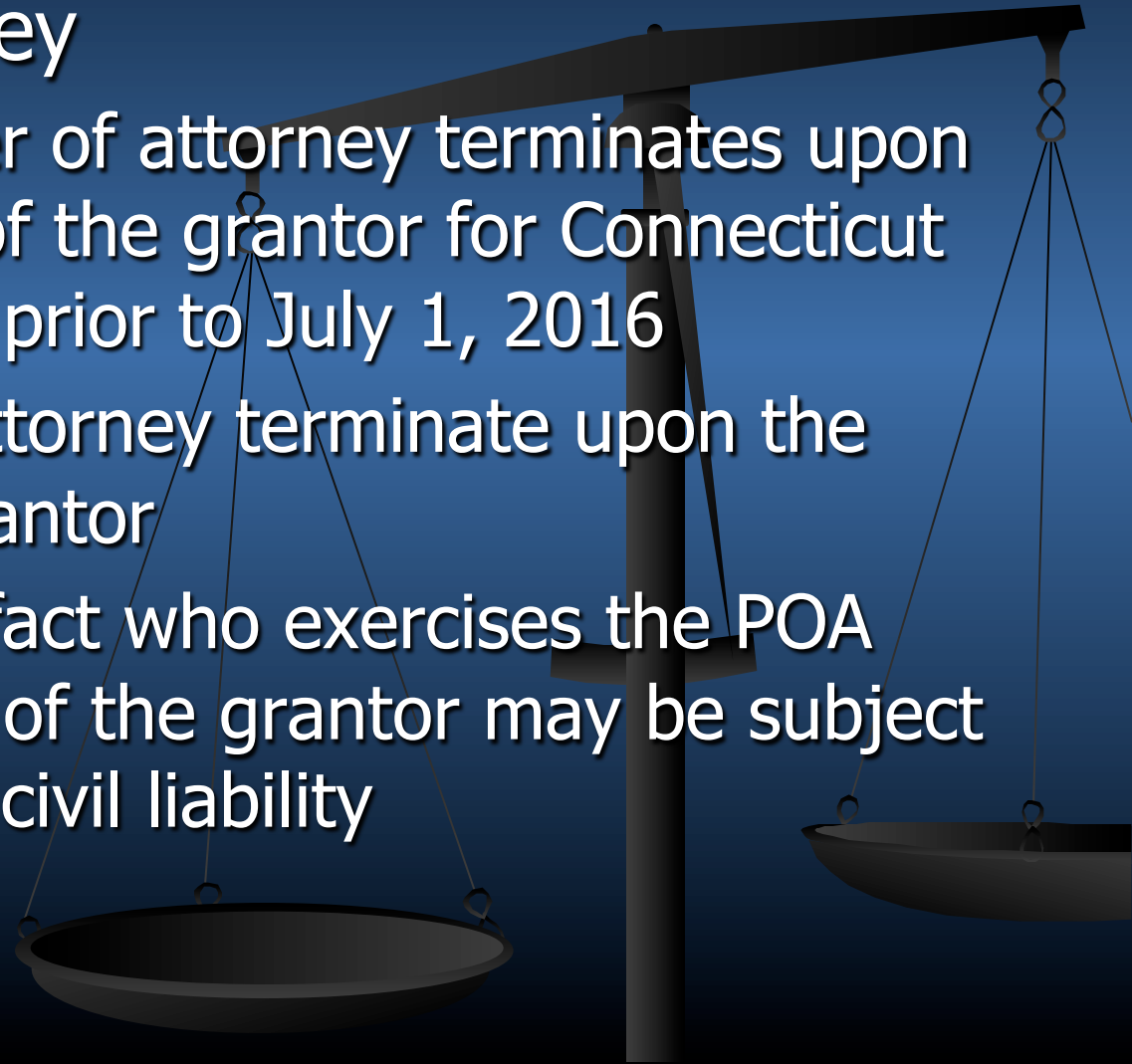
- An executor or administrator may do whatever they please with estate assets
 - Fiduciary duty: place the interests of the estate above the personal interests of the executor or administrator
 - No self-dealing
 - Highest legal standard
 - Must follow the law



Misconceptions (cont'd)

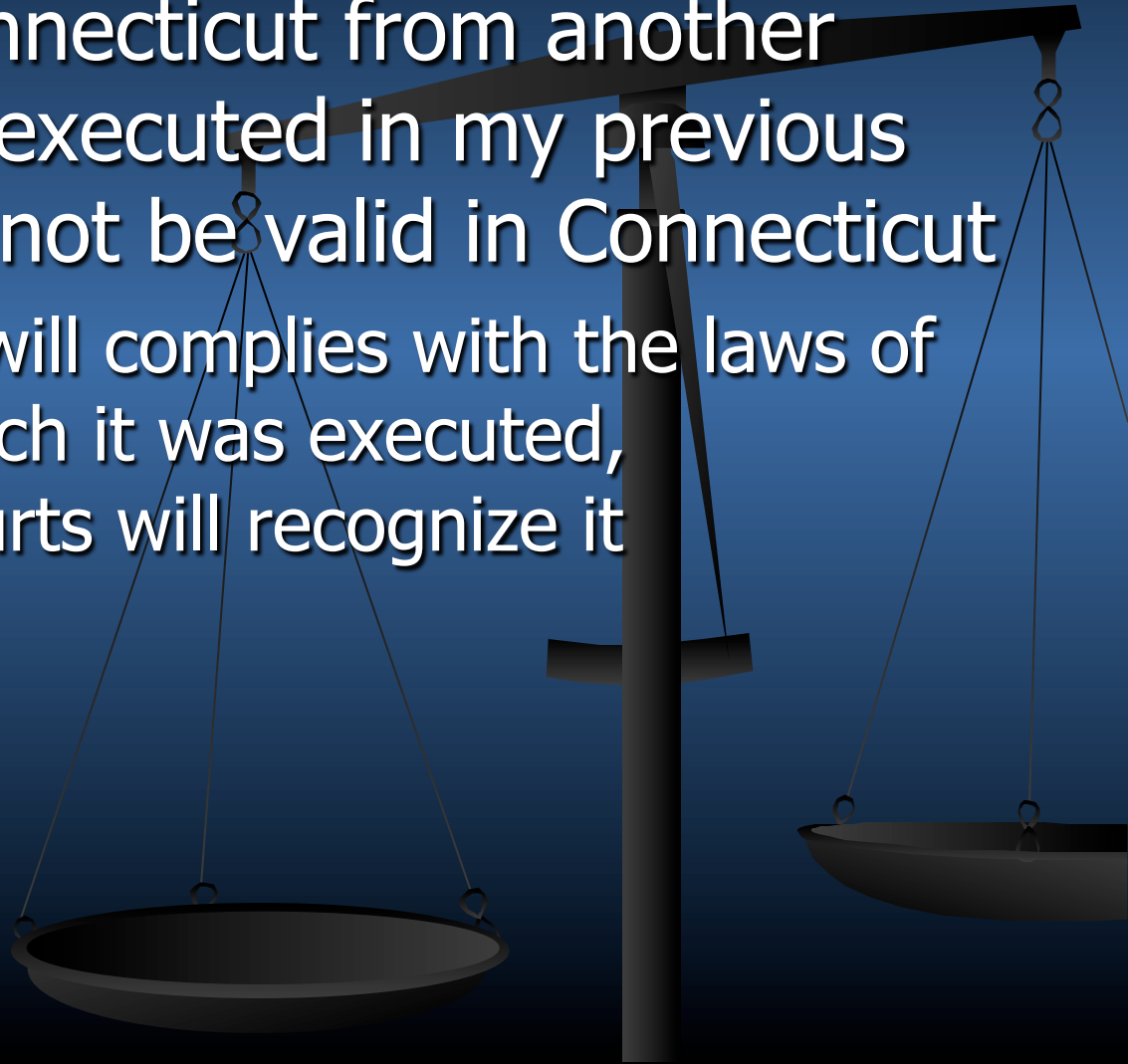
■ Power of attorney

- A general power of attorney terminates upon the incapacity of the grantor for Connecticut POAs executed prior to July 1, 2016
- All powers of attorney terminate upon the death of the grantor
- An attorney in fact who exercises the POA after the death of the grantor may be subject to criminal and civil liability



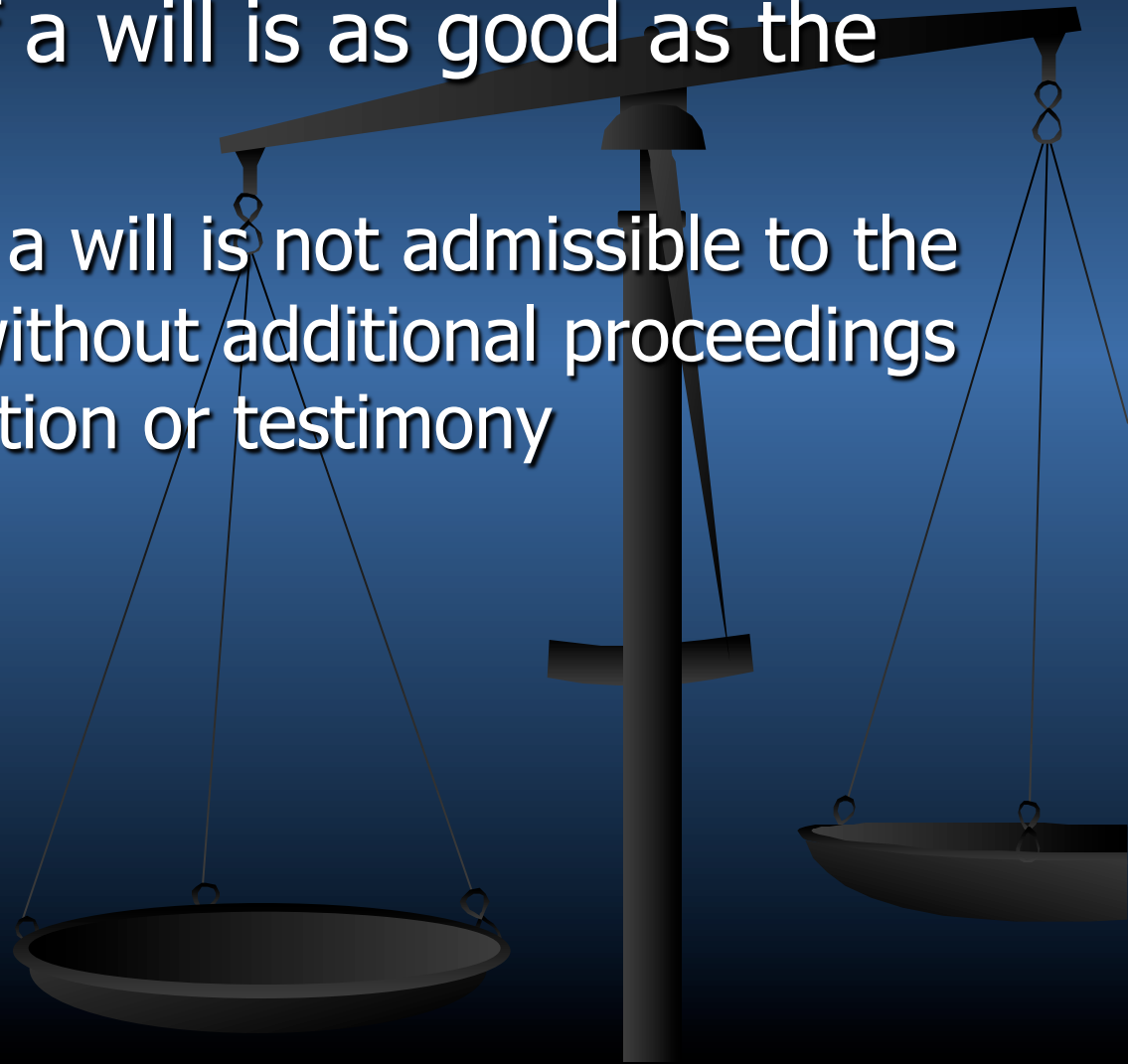
Misconceptions (cont'd)

- If I move to Connecticut from another state, the will I executed in my previous home state will not be valid in Connecticut
 - As long as the will complies with the laws of the state in which it was executed, Connecticut courts will recognize it



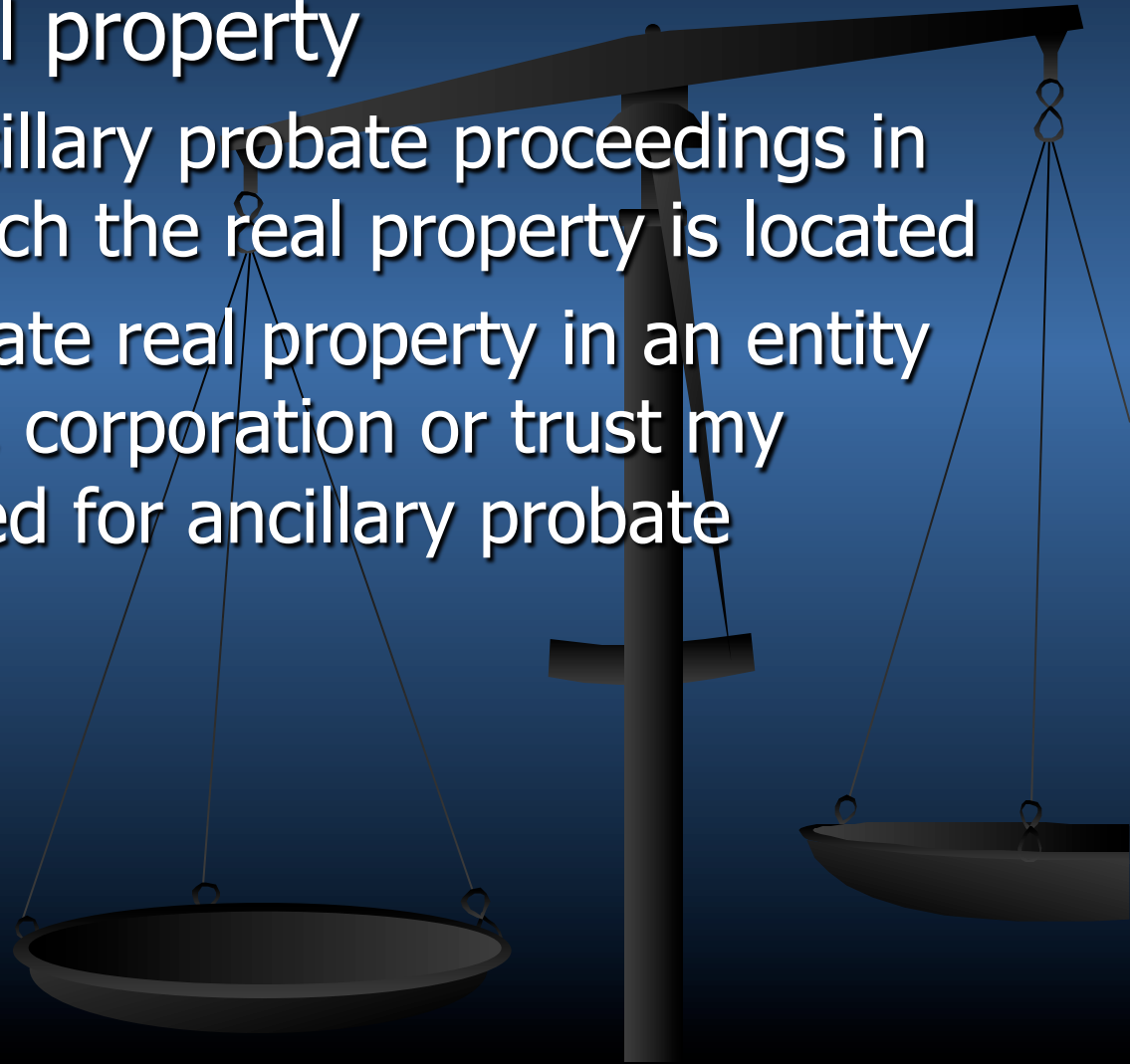
Misconceptions (cont'd)

- A photocopy of a will is as good as the original copy
 - A photocopy of a will is not admissible to the probate court without additional proceedings and documentation or testimony



Misconceptions (cont'd)

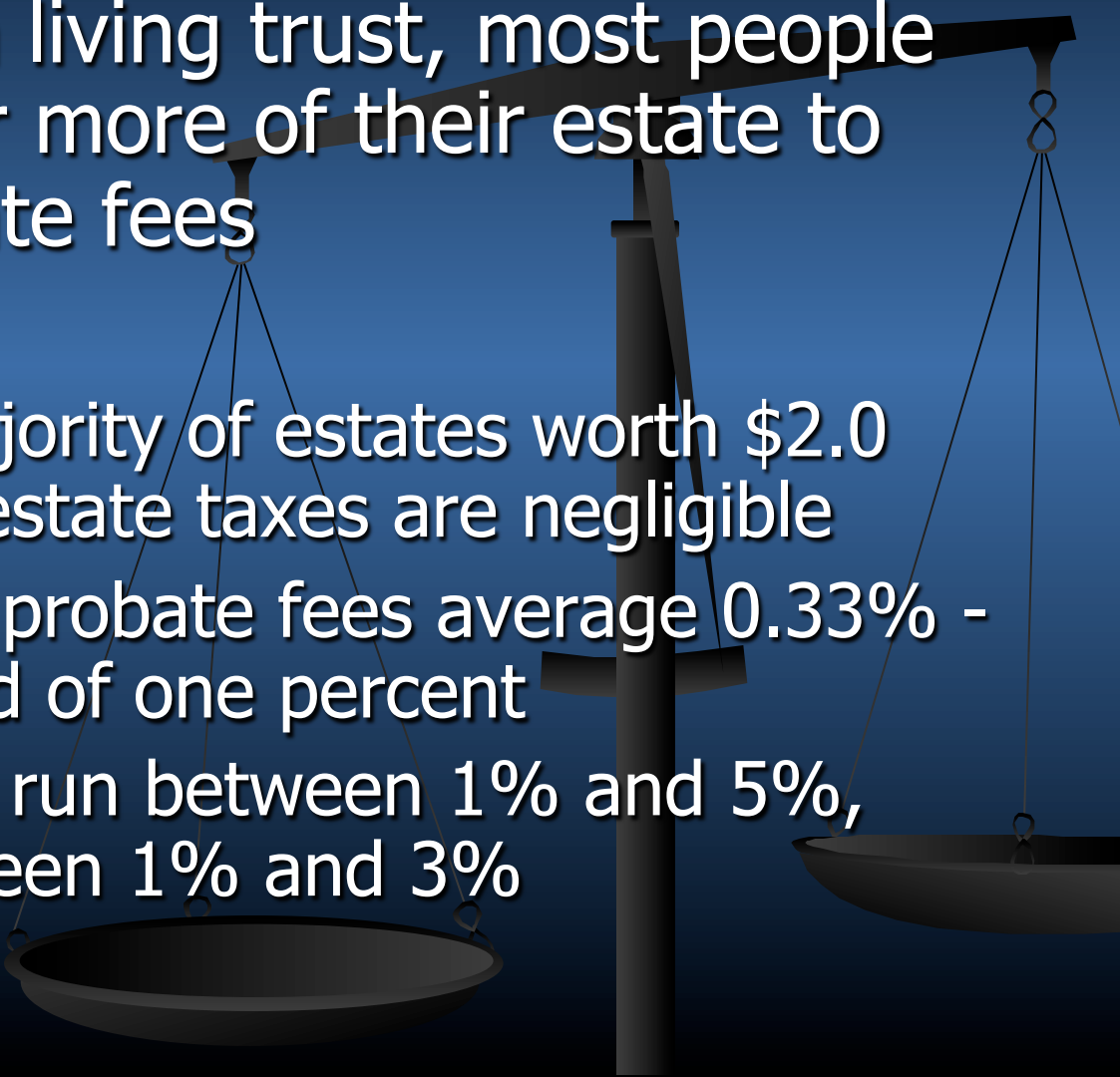
- Out of state real property
 - Will require ancillary probate proceedings in the state in which the real property is located
 - Titling out of state real property in an entity such as an LLC, corporation or trust may prevent the need for ancillary probate proceedings



MYTHS

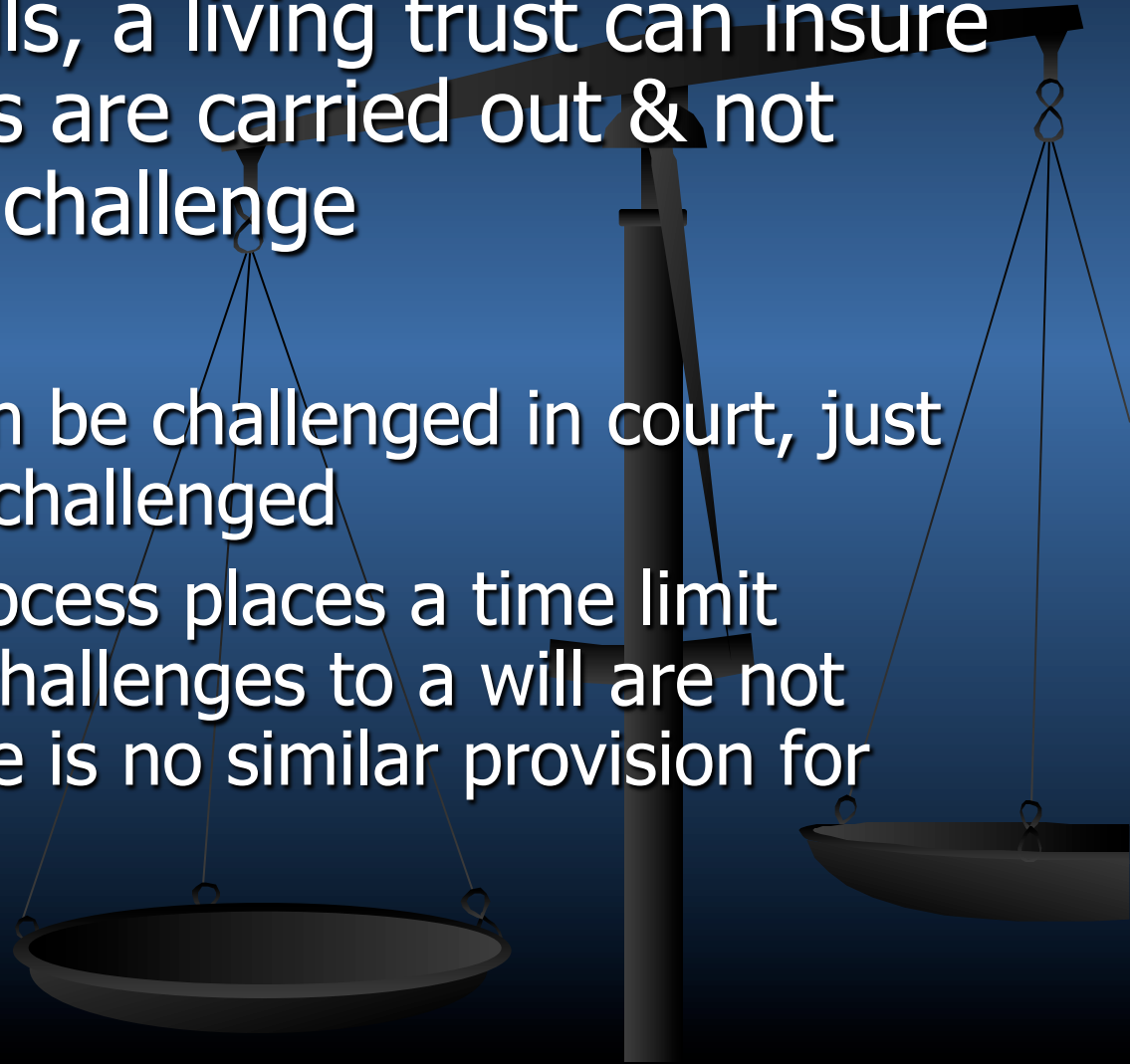


Myths

- Myth: Without a living trust, most people can lose 50% or more of their estate to taxes and probate fees
 - Reality
 - For the vast majority of estates worth \$2.0 million or less, estate taxes are negligible
 - In Connecticut, probate fees average 0.33% - that is, one third of one percent
 - Attorney's fees run between 1% and 5%, with most between 1% and 3%
- 

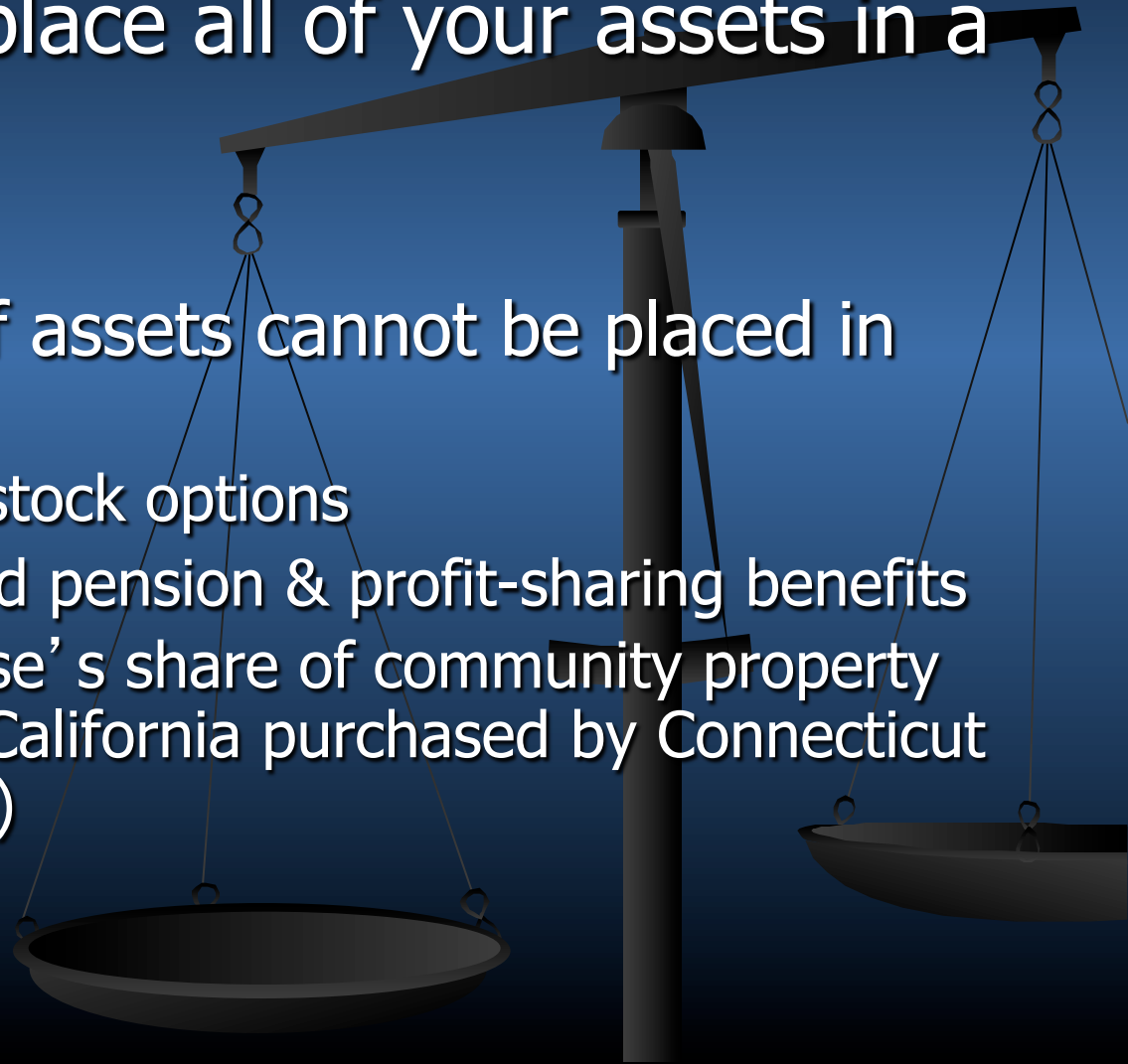
Myths (cont'd)

- Myth: Unlike wills, a living trust can insure that your wishes are carried out & not subject to legal challenge
- Reality
 - Living trusts can be challenged in court, just as wills can be challenged
 - The probate process places a time limit beyond which challenges to a will are not permitted; there is no similar provision for living trusts



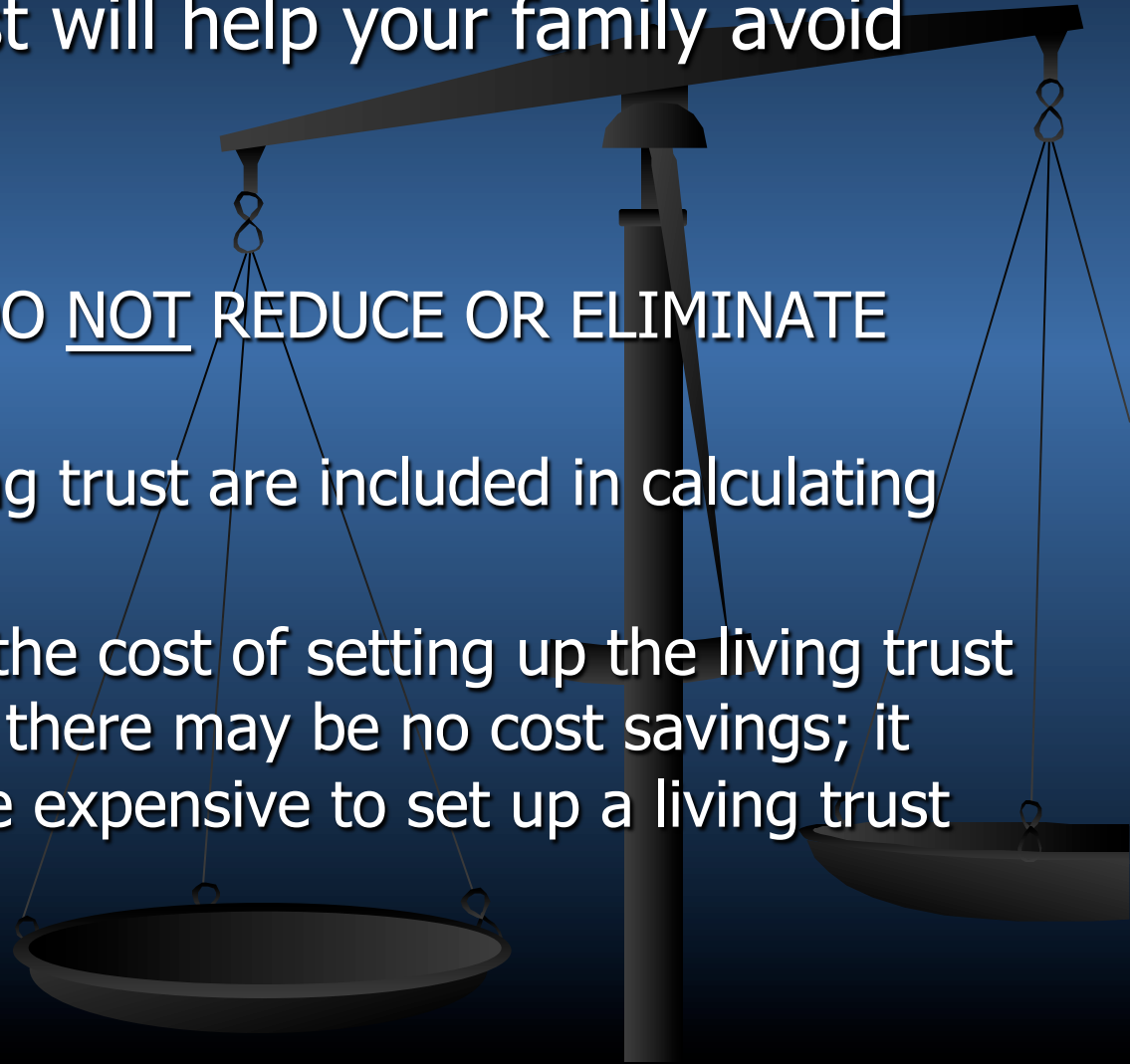
Myths (cont'd)

- Myth: You can place all of your assets in a living trust
- Reality:
 - Certain types of assets cannot be placed in living trusts:
 - Most forms of stock options
 - Certain qualified pension & profit-sharing benefits
 - Surviving spouse's share of community property (i.e., house in California purchased by Connecticut married couple)



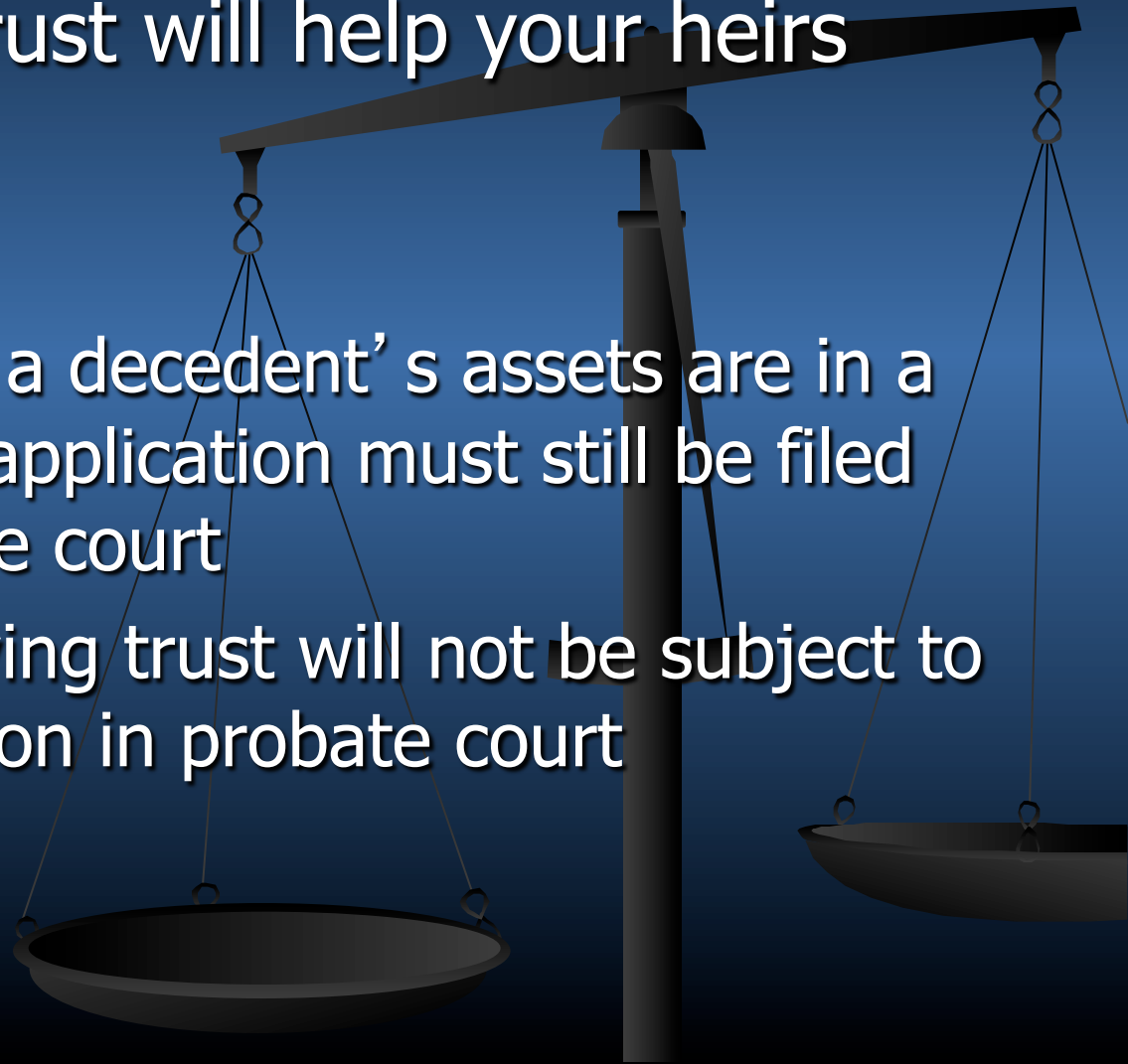
Myths (cont'd)

- Myth: A living trust will help your family avoid probate fees
- Reality
 - LIVING TRUSTS DO NOT REDUCE OR ELIMINATE PROBATE FEES!
 - All assets in a living trust are included in calculating the probate fee
 - When calculating the cost of setting up the living trust (attorney's fees), there may be no cost savings; it may even be more expensive to set up a living trust



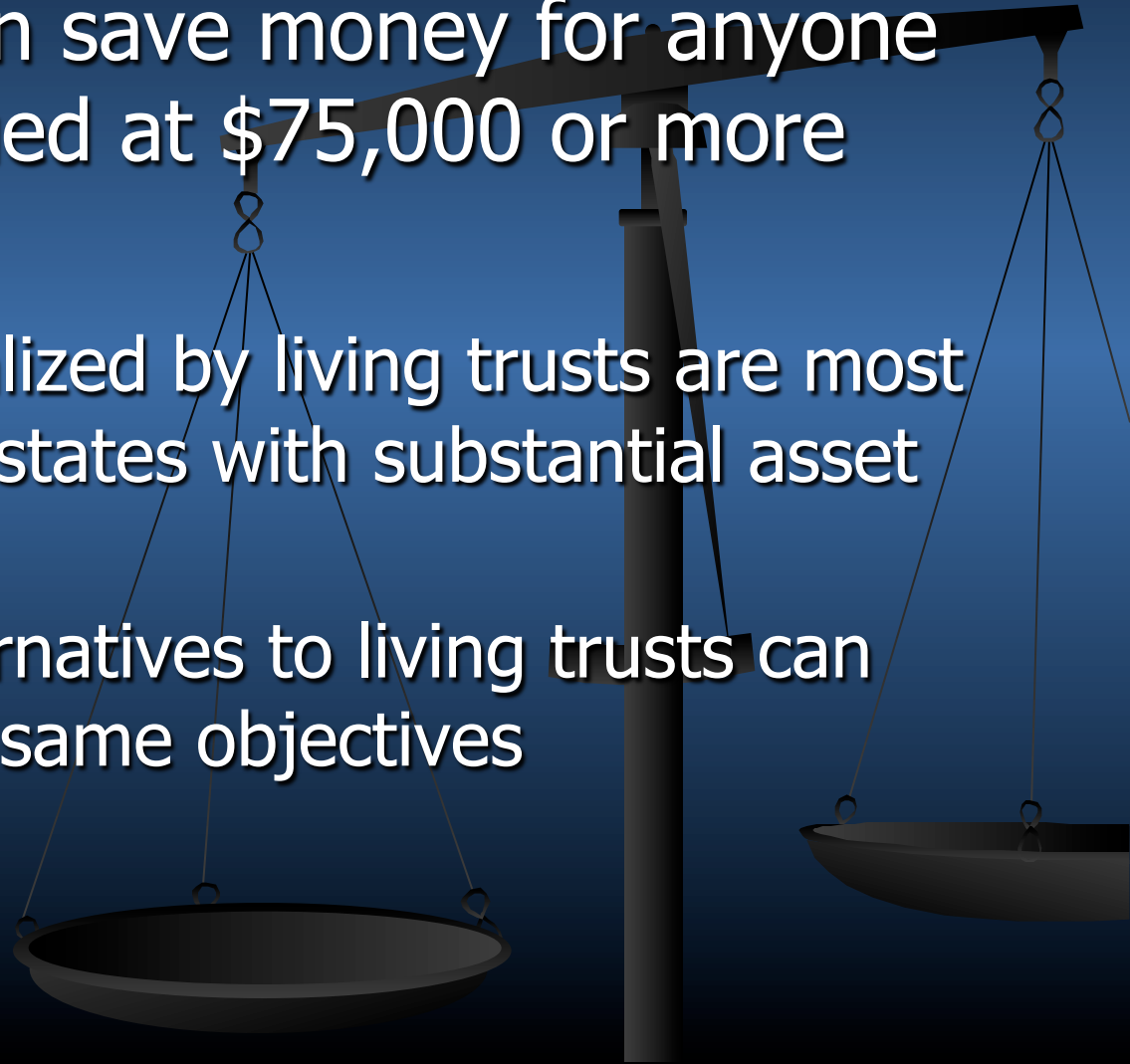
Myths (cont'd)

- Myth: A living trust will help your heirs avoid probate
- Reality
 - Even if most of a decedent's assets are in a living trust, an application must still be filed with the probate court
 - Assets in the living trust will not be subject to full administration in probate court



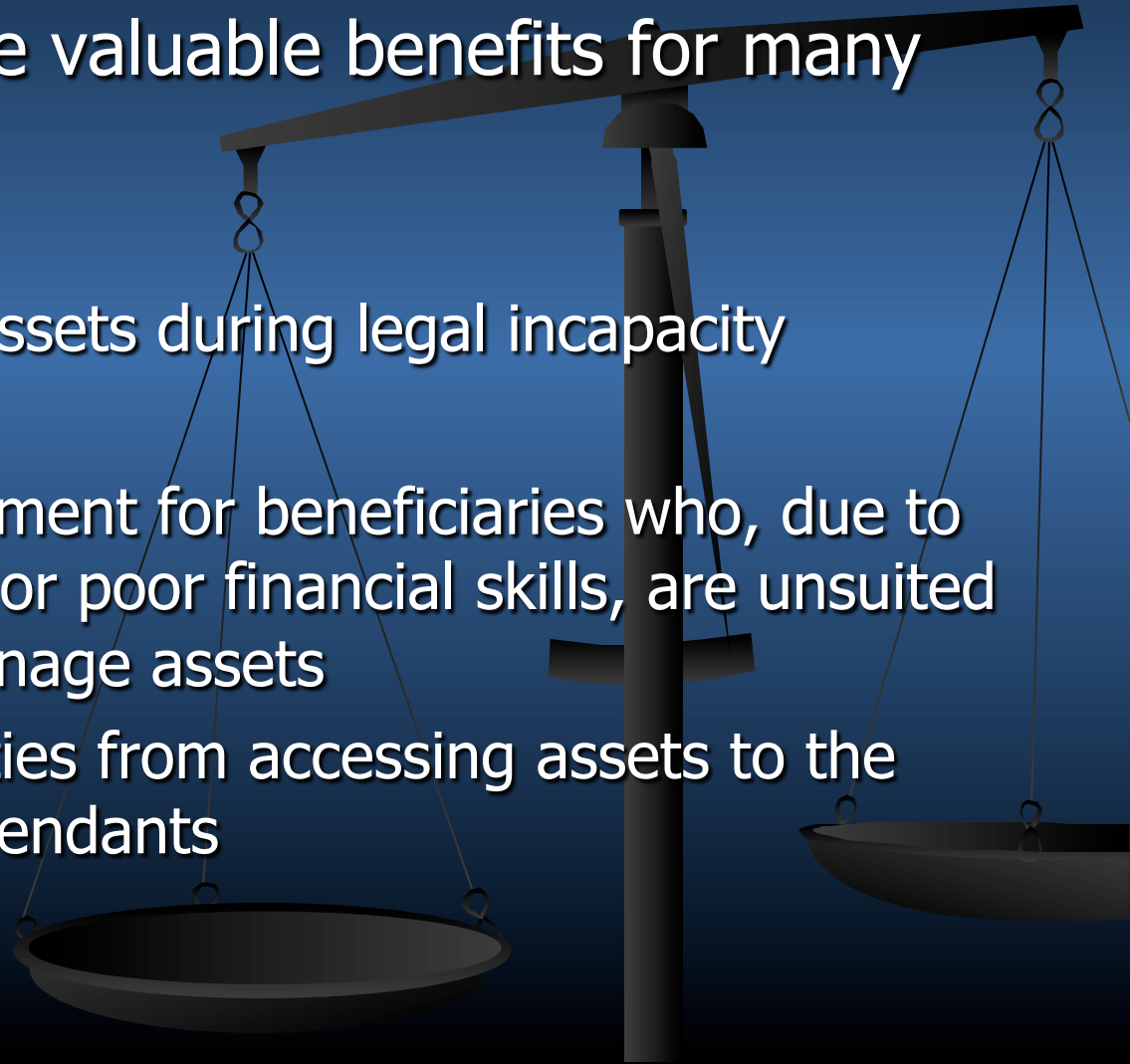
Myths (cont'd)

- A living trust can save money for anyone with assets valued at \$75,000 or more
- Reality
 - Tax savings realized by living trusts are most significant for estates with substantial asset levels
 - Lower cost alternatives to living trusts can accomplish the same objectives



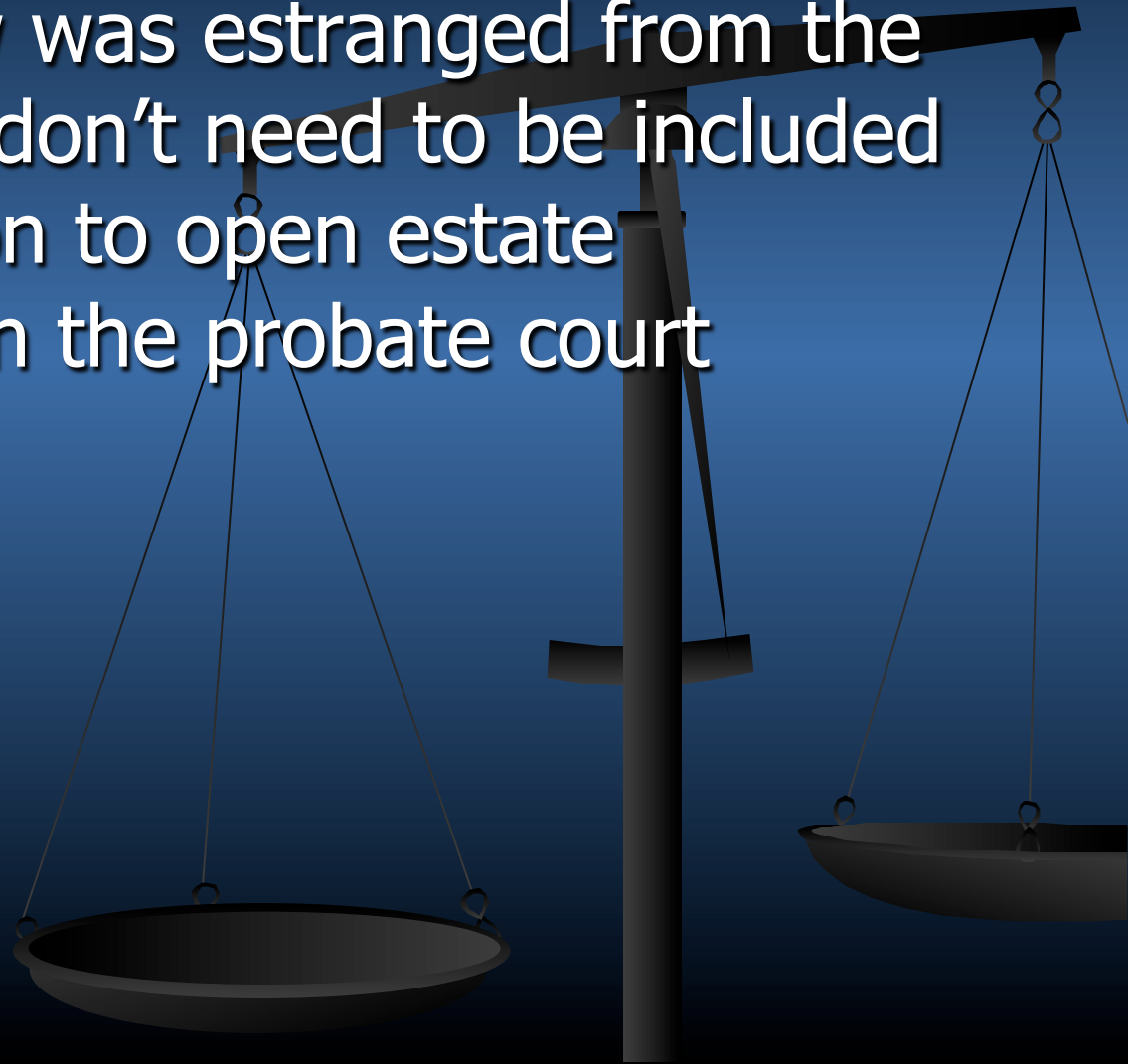
Myths (cont'd)

- Trusts are only for the wealthy
- Trusts can provide valuable benefits for many people:
 - Privacy
 - Management of assets during legal incapacity
 - Tax planning
 - Financial management for beneficiaries who, due to youth, incapacity or poor financial skills, are unsuited to adequately manage assets
 - Prevent third parties from accessing assets to the detriment of descendants



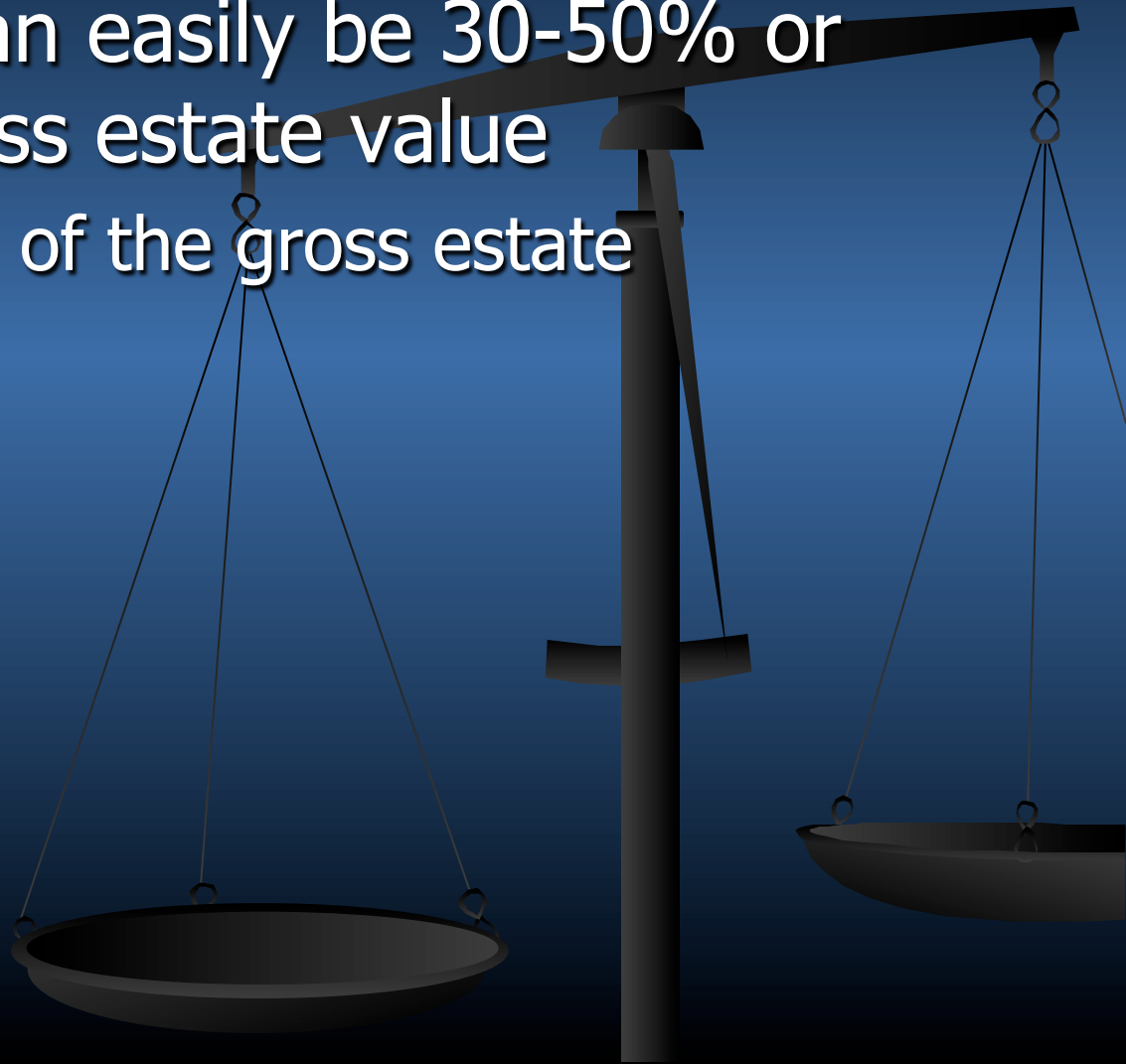
Myths (cont'd)

- If an heir at law was estranged from the decedent, they don't need to be included in the application to open estate administration in the probate court



Myths (cont'd)

- Attorney fees can easily be 30-50% or more of the gross estate value
 - Generally 1-5% of the gross estate

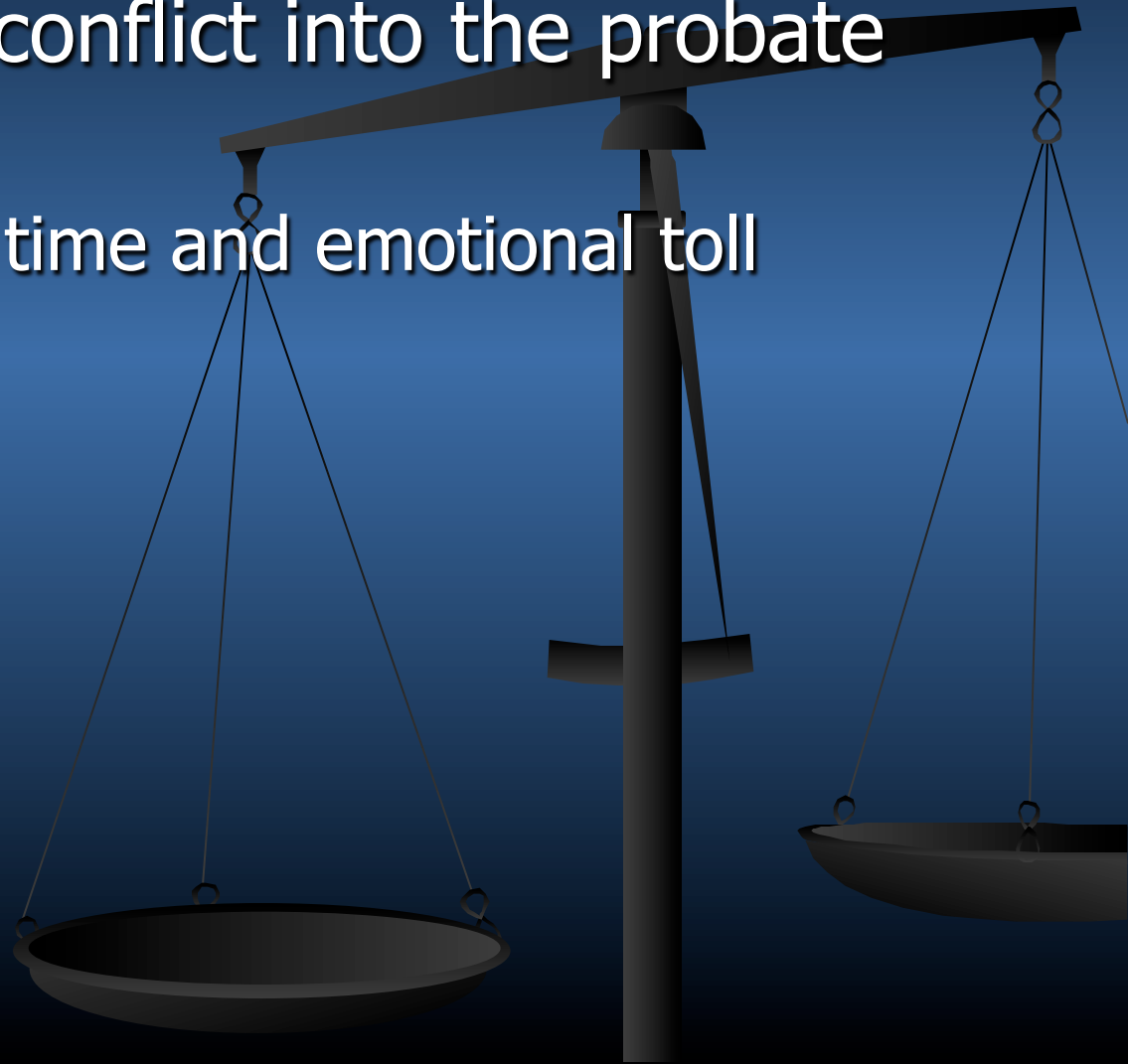


MISTAKES



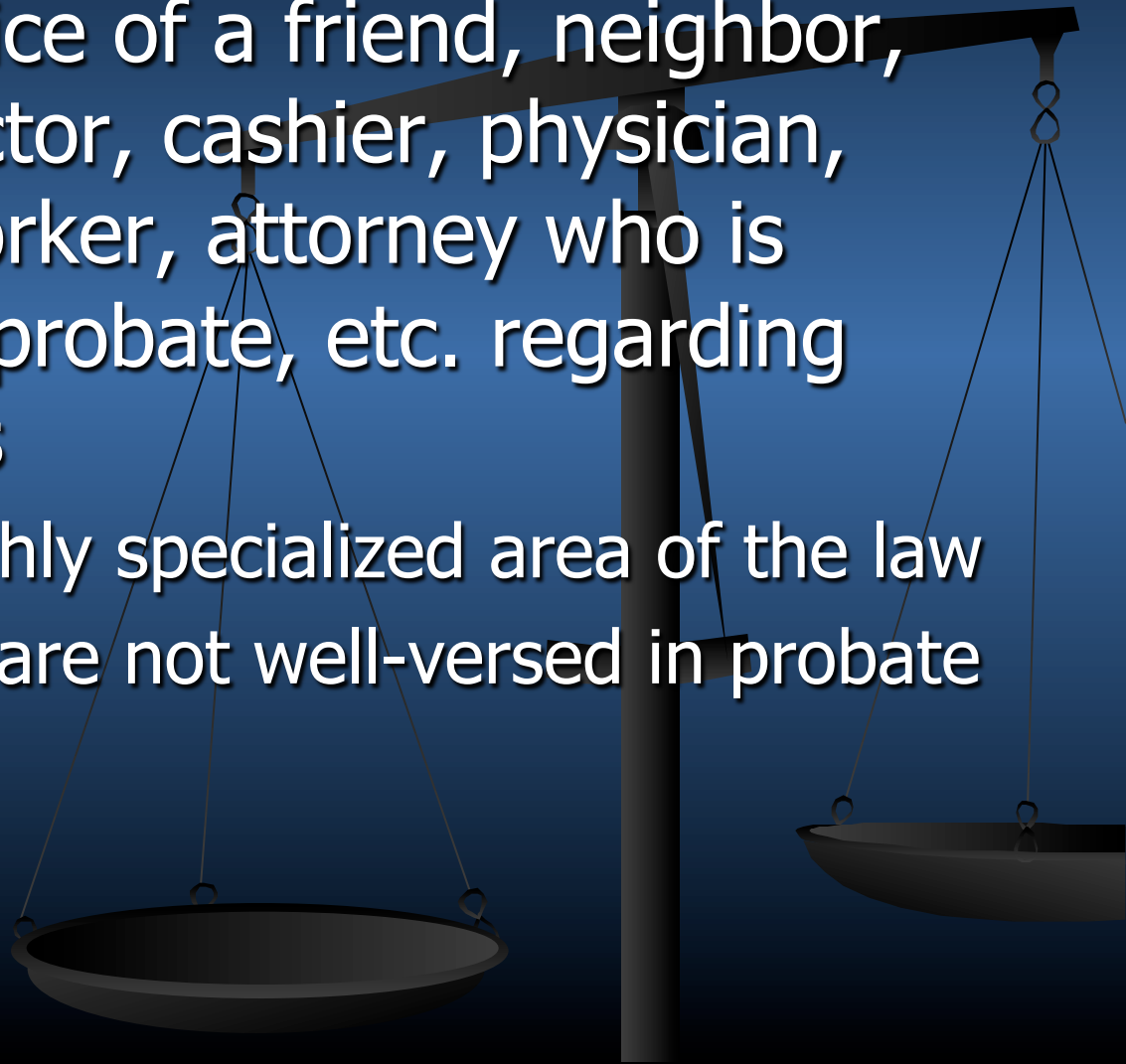
Mistakes

- Bringing family conflict into the probate process
 - Increases cost, time and emotional toll



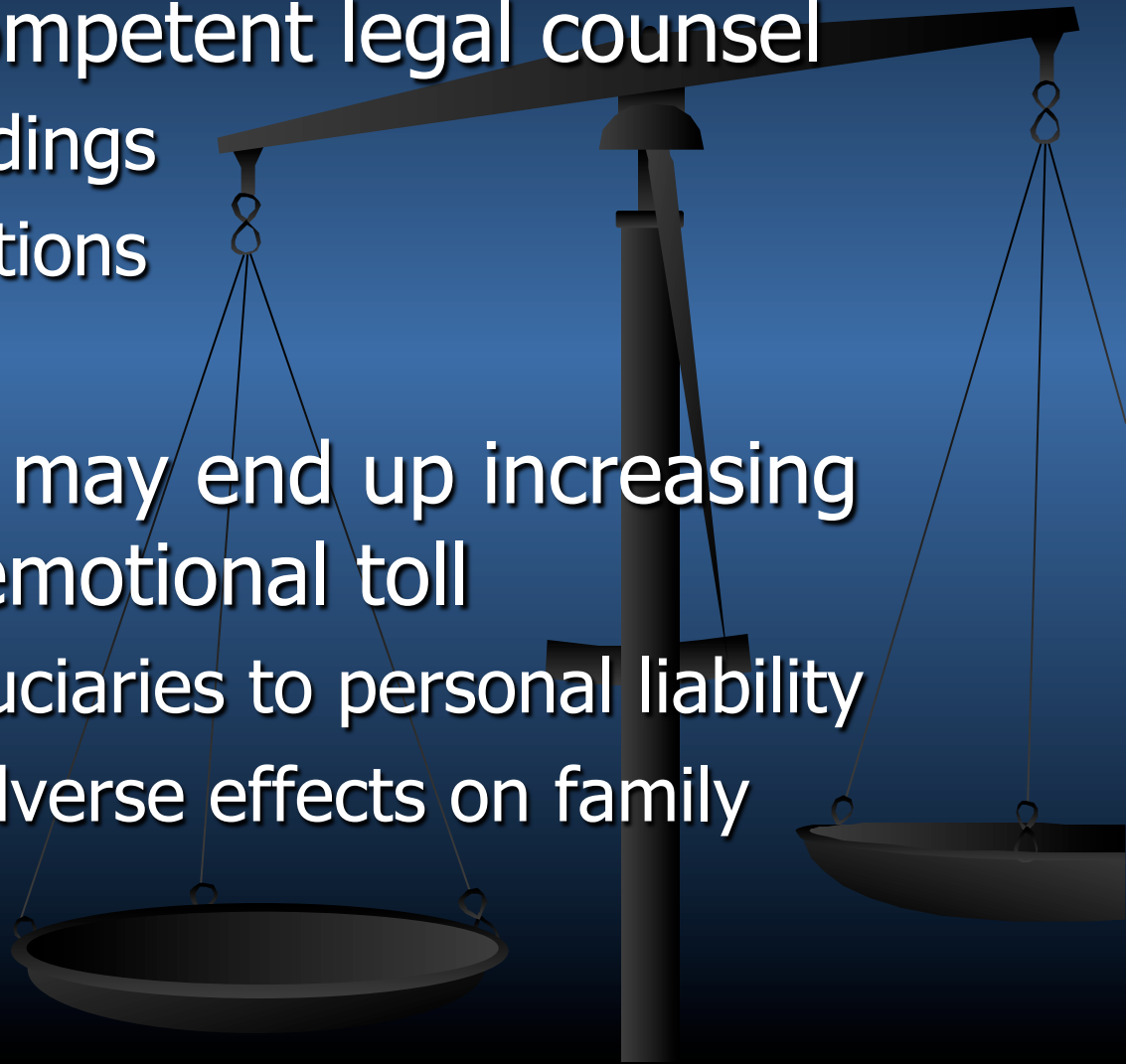
Mistakes (cont'd)

- Relying the advice of a friend, neighbor, relative, contractor, cashier, physician, nurse, social worker, attorney who is unfamiliar with probate, etc. regarding probate matters
 - Probate is a highly specialized area of the law
 - Most attorneys are not well-versed in probate law



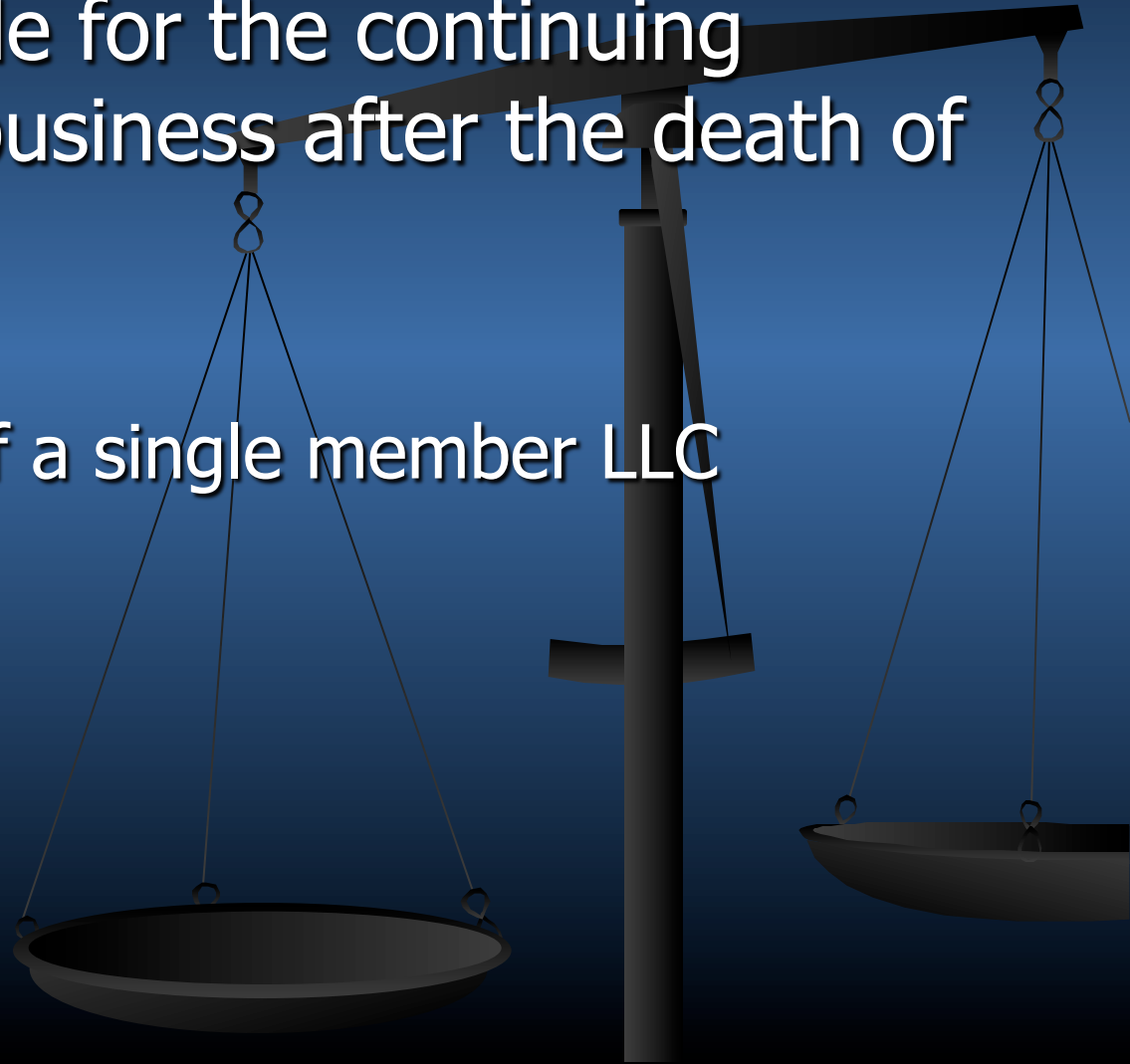
Mistakes (cont'd)

- Not retaining competent legal counsel
 - Probate proceedings
 - Probate applications
 - Estate planning
- Failure to do so may end up increasing cost, time and emotional toll
 - May expose fiduciaries to personal liability
 - May result in adverse effects on family members

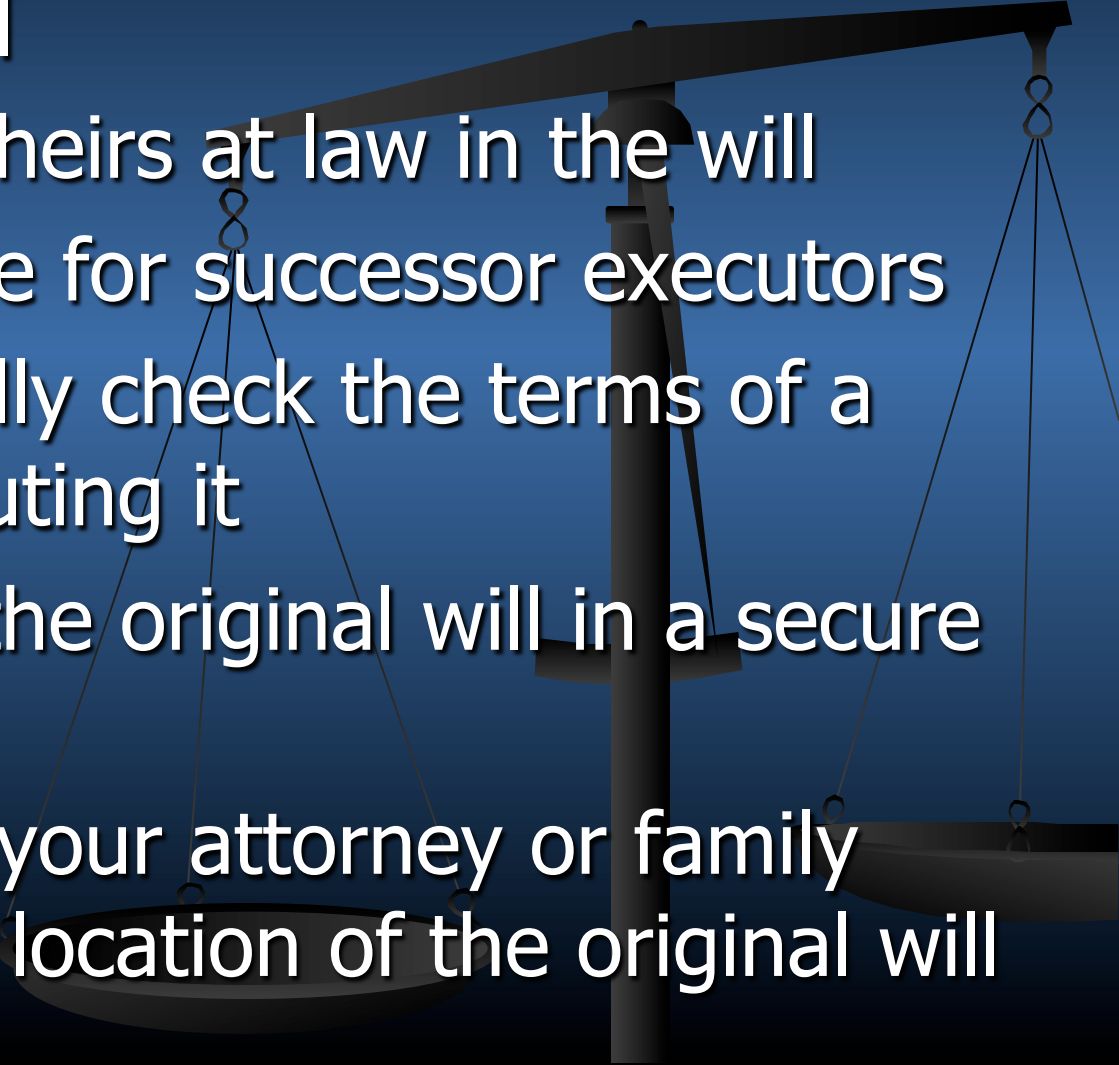


Mistakes (cont'd)

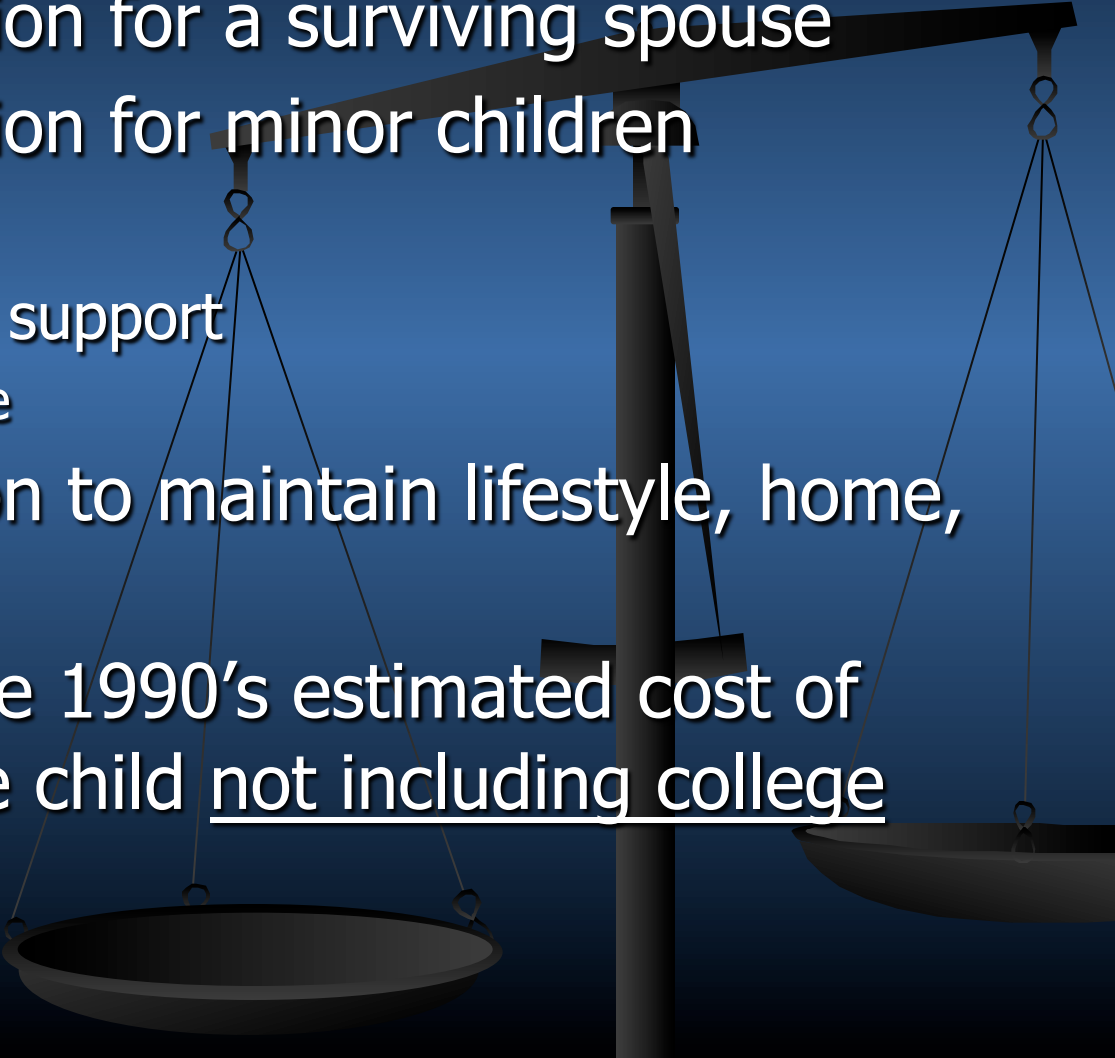
- Failing to provide for the continuing operation of a business after the death of the:
 - Sole owner
 - Sole member of a single member LLC
 - Corporation



Mistakes (cont'd)

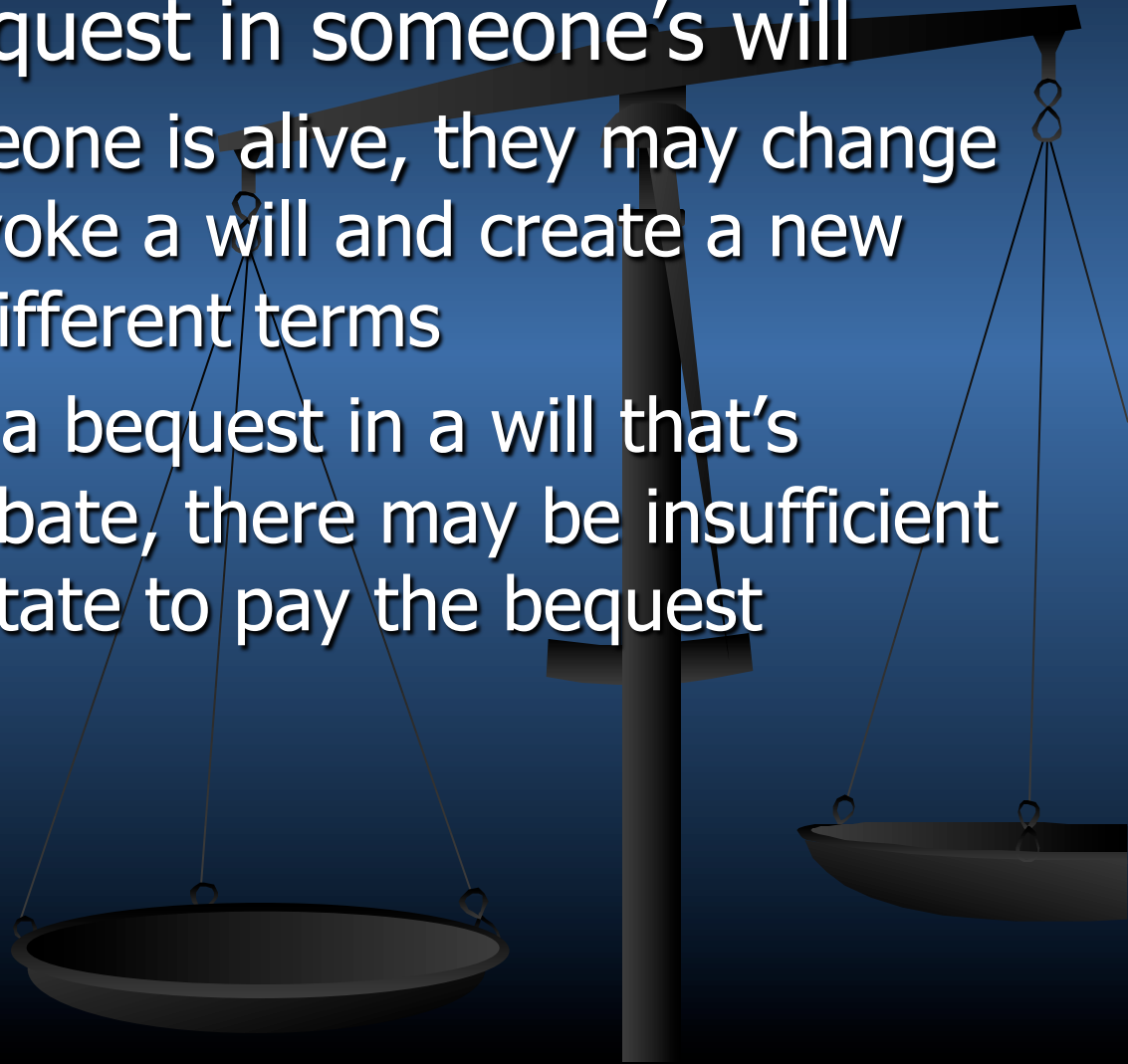
- Not having a will
 - Failing to name heirs at law in the will
 - Failing to provide for successor executors
 - Failing to carefully check the terms of a will before executing it
 - Failing to store the original will in a secure location
 - Failing to notify your attorney or family members of the location of the original will
- 

Mistakes (cont'd)

- Inadequate provision for a surviving spouse
 - Inadequate provision for minor children
 - Naming guardians
 - Providing financial support
 - Term life insurance
 - Objective: provision to maintain lifestyle, home, education, etc.
 - One study from the 1990's estimated cost of \$250K to raise one child not including college costs
- 

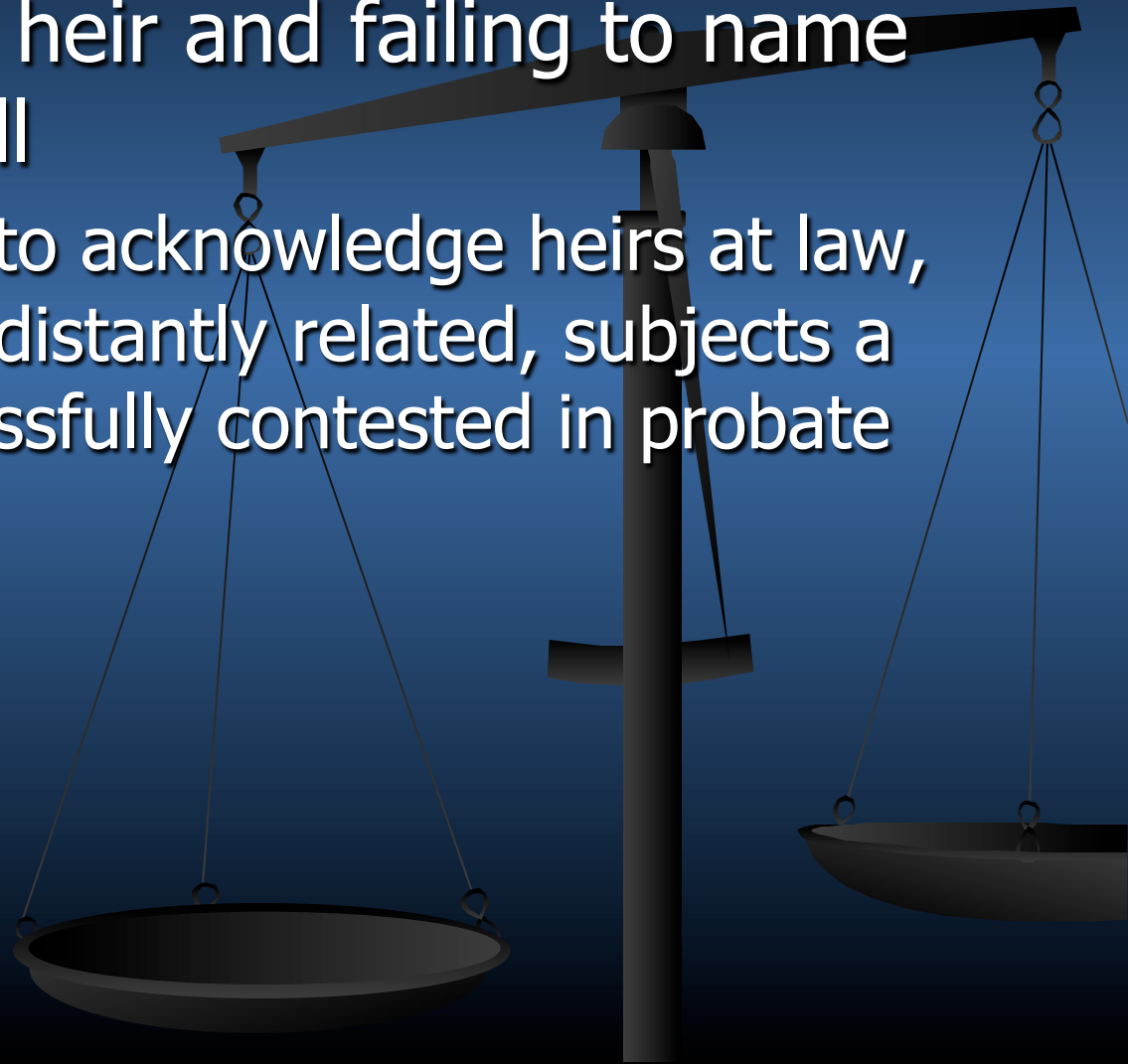
Mistakes (cont'd)

- Relying on a bequest in someone's will
 - As long as someone is alive, they may change their will, or revoke a will and create a new one with very different terms
 - Even if there is a bequest in a will that's admitted to probate, there may be insufficient assets in the estate to pay the bequest



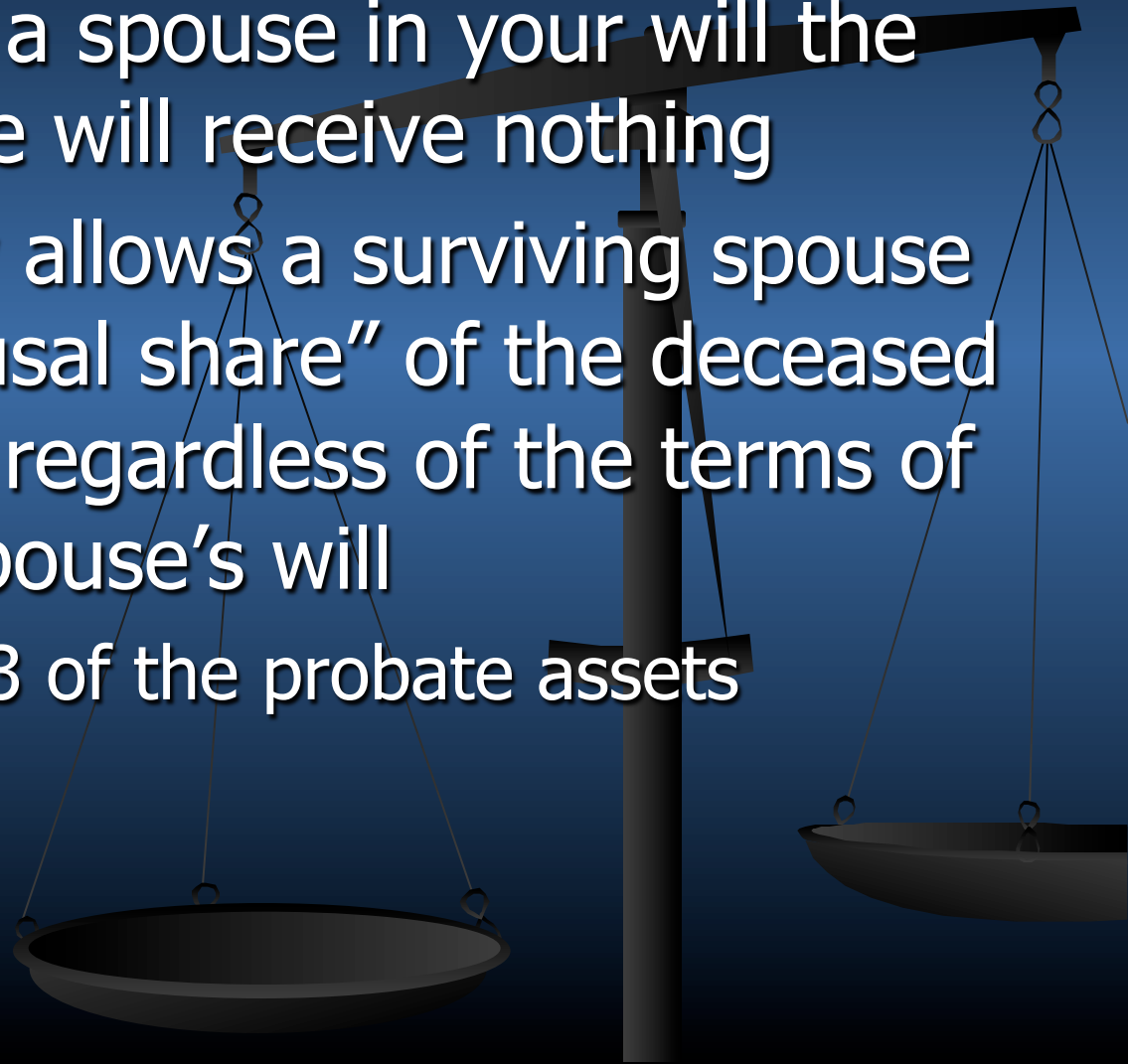
Mistakes (cont'd)

- Disinheriting an heir and failing to name them in your will
 - A will that fails to acknowledge heirs at law, no matter how distantly related, subjects a will to be successfully contested in probate court



Mistakes (cont'd)

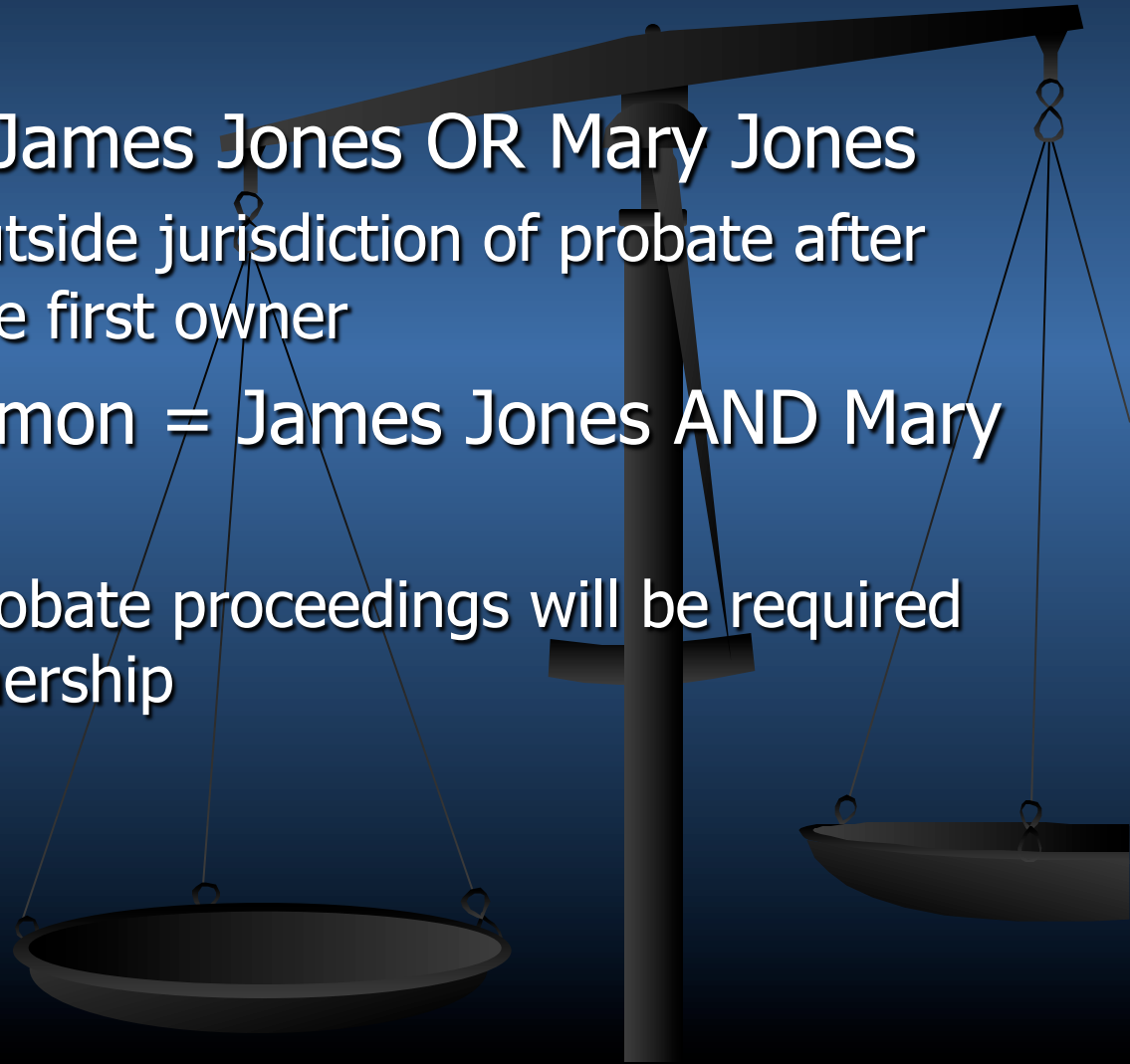
- By disinheriting a spouse in your will the surviving spouse will receive nothing
- Connecticut law allows a surviving spouse to claim a “spousal share” of the deceased spouse’s estate regardless of the terms of the deceased spouse’s will
 - life estate in 1/3 of the probate assets



Mistakes (cont'd)

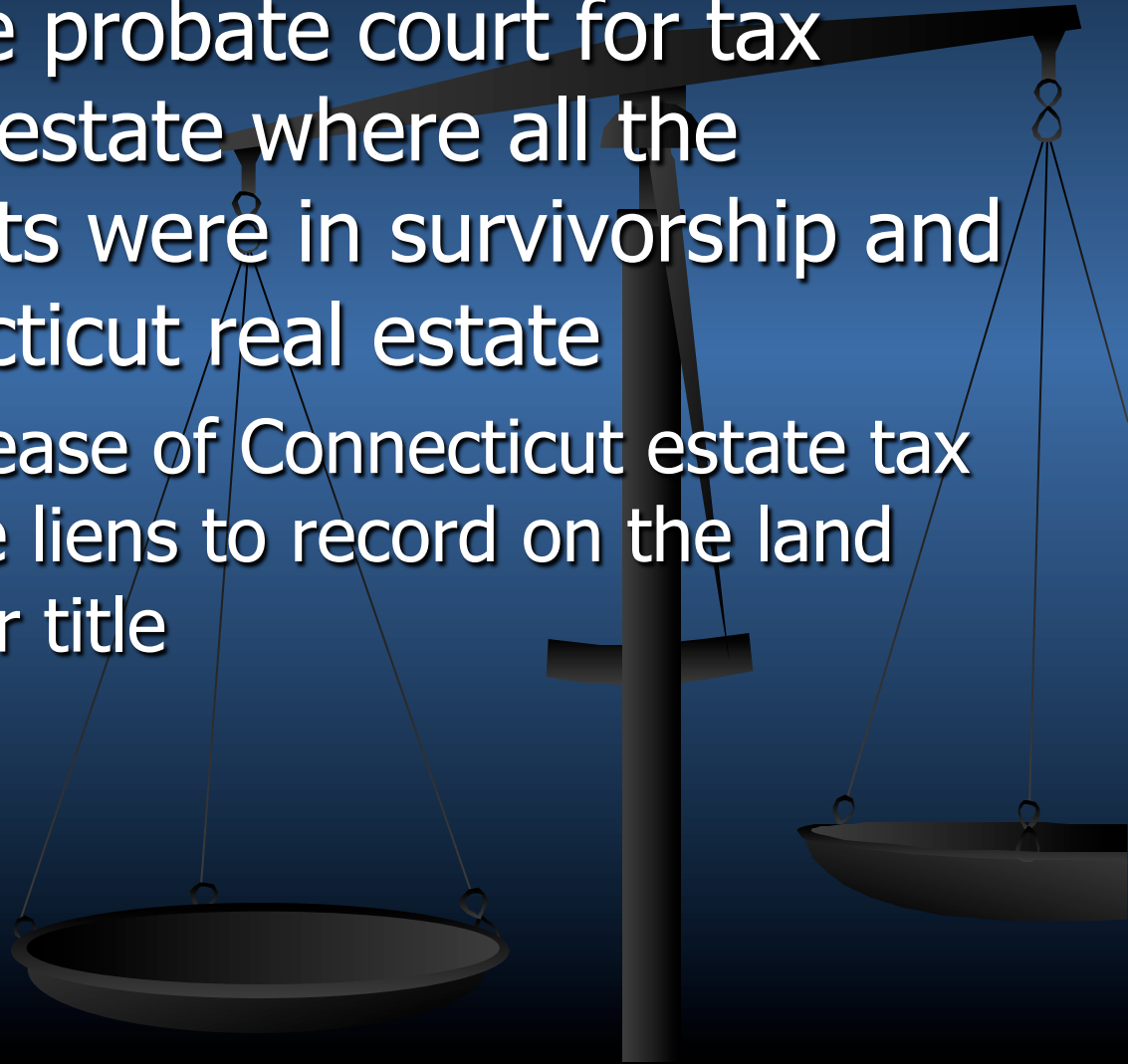
■ Motor Vehicles

- Survivorship = James Jones OR Mary Jones
 - In this case, outside jurisdiction of probate after the death of the first owner
- Tenants in common = James Jones AND Mary Jones
 - In this case, probate proceedings will be required to transfer ownership



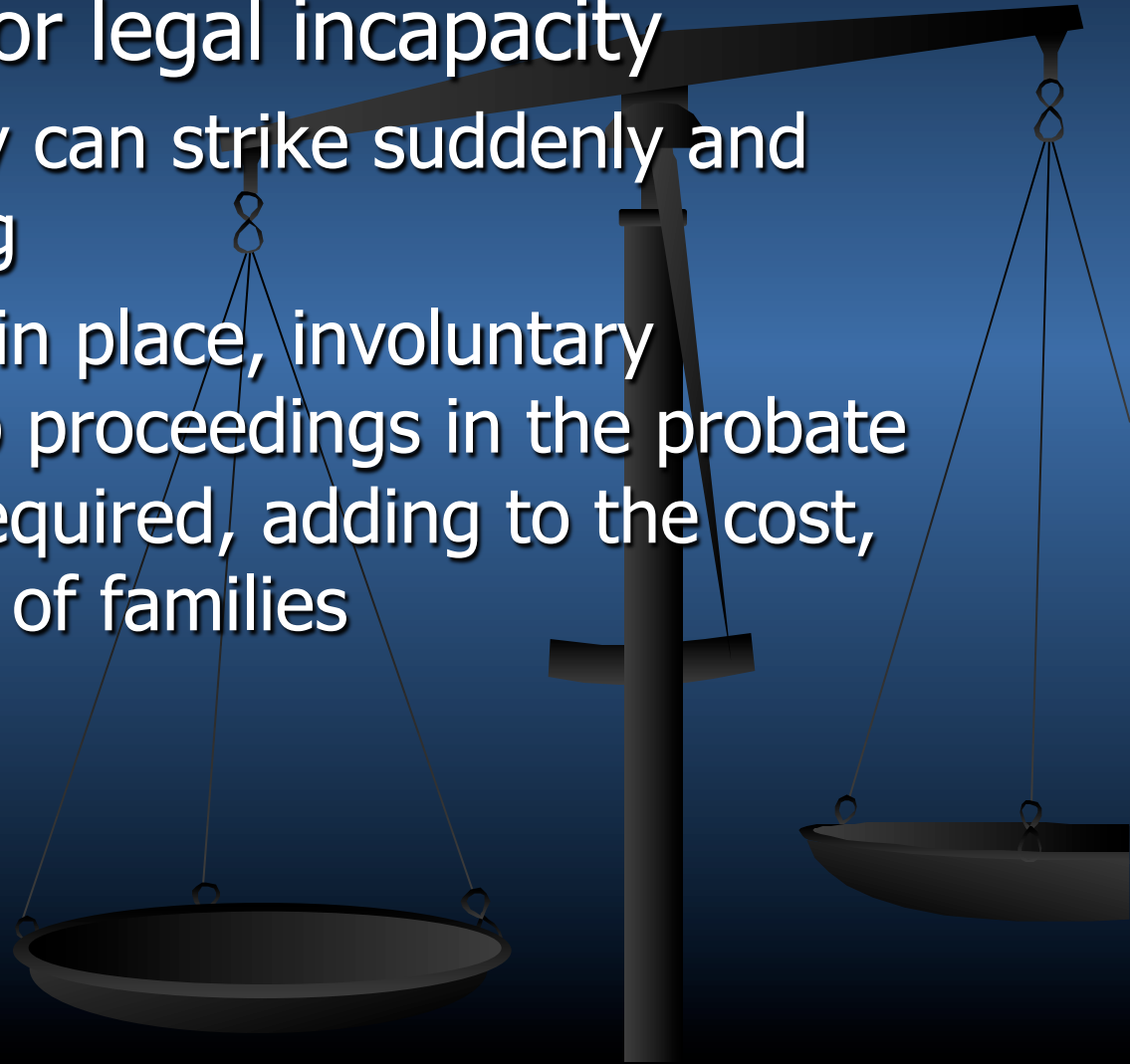
Mistakes (cont'd)

- Not going to the probate court for tax clearance in an estate where all the decedent's assets were in survivorship and included Connecticut real estate
 - Need to get release of Connecticut estate tax and probate fee liens to record on the land records for clear title



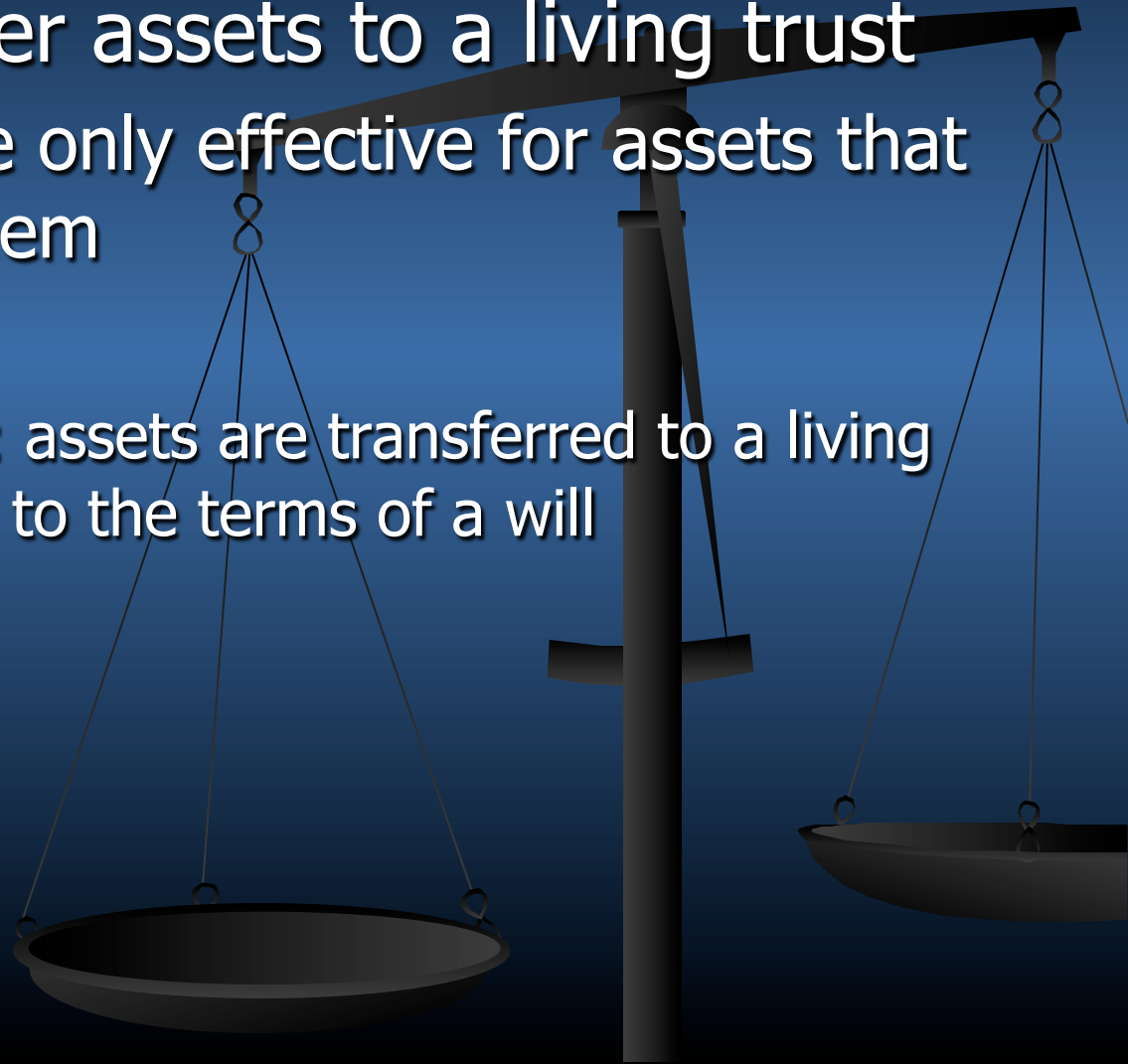
Mistakes (cont'd)

- Failing to plan for legal incapacity
 - Legal incapacity can strike suddenly and without warning
 - Without a plan in place, involuntary conservatorship proceedings in the probate court may be required, adding to the cost, time and stress of families



Mistakes (cont'd)

- Failing to transfer assets to a living trust
 - Living trusts are only effective for assets that are placed in them
 - Exception:
 - Pour over wills: assets are transferred to a living trust according to the terms of a will

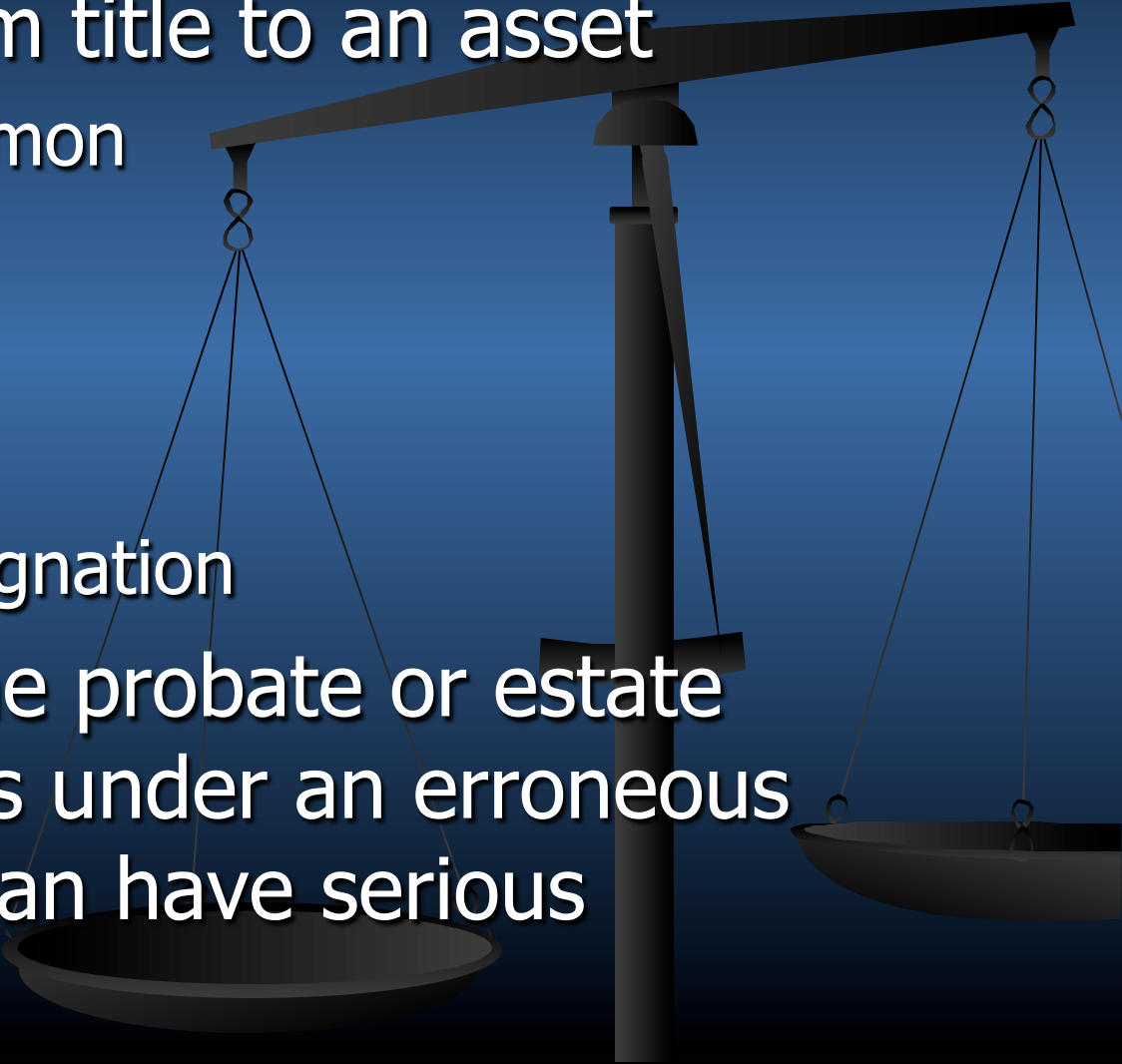


Mistakes (cont'd)

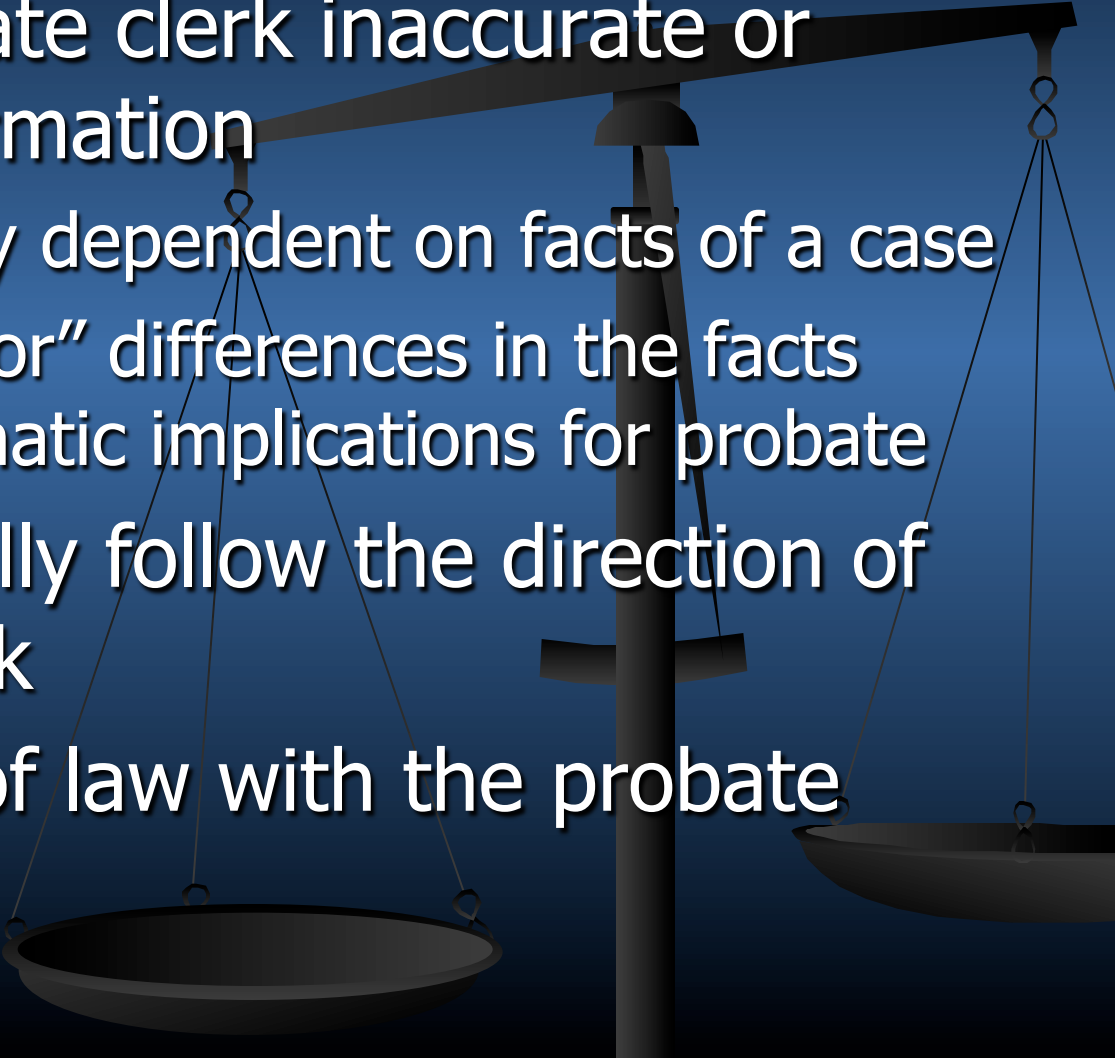
- Preparing “do it yourself” legal documents



Mistakes (cont'd)

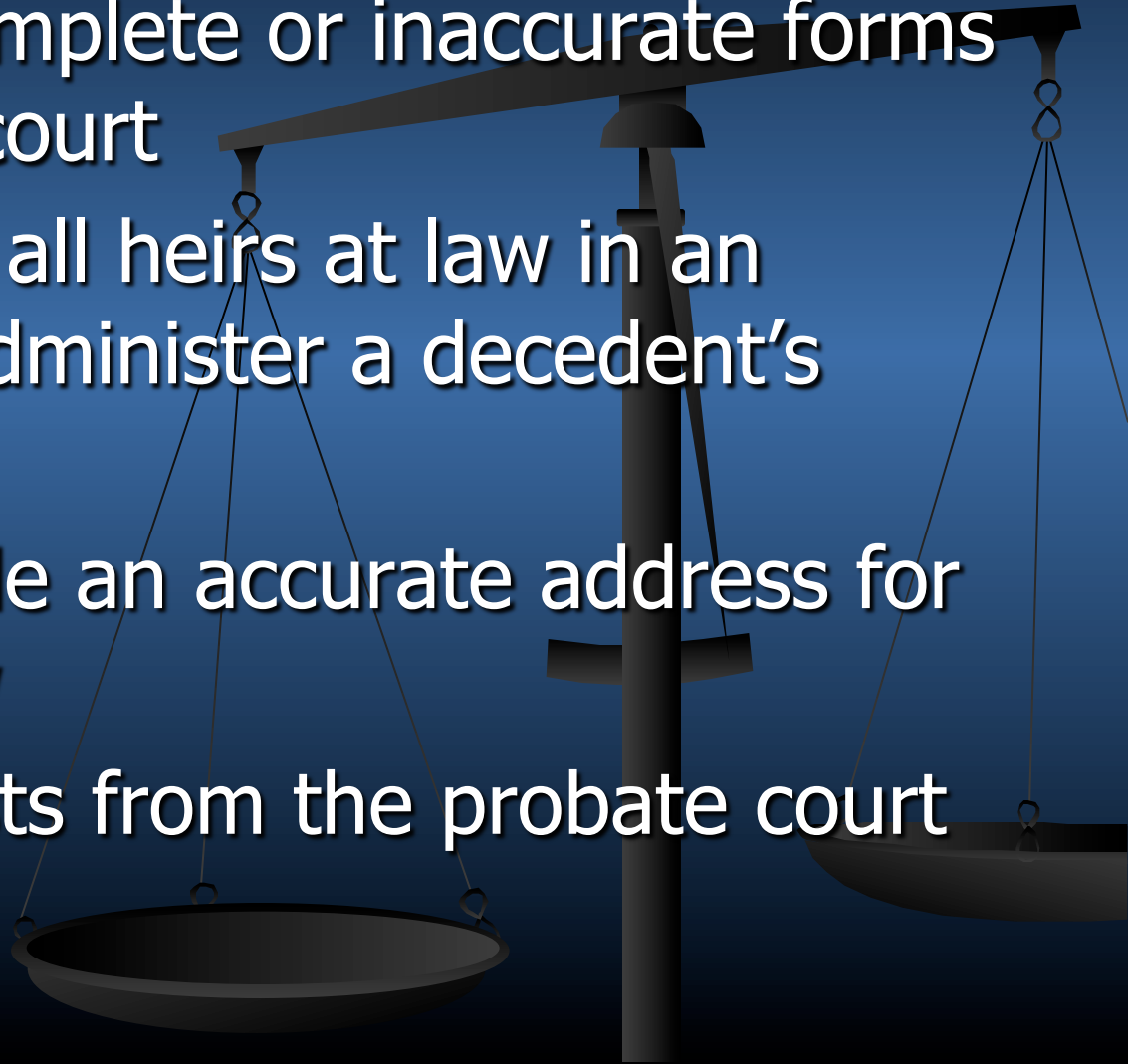
- Failing to confirm title to an asset
 - Tenants in common
 - Survivorship
 - Sole ownership
 - TOD
 - Beneficiary designation
 - Proceeding in the probate or estate planning process under an erroneous understanding can have serious consequences
- 

Mistakes (cont'd)

- Giving the probate clerk inaccurate or incomplete information
 - Process is highly dependent on facts of a case
 - Seemingly “minor” differences in the facts may have dramatic implications for probate
 - Failing to carefully follow the direction of the probate clerk
 - Arguing points of law with the probate clerk
- 

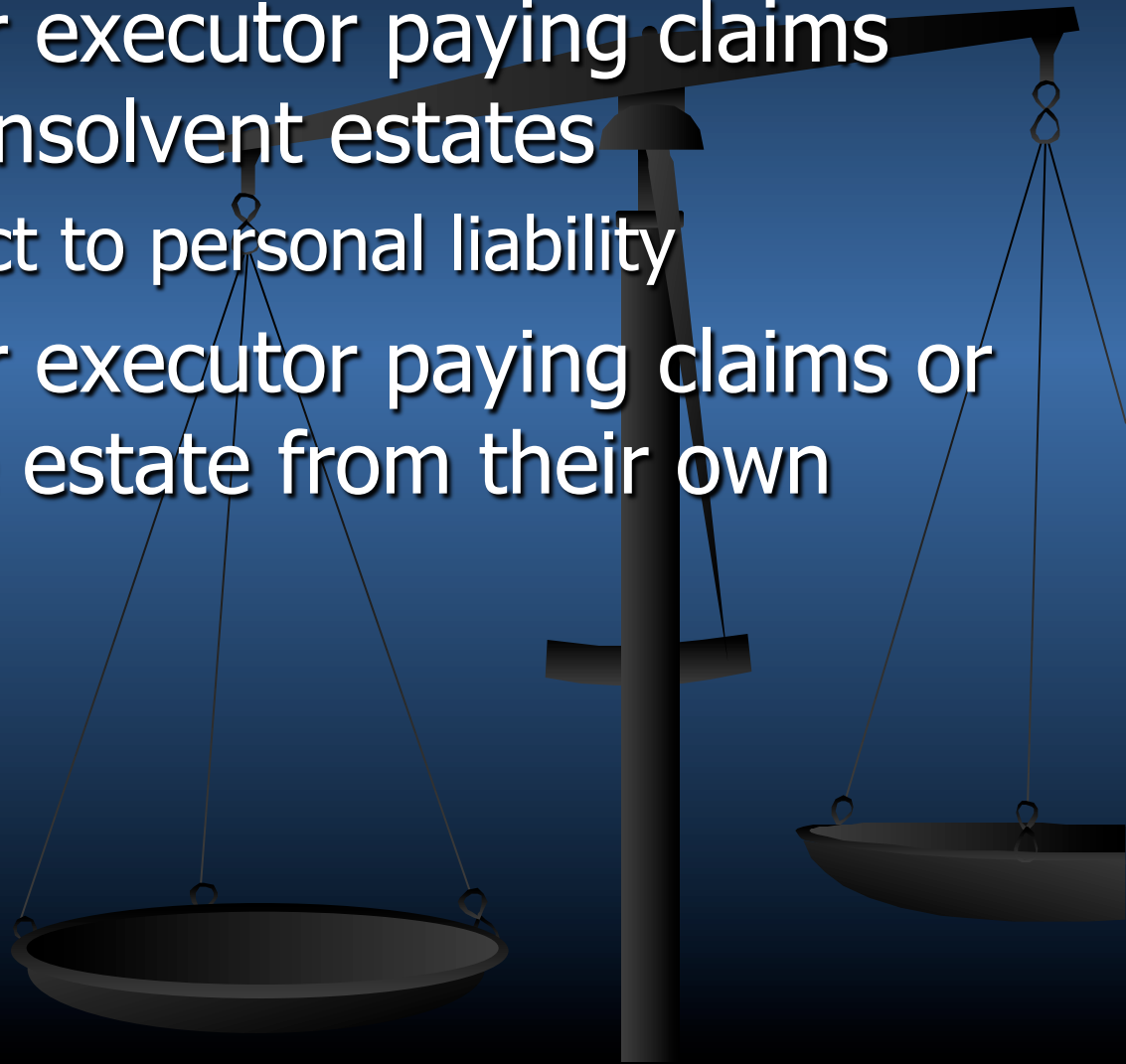
Mistakes (cont'd)

- Submitting incomplete or inaccurate forms to the probate court
- Failing to name all heirs at law in an application to administer a decedent's estate
- Failing to provide an accurate address for each heir at law
- Ignoring requests from the probate court



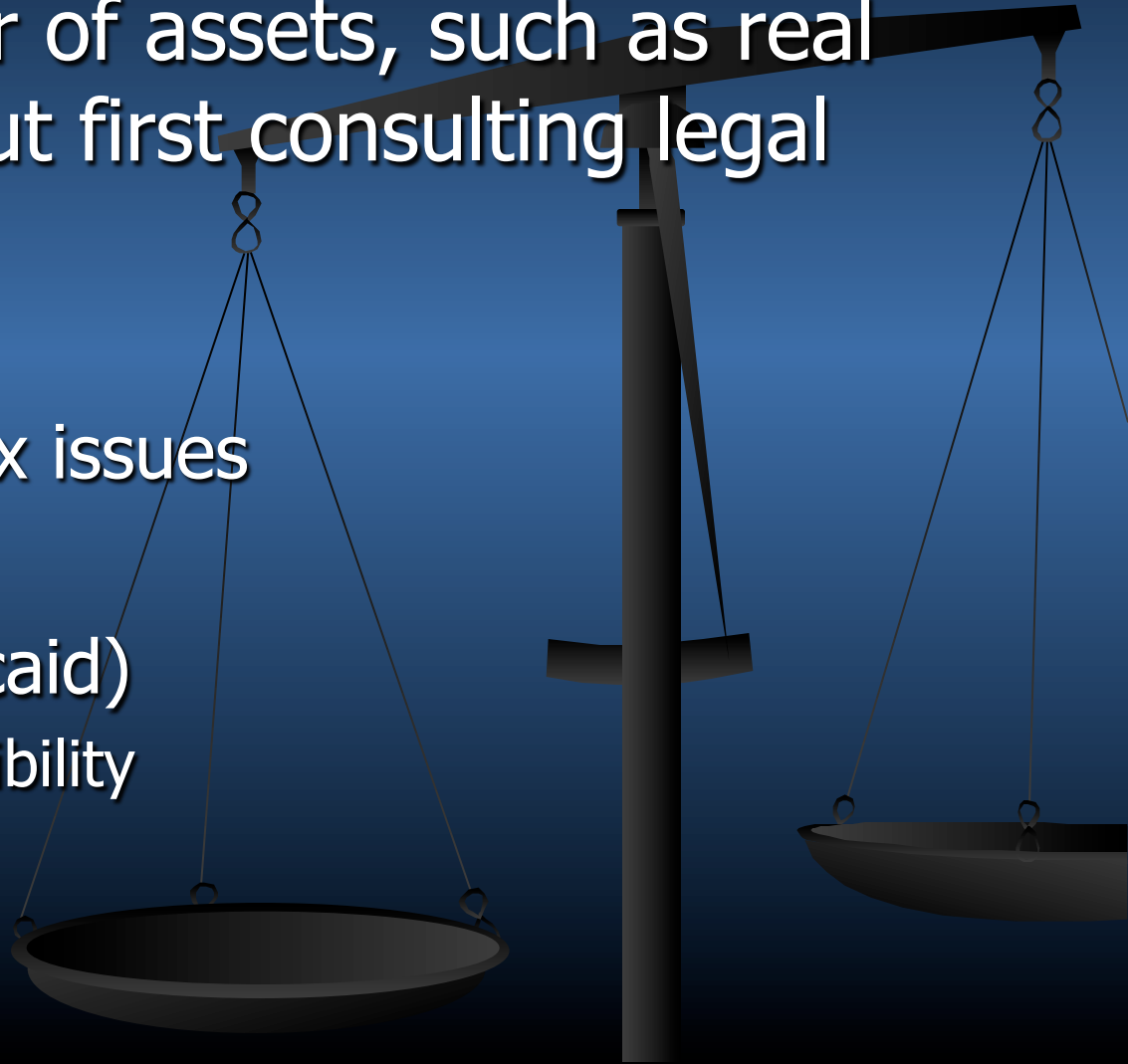
Mistakes (cont'd)

- Administrator or executor paying claims out of order in insolvent estates
 - Fiduciary subject to personal liability
- Administrator or executor paying claims or expenses of the estate from their own assets



Mistakes (cont'd)

- Lifetime transfer of assets, such as real property, without first consulting legal counsel
 - Gift tax issues
 - Capital gains tax issues
 - Loss of control
 - Title XIX (Medicaid)
 - Period of ineligibility



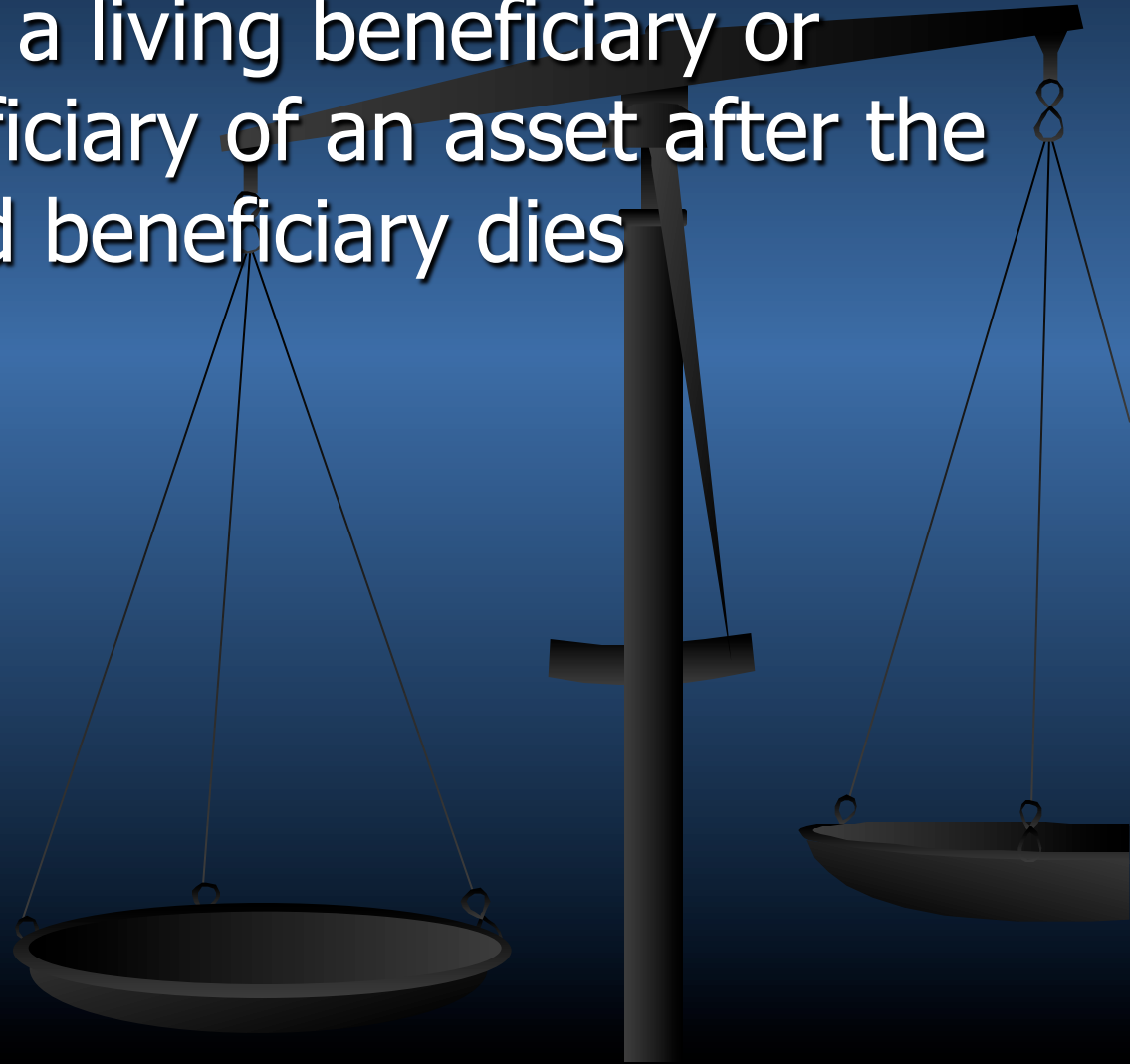
Mistakes (cont'd)

- Not arranging for the care of pets upon the death of the owner
 - Pet trusts
 - Advance informal arrangements with family or friends

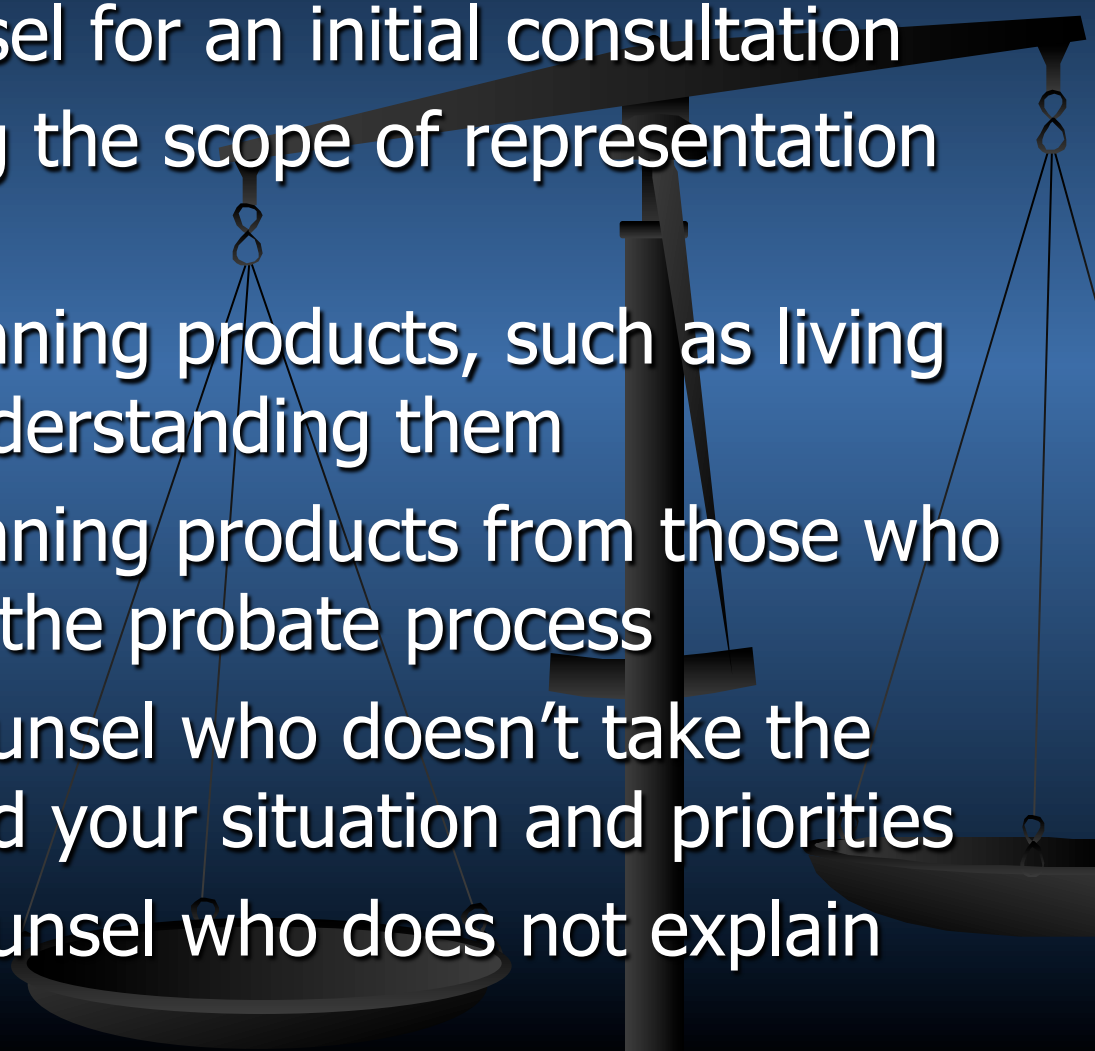


Mistakes (cont'd)

- Failure to name a living beneficiary or successor beneficiary of an asset after the currently named beneficiary dies
 - Life insurance
 - IRA
 - 401(k)
 - Pension
 - Other assets



Mistakes (cont'd)

- Paying legal counsel for an initial consultation
 - Not understanding the scope of representation and fee structure
 - Buying estate planning products, such as living trusts, without understanding them
 - Buying estate planning products from those who propagate fear of the probate process
 - Retaining legal counsel who doesn't take the time to understand your situation and priorities
 - Retaining legal counsel who does not explain your options
- 

Beware of the Unscrupulous

LIVING TRUST SCAMS

HOW PEOPLE BECOME VICTIMS OF LIVING TRUST SCAMS

Con artists make false and misleading statements to older people through:

1. telemarketing and mail solicitations;
2. door-to-door sales;
3. “free” seminars and workshops, and;
4. advertisements.

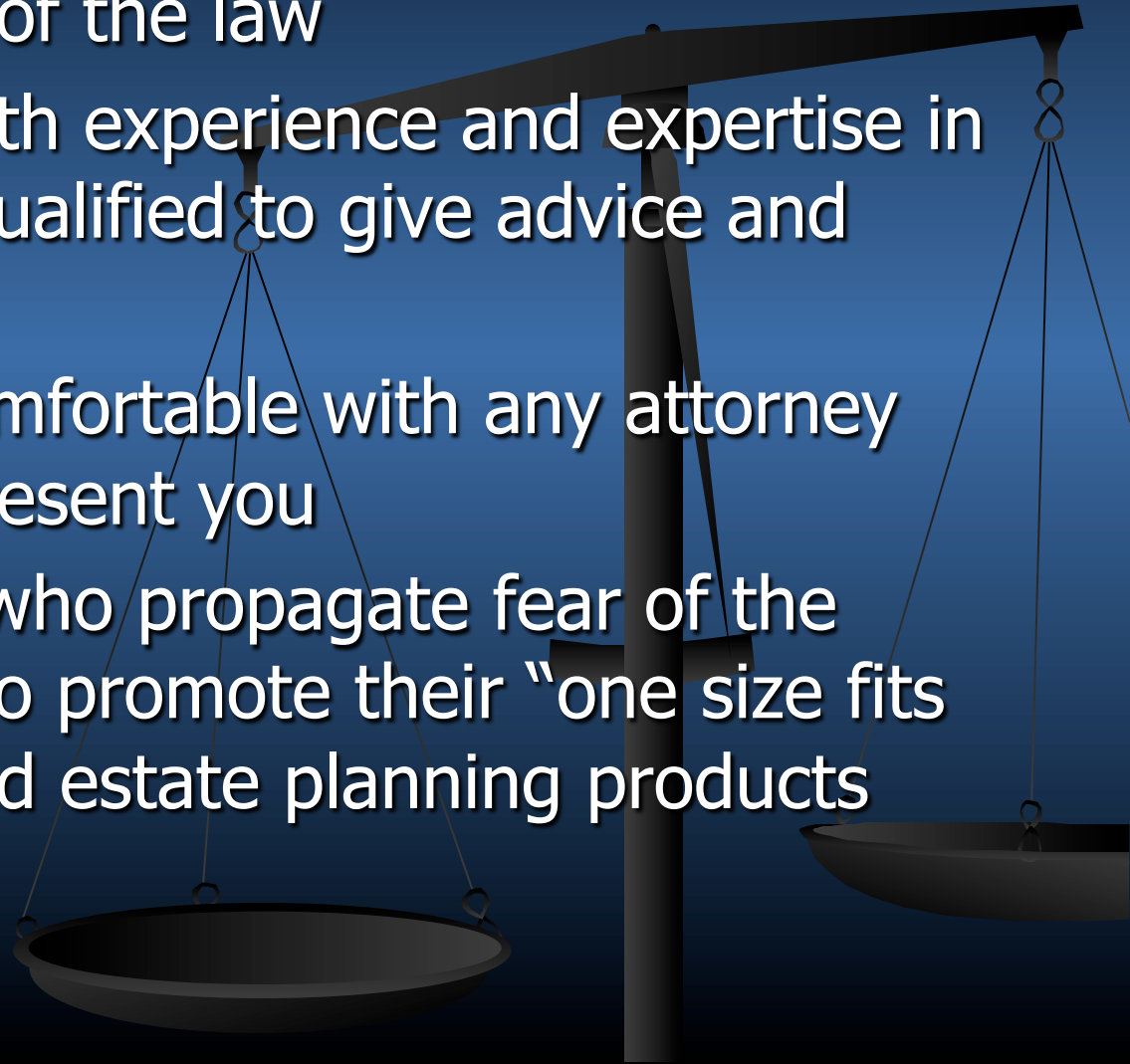


SUMMARY



Summary

- Probate and estate planning are highly specialized areas of the law
- Only attorneys with experience and expertise in these areas are qualified to give advice and representation
- You should be comfortable with any attorney you retain to represent you
- Beware of those who propagate fear of the probate process to promote their “one size fits all” living trust and estate planning products



FEAR

False

Evidence

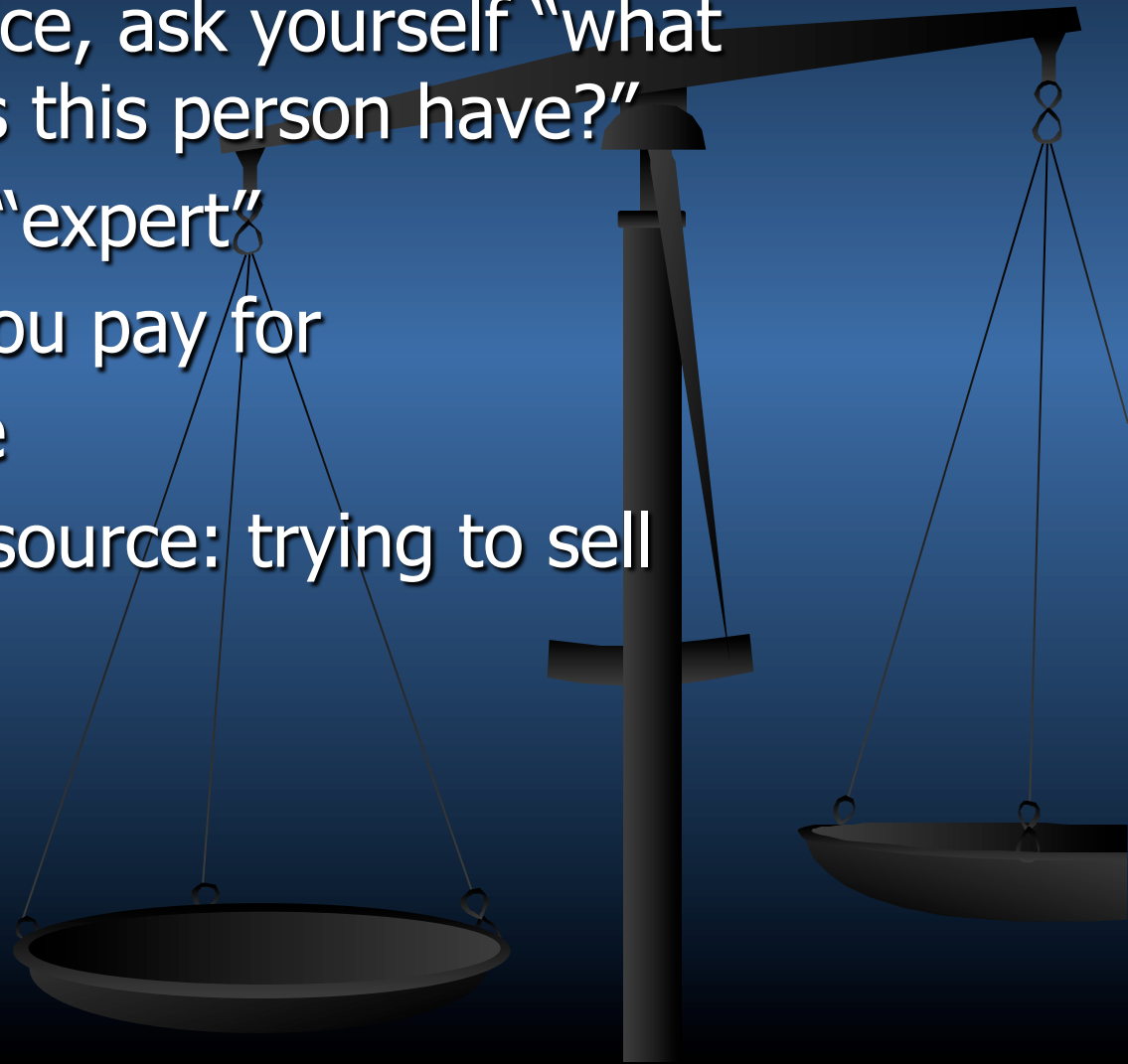
Appearing

Real



Summary (cont'd)

- Before taking advice, ask yourself “what qualifications does this person have?”
 - Everyone is an “expert”
 - You get what you pay for
 - “Free” advice
- Motivation of the source: trying to sell something?



Summary (cont'd)

- Failure to plan can have significant, expensive and disastrous consequences
- Not a “do it yourself” endeavor

