I. Introduction
   a. Inheritance and Its Limitations
      i. The Power to Transmit Property at Death
         1. Shapira v. Union National Bank: The right to receive property is not a natural right, it is one created by law.
         2. Dead Hand
         3. Unreasonable Restraint
         4. Testamentary Intent
   b. The Probate Process
      i. Probate v. Non-probate property
         1. Probate property is property that passes by decedent’s will or by intestacy
         2. Non-Probate property passes by instrument other than will (joint tenancy property, life-insurance, contracts payable on death)
      ii. Personal representative: Oversees the estate as it winds up (inventories and collects assets, manages assets, receives and pays claims of creditors, clears titles, distributes assets)
      iii. Probate Court: 1) Ensures that titles are transferred properly under the will or intestacy statute, 2) protects creditors by requiring payment of debts, 3) distributes remaining funds

II. Intestate Succession
   a. Introduction
      i. Intestate: Passage of property when a decedent dies without a will
      ii. Most Americans do not have wills—can’t afford it, don’t see the point, don’t want to deal with their own mortality
      iii. Wills allow people to take probate assets, designate guardians for children, select fiduciary to administer your estate and helps achieve tax savings
   b. Intestacy Rights of the Decedent’s Surviving Spouse and Children
      i. Shares of Surviving Spouse and Children
         1. Considered an heir and usually their share is large, but dependant on the number of children, parents, etc.
         2. UPC 2-102 (Pg. 61): Wife gets everything unless the decedent has surviving children or parents then it is apportioned
            a. Marriage involves an economic partnership and most people would like their spouse to share in a large portion of their estate
         3. Primary aim is to carry out probable intent of decedent
      ii. Who Qualifies as Surviving Spouse
         1. Bigamy and Beyond
            a. Putative Spouse: A person who cohabitated with the decedent in a good-faith but mistaken belief that he or she was married to decedent
            b. In re Estate of Vargas: Man has two wives and neither knew of the other. The wives share in intestate estate because they innocently engaged in bigamy. This was done based on equitable principles because the situation hadn’t arisen before and it is only fair since there was no crime and no third parties were harmed. (Supported by Restatement)
            c. Quasi-Marital Property: Each spouse would get ½ of the estate acquired during their marriage because that was what that portion of the couple’s estate already belongs to them
            d. Partnership/Joint Enterprise: Each holds tenancy in common in equal shares because she contributed her services and work
         2. Unmarried Cohabitants: Common law marriage, Domestic partnership, etc.
a. Restatement (Pg. 18-Supp)—Most jurisdictions require for common law: parties to agree to enter relationship as husband and wife, cohabitation or openly living together as husband and wife (some require them to hold themselves out to the world as husband and wife)

b. In re Estate of Ober: Common-law spouses when couple was competent to marry (age and mentally), cohabited, held themselves as married; filed taxes as single, used different last names, owned different property

iii. Who Qualifies as Children

1. Adopted Children
   a. Hall v. Vallandingham: Upon entry into adoption, the adopted child shall lose all rights of inheritance from its parents and from other natural collateral; they are only allowed to adopt from adopted family (Rebirth)
   b. Some states do not allow the child to adopt through their natural parents after they are adopted (though if adopted by spouse of biological parent they will still inherit biological side—UPC-Pg. 86)
   c. Other states allow inheritance through both natural and adoptive parents

2. Nonmarital children: Illegitimate children can usually inherit through their mother without additional proof, but many states require additional proof to inherit through the father
   a. Most allow proof by subsequent marriage of parents, acknowledgement by father, adjudication during life of father and convincing proof after death

3. Adult adoption: Most statutes make no distinction between minor and adult adoption
   a. May be useful in preventing a will contest—collateral relatives can’t challenge their right to take under a will or in intestacy

4. Posthumous children: A child that is conceived before, but born after, father’s death. If it is to the child’s advantage to be considered “in being” before birth, the child will be so treated if born alive

5. Reproductive Technology and the Definition of Child:
   a. Children can be born from artificial insemination, in vitro fertilization, etc., which may make both the parents different than the biological parents
      i. In artificial insemination, the father is typically the husband of the mother
      ii. Less uniformity otherwise

c. Shares of More Remote Descendants (See E&E)

i. General Rules
   1. Step 1: Identify Intestate’s Children
   2. Step 2: Did any of the intestate’s children predecease intestate leaving a child of their own?
      a. If none of the intestate’s children predeceased the intestate or none of the predeceased left children, simple divide the estate into equal shares and give each child one share (younger generation does not inherit if older generation ancestor is still alive)
      b. If one is predeceased with no children, their share goes to the remaining heirs

ii. Per Stirpes by Representation
   1. If a child of a predeceased parent is alive, they take the share their parent would have received (they “represent” their parents)
   2. The level of children is always used to determine what the younger generation gets

iii. Per Capita by Representation
1. The nearest surviving generation is used; thus if all takers are of the same generation they take per capita (equal shares)
2. If there are different generations, the younger generation is based on what the older generation would have gotten

iv. Per capita at Each Generation (UPC)
1. If there are predeceased: each child gets the share they would have if all the children had lived; the remaining amount is pooled and divided equally to all children of the next generation

d. Shares of Ancestors and Collaterals
   i. If no decedents survive, the ancestors and collaterals will inherit the balance of the estate that does not pass to the spouse—look to statute

ii. Parents First-Line Collaterals
   1. Under all modern systems, the parents will divide the estate that does not pass to the spouse
   2. If one parents and one sibling; the UPC has mother inheriting entire estate, others would have the mother and sibling split
   3. If no parent and a sibling(s), then the estate passes to the sibling(s) and their descendent(s)

iii. Grandparents and Second-line Collaterals
   1. Decedent not survived be child, parent or first-line collateral, the estate will go to grandparents or their decedents—jurisdictions have statutes for this
      a. Parentelic System: the estate is split and half goes to the maternal grandparent’s side and the other to the paternal grandparent’s side (if grandparent’s die, goes to aunts, uncles and cousins)
      b. Degree-of-relationship: Determines heirs by counting the degrees of kinship between intestate and heir and giving estate to nearest next of kin

   e. Half-Bloods: A relative of half-blood (half-sister) is treated as a whole blood in the majority of states, but is only give a half-share in some states. Very few disallow half-bloods to take.

   f. Advancement: Property the decedent gave during their life (inter vivos gift) to a person who is an heir at death is treated as an advancement against the heir’s share.
      i. UPC (Pg. 115): Gifts are treated as advancement only if 1) decedent wrote in contemporaneous writing that it was an advancement or 2) contemporaneous writing stating the gift should be taken into account when distributing the estate

g. Transfer to Minors: Special Problems
   i. A guardian ad litem is appointed receive payments and gifts and protect their interests

h. Bars to Succession and Unworthy Heirs
   i. Homicide
      1. Competing Public Policy: Heir should not be rewarded for causing the intestate’s death; Heir should not be deprived of inheritance without just cause
      2. In re Estate of Mahoney: A woman killed her husband (manslaughter) and he is survived by parents
         a. Slayer Statutes in most states and UPC: “An individual who feloniously and intentionally kills decedent may not inherit”
         b. In others the states impose constructive trusts to prevent unjust enrichment
         c. Some states continue to give to the slayer regardless of public policy (courts shouldn’t alter the terms of a will)
      3. Involuntary manslaughter and non-criminal killing usually allow inheritance
   ii. Disclaimer (UPC): An heir may disclaim or renounce their share of the estate
      1. May disclaim because property is undesired or has onerous burden
      2. Refuse on moral or religious grounds (don’t benefit from another’s death)
      3. Heir in debt and does not want the property taken by creditors
4. Reduce the heir’s tax burden

III. Wills
   a. Execution of Wills (Requirements of a Valid Will)
      i. Testamentary Capacity
         1. Legal Capacity (Age)
            a. Must be a certain age (usually 18, sometimes younger) to execute a will
         2. Mental Capacity (Sound Mind)
            a. Test of Mental Capacity
               i. *In re Estate of Wright:* The legal presumption is always in favor of sanity (sound mind), especially after attestation by subscribing witnesses
               ii. CPC requires:
                    1. Comprehended the action being taken and effect
                    2. Knew the nature and extent of testator’s property (depends on how far off they are—if its is a small discrepancy, not a problem)
                    3. Recognized the natural objects of testator’s bounty
                    4. Simultaneously had these things long enough to make a reasoned judgment regarding property disposition
               iii. “Capability” to know these things is not the same as actual knowledge
            b. Why Require Mental Capacity
               i. A will should only be given effect if it reflects the testator’s true desires
               ii. An incompetent person is not considered a “person” legally so they can’t sign the document
               iii. Protects the decedent’s family—inheritance provides family support and repays them for love and support; if they have an economic incentive to provide care they are more likely to do it
               iv. Gives legitimacy to the legal process
               v. Protects senile or incompetent from exploitation
            c. Insane Delusion
               i. A person may have capacity, but an insane delusion cases a provision or the entire will to fail for lack of capacity because they cannot make a rational distribution
                  1. The person believes something is true when in reality it is false
                  2. It is also irrational—there is no credible evidence to support the testator’s version of reality
               ii. Must be a nexus between the testator’s insane delusion and the property disposition in the will before the court will invalidate the will
               iii. *In re Strittmater:* A woman who decided that her parents were evil and devils had an insane delusion about them and men in general, so her will was invalidated
               iv. *In re Honigman:* A man believed his wife was having an affair with no credible evidence, he wrote her out of his will but it was invalidated
         3. Undue Influence
            a. A person who has testamentary capacity but is being influenced by an evil individual (Begging, pleading and badgering is usually not sufficient)
i. The testator was susceptible to influence
ii. The influencer had the disposition or motive to exercise undue influence
iii. The influencer had the opportunity to influence
iv. The testator executes a will they would not have signed but for the influence

b. Courts usually allow direct evidence (which is usually slim because people don’t act improperly in front of others) and circumstantial evidence to prove undue influence

c. *In re Lakatosh*: A woman was unduly influenced—she lived in horrible conditions and then gave a man who had been “taking care of her” all of her estate

d. *Lipper v. Winslow*: Must prove that the testator’s free will was overcome and substituted by the undue influence (*Pay special attention to attorney beneficiaries*)

4. Fraud
   a. The testator is deceived by a misrepresentation and does something he would not have done had the misrepresentation not been made
      i. False representation: Someone made a false representation
      ii. Knowledge of falsity: The individual making the false representation must have known it was false (intentional deception)
      iii. Reasonably believed: The testator must have reasonably believed it
      iv. Causation: The false representation caused the testator to execute the will in the way they did

   b. Fraud in the inducement: A person misrepresents facts causing the testator to execute a will including provisions in the wrongdoer’s favor or to refrain from executing or revoking a will
      i. *Puckett v. Krida*: Two women convinced an Alzheimer’s patient that her family was wasting her money so she executed a will giving them the money (also undue influence)

   c. Fraud in the execution: A person misrepresents the character or contents of the instrument signed by the testator

5. Duress
   a. Similar to undue influence that involves direct use of violence, threats of brutality to the testator or his family or withholding food or water to force the testator into submission

6. Tortious Interference with Expectancy
   a. Does not involve testator’s mental incapacity, but a person uses tortuous conduct (fraud, duress) to interfere with expected inheritance of another
      i. You actually sue them for damages resulting from the tort; seek tort remedies
         1. You can get damages in addition to the estate
         2. A no-contest clause is not a bar to recovery
         3. The statute of limitations is longer

7. No-Contest Provision: Provide that a beneficiary who contests the will loses at least some, and typically all, of the benefits under a given will—saves a lot of money in probate and can save family relations; several jurisdictions do not allow them

ii. Testamentary Intent
   1. The testator must intend that the will reflect the testator’s intent
a. **Letter of Instruction**: Must prove that a letter has actual testamentary character (Ex. “I hereby make the following changes to my will…) rather than just making them instructions of what to do because it will not be a codicil if it does not show intent.
   i. **In re Estate of Kurault**: Kurault was on his death bed and sent a letter to a woman who was his lover stating that she would get property from him—court held this was a valid codicil because it had testamentary intent (showed what he wanted to do after death with his property)

b. **Fake Wills**: Court will look at the surrounding facts to determine whether a person wrote their will as a joke or without intent to make it their real will—might just be kidding around

c. **Conditional Wills**: A will that is only effective if a particular thing happens (Ex. Someone writes their will before they go on vacation and it is only effective if they die on that vacation)

iii. **Statutory Execution Requirements: Attested Wills**
   1. The Function of Formalities
      a. Most states require exact conformity with basic formalities and do not excuse minor errors even if they’re harmless
      b. **Purposes**:
         i. Make sure the testator intended to make an at-death distribution of property
         ii. Provides evidence of the testator’s intent
         iii. Protects testators and beneficiaries from undue influence and fraud
         iv. Increases confidence that testator’s desires will actually be carried out upon death
   2. **Requirements for Attested Wills** (they vary from state to state)
      a. **Writing**: Most states do not specify with what or on what a will must be written, but it is better to be on conventional paper in ink (non-erasable, same color, etc.)
      b. **Signature by the Testator**
         i. **Purpose**: Provides proof that the signer approved the document and that it is a final document
         ii. **Location**: Most states do not require the signature at any particular place, however other follow the Wills Act and require signature at the end of the will (“end” might mean the physical end or where the last provision is added)
         iii. **Form**: Usually courts allow any symbol the testator uses with the intent of authenticating the will (initials, first name, nickname, typed names, rubber stamped name)
      c. **Attestation by Witnesses**
         i. **Number**: Statute of Frauds (3), Wills Act (2); almost all states now require 2, but one requires 3; may be a good idea to have extras just in case
         ii. **Competence**
             1. **Legal Capacity**: Most states do not limit capacity based on the age of the witness
             2. **Mental Capacity**: The witness must be “competent” or “credible” at the time they attested to the will—capable of giving testimony in court
3. **Disinterested**: Most require that the witnesses not stand to benefit. The will be completely invalid; the gift to the witness may be invalid (purge them); the gift to the witness is void unless otherwise an heir and then the gift cannot exceed his share; disinterested person can corroborate testimony of interested witness; no effect

iii. **Intent to Attest**: The witness must have the intention of giving validity to the document (don’t necessarily need to know what is in the will, just that it is a will—some states require “publication,” a formal statement saying this is my will; others require the testator to ask the witnesses to sign the will

iv. **Observatory Process**
   1. Witnessed by Testator’s Signature or Acknowledgement
   2. In the Presence of Testator?
   3. In the Presence of Each Other?

v. **Signatory Process**
   1. In the Presence of the Testator
   2. Location of the Signature: One-step attestation has signatures on the will itself after the testator; in two-step they must sign both the will and the attestation document
   3. **Timing**

3. **Execution, Proof, and Safeguarding of Wills**
   a. Most states have statutes recognizing as valid a will executed by the formalities required by 1) the state where the testator was domiciled at death, 2) the state where the will was executed, or 3) the state where the testator was domiciled when the will was executed—vary greatly though
   b. **Execution**: (See page 216 of book to see specifics that will have it approved everywhere)
   c. **Proof**: Add a self-proving affidavit that explains its purpose and effect; have a notary give the witnesses and testator an oath, everyone signs and notary approves
   d. **Safeguarding**: Testator must determine the proper custodian of the original copy of the will—should be secure location (safe-deposit box) where it will be readily found or allow attorneys to keep it (though the attorney should try not to keep it)

4. **Mistake in Execution and Curative Doctrines**
   a. Mistake occurs when a person executes their will under a mistake of law or fact and is not the result of anyone else’s misconduct
      i. **Mistake in the execution**: testator is in error regarding the contents or identity of the instrument
         1. *In re Pavlinko’s Estate*: A man and wife mixed up their wills (which were identical other than their names) and signed the wrong ones and the court denied probate.
         2. *In re Snide*: A person mistakenly executed a will and there was no argument about what was in the will or intent, but the guardian ad litem sued. Court held that equity and justice should prevail (unusual result)
      ii. **Mistake in the Inducement**: Testator falsely believes a fact to be true and makes the will based on that false fact (Ex. thought their child was dead)
   b. **Curative Doctrines**
i. **Harmless Error** (UPC, Pg. 226): Treat the document as if it had been executed in compliance...if the proponent establishes by clear and convincing evidence that it was meant to constitute the decedent’s will; revocation or an addition to the will; this gives the court the **dispensing power** to get rid of harmless error

   1. *In re Will of Raney*: Even if the will does not comply with the statute, it may be probated in limited circumstances if it **substantially complies** with the statute

ii. Other states make the wills valid if they were properly executed at the time and in the place where they were executed

iv. **Statutory Execution Requirements: Unattested Wills**

   1. **Holographic Wills**: Allowed in over half the states, mainly in the South or West, it is written in the testator’s hand and attesting witnesses are not required
   
      a. Hard to forge because the entire thing is written in the testator’s hand and lends itself to handwriting analysis
   
      b. Can be signed anywhere, but it should be signed at the end or there may be doubt that the name was meant to be a signature
   
      c. “Written in his own handwriting”

         i. 1st Generation Statutes: “entirely written, signed and dated by the testator (some struck down because they have even a couple printed words or other person’s notes)

         ii. 2nd Generation Statutes: The signature and material provisions must be in the testator’s hand—5 states still do this

         iii. 3rd Generation Statutes: “Material portions” and signatures must be handwritten and extrinsic evidence is allowed to prove the testator’s intent

     d. Useful when:

        i. Emergencies: No time to prepare a more formal document

        ii. Privacy: Eliminates the risk that witnesses might discover the nature or contents of the will

        iii. Interim Will: For use until the attorney is able to prepare and testator can execute the will

b. **Revocation of Wills**

   i. A testator can change or revoke their will at anytime until death (ambulatory document), but failure to do it in the manner allowed by law makes it ineffective

ii. **Revocation in Entirety**

   1. **By Subsequent Instrument** (UPC): A will is revoked if they write a subsequent will that revokes the previous will or part of it expressly (preferred method because it shows clear intent) or by inconsistency (if they are inconsistent, the one closest to death will be in effect)

   2. **By Physical Act**: The testator may destroy his will or perform another act that manifests his intent that the will not be used to determine the at-death disposition of the testator’s property. There are requirements though

      a. Must have mental capacity

      b. Must have intent to destroy

      c. Physical act must be within statute (burning, effacing, tearing, destroying)

         i. *In re McGill’s Will*: A woman wanted her attorney to destroy her will, but it never happened, so the will was not revoked

      d. Must all occur at once

      e. If a person has possession of their will and it is not found among their personal effects a presumption arises that she destroyed it.
3. **By Operation of Law:** Certain events or situations which automatically revoke the law because it is presumed that this would be in the intent of the testator
   
   a. **Marriage**—if a person gets married after executing will the spouse gets a specified share of his estate
   
   b. **Divorce:** If a person divorces the share in the will is void or significantly diminished
   
   c. **Pretermitted Heirs:** Heirs (usually children) born after the will was executed, they will receive a forced share of the estate
   
   d. **Death of beneficiary:** Will revoke automatically, so some states have statutes that prevent the gift from lapsing by substituting other individuals in their place

iii. **Partial Revocation:** Jurisdictions differ on whether your can revoke portions of the will

   1. Traditional approach you cannot partially revoke by adding words to existing text or striking out portions (interlineation)—it will enforce the unchanged form (opens the door to fraud)
   
   2. Allowed under the modern approach
      
      a. Will more closely match testator’s intent
      
      b. The risk of fraud is no greater in this situation than any other

   3. **Gould v. Chamberlain:** If a will or codicil includes different amounts from the first, they may be considered additional rather than substitutions unless language shows different intention

   4. **Hypos:** Traditional rule is that you cannot look at extrinsic evidence of intent, you have to look at what they understood the circumstances to be (if they believed their sister was poor and would need more money, not necessarily that he wanted her to have more money)

iv. **Dependant Relative Revocation:** “Implied Conditional Revocation” : If the testator purports to revoke his will upon a mistaken assumption of law or fact, it is ineffective if the testator would not have revoked his will if he’d known the truth—court’s attempt to save the testator who mistakenly revoked a will

   1. Usual situation is when the person believes a new will is valid, but for some reason it is not—in this case they will cancel the revocation and probate the destroyed will
   
   2. **LaCroix v. Senecal:** Woman left residue in equal amounts to her nephew and friend, then prepared a codicil revoking the will and adding her nephew’s real name (in addition to his nickname) but were otherwise the same. The codicil failed and the court held that she would not have revoked her will if she had known the codicil would be invalid.

   3. **Estate of Alburn:** Woman revoked a will assuming her old one would take effect (it had never been expressly revoked), but it did not under the state law. Revocation was ineffective because destruction was conditioned upon reinstating the previous will

v. **Revival:** Reinstatement of a will that the testator has already revoked. Can be done two ways: 1) Re-executing the old will, 2) Including an express statement in a new will that the old will is effective.

   1. **Hypo:** A will revokes a previous will then person mistakenly revokes the second will
      
      a. Common law: the first will is effective because the second will was not effective until death, so it never revoked the first
      
      b. Revival approach (most states follow this): The testator dies intestate because both will were revoked
c. Modern Approach (UPC): Court ascertains what the testator intended at the time he revoked Will 2—did he intend to revive Will 1 or simply get rid of the wills

c. Will Components
   i. Integration of Wills: All papers present at the time of the execution, intended to be part of the will, are integrated into that will. You can make this easy by attaching all the documents you want included together, but sometimes they are not together and it is confusing.
   ii. Republication by Codicil: Treat an old will as if it were executed at a later date—a will is republished as of the date of the codicil; incorporates all the terms of the existing will (can republish a revoked will and this makes it valid)
   iii. Incorporation by Reference: Treats a document as testamentary in character even though it is not physically part of the testator’s will and if done properly the terms of that document are considered part of the will
      1. Requirements:
         a. Intent: The testator must have the intent to incorporate the writing into the will
         b. In existence: The writing the testator wants to include must have been in existence when he executed the will.
         c. Identification: the testator must identify the writing to be incorporated in the will with sufficient specificity so that no other document could reasonably be referred to by that description
      2. Clark v. Greenhalge: Woman referenced a “memorandum” in her will that gave someone a painting and the court enforced it because the memorandum was properly referenced in the will
   iv. Tangible Personal Property Document (UPC Pg. 278): A will refers to a statement or list to dispose of items of tangible personal property not specifically devised in will
      1. Must be signed
      2. Must describe items with reasonable certainty
      3. May be a document available at the time of the testator’s death; may be prepared before or after the execution of the will; may be altered after preparation; may have no significance outside if the will
   v. Acts of Independent Significance (UPC and Common Law): Permits facts and circumstances outside the will to impact property disposition
      1. Hypo: Man leaves car to son and residue to daughter. Decides to buy new car which means his son gets better gift and daughter gets less and this holds up.
      2. Hypo: Unmarried man leaves money to spouse if he has one upon death and married shortly before death just so the person can get money. Proper because it had effect outside of will.
   vi. Pour-Over Wills (UPC 311): A clause in a gift to an inter vivos trust—a person gets the benefits of the trust without creating it in their will
      1. “I leave the remainder of my estate in trust to the trustee of the Children’s Trust.”
      2. Purposes
         a. Inter vivos trust easier to amend than will
         b. Trust is good receptacle for assets such as life insurance, annuity payments (you can unify things going to heirs)
         c. The testator may pour over into a trust created by someone else (their spouse)
      3. Incorporation by Reference: Incorporates by reference in the will as of the day the will is executed (the trust must exist as of the date of the execution or it doesn’t count)
4. **Independent Significance**: Subsequent changes to the trust affect how the transfer is handled—the terms are not frozen as of the day of the execution.

d. **Construction of Wills**
   i. **Mistake and Ambiguity**
      1. **Mistake**
         a. Traditionally courts could not reform mistakes even though they were innocently made, under the assumption that evil would ensue and people would claim mistakes that didn’t actually exist—this is changing
         b. **Mistake in Execution**: If you sign a will believing it is something else it fails (lack of testamentary intent); If you mistakenly add a section the court will strike it; If you forget to add a section the court won’t recognize it; Perhaps you only have one witness—court will not reform and no extrinsic evidence allowed
         c. **Mistake in Revocation, DRR**: Mistakenly revoked a will assuming another was valid—court will enforce the revoked will
         d. **Mistake in Inducement**: Only reason someone leaves something to someone is that they believe someone else is dead
            i. *Gifford v. Dyer*: Woman left something to her grandchildren and other money to her nephews because she assumed her son was dead; the court held that she would have done that even if she had known the right facts so it stays
         e. **Mistake in Drafting**: Make an error in details (Ex. You say 1933 painting when in fact it was painted in 1935)—traditionally there was no relief from mistake, but probably allowed now
            i. *Mahoney v. Grainger*: A woman left legacy to “heirs at law” assuming that included her cousin, but it only included Aunt—court held her to it because it would only look at language of the document, not extrinsic evidence of intent
   2. **Ambiguity**
      a. If the court finds that a provision is not ambiguous, it simply resolves the issue. If it finds that it is ambiguous, the solution is resolved by the fact finder.
      b. **Patent Ambiguity**: A provision that is unclear on its face and does not convey a sensible meaning to the reader. Some states don’t allow extrinsic evidence, but it is more common now
         i. Ex. “I leave my Zipvert to my daughter”—the word does not make sense, so you would use extrinsic evidence to determine what it is
         ii. Ex. “I leave my computer to ____.” The blank space is ambiguous and courts would not allow that since they do not want to write provisions of wills
      c. **Latent Ambiguity**: A provision conveys sensible meaning on its face, but cannot be carried out without clarification.
         i. Ex. “I leave my money to my children, Ann and Dan” but one of the children is named Don—courts will look to extrinsic evidence to correct it
         ii. Ex. “I give my home at 711 Main” but I live at 714 Main. The court will apply *falsa demonstratio non nocet* which states that the gift does not fail just because it was incorrect, since it was obvious what it was referring it (Scenario in *Arnheiter v. Arnheiter*)
iii. Estate of Gibbs: The middle initial and the address of the beneficiary were both off, but it was close enough that the court could give it to the right person with no problem

d. Equivocation: Intentionally vague language can be solved by extrinsic evidence

3. Correcting Drafting Errors
  a. Traditionally couldn’t change using extrinsic evidence, the will or provision simply failed if there was a mistake or it was ambiguous
  b. Today they are moving towards liberal laws that allow correction; trend away from formalism
    i. (Restatement Pg. 380): Mistake can be corrected to conform to the donor’s intention if the following are established with clear and convincing evidence:
      1. that a mistake of fact or law affected the terms of the document
      2. what the donor’s intention was
  c. Changes because there are more non-probate actions to handle these situations, other jurisdictions have worked well with liberal system, there was significant concern about unjust enrichment due to minor errors, spares lawyers from needless malpractice
  d. No meaningful difference between someone who commits an innocent mistake and fraud, the testator and beneficiaries shouldn’t bear the costs

ii. Death of Beneficiary Before Death of Testator
  1. Lapse: If a devisee does not survive the testator, the devise lapses (fails)
  2. Anti-lapse Statutes: Prevents lapse by providing substitute beneficiaries for the lapsed gift
    a. Assumes that testator would have preferred a distribution over giving it to residue or intestacy
    b. Most states apply statutes to most relatives (some only apply to limited people—say children and parents) and class gifts as well as to individuals
    c. Common Law:
      i. Specific or General device: If this fails, then it falls to residue.
      ii. Residuary Device: If the entire residue fails, the heirs take by intestacy
         1. If only part of the residue fails, that portion goes to intestacy (no residue-of-residue rule—only if no statute applies)
      iii. Class Gift: If one member of a class is deceased, then the rest of that class split the gift
      iv. Void Device: If someone is dead when the will is executed, the gift is void
    d. Modern Statutes:
      i. Gifts to specific devisees are usually given to their issue if issue survive
      ii. Most states apply statutes to most relatives (some only apply to limited people—say children and parents) and class gifts as well as to individuals
      iii. Only applies to humans
    e. Prevent an Anti-lapse Statute with careful drafting—giving “gift over” language to explain who it should go to if someone is dead (contrary intent)
3. **Class Gifts**: Disposition to beneficiaries who are defined by a group label and are intended to take as a group
   a. Membership is not static and the gifts will be divided to the then existing members on a fractional basis
   b. Most statutes now apply to class gifts—these believe it carries out testator’s intent; the shares of the deceased class members go to beneficiaries rather than the other class members; others give the shares to the class assuming that the testator didn’t care who got it, just within that class

iii. **Changes in Property after Execution of Will**

1. **Ademption by Extinction**: Failure of a specific gift because the property is not in the testator’s estate when he dies (sold, given away, stolen, destroyed)
   a. Most jurisdictions apply a rigid rule (Identity Theory) that if the specific item no longer exists than the gift “adeems” and the beneficiary gets nothing
      i. *Wasserman v. Cohen*: A testator disposes of property during their life, so it is considered adeemded regardless of intent.
   b. Minority of states avoid this harsh result by looking at the intent of the testator (Intent theory)—they may trace the item or give the value of the missing property (Ex. perhaps testator sold something to buy something else for the person or because the value was decreasing—mere change in form)
      i. UPC assumes the testator did not want gift to adeem and gives alternate gifts under wide variety of circumstances
   c. To avoid problem, the will can specify what the person gets if the specific property is no longer in their estate

2. **Stock Splits and the Problem of Increase**: The change in value of specifically gifted property is not considered when distributing the testator’s property, unless specific directions to the contrary are included in the will
   a. **Cash dividends** belong to the person who owns the stock on the record date
      i. If the dividends are reinvested, traditionally this was a change in substance because not everyone joins the programs, but some modern courts will distribute the stock purchased with the reinvested dividends as well
   b. **Stock splits**: These are changes in form and not substance, so the person who receives them in the will should receive all shares

3. **Satisfaction of General Pecuniary Bequests**: Failure of a testamentary gift because the testator has already transferred it to the beneficiary between the time of the will execution and death (Similar to advancement in intestate situations)

4. **Exoneration of Liens**: Specifically devised property is often encumbered by liens and mortgages.
   a. **Common law** exoneration was presumed and the beneficiary got them free and clear of liens because they wouldn’t want that burden.
   b. **Many states and the UPC** change that, however, because it has the potential to upset testator’s intent by taking all cash from other sources.

5. **Abatement**: A testator may attempt to give away more property than the testator is actually able to give (perhaps misjudged the value of their estate, may not have accounted for all debts). Abatement reduces or eliminates testamentary gifts to pay an obligation of the estate or gifts of higher priority. The order of priority
(with the top being the first place they take $$$ from, so a person receiving a specific gift is much more likely to receive a gift)

i. Property passing via intestate succession (that is, the testator passed partially intestate)
   ii. Residuary gifts
   iii. General Gifts
   iv. Specific Gifts

a. Some states retain common law rule that personal property in each category is to be exhausted before any real property is sold
b. Other states no longer make a distinction between real and personal property—with a category abatement is pro rata so that each gift is reduced by the same %
c. A few jurisdictions give certain gifts top priority so they are the last to abate (gifts to spouse are the top)

e. Restrictions on the Power of Disposition: Family Protection
   i. Protection of Spouse
   1. Introduction of Marital Property Systems
      a. Separate Property (England): Husband and wife own separately all property that each acquires. If there is one wage earner they will own all property.
      b. Community Property (France and Spain): Husband and wife own all acquisitions from earnings after marriage in equal undivided shares. Based on the idea that husband and wife are a marital partnership so they should share earnings equally. (Only available in a nine states)

   2. Rights of Surviving Spouse to Support: Social Security to help the widow of a deceased spouse, private pension plans (pre-retirement survivor annuity or her husband’s share of the pension if he died after retiring); Homestead Exception (surviving spouse has the right to occupy the family home for her lifetime); “family allowance” set aside by probate court

   3. Rights of Surviving to Elective Share
      a. This is a share of the decedent’s estate in addition to the support rights mentioned above
         i. Under traditional law, the spouse can either 1) take under the decedent’s will or 2) renounce the will and take a fractional share of the estate
      b. Rationale: It protects low earning spouses from disinheritance since in the separate property system they wouldn’t own anything. Spouse contributed to decedent’s acquisition of wealth so she should get a portion of it (the bargain of marriage—you help each other in life and afterwards)
      c. Property Subject to Elective Share: All property (often 1/3 of the estate), not merely that acquired with earnings (so stuff that is inherited and trusts if created during marriage and trustee controls—more than probate estate, it is the augmented estate), is involved. This is true whether the marriage lasted one hour or 50 years.
         i. If the amount of the bequests to a spouse does not satisfy the elective share, the difference must be made up either by pro rata contributions from all other beneficiaries (the UPC and majority approach) or residuary estate
      d. Waiver: A spouse can waive her survivor elective share and this usually occurs in a prenup, but there is still the fear that these are not made at
arms-length with full and fair disclosure (UPC: If deal not made voluntarily, was unconscionable, without disclosure, it is not valid)

i. In re Estate of Garbade: A prenuptial agreement is given the same presumption of legality as any other contract and is presumed to be valid in the absence of fraud

4. Rights of Surviving Spouse in Community Property: They own equally everything acquired from earnings during marriage; separate property includes property acquired before marriage or acquired during marriage by gift or inheritance. They can make agreements to change the nature of property all into community property or into a joint tenancy or one spouse can have everything (for tax reasons, etc.) Upon death the one spouse can dispose of their half the property and the survivor keeps their half

5. Migrating Couples: If spouses move during their marriage:
   a. The law of situs controls problems related to land
   b. The law of marital domicile at the time that personal property is acquired controls the characterization of the property
   c. The law of the marital domicile at the death of one spouse controls the survivor’s marital rights
   d. Hypo: From Separate Property to Community Property
      i. May be serious problems for surviving spouse because they may not have acquired much since they moved which is shared equally
      ii. Quasi-Community Property solves the problem—this is property which was acquired in separate property state but would have been considered community property in this state (not property located out of the state though)—1/2 of this belongs to surviving spouse upon death
   e. Hypo: From Community Property to Separate Property
      i. Usually does not change the preexisting property rights of the husband or wife and remains that way unless the couple agrees to convert it into separate property (if the sell community property they can retain the community property nature of it by taking it in the name of the husband and wife)
      ii. If husband dies and she take elective share, she gets her half of community property and 1/3 of his half; a windfall for her

6. Spouse Omitted in Premarital Will (UPC): The surviving spouse is entitled to receive as an intestate share no less than the value if the testator had died intestate
   a. Estate of Shannon: She gets share of estate unless it is clear that the husband she married after he executed his will, intentionally excluded her, provided for her outside the will or had a valid agreement to leave her out
   ii. Protection of Children
      1. Intentionally Disinherited Children: In all states but Louisiana, a child has no statutory protection against intentional disinherance by a parent—no requirement that they leave anything, even one dollar (very common to leave everything to spouse)
         a. This is a risky thing to do though and the courts do not favor disinheriting children unless leave it to spouse; it will invite a will challenge
         b. Lambeff v. Farmers Co-op Executors (Australia): “A child is allowed to claim a benefit if left without adequate provision for his proper maintenance, education or advancement in life…can be given at court’s discretion.”
2. **Issue Omitted from Will: Pretermitted Child Statutes**: If a parent leaves a child out of will (one born after execution of will, or in MA it can be before or after if accidental), they will get the share they would have gotten in an intestate situation (WA allows court to determine that the testator would have given less)
   a. Rules of abatement apply or some just come out shares of other children
   b. Most (MO) allow only to look at four corners of will to find contrary intent to show the child was purposely left out
   c. MA and others allow extrinsic evidence
   d. Most limits the gifts to issue and do not allow it to go to the children of deceased issue

IV. **Trusts**
   a. **Introduction: Testamentary v. Inter Vivos Trusts**
      i. **Revocable Trust**: O declares herself trustee of property to pay the income to herself for life, then pay the principal to her children on death—she retains the right to revoke the trust (avoids the costs, delays and publicity of probate)
      ii. **Testamentary Marital Trust**: Husband devises property to wife for her life and then the principal to husband’s children on her death.
   b. **Requirements**
      i. **Valid Purpose**: The trustee can create a trust for any reason as long as it is not illegal and the terms of the trust do not require the trustee to commit any act that is criminal, tortuous or contrary to public policy (1. Purpose must be lawful; 2. must not violate rule against perpetuities; 3. must not be contrary to public policy)
         1. **Intent Approach** (majority): a trust is illegal if the existence of the trust could induce another person to commit a crime even if the trustee does not have to perform an illegal act
         2. **Use Approach** (minority): Focuses on how the trust is actually used rather than on the motives of the settlor
         3. Not valid to defraud creditors (prevent them from reaching assets if the debts accrued before the transfer); discriminate against certain people
      ii. **Settlor**: Creates a trust by splitting the title of property into legal and equitable shares and by imposing fiduciary duties on the holder of legal title
         1. Capacity: Generally requires the same capacity necessary to make an outright gift. UPC requires settlor of revocable inter vivos trust to have testamentary capacity. Others require even more, like having the capacity to enter a contract
      iii. **Transfer/Present Declaration**: May create a trust while the settlor is alive or delay the time of creation until the settlor’s death by including trust gifts in the settlor’s will
         1. **Transfer in Trust**: In a transfer or conveyance, the settlor transfers legal title to another person as trustee and imposes fiduciary duties on that person. The settlor may retain some or all of the equitable title transfer all of the equitable title to other persons.
            a. **Brainard v. Commissioner**: An interest does not come into existence or which has ceased to exist cannot be held in trust (Person tried to create trust to buy stocks and then give proceeds to wife and children after taking commission, but there was no property when it was set up and when it finally had property it was too late)
         2. **Declaration of Trust**: The settlor declares himself to be the trustee of specific property and then transfers some or all of that property’s equitable title to on or more beneficiaries
   iv. **Trustee**: Trustee holds legal title to trust property and is bound by fiduciary duties to deal with that property for the benefit of the beneficiaries.
1. **Capacity**: Needs the ability to take, hold and transfer title to trust property. Must be of legal age and competent

2. **Acceptance**: The settlor cannot force someone to be a trustee, a person must take an affirmative step (1) comply with method of acceptance provided in the trust, 2) sign written acceptance, 3) may be implied because the trustee started acting as trustee

3. **Oath**: Some states require them to take an oath of office

4. **Successors**: May need to be replaced (die, become incompetent, resign or be removed), so perhaps settlor named successor or local trust statutes will determine

5. **Resignation**: A trustee may resign at any time

vi. **Intent**: *Threshold factor*—If transferor does not express intent, no trust is created and the court will not intervene to create a trust. Intent is determined if transferor:

1. Divides title to the property into legal and equitable components (same person can’t hold both)

2. Imposes enforceable fiduciary duties on the holder of legal title to deal with the property for the benefit of the equitable title holder

3. *Jimenez v Lee*: Must have mandatory, explicit description (though no particular form of words or conduct is necessary) of intent and split the title

4. **Precatory Language**: Ex. “I hope he will use this money for education”—not mandatory limiting language (watch for “I wish…,” “I recommend…,” or “I suggest…”)—provides a moral responsibility to comply with wishes, there is no legally enforceable duty

vii. **Property**: The existence of property is crucial, no trust exists until it has property and it terminates when no property remains

1. Property can consist of present or future interests in real property and tangible and intangible personal property

2. Legal title of the property goes to the trustee—it must actually be transferred, the settlor cannot hold onto it

viii. **Beneficiary**: **Trust for Friends, Lovers and Pets**: Beneficiaries hold equitable title to trust property and have standing to enforce the trust. The trust cannot exist without them

1. **Capacity**: A person must have the capacity to take and hold property, but need not be able to transfer and manage. Thus it can be any human alive. Settlor can also be beneficiary as can trustee as long as he is not sole beneficiary.

2. **Adequacy of Designation**: They must be clearly ascertainable, the trust will fail if the settlor fails to describe the beneficiaries with sufficient certainty (watch for class gifts and vague gifts).

   a. *Clark v. Campbell*: Can’t simply leave trust to benefit “friends”—need to define friends more precisely

3. **Honorary Trust**: A gift the donor intends to benefit a non-human, non-charitable purpose—no one can enforce the trust because no person holds an equitable interest, so the trustee is on his honor

   a. Usually to care for pets, maintain specified property in good condition (a car or piano)

   b. Most jurisdictions do not recognize honorary trusts, so the trust reverts to settlor (who is dead) and then goes to heirs or beneficiaries; more are allowing them though if the purpose is not illegal and does not exceed RAP.

   c. UPC has special provisions for it and allows an individual to be designated to enforce the purpose of the trust instrument

   d. *In re Searight’s Estate*: The absence of a beneficiary having legal standing is fatal and the trust fails, but in some situations it is becoming more likely
Better solution is to name the caretaker the beneficiary and make
the money dependent on her caring for the dog (also do not name
her a beneficiary of the residue or else she’ll have incentive to kill
the animal early)

4. **Incidental Beneficiaries**: Someone who benefits from the trust but is not named a
beneficiary (parent who is required to maintain a clean home for their child who is
beneficiary) cannot enforce trust

5. **Disclaimer**: A beneficiary does not need to accept equitable title

**viii. Writing**: None is required, oral trusts are fine; some states restrict oral trusts to situation
when the trustee is neither settlor or beneficiary and settlor expressed trust intent before
or with transfer

c. **Types of Private Express Trusts**

i. **Discretionary**: A trust for someone who’s future needs cannot accurately be predicted
(Ex. children are young so you don’t know if they’ll need medical care, education, etc.),
so the settlor wants the trustee to make trust distributions in accordance with
beneficiary’s needs just as the settlor would do (substituting trustee’s judgment for
settlor’s).

1. The trustee’s discretion may be broad (“distribute at your absolute discretion”) or
   narrow (“distribute at your discretion for my children’s education”)
2. Trustee must act in good faith, honestly and for the stated purpose—otherwise
   quite broad and courts are deferential; if settlor is concerned about it, make
   instructions quite specific
   a. Remedies for breach:
      i. Remove trustee and appoint a new one
      ii. Order the trustee to make certain payments
      iii. Scold the trustee and instruct how to make things right
   who was supposed to be cared for out of the trust, so the trustee is removed. There
   is a duty to inquire

ii. **Mandatory**: A trust that requires a trustee to make pre-designated distributions
regardless of circumstances

iii. **Support Trusts**: The settlor can restrict the use of trust income or principal to the
beneficiaries basic needs such as food, clothing, medical care and education (basic
support)—may be mandatory (must make payments) or discretionary (only makes
payments when he deems them necessary)

   1. Often treated like spendthrift trusts even without spendthrift clauses and are not
      allowed to convey the interest of the beneficiary

iv. **Spendthrift Trusts**: A spendthrift clause of a trust does two things: 1) Prohibits the
beneficiary from selling, giving away, or otherwise transferring the beneficiary’s interest;
2) prevents the beneficiary’s creditors from reaching the beneficiary’s interest in the trust.
Unless prohibited, settlers include spendthrift restrictions in almost every trust because
they protect beneficiaries from their own improvidence and personal creditors (protect
people who don’t have good sense).

   1. Once the trustee gives the income to the beneficiary the protection ends and
      creditors can reach the money under state law procedures (beneficiaries can
      usually avoid paying however by not depositing in an account that is garnished or
      keeping cash where it can be taken directly
   2. Easy to create, most times only need language stating “This is a spendthrift trust”
      (UTC)
   3. Most states restrict legislatively or through the courts justifying with these
      policies:
a. Settlor has the right to distribute property however he chooses
b. Granting this protection prevents them from becoming public burdens should the trust property be exhausted paying the claims of creditors
c. Creditors have the responsibility to investigate the debtor and the wisdom to know that they should not use the trust as the basis for granting credit

4. Can be reached for spousal and child support claims, tax liens and often for necessities (grocery stores, landlords, etc. who have extended credit)
   a. *Shelley v. Shelley*: The duty of a husband to his wife and father to his children should override the restrictions called for by the spendthrift trust; children’s support can come out of principal
   
   v. **Self-Settled Asset Protection Trusts**: A self-settled trust gives the settlors the options being the beneficiaries of the trust with spendthrift provisions so creditors can’t reach the money. Courts usually do not like to enforce these arrangements because it is against public policy to allow people to protect their own assets against creditors with this loophole

1. **Asset protection Trusts**: Usually off-shore, but not in at least five states, people can put money in a bank and settlor/beneficiary is not allowed to get money from the trustee to give creditors
   a. *FTC v. Affordable Media*: Couple operated a ponzi scheme and sent their money offshore as beneficiaries and co-trustees. When people sued them for fraud the trust was closed to them “under duress” and the bank would then not give them money so it couldn’t be seized. The court held them in contempt because they claimed they couldn’t get the money even though there was evidence that they could get to it. Off-shore so courts really couldn’t reach funds.

d. **Resulting Trusts**: A resulting trust arises by operation of law in one of two situations: 1) where an express trust fails or makes an incomplete disposition or b) where one person pays the purchase price for property and causes title to the property to be taken by someone who is not a natural object of the bounty of the purchaser (Ex. A buys Blackacre and names B, not natural bounty, as grantee, so a presumption arises that A did not intend to make a gift of property, but had a different reason and B holds title in trust for A—this is rebuttable; If B had been A’s daughter then presumption is that it is a gift)
   
   i. A resulting trust does not contemplate on ongoing fiduciary relationship wherein trustee holds and manages property—when the resulting trust is found, the trustee must reconvey it to the beneficial owner on demand

e. **Constructive Trusts**: Flexible remedy to prevent unjust enrichment—if the legal title holder cannot retain the beneficial interest, he is turned into a trustee and the benefits go to a different person—trustee has duty to convey to another on the theory that retention would be wrongful. Requirements for constructive trust:
   
   i. Confidential or fiduciary relationship
   ii. A promise, express or implied, by the transferee
   iii. A transfer in reliance on the promise
   iv. Unjust enrichment of the transferee
   v. Also applies in other situations (inheritance by fraud, etc.)

f. **Secret Trust**: A will that does not mention a trust, but a legacy given to a person in the will is based on a promise to distribute money somehow—this is enforceable by a constructive trust and extrinsic evidence is allowed to demonstrate the intent so the beneficiary isn’t unjustly enriched

g. **Semi-Secret Trust**: If the will indicates that a person is to hold the legacy in trust but does not identify the beneficiary, the legacy fails because extrinsic evidence of the intent to benefit someone is excluded (a trust must have a specified beneficiary)

h. **Exculpatory Clause**: Excuses trustees from liability except for “willful neglect or default”
i. Enforceable (though not if it is an absolute prohibition), but it will possibly encourage trustees to take the job

i. Modification and Termination of Trusts

i. Modification: If the settlors and all beneficiaries consent, an irrevocable trust may be modified or terminated; if the settlor is dead, however, the trust cannot be modified prior to a time fixed, even with consent of beneficiaries, because it would be contrary to the purpose of the settlor

1. In re Trust of Stuchell: A child needed a lot of support and the trust would have cut off his government benefits so the other beneficiaries tried to modify the trust. The court did not allow modification simply because it would benefit the beneficiaries—needed to wait until the purpose was accomplished

2. Deviation (UTC): The court may modify if unanticipated circumstance arise and it would further the purpose of the trust to modify or terminated the trust—probably different result in case

ii. Termination: Generally termination cannot be terminated if it is a spendthrift trust, if the beneficiary is not to receive the principal until reaching a certain age, if it is a discretionary trust, if it is a trust for support

1. In re Estate of Brown: An active trust may not be terminated, even with consent, if the material purpose of the settlor remains to be accomplished (Claflin Rule)

2. Merger: Sole trustee and beneficiary are the same person—no true trust

3. No trust property: Trust terminates because nothing else to give

4. Duress, undue influence: invalid if trust made under these conditions

iii. Revocable Trust: In most states, a will can be made revocable by the settlor if he expressly reserves that right. In a minority of states a trust is automatically revocable unless the terms specify it is irrevocable. Settlor may also give trustee right to revoke under certain circumstances

1. Traditional rule is that a trust cannot be revoked by will, but UTC now allows it

iv. Trustee Removal: Trustees can be removed for breach of trust, but not be a modification of the trust terms (courts can remove for dishonesty or serious breaches, not because they fight with the beneficiaries)

1. If beneficiaries could change trustee it would encourage competition

2. They can change if things like a bank merger occur and you no longer have a relationship with your trustee

j. Charitable Trusts

i. What makes a charitable trust charitable? Trust established for the benefit of the community as a whole or a relatively large segment (or indefinite part) of the community. It is not subject to the rule against perpetuities and trust taxes as are private trusts.

1. Marsh v. Frost National Bank: Man left trust that would take 346 years to build and then would pay everyone over 18 years old $1,000,000. The court said that it was generous but there wasn’t general charitable because it would have benefited everyone equally and since it violated RAP it could not be valid

2. Charitable Purpose:
   a. Relief of poverty
   b. Education
   c. Religion
   d. Health
   e. Government or Municipal
   f. Other purposes beneficial to community
   g. Rosser v. Prem: Woman wrote a terrible book about her daughter’s death and left money to publish it. The lower court said it was not a valid
charitable gift because the writing had no value (charitable trusts must provide some social value), but the court disagreed and allowed the trust

3. **Indefinite Beneficiaries:** It is not defined exactly who is going to benefit—you can set a class, but the people are not named with specificity and it will benefit society as a whole

ii. **Are a donor’s wishes sacred?**

1. **Cy Pres:** Under circumstances where a settlor’s charitable purpose cannot be carried out—impossible, impractical or illegal (would otherwise be invalid), the court may direct the property to another charitable purpose that approximates the settlor’s intention (“as nearly as possible”)—if you are too rigid you are not going to benefit settlor’s wishes and will frustrate society. The trust must be a general charitable intent and will not be valid if there is a gift over provision

   a. *In re Neher:* Woman left money to town to build hospital, but there was one nearby and it couldn’t afford maintenance, so the court allowed them to use the money for the other hospital and to use property as administrative buildings

   b. *Obermeyer v. Bank of America:* Man left money to Wash U dental school which had ceased to exist so the court allowed the money to go to other purposes at the school rather than going to heirs

2. **Deviation:** A court may allow the trustee to deviate from the settlor’s instruction if the court is convinced that the settlor would have consented to the change had he anticipated the current situation.

   a. The purposes of the trust have been fulfilled

   b. The purposes have become illegal

   c. The purposes have become impossible

   d. Compliance would defeat or impair the trustee’s ability to accomplish the purposes of the trust

   e. Courts will:

      i. Change the trustee

      ii. Terminate the trust

      iii. Permit acts forbidden by the trust

      iv. Prohibit acts mandated by the settlor

      v. Modify the terms

iii. **Supervision of Charitable Trusts:** Traditionally the donor does not have standing to enforce the terms of a charitable trust and the attorney general is responsible for enforcement. This is because beneficiaries are indefinite and cannot enforce it themselves and donor/donor’s heirs have abdicated responsibility. Can also use someone with special interest aside from general public, but that is narrowly interpreted. Many people now support allowing donors to enforce their wishes

   1. *Herzog v. Univ. of Bridgeport:* Person gave money to nursing school that no longer existed and school gave it to general endowment instead, but since the donor had no rights anymore to enforce it the money stayed where it was

   2. *Smithers v. St. Luke’s Hospital:* A woman whose husband gave money to an organization did not get the enforcement she liked from the attorney general, so she was granted permission to sue as a “special interest”

      a. Keeps the attorney general on their toes and sometimes necessary since they are so overburdened and this is not a top priority

   3. *Russell v. Yale:* A man left money to build a building at Yale. The school was going to tear it down so the family tried to intervene, but the court held that the family, the students, and alumni have no special interest to enforce their rights

V. **Fiduciary Administration of Trusts**
a. **Fiduciary Powers**
   i. The administrative powers of a trustee are drawn from statute and the instrument creating the trust—there are no “inherent powers” of the trustee (unlike executor who has specific tasks like paying debts and distributing money)
   ii. Legislatures have broadened the power in two ways
       1. The trust drafter does not need to include long list of powers because it can incorporate by express reference to the statute
       2. A broad powers act that automatically grants to trustees basic powers
   iii. Must have **standing** to enforce the trust—beneficiaries and trustees both hold title so they have standing
   iv. **Remedies** when surcharging trustee for breaching trust
       1. **Lost Value**: Loss or depreciation in value of the trust due to breach
       2. **Profit made by trustee**: Trustee must pay everything they made in profit except compensation even if trust did not suffer loss
       3. **Lost Profits**: Profits the trust would have earned but for the breach—hard to prove because they are speculative
       4. **Punitive damages**
       5. **Removal of trustee**

b. **Judicial and Statutory Limitations**
   i. **Duty of Loyalty**: Fundamental principle of fiduciary obligation is loyalty to the beneficiaries
       1. *Hartman v. Hartle*: A man was trustee and beneficiary and auctioned a farm to his wife then turned around and sold it without sharing profits. The court said that there is **no self-dealing** and that includes spouse of trustee, so the profits needed to be shared
       2. *In re Gleeson’s Will*: A man was the lessee of a farm and was named trustee of it. He kept leasing the farm because it was the best thing for many reasons, but the beneficiaries sued and he was required to return profits for self-dealing
       3. *In re Rothko*: Co-trustees made deals with a gallery (one was a board member, one was an aspiring painter who got a contract with the gallery, one was just along for the ride) to sell Rothko paintings for way less than market value. Daughter sued, court found self-dealing and invalidated agreements, returned profits and unsold paintings
       4. **“No further inquiry** In self-dealing cases, the court will not look at extrinsic evidence that the deal was actually good and fair, it will just invalidate the deal (goes for trustees, agents, spouses, children)
       5. **Trust Pursuit Rule**: If trustee wrongfully disposes of trust property and acquires other property, the beneficiary is entitled to enforce a constructive trust on the property acquired (treat it as part of the trust). If the third party did not act in good faith then the third party is liable as well and a constructive trust is placed on the property originally in the trust
   ii. **Duty to Follow the Terms of the Trust Instrument/Will**: Trustee shall administer in good faith in accordance with the terms and purposes and interests of the beneficiaries
   iii. **Duty of Prudence: Trust Management and Investment**: Traditionally, the trustee was under a duty to the beneficiary to exercise such skill and trust as a man of ordinary prudence would exercise in dealing with his own property” and more modern: “by considering the terms of the trust and in satisfying this standard, the trustee shall exercise reasonable care, skill and caution.” UPC and some states now requires how a reasonable person would deal with the property of another.
       a. Look at the safety of investment
       b. Investment’s potential to appreciate
c. Income the trust is expected to generate

2. Duty to Collect, Protect and Preserve Trust Property
   a. **Prudent Manager Standard**: A trustee has the duty of obtaining possession of trust assets without unnecessary delay and to examine them to make sure that the property tendered by the executor is what the trust is supposed to receive.

3. Duty to Earmark Trust Property: Designate property as owned by the trust rather than the trustee’s own. This prevents the trustee from later claiming that investments which proved profitable were his own and ones that lost money were from the trust.

4. Duty not to Commingle: Trustee must assure that the property remains separate from the trustee’s own assets because then they become more difficult to trace and may be used by trustee.
   a. Some states allow common trust funds for trustees who monitor multiple trusts—allows them to diversify, lower transaction costs and more leverage so better for the beneficiaries.

5. Duty to Make Trust Property Productive
   a. **Prudent Investor Rule (portfolio standard)**: The prudent investor (see standards for prudence—these apply to investing), looks at the whole portfolio, not individual investments, and fits to meet the objectives of the trust.
      i. Most states used to require investments in only certain assets that were safe, now most states give much more leeway and only require reasonableness (allow more risk for higher return, etc.).
      ii. Look to these factors as guides of what is reasonable:
         1. General economic conditions
         2. Anticipated effects of inflation
         3. Tax consequences
         4. Role each investment plays in the portfolios
         5. Expected income
         6. Anticipatory appreciation
         7. Beneficiary’s other income sources
         8. Need for liquidity
      iii. Require the same skill that someone would have in regular life, so with low investing skill you are not breaching duty if the return isn’t as good as if you are someone with high skill.
   b. **Social Investing**: This is investing where you look to factors other than monetary safety and potential to earn income (how the company handles environmental matters, fair wages, doesn’t make tobacco, etc.) If the investments still make money, this is fine, but if not, then the trustee may be prohibited unless specifically requested by settlor.
   c. **Diversification**: Trustees have a duty to diversify and should not have all of their eggs in one basket, particularly a risky one. Protects the principal.
      i. *Estate of Collins*: People invested all of trust in a construction project that went bust and the trust lost all of its assets—this was not properly diversified.

iv. Duty not to Delegate/Duty to Delegate: A trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required to personally perform himself. A trustee lacking investment experience must seek out expert advice (can seek help in other areas as well, but must choose a good person and will need to enforce the rights of beneficiaries (sue the people for wrong doing).
1. Cannot delegate complete control over investments—must at least monitor them to make sure they are not being abused
   a. *Shriner’s Hospital v. Gardiner*: A trustee let her brother handle investments and he swindled the trust to take all the money. The court said she had failed in her duty not to delegate ultimate authority over investments and should have paid close attention to their performance.
      i. Uses the revised manager’s duty—reasonable care in managing someone else’s affairs

v. **Duties Involved in Trustee Relationships with Beneficiaries**

1. **Duty of Loyalty**: Trustee must act with complete loyalty to beneficiaries (*Rothko*)

2. **Duty of Inquiry into the Needs of the Beneficiary**: In a support trust or discretionary trust, the trustee must inquire to make sure that the beneficiary is being properly supported and the trust is being carried out effectively

3. **Duty of Impartiality**: A trustee must act impartially with respect for both life tenants and remaindermen.
   a. *Dennis v. Rhode Island Hospital*: Trustees failed to watch the condition of a building and to make repairs so it could earn lots of income, but then the remaindermen were Screwed, so the court gave them damages.

4. **Duty to Inform and Account**: A trustee must keep accurate records of all transactions involving the trust property and provide accountings to beneficiary to ensure that they are doing a good job.
   a. *Fletcher v. Fletcher*: Son wanted to see what the mother left in trust to ensure that the trustee was doing his job, but the trustee would only provide information related to that beneficiary’s trust (by instruction). Court said the trustee is under a duty to account and should have provided all relevant documents
      i. Before this case, you only saw what related to your own part of a trust, may not get to see the whole thing (a little guidance)
      ii. Should there be different rules for an inter vivos trust where the settlor is alive and may want to keep his own privacy
   b. May not want full accounting—avoids costs and delays, keeps things private, family harmony, allows trustee to manage without interference from nosy beneficiaries

VI. **Lifetime Transfers with Post-Mortem Consequences**

a. **How to Ensure Lifelong Care and Affection**
   i. **Contract to Devise**: Enter a contract to make a will or not to revoke a will in exchange for some other promise (to assist in life or something).
      1. A party must sue in contract if the contract became binding, a party dies and the will was not in effect
      2. *In re the Estate of Frank Linden Fritz*: Man had a contract to be included in a person’s will in exchange for caring for him during life. The contract can be proven by:
         a. A provision of a will stating the material provisions of the contract
         b. An express reference in a will to a contract and extrinsic evidence proving the terms of the contract
         c. A writing (not valid as a will) signed by decedent evidencing a contract
      3. Subject to statute of frauds (must be in writing and enforceable)

b. **Gifts of Personal Property**
   i. A gift requires three things
1. **Delivery**: Physical delivery if possible, but can also be symbolic (a representation like a photo of a house) or constructive (a key to a car)—feel the wrench of the gift and evidence

2. **Intent**: They must intend to give the gift—delivery shows this

3. **Acceptance**: A person taking the gift qualifies and this is usually assumed

   **ii. Scherer v. Hyland**: A woman left a check to her husband before she went to kill herself. The gift was approved because it was *donation causa mortis* (gift of personal property made by a party in expectation of death, then imminent, subject to the condition that the donor actually die)