I. INTRODUCTION

T&E all about people—get the names make a tree, “cast of characters”

A. Inheritance and its limits

Shapira v. Union Ntl Bank
David died testatee (with a will) and left 2 sons and 1 daughter. Will stated that both sons have to marry a Jewish girl with Jewish parents within 7 years of his death in order to get the residual of the estate. If they don’t then their portion goes to Israel (gift over). State of Israel shows testor’s intent of larger commitment to cause (Judasm) instead of just punishing sons. Const issue: clause violates son’s const right to marry. Crt does not buy this argument. He can still marry whoever he wants, just can’t get his inheritance. Const issue is of a state action that violates right to marry, here restriction in enforced by a private person. Public policy issue: unreasonable so therefore unenforceable. A partial restraint of marriage which imposes only reasonable restrictions is valid. Crt finds that this restriction is not unreasonable. Son argued that not enough eligible women he can marry. Crt says 7 years is enough—he can move and look elsewhere. But if effect of provision is to prevent marriage or discourage a particular marriage then courts are unlikely to uphold provision. Example: Can’t marry Rachel would be unreasonable.

Testator Intent: tension between the interests of testator and interests of beneficiary and heirs and society’s interests.

Dead Hand Control: should there by any limits? Public policy reasons to prevent provisions that direct destruction of property, pets. Restatement of Trusts invalidates trusts “contrary to public policy” Generally the Restatement frowns on restraints on beneficiary behaviour, including restraints on marriage or religious freedom, disrupting family relations, and choice of careers, but calls for a balancing of conflicting social values.

B. Definitions of Status

1. Surviving Spouse

Overriding Question: Does the individual qualify as a surviving spouse?

a. Divorced Spouse

Biewald v. Jensen
Married couple divorced, but still lived together until women’s death. Guy tried to argue that he is the surviving spouse regardless of divorce because they still lived together and held each out as such. Crt held that guy cannot claim he is surviving spouse bc of the divorce. This might not be fair, but legis must respond and not the courts.

Legistatures did respond: NH statute—if cohabit ate for 3 years then legally married;

   OR: 10 yrs of holding out and dual responsibilities then married; HI: Does not extend any protection to those not legally married; VT: civil unions ok.

Putative Spouse: man marries 2 women. Second women is a putative (innocent) spouse when she thinks she is legally married and doesn’t know about the other women.
How divide up estates between putative spouses? If there is a legal spouse and putative spouse, the rights of one does not supersede the other.

**Vargas v. Vargas**: Crt split the estate in half.

Factors to determine how to divide estate:
- length of marriage;
- any children

If spouse is not an innocent party (knows of other wife) then not putative.

C. Unmarried Cohabitants (spousal relations)

**In re Cooper** [homosexual relationship]
Can expand definition of surviving spouse to homosexuals?
Crt: homosexual is not a surviving spouse because the legislature statutory defined spouse to mean husband or wife. If don’t expand the definition, then is the definition unconstitutional because restricts right to marry based on gender. Individual denied right to marry and therefore denied benefits of marriage (ie inheritance). No bc rational basis review, valid state interest.

D. Sex change

2. Definition of Child

A. posthumous child (afterborn heirs): is an heir conceived while the intestate is alive but who is not born until after the intestate’s death.

At common law treated as “in being” and capable of inheriting from the time of conception if the heir was thereafter born alive. Some statutes make a distinction based in the relationship between the intestate and the posthumous heir. For example if the child is a descendant of the intestate (child of dead father or dead mother (delivered out of dead mother)) the child may inherit. But if the child is a more distant relative, the child may not inherit.

There is a 300 day rebuttable presumption of gestation and paternity—but this is changing as technology changes (sperm banks etc…)

B. Adoptive Child
Adoptive child can inherit through adoptive parents. Inheritance through biological parents:
Adoptive child vs biological child. Possible outcomes with inheritance:

**Hall v. Vallundingham** [Rebirth]
Once children (A, B) are adopted they are reborn into a new family. A and B then left all rights (including inheritance) from their old family. Therefore the adopted child cannot inherit from biological family. (MD). UPC stepparent exception: rule is usually adjusted if the child is adopted by the spouse of a biological parent so the child does not lose inheritance rights from either biological parent.

TX: double inheritance—adopted children can inherit from both sides of the family.

UPC: Can’t get inheritance from both sides of family, but can get the larger share.
Wide range of complexities to calculate shares.

Can you adopt an Adult? A lover?
Most states make no distinction based on the age of the child at the time of adoption. But some states restrict inheritance rights if the adopted individual was an adult and had not lived with the adoptive parents as a minor. These rules may differ if the adopted adult is mentally challenged. Adoption of a mentally challenged adult may create inheritance rights. Class: some statutes allow while others don’t.

**Equitable Adoption** (also called adoption by estoppel):
This occurs when a “parent” acts as though the “parent” adopted the child even though a formal court-approved adoption never occurred. The courts in states that recognize this type of relationship examine many factors to determine where an equitable adoption occurred—held the child out as their own. Thus if the parent dies, the child can take as if adoption had really occurred.

C. Non—marital Child
At common law a child born outside of marriage was considered as having no parents. Thus this child could not inherit from the biological mother or father. This changed under modern law: SCT held that marital and non-marital heirs must be treated the same when determining heirs under intestacy status. Set held that discriminating against non-marital children violated the equal protection clause. Later the SCT went back and said the state may have legitimate reasons to apply a more demanding standard for non-marital children to inherit from their fathers than their mothers. In response, many states have expanded the ability of non-marital children to inherit. Most jurisdictions permit the non-marital child to inherit from and through the biological mother without any difference in maternity proof from that which a marital child is required. Many states impose a higher standard on these children to inherit from the father, especially if the father did not recognize or take steps to make paternity clear. Example of paternity proof: subsequent marriage of biological parents, child living with father, father holding out child as own, court decree of paternity, father consent to being named on child’s birth certificate. Many states allow the child to prove paternity after the father has died by clear and convincing evidence—as in using DNA.

Hold out illegitimate child as own: equitable illegitimation

D. Reproductive Technologies
Jurisdictions have different standards.

II. **INTESTATE SUCCESSION:** when die without a will [SEE SEP OUTLINE]

--Surviving Spouse
--Descendants
--Ascendants
--Collaterals
--Remote Collaterals
--Very Remote Collateralists
--Laughing Heirs
--Half-Bloods

--Advancements
When parent gives gift to child (or other descendents) during lifetime, should this be included in the child’s estate? This is a special type of inter vivos gift.
Common Law: Any lifetime gift to a child (or other descendents) during dead guys lifetime is presumed an advancement, or a prepayment of the estate. The advanced property is treated as if it were still in the advancer’s probate estate when computing the size of the intestate shares. Thus, the advancee recieves a smaller share in the estate because the advancee already has part of the advancer’s estate (the advancement). This equalization process is called hotchpot.

12 + 3 = 15 million. Divide by 3 children = 5 million per child. Then subtract prepayment for C. 5-3 = 2 million C; A and B get 5 million.

*If advance more money than left in intestacy—the advancee heir simply doesn’t share in the intestate estate.

**If advanced property that goes up or down in value at time of death and intestate—advancements are typically valued as of the date of the advancement. Subsequent appreciation or depreciation of advanced property is ignored when going into hotchpot.

Modern Approach (most states): Presume lifetime gifts are not advancements. The heir who wishes to establish an advancement has the burden of proof to show that the intestate decedent intended the gift to be an advancement. Most states require written documentation that decedent intended gift to be an advancement. UPC requires a writing clearly indicating the advancement nature of the gift that is excuted either 1) by the advancer contemporaneously with the transfer, or 2) by the advancee at any time.

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**Probate Assets**
[not on test] just to alert us that not all of decendant’s assets are included in the intestate estate. Some assets are non-probate such as joint tenancy, life insurance, contracts with payable upon death clauses, and trust.

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**Evil Heirs** (slayers, killers)

In re Estate of Mahoney

Women convicted of killing her husband (manslaughter). Probate court divided up husband’s estate equally between husband’s parents and none to the widow slayer. Widow sued for estate as surviving spouse. Generally surviving spouse gets all of the estate and only goes to parents if no surviving spouse.

Possible Approaches:
1) legal title passes to Widow—slayer gets the estate [Refusing estate should not be an additional punishment]
2) No legal title passes—slayer does not get the estate.
3) Legal title passes to widow as a constructive trustee. She holds title but cannot benefit—she holds estate for her heirs. [Don’t want her to profit from crime]

Probate court held that title does not pass to her because she was involved with the death of the decedant and she should not profit from her misconduct. Crt on review held that the probate court was bound to follow the state’s statute of descendant and distribution—so its devisee to parents was in error. Lwr crt has limited jurisdiction—they can just apply the facts to the statute and cannot deviate. Crt chose #3—title passes as a constructive trust

Also factor that mansluaghter case: issuer over whether killing was voluntarily or involuntarily? Was there intent to kill?
**Murder**
To prevent murders from benefiting from their evil acts, most states have enacted statutes prohibiting murders from inheriting: called **slayer’s statutes**. Generally estate passes as if murder had disclaimed any inheritance rights (like the murder predeceased the intestate).

For States that don’t have statutes on point—courts usually impose a constructive trust.

*When person is acquitted of murder—doesn’t stop inquiry because while crime must be beyond a reasonable doubt, court for inheritance uses a lower standard: preponderance of evidence. So a person can be acquitted of murder, but still lose inheritance rights from bad act. [**Some state statutes though provide that conviction must be a pre-req for disinheriance, but other statutes have a preponderance standard, and for states with no statute, a court would probably still impose a constructive trust]

*Mercy Killing: Still murder if spouse or child kills parent (spouse) because spouse is sick or in pain. Since voluntarily euthanasia is not legally acceptable, killer wold not inherent. Almost all courts motives of the murderer are irrelevant.

**Voluntary Manslaughter**
Vol manslaughter is an intentional and unlawful killing that the killer performed with the intent of causing death, but the killing was the result of sudden passion or provocation. Many courts would still not let heir take because had intent to kill.

**Involuntary Manslaughter**
If the killer unlawfully, but unintentionally kills. Most courts would permit the killer to take because there was no intent to kill.

**Other types of Killings:**
Courts usually allow the slayer to take when—kills inestate by accident, in self-defense, or if the slayer was insane at time of killing.

Suicide: most states have statutes that provide for the property of a person who commits suicide to pass as if the death was caused by other means

**Unworthy Heirs:** should disininheritance extend beyond murder to include other bad acts? Child Abuse? Child who abuses parent? Failure to support child? Adultery? Many states have statutes that limits rights of spouse (or forfeits rights) is spouse commits adultery.

**Especially Worthy Heirs:** good heirs: special funds (conditional gifts) for heir who dedicates himself to care for the disabled person…[Ill statute is for at least 3 years].

--Disclaimer: under common law heir had no choice but to take the estate, but under modern law, an heir may disclaim or renounce the heir’s share in the estate of the intestate decedent. An heir may disclaim because: property may be undesribale or a burden to take care of; might believe its wrong to profit from death; if in debt-could disclaim to prevent their creditor from taking; may disclaim to reduce tax burden.

Requirements: State and federal impose many formalities on disclaimers:
1) disclaimer must be in writing that is signed by the claiming heir;
2) disclaimer document must be timely filed with the proper authorities. Fed law requires disclaimer to be filed within 9 months of disclaimers death, but some states soften this rule by allowing disclaimer
to be filed within 9 months of when heir learns of the inheritance. Some states impose no time restriction;
3) a copy of the disclaimer must be sent to the administrator;
4) disclaimer must be irrevocable. Once heir disclaims, the heir cannot regain the property by revoking the disclaimer, even if the attempted revocation comes within the 9 month period. Also courts will not undo a disclaimer just because the person who disclaimed did not understand the effect of the disclaimer;
5) partial disclaimers are allowed: heir can elect to disclaim undesirable property and keep the good property;
6) if the heir has accepted the property or any benefits, it is too late for the heir to disclaim, even within 9 month period. Acceptance is manifested by an affirmative act consistent with ownership;
7) the disclaimer must be unconditional: the heir cannot receive something in exchange for making the disclaimer.

Distribution of Disclaimed Property:
Disclaimed property typically passes as if the disclaiming heir predeceased the intestate. UPC tried to change this result—distributed estate as if A was alive for distribution, but the portion can pass down by representation. Hope to deter people from manipulating inheritance via disclaimer.

What extent can people redirect assets to retain eligibility for Medicaid assistance?

Troy v. Hart
Brother was in nursing home receiving Medicaid and Medicare. Sister died and now available to brother. Another sister appointed administrator of estate. She convinced brother to disclaim his interest in the estate so it would be split among remaining sisters. If receive Medicaid and Medicare—you have 10 days to notify authorities of changed financial status so can re-asses payments. Could be fraud when brother disclaimed and did not inform. Crt’s issue was not whether brother could properly disclaim (old and in home) but whether disclaimer by someone receiving benefits was valid. Crt: Not valid, cannot disclaim when receiving benefits—sol’n: constructive trust. Amount he disclaimed goes into a trust so Medicaid bills get paid and whatever is left over goes to the sisters. The loser in the deal was whoever was to take under brother’s estate.

--Transfer of an Expectancy
No living person has heirs. Because of this, an heir apparent does not have an interest that rises to the level of a property interest—instead the heir’s interest is a mere expectancy. This expectancy can be destroyed by will, since not a legal interest—the expectancy cannot be transferred. The heir apparent may agree 1) to transfer the inheritance once received, or 2) not to claim a future inheritance as long as the agreement meets all the requirements of a contract. Most court will enforce this contract if the heir apparent fails to perform upon the intestate’s death. Some courts might not enforce this though because was unfair.

III. WILLS

A. Execution of Wills
The only way for a person to avoid having the probate estate pass to heirs under the law of intestate succession is to execute a valid will. Since a will is a privilege, a will typically has no effect unless the testator precisely followed all the requirements. Most states demand strict compliance but a few states have adopted substantial compliance standards which grants the court a dispensing power to excuse a
harmless error is there is clear and convincing evidence that the testator intended the document to be a will.

1. Testamentary Capacity
Testator must have a “sound mind”

a. Mental Capacity
*Jury trials tend to favor families when contest mental capacity of testator.

To show a lack of mental capacity, courts focus on 4 elements: the testator,
1) comprehended the action being taken and its effect;
2) knew the nature and extent of the testor’s property;
3) recognized the natural objects if the testator’s bounty; and
4) Simultaneously held the first three elements in the testator’s mind long enough to make a reasoned judgement regarding property disposition.

In other words:
1) nature and extent of property
2) the persons who are the natural objects of the testator’s bounty
3) the disposition the testator is making and
4) how these elements relate so as to form an orderly plan for the disposition of the testator’s property.

*focus on the will/actual document to show capacity
*mental state overall
*look at timing of the will/ conditions the will was written under

Comprehend action and effect: testator must understand that the instrument determines the identity of the person who will own his property upon his death. It is not necessary that testor knows the legal name of the document (doesn’t matter is he calls the document a deed or power of attorney instead of a will).

Nature and extent of property: Testator doesn’t need to know a precise accounting of each asset and its value, just general sense. The bigger the difference between the actual size and perceived size of testator’s estate—more likely than not that testator lacked capacity. Question did the testator perceive the significance of leaving to X a large estate or a small estate?

Recognize natural objects of bounty: testator must know, or be able to understand, the individuals who would “naturally” benefit from his death. Testator must know the identity of his presumptive heirs: ie spouse, children, grandchildren, parents, sibilings. But testator has no obligation to leave property to these people. Just because leave out, doesn’t necessarily mean that the testator lacked capacity.

*A person who is adjudicated incompetent later writes a will. The testator is presumed to lack capacity but this presumption may be rebutted by evidence showing that testator was in a lucid interval at the time of will execution.
Likewise a sane individual might lack capacity if write will while under the influence of drugs or disoriented because accident or medical procedure.
*Age might diminish capacity.

*Testamentary capacity is a low standard when compared to other kinds of capacity such as contractual capacity or capacity to transact business.
b. **Insane Delusion**

Delusion is a legal term, not a psyc term. A delusion is 1) a false concept of reality, not a mistake, a belief that is not susceptible to correction and it must 2) have an impact on the will.

Example: Delusion: testator believes injustice prevasive in America (CIA follows her, etc). Impact on will: leaves estate to Elian Gonzales. Testor lacks capacity because from insane delusion, trying to correct perceived injustices via will.

Lawyer would want to make sure competent because can’t draft a will for incompetent people.

Difference between a mistake (rational belief) and a delusion (belief not susceptible to correction). As a general rule, courts do not reform or invalidate wills because of mistake whereas they do invalidate wills resulting from an insane delusion.

**In re Hanigan**

Husband died and 1 month before death he wrote a will which cut out his wife. His widow contested the will by arguing that he was not of sound mind at the time of will execution. Issue over decedant’s testamentary capacity. Widow argued that he had an insane delusion that she was having an affair so his will is void. Her evidence: -no affair; -he said that he was sick in the head. His evidence: phone calls, letters, card, etc..

The issue is not whether she was or was not actually having an affair but rather if he rationally believed that she was having an affair.

If it is a mistake- the will will stand, but if it is a deusion—the will will not stand.

**B. Undue Influence**

Undue influence = coercion.

**Lipper v. Weslow**

Frank is Sophie’s son and attorney. He helped sophie draft her last will. In last will, sophie disinherited Weslow’s side of the family and left half of her estate to Frank and other half to Irene. Frank didn’t like Weslow side of family, close realtionship with Sophie, had key to her house. Problem that Frank drafted and executed a will that benefited him. Clues in her will that Frank thought it would be challenged for undue influence: specific language and reasoning why sophie disinherited the Weslows [explained poor relationship and related specific nasty examples—other side contested those examples]; clause that said Frank did not “unduly influence her”; no contest clause [ clause states will lose inheritance if contest the will, this was a mistake, because grandchildren weren’t getting anything anyway]. Nevertheless, court held no undue influence because understood what she was doing and why and had told this to impartial witnesses.

Test for Undue Influence:

Whether such control was exercised over the mind of the testatrix as to overcome her free agency and free will and to substitute the of another so as to cause the testatrix to do what she would not have otherwise have done, but for the control.

Focus on: 1) Testator-susceptible

2) Influence- disposition, opportunity, in position to inherent

3) Disposition- influence resulted in will
Presumption: where 1) a person in a confidential relationship 2) receives a bulk of the testator’s property 3) from a testator of weakened intellect, the burden of proof shifts to the person occupying the confidential relationship to affirmatively prove the absence of undue influence. In some jurisdictions, there must be additional evidence that the beneficiary was active in procuring the execution of the will.

Test under Lipper: Frank had opportunity to influence (son, atty, keys) and was in a confidential relationship and did dispose of the bulk of her property but court found she was of sound mind, strong will and told 3 disinterested people what she wanted.

Frank may rely on the “good child defense”: He was looking out for the best interests of his mother—there is a preference for the child who stays at home and is caretaker for parent.

Could have done: independent counsel; reasons not so good in will (write them in separate document) But even with both of these—courts have still found undue influence.

In re Will of Moses
Testrix and atty were in a sexual relationship. Testrix was 15 years older, alhoholic and left everything to her lover-attorney. An independent atty drafted the will-no connection to the atty or the testrix. Crt still found that there was undue influence because the drafter of the will (the indepen atty) just wrote whatever the testrix told him to write. The atty did not provide any meaningful independent advice or counsel about her will. This did not overcome the presumption of undue influence. Presumption of undue influence unless can rebut it. Facts to rebut presumption: independent meaningful advice—indep atty should have discussed with testrix her natural objects of bounty, why she was leaving everything to the atty and not her realltives.

In re Kaufman
Testator left estate to gay lover and not family. He wrote a separate letter explaining why he left everything to lover and not family. Crt still found undue influence—probably because the court was homphobic: said beneficiary had a long standing dominating relationship with testator.

--Bequests to Attorneys
presumption of undue influence arises when an attorney-drafter receives a legacy, except when the attorney is related to the testator. This presumption can be rebutted only by clear and convincing evidence provided by the attorney.

Different combinations of possible conflicts
--atty/drafts will/ left estate; atty as executor, witness

--No-Contest Clauses
A no-contest clause provides that a beneficiary who contests the will shall take nothing, or a token amount, in lieu of the provisions made for the beneficiary in the will. Majority of courts enforce no-contest clause unless there is probable cause for the contest. In a minority of jurisdictions, courts enforce no-contest clauses unless the contestant alleges forgery or subsequent revocation by a latter will or codicil, or the beneficiary is contesting a provision benefiting the drafter of the will.

c. Fraud
Fraud occurs where the testator is deceived by a misrepresentation and does that which the testator would not have done had the misrepresentation not been made. The misrepresentation must be made with both the intent to deceive the testator and the purpose of influencing the testamentary disposition. A provision
in a will procured by fraud is invalid. [Court can extract parts of will made with fraud and invalidate and keep the remaining portions] The remaining portion of the will stands unless the fraud goes to the entire will or the portions invalidated by fraud are inseparable from the rest of the will.

2 types of fraud:

**Fraud in the inducement**: when a person misrepresents facts thereby causing the testator to execute a will, to include particular provisions in the wrongdoer’s favor, to refrain from revoking a will, or not to execute a will. A fraudulently procured inheritance or bequest is invalid only if the testator would not have the inheritance or made the bequest had the testator known the true facts. Question: what would the testator done had the true facts been known? Was the devise the fruit of the fraud?

**Fraud in the execution**: when a person misrepresents the character or contents of the instrument signed by the testator, which does not in fact carry out the testator’s intent. This can happen when testator fraudulently signs wrong will; individual misrepresents the document (substitutes wills) or fraud in the terms of the document.

**Latham v. Father Divine**
Will left everything to Father Divine (religious group-cult). Ps are first cousins and claim that testrix wanted to revoke the will and write a different second will where she would give the property to the Ps. Ps charge that Father Divine killed her so that she could not write a second will. If court denied the current will, the estate would not naturally go to the P because not intestate heirs—this is why the P ask for relief in equity. Crt grants constructive trust.

How do you get a constructive trust remedy? Fact pattern for constructive trust:
Where a devisee or legatee under the will already executed prevents the testator by fraud, duress or undue influence from revoking the will and executing a new will in favor of another will so that the testator dies leaving the original will in tack.

Constructive trust scenarios:
1) promise: constructive trust;
2) murdering (slayer) beneficary: constructive trust

**Latham is a landmark case because 1) extending fraud to include scenario where prevent testator from executing will and 2) apply constructive trust not just to prevent wrongdoer from taking, but for the benefit of intended beneficiaries.**

Another remedy in this case: **tortious interference with expectancy**. This is intentional interference with an exoected inheritance or gift. Need intent and that the interference itself involved tortious conduct: fraud, duress or undue influence. Here remedy and punitive damages by suing the third party who interfered with the will. Since not a will contest, a no-contest clause would not apply to this action also.

d. Testamentary Intent

**Conditional Will**
A testator may condition the effetivenss of a will on the occurrence or nonoccurrence of a stated event. If the condition is not statisfied, the will has no effect and the property passes under the provision of a prior revoked will or intestate succession.

Issue with conditions in will: was the clause a real condition, or rather just an inducement to write a will (example—if I die while skydiving) If the condition didn’t kill the person, should the will still be upheld when later event eventually kills person (dies 10 years after skydive). Need to distinguish if person
writes: this will is only effective if I die in a car accident (will not valid if dies in plane accident) vs. I might die from surgery and if I do… (this is a statement of inducement, no only if language)

**Sham Will**

**Flemming v. Morrison**
Guy writes will which leaves entire estate to girl so that the girl will sleep with him. After the guys signs the will he tells the witnesses that the will is fake: just wrote so girl would sleep with him. This was a sham will. There was no testamentary intent to actually leave money to her so will was invalid. Lawyer’s role in sham wills: is the atty upholding the client’s intent or is part of the fraud?

A will cannot be admitted into probate unless sufficient testamentary intent.

**Can attack wills with testamentary intent and/or execution.** First examine whether there is testamentary intent and then examine the form of the will, whether proper formalities.

2. **Statutory Requirements/ Will Execution**

Wills Act: strict standard—will signed at bottom; written; signature must be signed in presence or acknowledge in presence at same time.

Purposes of formalities: ritual function—formal process signifies to testator how important the event is; evidentiary function—create reliable evidence of testator’s intent; protective function—make it hard for someone to exert undue influence or fraud; channeling function—increases confidence with testator that will be actually carried out and uniformity of wills make it easier for courts to carry them out.

a. **Attested Wills:** wills that are witnessed.
An attested will must be 1) in writing; 2) signed by the testator, and 3) witnessed.

B. **Writing**

Issues: What is a writing? Statutes usually don’t specify with what or on what the will must be written. Videotape is not today considered a writing because needs to be reduced to tangible form. Computer disk? CD-Rom? If written in short hand or secret code: usually ok if there is a reliable way to translate the will.

C. **Signature**

Form of signature: statute of frauds requires testator to sign will. Courts and legislatures have defined “signature” to encompass any symbol the testator executes or adopts with the present intent to authenticate the will. Might qualify as signature: initials, first names, nicknames, statements of family relationship (mom), part of name, illegible writing, typed names, rubber-stamped names, and fingerprints.

Courts have recognized signatures by marks (whether mark is a simple X or Prince’s symbol). Good practice if testator signs by mark to write name near it, indicate testator’s signature was by mark and list of people who observed the mark.

Proxy signatures: most courts allow the testator’s signature to be affixed to the will by another person. Proxy signature must meet 2 requirements: 1) the proxy must sign in the testator’s presence; 2) the proxy must sign at the testator’s direction. Courts hold that the testator need not actually see the proxy make the signature, but must be in a position where the testator could see or make use of the testator’s other senses to determine what is happening.
Location of Signature: signature may be at top, bottom, margin or in body of will. But some states specifically state that the will must be signed at the end, or foot of the instrument. If sign will then add an additional sentence can admit will into probate without the sentence because it was an unexecuted codicil or toss out whole will.

ii. Witness

Witness: Most states require 2 and do not limit the legal capacity of the witnesses (can be under 18, even though some states might require witness to be over a min age, like 14). The witness must be competent and credible (able to give testimony in court). Attestation intent: witnesses must intend to give validity to the document as an act of the testator.

Publication: tell witness that the document they are sighing is a will. Some states do not require publication, but others do.

Order of signature and witnesses: delayed attestation

In re Groffman
Testator signed will alone. Later asked 2 friends to be witnesses. 1 friend and testator went into different room where friend signed then 2nd friend came into room and signed as second witness. Issue: witnesses were not there when testator signed. Question: whether the testator acknowledged his signature in the presence of his witnesses?

Different states have different requirments for this. Many states do not require that the testator sign in the will in the witnesses precence, the testator may ackonwledge the signature. The witnesses may sign then or some jurisidctions allow the witness to sign a reasonable time after after the testator signed or aknowledged signature.

What does presence mean? A majority of state adopt a conscious presence test [less strict]: attestation is proper if the testator was able to see it from the testator’s actual position or from a slightly altered position other words, witness meets test if the witness through sight, hearing or general consciousness of the events comprehends the act of signing. Minority of states follow the Line of sight test: could have seen the testator if the witness had looked [more strict].

The testator must sign or acknowledge signature before the witnesses sign (attest).

Competency of Witnesses—Interested Witnesses
An interested witness is a witness who stands to benefit if the testator’s will is valid. The most common type of interest is being a beneficiary under the will. Potential consequences of interested witnesses, from most restrictive to most liberal:

1) Total Purge: whole will is void
2) Supernumary exception: interested witness gets 0, unless have more than the required number of disinterested witnesses-then this exception will save the gift to the interested witness.
3) Supernumerary/ lesser of two: if have more than two, same as # 2, but if only have 2 witnesses the interested witness can take the smaller amount of what should receive under the will or what would have received under intestate succession. You never get to the lesser of two rule if have a sufficient number of disinterested witnesses.
4) No purge, but presumption of undue influence. Witness can rebut the presumption and take.
5) No purge (old and new UPC): don’t care about having disinterested witnesses.

Estate of Parsons
Whether a subscribing witness to a will who is named in the will as a beneficiary becomes disinterested by filing a disclaimer of her interest after the testrix’s death. Crt: the disclaimer was ineffective to cleanse interested witness after the fact—subsequent disclaimer is ineffective to transform an interested witness into a disinterested witness. This is to protect the testator against fraud or undue influence at the time of execution (even though no fraud or influence in particular case). Since only 1 disinterested witness—will was void.

*executor of will is not an interested party—so the executor and witness could be same person.
**debate on how interested person is determined. Example: entire estate to grandchildren and the witnesses are children and grandchild’s spouse. Witnesses would seem to have a lot at stake and would benefit indirectly, but many purging statutes are not broad enough to cover the situation where the actual beneficiary is not the witness.

**under conflict of law rules, the law of the testator’s domicile at death determines the validity of the will insofar as it disposes of personal property. For real property, law of situs governs (law of state where the real property is)/

Self-proving affidavit: typed at the end of the will and swears before notary public that the will has been duly executed, signed by testator, and the witnesses before the notary. If the witnesses are dead or cannot be located a self proving affidavit that recites that all the requirements of due execution has been complied with permits the will to be probated. The will is still valid without it, but the affidavit makes it easier to probate the will.

Other issues…
Where should you keep the will? Give the original to the client?

Problems with will executions:

Pavlinko
Husband and wife signed each other wills by mistake. Both wills identical, left estate to each other; drafted wills at same time; didn’t know English. Crt: looked to indiv wills and declared invalid bc statutory requirement not met—no signature. Dissent: should look at both wills together in context and allow wills. Policy justification for majority: keep in tact Wills Act, slippery slope if don’t—wills act would be meaningless if allow. Crt follows plain meaning rule: look to 4 corners of will if unambiguous, clear and unmistakable.

Ways to save Pavlinko will?
1) look at both wills together, 8 corners of will. [dissent]
2) Substantial compliance—look at statute in effect and then compare actual execution of will to statute—then look to extent will complies.
3) Dispensing power—testator intent—whether they intended it to be their will. Standard is clear and convincing evidence—even if don’t meet execution requirement, if clear and convincing evidence that it is the testator’s intent—then can probate will anyway [few jurisdictions use]
4) Harmless error—a harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the testator adopted the document as his or her will.

5) Reform the will—crt go through and change names. Here wills identical, identical content (but slippery slope—where do you draw the line when the wills are not identical)

6) Strike “mere misdescription”—crt can’t add or change language but can strike

7) Equity—constructive trust

8) Malpractice—beneficiary could sue attorney. Problem with this—lack of privity between intended beneficiary and atty. Factors: extent to which transaction was intended to affect the P; foreseeability of harm to him; degree of certainty that the P suffered injury; closeness if the connection btwn D’s conduct and the injury; prevent future harm.

Policy advantage: keeps Wills Act in tack, makes lawyers accountable and careful
Disadvantage: malpractice wouldn’t a good remedy if will left real property and not cash.

Ranney will reform and execution
2 witnesses signed an attached self-proving affidavit and not the will itself. Crt says this does not comport with the literal requirement of the Wills Act bc they didn’t sign the actual will. However will can be probated bc had substantial compliance of Wills Act

While will does not comply with formalities, substantial compliance does comply with the policy/purposes of formalities because allows for testator intent when no undue influence, fraud, etc., so ok that witnesses didn’t sign actual but affidavit

Substantial compliance vs dispensing power: [Ask Foster]

Weird Wills

Holographic Wills: will that is prepared in the testator’s own handwriting
Some states do not allow and those states that do—the requirements for validity vary.
Half of the states allow holographic wills and exempt the wills from the attestation requirement bc when the doc is in handwriting, there is less likely a chance of forgery and more authentic.

Kinds of requirements:

Strict: 1) entirely handwritten
         2) Dated [full date of day, month, year]
         3) Signed [could sign at end, beginning or anywhere, but could be a problem if not signed since issue whether the testator intended his name to be the signature]

Old UPC: 1) material provisions are handwritten
         2) signed

New UPC: 1) material portions are handwritten
         2) signed

Extent of handwritten vs non-handwritten material on will:
Strict standard is the intent standard: if the testator intended any nonholographic material to be part of the will, the will is thus nonholographic even if the nonholographic material is not necessary to an understanding of the will. If the will is not holographic then, it will also fail the execution requirements probably of a written will. Most courts use the surplusage standard: nonholographic materials can be
ignored if doing so does not alter the testator’s dispositive arrangements. Modern view: a will is holographic merely if the most important words are in the testator’s handwriting.

Example of different approach with a stationary’s will [form will can buy at store and fill in blanks]
Strict: This is not a holographic will because testator intended the printed part to be part of the will
Surplusage: This is also not a holographic will because the printed parts tie together the handwritten parts—will doesn’t make sense if take out print bc then just a bunch of names.
Material: This could be a valid holographic will because the material parts (as in the names of the beneficiaries, etc..) are in handwriting.

Johnson
Testator bought a stationary will [fill in form will] and filled in the blanks. Tried to get this will in as a holographic will. This can’t pass as a regular will because there were no witnesses-failed execution requirements. Issue: will not entirely handwritten because of the printed form. Crt uses the surplusage approach (eliminate print to see if handwriting stands out on its own). Crt holds that the handwriting does not stand on its own to show testamentary intent

Kimmel’s Estate
Handwritten will, no grammar or punctuation and signed with “father”. Crt said this was a valid holographic will, the court looked to the testator as a person-asked is this proper testamentary intent from the person’s character. Crt held this is how an uneducated person would have written his will—it shows how he would have known to dispose of his property—so there is testamentary intent. Also not a problem that he signed the will “father” and not with his name. Crt looked to fact that this is always how he signed his name—sufficient intent in writing and signature ok.

*Note: several state legislatures have allowed an increased number of people to execute wills by using fill-in-the-blank forms designed to be completed without legal assistance. Pros of this: 1) increased use of wills to effectuate intent; 2) lowering estate planning costs; 3) less time and effort; 4) enhanced awareness of public to execute wills; 5) reduction in family conflict (?); expanded access to legal system. Cons are 1) lack of individualization; 2) improper completion; 3) failure to comprehend form and effect; 4) encouragement of evil conduct; 5) lack of comprehensive estate planning; 6) increased legal expense for survivors; and 8) decreased quality of service.

Ambiguous writing that does not clearly show testator intent: or that the testator was dictating how to dispose of his property:

“Daniel, Take care of my belongings” This statement is unclear because could mean that Daniel is the beneficiary of the belongings or that the testator wanted Daniel just to be an executor to oversee his belongings.

Letter which states “will have the lawyers come to the hospital to give you everything.” This is not valid because it was a forward thinking event---talking about finalizing a will, but this letter in itself does not suffice to finalize the will.

Oral Wills: nuncupative (oral or spoken)
Wills Act eliminated oral wills except for soliders and sailors. Courts do not favor oral wills because of difficulty of proof and potential for fraud. Many states and the UPC does not recognize oral wills. But some jurisdictions will permit oral wills under limited circumstances:
1) Type of property covered: no disposition of real property
2) Amount of property: ranges, and in some states the testator could make larger gifts if there are a specified number of witnesses.

3) Condition of testator: is overtaken by sudden and violent sickness or death from an injury that the testator suffered on the same day the testator spoke the testamentary words.

4) Location of speaking will: the testator must speak the testamentary words at a) home; b) a place where the testator became ill while away from home and spoke the words before returning home, or c) a place where the testator resided for ten days or more before speaking the words.

5) Testator may need to make a request that the witnesses bear witness that the spoken words constitute the testator’s will.

6) Number of witnesses: 3, even though 2 are needed for written wills.

7) Proof: if the will is not probated within 6 months after the testator made the will, proof is needed that someone wrote down the substance of the will within 6 days from when the testator spoke the testamentary words.

8) Notice: better quality of notice to the testator’s heirs than is required to probate a written will.

B. Revocation and Revival of Wills

The testator may change or revoke the will at any time with or without a reason. A will is ambulatory, that is it walks with the testator during life—but has no legal effect until the testator’s death. The will is subject to modification or revocation. As with will creation, the only ways to revoke a will is by state law. Failure to revoke the will in a manner allowed by law will make the revocation ineffective regardless of the testator’s intent.

An oral declaration that the will is revoked, without more, is inoperative in all states.

1. Revocation in Entirety

Three ways to revoke:

a) subsequent instrument: express and implication (inconsistency);
b) physical act; and

c) operation by law

1. Inconsistent

McGill

Testator made a Sept 23 1916 will and left estate to Hart. Will was kept in executor’s office in a safe. 1918 testator’s cousin writes a letter to the executor which instructs the executor to destroy the will and testator signed the letter. Executor did not destroy the will and testator died. Heirs of testator argued that the testator intended by the letter to revoke the will.

Requirements to Revoke Wills:

1) intent to revoke and

2) either by a writing that meets execution requirements or

3) a physical act/ burn, destroy or tear.

Missing in McGill: intent to revoke—there was a writing (the letter) but issue whether the letter was in of itself a revocation of the will. Crt: an intention to destroy the will is not a revocation. To make intent effective, it would be necessary to find as a fact that she intended that the act of signing the paper (letter) was in itself a complete revocation of the will.

Wolfe’s Will

1st will left real property to x,y,z. 2nd will contained no revocation clause and left all effects to a. Both wills were validly executed. Issue: are these 2 wills inconsistent so that the 2nd will will revoke the 1st? Crt: No the 2 wills are not inconsistent because the 2nd will’s language: “all effects” can be interpreted as
just personal property while 1st will left real property. Wills are not inconsistent. The crt held that the 2nd will is a codicil to the first will. [note if destroy will, that affects all codicils to the will]

Rules to determine whether inconsistent wills: crts don’t prefer revocation by inconsistency or implication. The proponent of the will (person who wants will to be valid) must prove that it was indeed the testator’s final wishes—ie. that the testator did not revoke the will. Crts will look at both wills together—presumption against intestacy. A subsequent will wholly revokes the previous will by inconsistency if the testator intends the subsequent will to replace rather than supplement the previous will. A subsequent will that does not expressly revoke the prior will but makes a complete disposition of the testator’s estate is presumed to replace the prior will and revoke it by inconsistency. If the subsequent will does not make a complete disposition of the testator’s estate, it is not presumed to revoke the prior will but is viewed as a codicil.

2. Physical Act
Revocation by physical act can be very ambiguous. After the testator dies, courts have may have great difficulty determining who actually did the physical act, when it was done and why. Courts admit a wide array of extrinsic evidence to ascertain these facts. For valid revocation by a physical act testator needs: 1) capacity to revoke, 2) intent to revoke, 3) a satisfactory physical act performed on the will, and 4) the simultaneous existence of the first 3 prerequisites.

Harrison v. Bird
Testator writes to lawyer (who is also his executor) to destroy will. Lawyer/executor rips up will into 4 pieces and delivers the 4 pieces to testator with a letter stating that “I destroyed the will.” Issue that lawyer destroyed the will and not the testator, and that the lawyer did not destroy the will in the testator’s conscious presence. This was an invalid revocation. After testator’s death, the 4 pieces people found the letter stating that the will was destroyed, but not the 4 pieces. Crt: since the pieces of the will were missing, can presume then that the testator destroyed the will. This presumption can be rebutted. Rebutting the presumption is on the proponent of the will.

*If they found the pieces of the will at the testator’s death then no presumption of revocation.
**Most states permit the testator to designate a proxy to perform the actual physical act on the will, but most states require that the proxy act not only at the testator’s direction, but also in the testator’s conscious presence.

Thompson v. Royall
Testator signed back pages of will with note written by someone else that stated that this will is void, that testator was told to destroy the will but she didn’t because wanted the document for her memories. Here intent to revoke, but the writing did not meet the execution requirements because no witnesses. Also, not holographic because she did not write text of the note herself, she just signed it herself. Also her writing was not a physical act because she wrote on back of her will and did not deface or destroy the text of the will. She needed to have burned, tear up will or write on top of the text of the will.

Need 1) intent to revoke and 2) acts specified in a statute. Testator did not fit #2.

*defacement must touch print.
** if write in margin—this could be revocation by another instrument. Will 1 and the note in the margin is the 2nd instrument—valid if jurisdiction allows holographic wills. But issue: did testator intend to revoke whole will, or just the provisions next to the note?
***Can’t revoke a will by cancelation when cancel a photocopied will, it must be the actual will.
***Crossing lines through signature line is effective revocation because removes one of the requirements of a will.

More liberal—physical act does not need to touch the print
UPC: intent to revoke, and physical acts includes: acts listed..destroyed the will or any part of it. “A burning, tearing, or canceling is a revocatory act on the will whether or not the physical act touched any of the words on the will.

Probate of Lost Wills:
-in the absence of a statute, a will that is lost, or is destroyed without the consent of the testator, or is destroyed with the consent of the testator but not in compliance with the revocation statute can be admitted into probate if its contents are proved. A lost will can be proved by a copy in the lawyer’s office or by other clear and convincing evidence.
-In a few states, a lost will cannot be probated unless the will was in existence at the testators death.

• A will proponent who can present the original will to the court can benefit from the presumption of continuity that the testator died without revoking the will. For this presumption-the source of the will and the will itself must be free from suspicion. The will must be found either 1) in the possession of the individual to whom the testator delivered the will, such as the testator’s atty, executor… or 2) among the testator’s valuable papers in a place the testator kept such documents. A will proponent who cannot produce the original will is usually confronted with presumption of revocation. If the testator had possession of the will or access to it, failure to produce the will raises a presumption that the testator destroyed it with the intent to revoke it. The proponent has a heavy burden to rebut this presumption to show that the will was inadvertently destroyed. State statutes dictate what the person has to prove to rebut.

3. Operation of law:
Certain events or circumstances may trigger a revocation by operation of law. The law assumes that these occurrences would cause most testators to make corresponding changes. In essence-tyring to rescue the testator because assume he forgot to change the will. In most revocation by operation of the law situations, extrinsic evidence may not be used to show that the testator actually would not have wanted the will or portions thereof changed or revoked. Examples of these situations:
  -Marriage of the Testator: often a testator will write a will before he is married and doesn’t make appropriate changes to the will to account for the spouse. To protect a spouse from being disinheritenced or receiving only a nominal share of the estate—most states permit the surviving spouse to claim a specified share of the deceased estate, regardless of the terms of the will.
    --Divorce of Testator: some statutes provide that all provisions in favor of the former spouse contained in a will executed during marriage is void. Treats divorce w/o changed will as if spouse pre-deceased the testator. UPC: will that provides for divorced spouse-all gifts to divorced spouse and any relatives of divorced spouse are revoked.
    --Pretermitted Heirs: if a testator does not provide for one of his children in will that was written before child was born, statutes allow an omitted child to take in the parent’s estate.
    --Death of Beneficiary: A gift to a beneficiary who predeceases the testator is automatically revoked because property can only be transferred to people who are alive. In some cases, statutes will prevent the gift from lapsing by substituting other individuals as beneficiaries of lapsed gifts.
    --Slayers. Discussed earlier

2. Partial Revocation
This occurs when testator strikes out parts of will, but not entire will by example physical marks such as adding words to existing text, striking out text but text still readable, and obliterating text so that marked out part is not readable. Traditionally courts found these kinds of alterations ineffective and the will was given effect to its prechanged form since potential for fraud was great. However, the modern approach permits partial revocations to carry out testator’s intent.

A. Subsequent instrument [%?%]

Example:

<table>
<thead>
<tr>
<th>Will of Oct. 28 1999</th>
<th>Codicil of Sept 28, 2000</th>
</tr>
</thead>
<tbody>
<tr>
<td>I devise my real and personal property to:</td>
<td>“ “</td>
</tr>
<tr>
<td>My home to B</td>
<td>my home to B</td>
</tr>
<tr>
<td>My medals to E</td>
<td>my medals to E</td>
</tr>
<tr>
<td>My necklace to J</td>
<td>$30K to J</td>
</tr>
<tr>
<td>$50K to A and reside to Aee</td>
<td>$50K to A Residue to Aee</td>
</tr>
</tbody>
</table>

J would argue that the codicil is cumulative so could get both necklace and 30K: 1. it is a codicil (look to word used “codicil”) and 2. Doesn’t conflict with will since necklace is a specific gift and the 30K, money, is a general gift.

A would argue that the 2nd doc is a new will and substitutes the 1st: 1. there is the same language (same intro clause) and 2. Disposition of the entire estate.

What evidence is needed to show which one is right? Declaration of intent are not admissible for testator’s intent but evidence relating to circumstances surrounding potential change can be admitted. Gould v. Chamberlain

Ways to handle same gift to 2 different people or same person with 2 gifts:

Example: Will devises
Home to B [specific]
Medals to E
Necklace to J
$50K to A [general]
$100K to B
necklace to S
$50K to A
Residual to Aee

B can get both specific and general gift; necklace: later in time provision prevails so to S or give to nobody or have J and S share [some courts have stated]

C. Physical Act.

Example: Residue in equal shares to Jon, Blane [line through], Paul and Morgan.
*crossed out in lead pencil and there is no evidence whether testator marked out name.

Need: 1) intent to revoke and 2) statutory act/requirement (will or any part)
Crt will look at: where was the will found, if will is found with testator’s personal papers there is a presumption that testator crossed out the name. Pencil? Some courts would say that using pencil shows that testator didn’t want to cross off name and other courts could say that there is no difference between pen and pencil (like for wills generally).

*If statute allows partial revocation by physical act [UPC]: give effect to the physical act—others share and Blaine gets 0

*If statute doesn’t allow partial revocation by a physical act [IN]: some statutes state that they won’t allow partial revocation, but only total revocation. Here will is probated as if no revocation. What id completely takes out name and can’t read—courts will do different things with this case—a court could give of people ¼ because there was originally 4 names and the missing ¼ goes by intestate succession.

*Silent Statute: some courts won’t allow partial revocation, but Bigelow allowed.

What about a holographic will with a line drawn through name: crt will give effect to will with line drawn through but if type written will with line drawn through, the court won’t give effect because not holographic bc not entirely in hand.

**Residue Clause Exception**
Partial revocation by physical act and jurisdiction permits it—what happens if result is to increase the shares or result is to make a new disposition altogether—then not a valid revocation.

**DRR (dependent relative revocation)** DRR is an option that courts use for presumption of testator’s intent. This doctrine is to rescue the misguided testator, had the testator known the written provision could be invalid would she had crossed off old part? Example: To daniel 50K [crossed off and written above it house]. Under DRR, a court may ignore a valid revocation and probate will as if never revoked. DRR is very fact specific and crts weigh a lot evidence.

Line through cases: Must have a valid revocation and only if have that- then can address DRR.
Example: there is a partial revocation by a physical act. First question: is the revocation valid? If it is not valid then will is probated in its original form. If the revocation is valid then DRR possible.

**note that partial revocation by a physical act is not valid if it causes increase gift to someone other than the residual legatee or residual heir or not valid if it creates an entirely new disposition.

Example of this situation:
Typewritten will—I give my dodge ram to marshall and my home to isaac; 6 million in equal shares to mike, georgia and trent; reside to jeff.

--line drawn through whole residue clause. This is valid because increases shares of family since residue now goes through intestate succession.
--if cross out whole dodge ram clause: still valid partial revocation because ok to increase residual share.
--cross out georgia: revocation is not vaild be would increase other shares
--cross out marshall: revocation invalid since isaac would then get both truck and house—so new disposition.
--cross out house and writes above it (57 cents). Revocation is valid, but can’t get in the written 57 cents because writing doesn’t meet execution requirments. Now it is a DRR situation.
Crt can 1) ignore the revocation (gets house) OR 2) give effect to the revocation (gets nothing).

The question is which option is closer to the testator’s intent? If testator knew that the writing would not be valid, which option would have the testator chosen? Here option 2, nothing is closer because 57 cents is closer in value to 0 than a house.

*If the written section over the crossed out house read 570 million, then the court would chose option number 1 because it is closer to intent. Crts let in lots of evidence under DRR to rescue the testator—but still the crt cannot give effect to what the testator actually wanted.

Example: I bequeath the sum of 1000 to my nephew Charles. [1000 is crossed out and above it is written 1500 dated and initaled].

In a state that recognizes holographic wills, this addition would not meet holographic requirements because need enough handwriting to supply context. So thee cross out wouldn’t work.

If state doesn’t permit partial revocation by physical act, the court will probate as if the cross out never occurred and Charles can take the 1000.

For states that do allow partial revocation by physical act → DRR: the 1500 is invalid in any case so court can give effect to the revocation and the Charles gets 0 or court can apply DRR and rescue the testator’s intent by ignoring the revocation so Charles gets 1000.

Basically the court is saying “testator would have never drawn the line through term had she known that the written 1500 been invalid.”

D. Revocation from mistake of Law
Testator revokes will because he mistakes the law—he thinks that by revoking the will that a prior older will-will become valid. But the problem is that Testator revoked the 1st will when he executed the 2nd will. Result?

1. **Revival:** will # 1 is not revoked unless will #2 remains in effect until the testator’s death. Theory behind this is since a will does not operate during the testator’s death, will # 2 is not legally effective during the testator’s life—so will # 1 was not “revoked” by will # 2. [English common law and few states]

2. **Revival if intent:** upon revocation of will # 2, if testator intends for 1st will to be his will, then it is so. Intent may be shown from the circumstances surrounding revocation of will 2 or from the testator’s contemporaneous or subsequent oral declaratons that will # 1 is to take effect. [most common approach, UPC]

3. **Anti-Revival:** a revoked will cannot be revived unless it is reexecuted with the testamentary formalities or republished by being reffered to in a later duly executed writing [codicil]. [minority approach]. Under this, can also approach problem with DRR:

Estate of Alburn
Will executed in 1955 WI (will 1). Testator moved to IL and executed another will in 1959 (will 2). 1960 moved back to Wiscon and died. In 1959 there was an express revocation then destroyed the will (court knows the contents of the will bc the atty had a carbon copy) and stated that she wanted the ’55 will (will 1) to be her will. She destroyed will 2 thinking that this would make will 1 valid. Wiscon is an anti-revival state so court looked at situtation using DRR. The court’s options: 1) give effect to the revocation (then the estate goes in intestatcy) or 2) ignore the revocation and the 1959 will stands. This is an issue of 2nd best because not giving her what she really wanted: will 1. To determine which option to use court looked at evidence that she did not want to die intestate.

*couldn’t argue here that will 2 was just a codicil to will 1 because in 2 expressly revoked 1.
Found will with testator’s personal papers with pencil marks through parts of the will. The evidence in this case did not rebut the presumption against intestacy.

E. Will Components
Above outline addressed the formalities with which a will must be executed. If the formalities are not followed, in most jurisdictions the will cannot be probated. But even despite the formal requirements, it is possible for documents and acts not executed with testamentary formalities to have the effect of determining who takes what of the testator’s property. 2 doctrines can give this effect: 1) doctrine of incorporation by reference and 2) doctrine of acts of independent significance. Others are also:

1. Integration of Wills
Wills are often written on more than one sheet of paper. Under the doctrine of integration, all papers present at the time of execution intended to be part of the will, are integrated into the will. There is usually no problem with proof here when the pages are stapled or fastened together. *Could be a problem if multiple staple holes, looks like pages removed. Also must have will in same ink, same computer font, same type of paper, testator can intital each page, blank space is avoided, testator should have sentences that begin at end of one page and carry over to the second page. Loose-leaf wills are the opposite and make it easy for pages to be removed and instered.

2. Republication by Codicil
Under this doctrine, a will is treated as reexecuted or “republished” as of the date of the codicil. The codicil incorporates by reference the terms of the original will that are not inconsistent with the codicil. These two documents are then treated as one will with the date of execution being the date the testator executed the codicil. Thus, it is one the date of codicil execution that all of the requirments of a valid will must be statisifed and that date is used to determine the proper law to apply and the effect of changed circumstances. This doctrine is not applied automatically, but only where updating the will carries out the testator’s intent.

This can have important consequences. Example: testator revokes a first will by a second will and the executes a codicil to the first will. The first will is republished and thus the second will is revoked by implication.

Executed will in 1990 leaving entire estate to several chartiees. In 1994 and 98 testator had 2 children. In 1999 testator executed a codicil to the 90 will changing one of the charities. Upon testator’s death, the children try to get a portion of the estate as pretermitted children. Children cannot succeed because the 99 codicil acts to republish the 90 will except for the inconsistent portions and treated as executed in 99. Since the children were born before 99, they are no pretermitted and thus cannot take.

The fundamental difference between republication and doctrine of incorporation by reference (below) is that republication applies only to a prior validly executed will, whereas incorporation by reference applies to incorporate into a will instrument that has never been validly executed. In a few jurisdictions that do not recognize incoproation by reference, courts have sometimes used the republication doctrine to give effect to wills that are invalid for some reason other than faulty execution. Example: NY does not permit incorporation of unattested documents into a will, but a codicil can republish and thereby give testamentary effect to a will that was invalid bc of mental incapacity or undue influence—but a codicil cannot republish an instrument never duly executed with the required formalities.

3. Incorporation by Reference [UPC]:
This doctrine treats a doc as testamentary in character even though the document is not physically part of
the testator’s will. If the testator successfully incorporates a document by reference into the will, the will
is treated as if the terms of the incorporated doc are actually contained in the will. Almost all states
recognize this doctrine.

3 requirements to have incorporation by reference;
   a) Intent: the testator must have the intent to incorporate the writing.
   b) In Existence: the writing the testator wishes to incorporate must have been in existence when
      the testator 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.

Clark v. Greenhalge
Beneficiary is suing the executor to get paintings, because the executor failed to deliver the paintings.
1972 memo; 76 modified; 77 will; 79 notebook; 80 codicil; dies.
The notebook leaves the paintings to the beneficiary—so he needs to get those in by incorporation by
reference. Problem with existence because the notebook was no in existence when will executed in 77.
The codicil updates the wills as a 1980 will and now can have a 80 will which makes the 79 notebook in
existence—can incorporate the will so beneficiary gets the paintings.

4. Acts of Independent Significance
This doctrine permits the use of facts and circumstances outside of the will to impact the property
disposition the testator made in the will. Extrinsic evidence can be used to identify the beneficiary or
property passing under the will. These facts and circumstances have testamentary effect despite not being
contained in an actual testamentary document. If the beneficiary or property designations are identified by
acts or events that have a lifetime motive and sigificance apart from their effect on the will, the gift will
be upheld.

Example: “I leave my car to my son and rest of estate to daughter” At time of execution testator owned
an old ford but before death traded it in and bought a bmw. This trade in and new purchase made a big
difference in the value of the son and daughter’s estates. Even so, the son can take the bmw and the
daughter gets less of a residual estate because the car has a legal reason for existing other than for testator
to dispose of at death—transportation.

E. Will Construction
In construing a will, the majority of jurisdictions follow the plain meaning rule: a plain meaning will
cannot be distributed by the introduction of extrinsic evidence that another meaning was intended.

Mahoney
Where no doubt exists as to the property bequeathed or the identity of the beneficiary there is no room for
extrinsic evidence—the will must stand as written.

Construction is an attempt to assign a meaning to a will provision when the testator’s actual intent cannot
be fully ascertained.

   1. Admission of Extrinsic Evidence
      A) mistake
         i) Mistake in Execution: Pavlinko
         ii) Mistake in Revocation
         iii) Mistake in Inducement
iv) Mistake in Drafting

Many times with mistake, court apply rigid rules that operate to defeat the testator’s intent. Courts will try and work around the rules: try and reinterpert the will; directly remedy the will. Some jurisdictions will try to provide some relief, especially where mistake was caused by the drafter.

B. Ambiguity

Most common interpretation issue
The court starts by examining the supposed ambiguous provision. If the court finds as a matter of law that it is not ambiguous, the court simply resolves the issue. If the court find that the provision is ambiguous, the facts necessary to resolve the ambiguity are determined by the fact-finder. The way ambiguities are resolved depends on the type of ambiguity: 1) patent; 2) latent; or 3) not readily apparent.

Patent Ambiguity
This is an obvious ambiguity—it is unclear on its face and does not convey a sensible meaning to the reader. Most courts will permit extrinsic evidence to resolve a term in the will which, on its face does not make sense. Example: I leave my Zipvert to my son. Zipvert does not on its face make sense—court will allow son to show evidence that this is what the testator called his car. Courts will also allow such evidence to determine dollar amounts when unclear in will. If a testator leaves a space blank “I leave my computer to ---“ Most courts won’t let in extrinsic evidence to fill in blank—this would be going to far.

Latent Ambiguity
This is a hidden ambiguity—it conveys a sensible meaning on its face but cannot be carried out without further clarification. Courts will allow extrinsic evidence to carry out testator intent. If property is mistated “I leave my house on 75 oxford” and house is really on 57 oxford—courts will state that the gift does not fail merely because the description of the property is incorrect.

No Apparent Ambiguity
Happens when the will provision is neither latent or patently ambiguous, but yet someone wants to introduce extrinsic evidence that the testator did not mean for the will to say what it appears to say. Jurisdictions are divided over this—most follow the plain meaning that since the will is clear—there can be no extrinsic evidence while other jurisdictions may be more liberal and permit extrinsic evidence—but these jurisdictions will probably only do this if the will was not professionally prepared and the evidence is very strong that the will would frustrate the testator’s intent.

C. Correcting Drafting Errors

Erickson
Will executed 2 days before marriage. Challenged will because did not provide for contingency of marriage. In conn there is a statute that automatically voids wills when by operation of law circumstances change—here marriage. Lawyer who drafted will knew that the couple was going to get married but didn’t know about this statute—so didn’t include a waiver. Children challenged will, wanted to apply statute to revoke the will. Crt looked at language of the will and considered circumstances—crt looked at fact that will only 2 days before marriage and that provided for future wife to also be executor and guardian. Crt considered the extrinisc evidence and allowed the will. There was no policy difference in allowing extrinsic evidence to show fraud, duress or undue influence and evidence to show that a scrivener’s error induced the testator to execute a will that he believed would survive the subsequent marriage. Also would subvert testator intent if don’t look beyond wording. This won’t lead to many will contests because very narrow exception
What evidence is allowed to be admitted: 1) scrivener’s error; 2) effect on testator and is clear and convincing evidence. “If a scrivener’s error has mislead the testator into executing a will on the belief that it would be valid, extrinsic evidence of that error is admissible to establish the intent of the testator that his will be valid.

If part of the estate is void—then part that is ok goes to the beneficiary and the part that is void goes to residue (or intestacy).

2. Changes in Condition or Status of Beneficiaries: **Lapse**

If a devisee does not survive the testator, the devise lapses (or fails). All gifts made by the will are subject to a requirement that the devisee survive the testator, unless the testator specifies otherwise. Most all states have enacted antilapse statutes which dictate the circumstances where the statute can substitute another beneficiary for the predeceased devisee.

Lapse gift: must die before distribution of the will
Void gift: must die before execution of the will.

**Common law:**
- If a specific or general devise lapses, the devise falls into the residue.
- If the devise of the entire residue lapses because the sole residuary devisee or all the residuary devisees predecease the testator, the heirs of the testator take by intestacy. If a share of the residue lapses, such as happens when one of two residuary devisees predeceases the testator, the lapsed residuary share passes by intestacy to the testator’s heirs rather than to the remaining residuary devisees—rule called the no-residue-of-a-residue rule. In majority of states, this rule has been overruled by statute—UPC
  - if the devise is to a class of persons, and one member of the class predeceases the testator, the surviving members of the class divide the gift.
  - where a devisee is dead at the time the will is executed, the devise is void.

**Anti-Lapse Statutes:**
*contrary intention will trump these statutes. Proper drafting can stop lapse problems bcc statute meant to be a fall back. For the statutes first look at the devisee’s relationship to the testator and the potential claimants. An antilapse statute applies only if the devisee bears the particular relationship to the testator specified in the statute*

If a statute is silent—then look at case law.

Contrary intent: “if she survives me, otherwise to…”
Is just “if she survives me” contrary intent? Maj reads this as contrary intent to prevent anti-lapse, but minority does not let this statement overcome the lapse statute. Good to be specific about what you want to happen to your property.

120 hour clause: several statutes have this—if devisee does not survive testator by 120 hours then treat as predeceased…

is “or heirs” a substitutionary clause to prevent statute? Yes, statute does not apply because it shows contrary intent. Questionable when “and her heirs” whether this is substitutionary or not—this could mean take as fee simple absolute so no substitution and the anti-lapse statute applies. But see:
Jackson v. Shultz
This is result driven. The crt read a and like or so that heirs could be substited. Why? Because if not the
estate would have escheated to the state—and this was the testator’s intent. This is not the conventional
approach—so normaly don’t read “and” this way.

Class gifts: There is a rebuttable presumption of class gift and courts will admit evidence to determine
whether devise is an individual gift. For a share of a class gift which has lapsed, that share goes to the
other members of the class and does not lapse to the residual. Crucial issue is—what is a class? The test
can be whether the testator was group minded. Is group minded if uses a class label to describe the
beneficairies. “A’s children” [but note “my children” would permit testator’s children to take, but not his
grandchildren]. But a class label is not totally necessary for a class gift. Beneficiaries described by their
individual names, but forming a natural class, may be deemed a class gift if the court decides, after
admitting extrinsic evidence, that the testator would want the testator’s to divide the property. **Most
antilapse statutes provide for class gifts.

Dawson
Words that create presumption of class gift: names, numbers, share of porportions

**If gift is not saved by an anti-lapse statute, the lapsed property passes through the residuary clause of
the will. If there is no residuary clause, or that is the gift that is lapsing, courts will distribute the property
according to intestate succession.

*courts typically adopt 1 of 2 approaches if the anti-lapse statute does not save a residuary gift to multiple
beneficiaries. Traditional view is that the lapsed gift passes via intestacy. Modern approach us for the
court to prevent partial partial intestacy by pretending that the residual clause contains survivorship
language.

3. Changes in Property: Ademption, Accession, Abatement, Exoneration and
Satisfaction
What happens when testator devises home to child and then sells the house before he dies?

Gifts in a will can be broadly classified based on the type of property the testator is giving away. A
devise is a gift of real property. Bequest is a gift of personal property. [sometimes terms are used
interchangably]

Specific Gifts: identified in the will in sufficient detail so it is clear the exact gift. Can be described
very specifically [I leave my timex watch] or broadly so that the exact property to which the discription
refers to cannot be ascertained until the testator dies [I leave my cds].

General Gifts: gift that is insufficently described to be specific. [I leave 25K]. Watch if state “I leave my
stock” then conventional reading is that this is a specific gift. Also if leave bank account-that is a specific
gift; but if leave 10K from bank account—then that is a general gift.

Demonstrative Gift: combo of specific and general gifts. Specifies amount of money and the source of
that money: [25K from the proceeds of selling the house]

Residuary Gifts: the property remaning after all specific, general and demonstrative gifts are satisfied.
Ademption by extinction
Applies only to specific devisees. Does not apply to general or demonstrative devisees. Ademption refers to the failure of a specific gift because the property is not in the testator’s estate when the testator dies. Example will—Leave Justin my cds, but sold them all before I died. There are 2 approaches to this problem:

Identity theory: if the exact item the testator attempted to give away in the will is not in the testator’s estate, the gift adeems (fails) and the beneficiary receives nothing. No evidence that the testator intended ademption to occur is required. The beneficiary gets nothing—the beneficiary does not receive the value of the attempted gift, may not demand that the executor obtain the item for the beneficiary, and cannot trace into the proceeds of the asset. Exception to identity theory—if there is a mere change in form, but not substance can still devise gift to named beneficiary. If not then gift to residue and the named beneficiary gets nothing. To avoid ademption under this theory the court could also classify the devise as general or demonstrative; construe the meaning of the will as of the time of death rather than as of the time of execution.

Intent theory: may allow tracing and may permit beneficiary to receive the value of the missing property

Example: I leave 100 shares of Aspen to Alice; I leave my 100 shares of Oak to Oscar; I leave stock certificate # 123 of Maple stock to Mary. When testator dies, he doesn’t own any stocks. Treatments: Gift to Alice is general, so she can receive the value of the stock from the estate. Both Oscars and Mary’s gifts are specific because they contain words of testator’s ownership and specific identification—so both subject to ademption and O and M would get nothing.

If no ademption (bc exception, general or demonstrative gift)—then need to sell estate so beneficiary can get the value of the missing gift.

Ademption by Satisfaction
This is the failure of a gift be the testator has already transferred the property to the beneficiary between the time of the will execution and time of death. Presumption that the advancement is partial satisfaction of gift. This is like advancement in intestate succession. At common law the doctrine applied only to gifts of personal property while the modern trend us to permit gifts of real property to be satisfied as well. This applies to general bequests, not specific. Satisfaction may also apply to residuary and demonstrative gifts. Satisfaction depends on testator intent. Under statutes, there is no presumption of satisfaction by a gift to a child. Also to show testator intent, most statutes require writing. Most states allow extrinsic evidence for beneficiary to prove that the advancement was a gift, in addition to the estate but most states restrict the kind of evidence: to either a writing signed by the testator or the beneficiary declaring the gift to be a satisfaction, or express directions in the will providing for the deduction of inter vivos gifts from testamentary ones.

Exoneration
Specifically devised or bequeathed property is often subject to encumbrances. Real property may be burdened by a mortgage or deed, and the testator may have used the property as collateral. Does the beneficiary of encumbered specific gifts take them free and clear of the liens, or does the beneficiary take subject to the liens receiving only the testator’s equity interest in the property? At common law, exoneration was presumed –along with property there was an implied gift of sufficient money to pay off the debt. Now many statutes reversed that and require that exoneration only occurs if there is express
language requiring it in the will. So beneficiary would get the property with the mortgage, lien attached unless specified otherwise.

**Changes in Value: Accessions and Accretions**
Change in value of gifted property between the time of the will execution and time of death is not considered when distributing the testator’s property. Beneficiaries bear burden of depreciation and reap benefit of appreciation.

--no adjustments are made for interest. If T leaves Justin 10K in 1990 and T dies in 2000, Justin is entitled to only 10K.

In this area—gifts of stock are often in dispute: Ask if change in substance or form? If just change in form and not substance—the beneficiary will get the stock as is at death—but if change in substance the beneficiary might get the stock as they were at will execution.

--cash dividends belong to the person who owns the stock on the record date—or the date on which a person must be a stockholder on record—beneficiaries of stock thus own the stock once title passes—at testator’s death—then they are entitled to receive the dividends. If the cash dividend is paid out before testator dies then that money is just part of the estate and goes into the residual unless otherwise provided for.

--Stock splits: suppose that T executes a will devising 100 shares of stock to A. The corp splits its stock 3 for 1 so at T’s death he now owns 300 shares. Does A take 100 shares or 300 shares? What is the nature of a stock split—it is form over substance—the substance of the transaction doesn’t change before T has the same proportional interest before the swap as he did after. Thus many modern courts have held that, absent a contrary showing of intent, a devisee of stock is entitled to the additional shares received by the testator as a result of the stock split.

**Abatement**
Abatement is the reduction or elimination of a testamentary gift to pay for an obligation of the estate or a testamentary gift of a higher priority.

Turns on classification of a devise as general or specific. The problem of abatement arises when the estate has sufficient assets to pay the testator’s debts as well as the devises; some of the devises must be abated or reduced. In the absence of any indication in the will as to how the devises should be abated or reduced, devises ordinarily abate in the following order:

1) residuary devises are reduced first,
2) general devises are reduced second; and
3) specific and demonstrative devises are the last to abate and are reduced pro rata.

*These are default rules and testator can set out different rules.

**basically recipient of specific gift is more likely to receive the devise than a residual recipient.

Formula: 1) figure out original shares and how would divide and 2) take a smaller amount of what is left but in the same proportion.

*few jurisdictions will give preference to close relatives, but the ordinary rules don’t look at relationship.

D. Restrictions on Testation: Family Protection
A. Marital Property Rights

Elective share states vs community property states
**Elective share**: surviving spouse gets a forced share of the estate of the deceased spouse—usually 1/3 of all assets at time of death when married. Some states have a sliding scale of percentage—factors are dependent on the number of years of marriage, assets of the other spouse, number of children etc. UPC has a scale which raises the percentage based on how long married. Traditionally gifts made to spouse during the marriage are not included in the share. Some states have an “augmented estate” that includes gifts to spouse in calculating the size of the estate or the spouse’s share in any joint property.

**Estate of Cross**
Husband left entire estate to son from 1st marriage and disinherited the surviving spouse who is in a nursing home and on medicare. Since she was incompetent, court appointed her a commissioner to elect her share from the estate. Issue was that she had an available monetary resource (elected share) for medicare and if she did not elect, then she would have lost her medicare payments because she would not have availed herself of possible income. Commissioner needed to look out for best interest but instead Crt focused what is necessary to provide her adequate support: her age, physical condition, needs. Problem with adequate support is that this does not take into account her heirs.

*Distinction between competent (best interest) vs, incompetent (adequate support) standard*

**Community property**: all earnings of the spouses and property acquired from the earnings are community property. Each spouse is the owner of an undivided ½ interest in the community property. Based on idea that husband and wife are a martial partnership. But property acquired before marriage and property acquired during marriage by gift, devise, or descent is the acquiring spouse’s separate property.

Change in domicile: general rule is that the ownership of earnings between spouses is governed by the law of the spouse’s domicile at the time the property was acquired. Marital rights in property does not change as the couple moves from one type of marital property state to another.

**Abatement revisited:**
What happens in terms of contributions towards the elective share? 2 approaches:
--ordinary rules of abatement: elective share satisfied out of residue if enough property.
--pro rata scheme: doesn’t care about classification—all takers under the will contribute to the elective share.

**Schemes to disinherit the spouse**: What happens if testator tries to deplete the estate?

**Sullivan v. Burkin**
Husband set up a testamentary trust (trust created by will—can only operate when indiv dies). Since trust created in a will, it has to meet all the will execution requirements. An inter vivos trust is created during life and becomes operative during life and still operative after settlor’s death. For an inter vivos trust, only have to meet trust requirements, not will execution requirements. This trust met all the will execution requirements plus requirements for trusts.

**Trust Requirements:**
--settlor: husband
--trustee: husband; successor: Burkin
--beneficiary: husband; successor: Cronnis
--property: real estate
--transfer: writing
--valid intent: yes, intent to create a trust.

The will was a pour over will: his assets in the will all poured over into the trust.
**Also pour over provisions: clauses in a will that makes a gift to an inter vivos trust. These are common because a testator may wish to obtain the benefits of a trust, but not want to create the trust in the will document. Reasons why pour-over are good: 1) an iv trust is easier to amend than a will, 2) an iv trust can serve as a receptacle for a variety of other assets, such as life insurance and annuities, and 3) the testator may pour-over into a trust created by someone else, such as a spouse.

Here the husband could revoke or modify the trust at any time. Wife argued that the iv trust was an invalid testamentary trust because it didn’t meet the will execution requirements of 2 witnesses—since the trust is invalid, the assets go back to the estate. Crt: this is an iv trust and is valid. Crt for policy reasons wanted to change the existing rule that allowed the spouse to deplete the estate. For the P, the trust assets will not be counted in probate, but for the future the assets would be counted in probate. The rule the crt favors would treat as part of the estate of the deceased—assets if an iv trust created during marriage by the deceased spouse over which he or she alone had a general power of appointment, exercisable by deed or will. This objective test would involve no consideration of the motive or intention of the spouse in creating the trust. So no need to determine whether spouse made transfers in good faith or not.

*in these situations states have many different responses to determine when nonprobate assets are subjected to elective share:
1) illusory transfer test—how much control was retained by the deceased spouse?
2) intent to defraud—to determine whether the decedent intended to defraud his surviving spouse of her elective share—look to subjective intent others jurisdictions with this test also look at objective factors: control retained, amount of time between transfer and death, degree to which the surviving spouse is left without an interest in the estate, the surviving spouse’s means of support;
3) present donative intent: test focuses not on what the transferor retained, but on whether the transferor intended to make a present gift. Crts look at similar factors from intent to defraud.

Waiver?

Estate of Garbade
Husband was wealthy and wife had nothing. They married with a pre-nup which cut her out of everything—but she did get life insurance. The pre-nup was signed a couple of hours before the wedding. Crt’s approach to decide whether pre-nup was a valid waiver of her elective share: Yes, was valid, she had time to read it over and could have gotten her own lawyer. A pre-nup is presumed valid unless can prove fraud—very strict approach.

Grieff
[same jurisdiction, 3 yrs later]. Crt invalidated the pre-nup, was not a valid waiver. Crt reasoned that a particularized and exceptional scrutiny must be given to pre-nup agreements, inasmuch as the relationship between the prospective spouses is by its nature permeated with trust, confidence, honesty and reliance. This is a special contract bc of the relationship of the parties. Crt must look at the nature of the relationship at the time of signing—here husband dominated wife and exhibited bad faith and overreaching. Very fact-based approach.

For pre-nups/ waivers there has to be full/ fair disclosure:
--what is being waived; independent counsel; timing; unconscionablity; should standard vary according to the education and profession of the spouse.

Migrating spouses
When spouse move back and forth between community property and elective share states—which state governs?

a) the law of situs controls problems related to land.
b) The law of martial domicile at the time personal property is acquired controls the characterization of the property (that is separate or community).
c) The law of the martial domicile at the death of one spouse controls the survivor’s marital rights.

For these problems: First question is which state determines whether community or separate? Situs. Second question: which state controls marital rights? Situs.

Omitted Spouse
When will is written prior to marriage and not changed to include spouse. Spouse almost always gets more under intestacy than under elective share.

Omitted Child
Statutes try to cover unintentional disinheritance—will written before child is born. But parents have no obligation to provide for their children. Statutes to try and protect unintentional disinheritance. In these statutes—cover children, adopted children and some times grandchildren. Few statutes allow children born before the will to take. Some have provisions that allows child to take if parent mistakenly thought that the child was dead. **Make sure that child isn’t already provided for in a class gift or benefits from a nonprobate asset (life insurance) but some crts won’t allow this kind of evidence.

*if child is mentioned in the will, but given nominal amount—cannot use this stau te to force a share bc child was not forgotten.

Azcune
Can’t admit extrinsic evidence to determine whether child unintentionally omitted—must only look at the will for the testator’s intent. Crt would not look at evidence that testator had wanted to include his child.

Estate of Laura
If omit the child, then all of child’s issue are also omitted.

Testamentary Libel: can sue for libel if include nasty reason in will why can’t inherent.

Malpractice: can’t sue atty for malpractice if forget to include name in will because there is no privity—people in the will can only sue the atty.

IV. TRUSTS
Inter vivos trust: made during life time.
-Declared trust: orally declared. For valid declared trusts, must only dispose of personal property.
--Revocable: retain the right to amend the trust.
To create a trust, a property owner transfers assets to a trustee, with the trust instrument or will setting forth both the dispositive provisions fixing the beneficiaries’ interests and the administrative provisions specifying the power and the duties of the trustee in managing the trust. Property in a trust created during the settlor’s lifetime is not part of the probate estate upon the settlor’s death. The property remaining in the trust when the settlor dies is administered and distributed according to the terms of the trust; it does not pass under the settlor’s will or by intestate succession. Trust involves 3 parties: settlor, the trustee, and 1 or more beneficiaries.
A. Parties to a Trust:

The person who creates a trust is the *settlor*. The trust may be created during the settlor’s life, in which case it is called an inter vivos trust—or it can be created in a will (called a testamentary trust). Settlor can make a trust by a declaration of intent or by a deed of trust. Under the declaration of trust, the settlor is the trustee—donor must manifest an intention to hold the property in trust. If the trust property is real property, then the Statute of Frauds requires a written instrument for a declaration of trust.

**Trustees**: can be 1 or several trustees. The trustee can be an individual or a corporation. The trustee may be the settlor, or the beneficiary, or a 3rd party. The trustee holds legal title to the trust while the beneficiaries hold equitable title. The trustee is held to very high standards and must follow state law fiduciary duties in administering the trust. The law does not force you to be a trustee, but once accept—there are only 2 ways to get out: either the court allows or beneficiaries allow [or/ and?]. Under the **doctrine of mergers** there cannot be the same person as sole beneficiary and sole trustee. The same person cannot hold both legal and equitable title. But the same person can hold both titles if there are multiple trustees or beneficiaries. Can also transfer legal title and equitable to the same group of people (just as long as more than 1). Merger occurs when all legal and equitable title is with 1 person.

**Beneficiaries**: have a personal claim against the trustees for breaches of trust. If the trustee wrongfully disposes of the trust property, the beneficiaries can recover the trust property unless it has come into the hands of a bona fide purchaser for value,

B. Creation of Trust

No particular form of words is necessary to create a trust. Settlor does not need to use the words “trust or trustee.” The sole question is whether the grantor manifested an intention to create a trust relationship. There are *private trusts* which is a trust created for noncharitable beneficiaries and a *charitable trust* which is established for charitable purposes. The requirements are basically the same for both private and charitable trusts. (but some of the valid purpose requirments are different for charitable trusts).

Requirements:

1) Trust intent: the settlor must intend to split legal and equitable title and impose fiduciary duties on the trustee for the benefit of the beneficiary
2) Capacity: The settlor must have the capacity to make a conveyance of property.
3) Statute of Frauds: if property is real property—the trust must be in writing
4) Purpose: must not be illegal or against public policy.
5) Property: settlor must place the property in a trust and the trust must hold the property
6) Trustee: must hold the property and obligated to administer it for the beneficiaries. The court will appoint a trustee if necessary to ensure the trust’s creation or continued existence.
7) Beneficiary:
8) Rule Against Perpetuities: Under most states, the duration of a private trust cannot exceed the period permitted by RAP. This is not a requirement for a charitable trust.

Intent:

*Jimenez v. Lee*

P = Betsy Lee; D = dad, Jason Lee

1945 gift from grandmother = bond
1956 2*nd* gift = savings account
Dad wants to label himself a custodian of the bond, account and Betsy wants to label him a trustee because as a trustee he had fid duties to account for the property and spend for the beneficiary’s education. He didn’t have these duties as a custodian. Also statute for limitations for a custodian was only 2 years and that had passed. There is no statute of limitations for trustee until he accounts. Potential problem: When settlors of bond and account dies they did not specifically state that the gifts were trusts. Was there intent to create trusts? Crt: This was not a problem, can be a trust even though settlors’ didn’t use “magic words” like trust—don’t need a formalistic approach and could still find intent. Dad tried to argue that the trust terminated—Crt, No doctrine of mergers because there were multiple people in the trust (different trustees and beneficiaries). Crt: was a trust, father used these word in letter to daughter and he violated his duties of accounting, self-dealing (used money for self) and commingling.

**Precatory Language:** when testator uses language that shows wishes that testator will use the property in a certain way—just a moral obligation, but not a legal one. Language includes “I wish, hope, suggest, recommend…” This is not sufficient in itself to show intent to create a binding trust obligation When precatory language is used, cts look at facts of each case in light of all the circumstances—look at settlor’s language and use extrinsic evidence to find settlors’ intent.

**Trust property:** What is required to be a valid trust?

**Brainard**
1927 wants to trade in stock market, tells wife that the profits from the stock will be held in trust for the wife and children and mother. Trust is declared
1928 trades stock and profits made
Dec 1928: time when officially credits the books.
At which date was the trust created? Valid purpose: Yes on its face, but it could be to shift the tax burdens to lwr bracket individuals. Can be a declared trust since no real property. Not a trust when he declared because no property yet, trust once profits made.
Pour over will: there can be a valid trust without any trust property when in will leave estate to trust..

**setting up a trust to defraud creditors or evade taxes is an illegal trust.**
If trust is set up to defraud creditors—the creditors could get their share from the trust and the excess can remain effectively in the trust.

**Beneficiaries:**

**Clark v. Campbell**
Trust with beneficiaries describes as “all my friends.” Trustee would decide what friends get what stuff. Crt: the friends do not get anything, all that stuff goes into the residuary. Friends was too indefinite a term—no statutory definition. Cannot create a trust with indefinite beneficiaries. Disposition would have been valid had it stated “to trustees, with hope and expectation they would distribute to friends.” This would be a gift to the trustees with precatory language that hope they will distribute. Here problem with trust itself. Why not say that it is a gift? No, can’t do that because there was clear intent to create a trust. Label this power of appointment? No, because mandatory and imperative language to create a trust—to
put property in hands of trustees with a fid duty to manage—the court does not have discretion to change it.

Negative will: trust different than will be relying on someone else in trust to carry out the wishes—need a check to see if this trust is carried out. Creates a special relationship therefore it is important to have definite beneficiaries in a position to sue the trustee in case the trustee didn’t follow orders or breached her duties.

**Pet Trusts** [get notes]

**Secret Trust:** when will itself does not indicate a trust but settlor promises a trust. Courts admit evidence of the promise and remedy by enforcing a constructive trust.

**Semi-secret:** will indicates that person is to hold legacy as a trustee but does not identify the beneficiary. Face of the will indicates something is going on, but is unclear. Here no evidence is admissible and the remedy is a resulting trust the settlor or estate. Resulting trust is a trust that arises by operation of law in one of 2 situations: a) where 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 in the name of another person who is not the natural object of the bounty of the purchaser. A resulting trust does not contemplate an ongoing fid duty where the trustee holds and manages the property for the beneficiary. Once a resulting trust is created, the trustee must reconvey the property to the beneficial owner upon demand.

How to use an oral trust or a secret trust to take care of a lover? Very hard because spouse will find out about in probate or from taxes.

C. Special Types of Private Express Trusts

**Discretionary Trusts**

Trusts can be divided into mandatory trusts and discretionary trusts. In a *mandatory* trust, the trustee must distribute all the income. (example: 1,000 per month for each beneficiary). In a discretionary trust, the trustee has discretion over payments of either the income or the principal or both. Discretionary powers of a trustee can be drafted in several ways. It can be broad (distribute at your discretion) or narrow (distribute for their dental needs) or in the middle (for their care and support). Even though trustee has discretion, it is not absolute (even if the doc states that trustee has absolute discretion). The trustee must act in good faith and must exercise their discretion to pay or not to pay—they can’t sit idly by.

*Marsman v. Nasca* [Cappy]

\[ X= SaXra = CaXppy = Margart [surving spouse] \]

\[ I \]

Marlette = SallyX

Marget was evicted from house. Cappy left house to his spouse in a 1973 will, but he didn’t have enough money to pay for the house so in 1974 he made a deed with Sally and transferred the home to her. Cappy dies so his life estate is over. Sally dies and left home to her husband, Marlette. He then owned the house in tenancy in entirety. Marlette the kicked out Marget. Why couldn’t Marget get an elective share of the house? There was no recaputre rule bc *Sullivan v. Burkin* hadn’t happened yet. Cappy was the beneficiary of the trust from Sara for his reasonable support and care. Farr was atty and was trustee. Cappy didn’t request trust money from Farr when needed it for the house because he requested money
once and only got $300 and a lot of grief from the trustee (Farr—wanted an explanation in writing, etc).  
The crt didn’t care that Cappy hadn’t requested money because the trustee violated his fid duty to look into/take care of Cappy’s resources.  Trustee should have been proactive and given Cappy money when he needed.  **There is a fid duty to inquire about beneficiary’s needs.**  Even though there is a discretionary clause—trustee does not have absolute discretion—still burden off good faith and reasonable actions (varies by jurisdiction).  Sara intended in her trust that Cappy live in the manner he was accustomed to “comfortable support and maintence”  

**Trustees can be conservative in giving out funds bc trustees get fees based on the percentage of the principal—the trustee is supposed to protect principal and if give out money liberally—trustee could be liable for being too generous.

What is the appropriate remedy for the trustee’s breach of fid duty?

The probate court took away the house from Marlette and directed him to convey the house to Margart. The trust must pay back Marlette for any expenditure that he made on the house.  If the trust is insufficient-then take amount out of trustee.  Trustee challenges his personal liability: Assent vs. Allow

Effect of exculpatory clause in will: can an atty put in a clause that exempts himself from liability.  Crt: clause is effective bc no evidence inserted it from a breach of confidence, need to really breach duties with drafting the clause and here there was no evidence that the clause was a result of an abuse of confidence or overreaching.  Other jurisdictions prohibit these clauses.

Crt of Appeals remedy: Marlette keeps the home since the deed was ok since bona fide purchaser for value.  The money that should have been given to Cappy from the trust should go to Margrat by constructive trust.  The rest of cappy’s trust money that he didn’t use goes into the second trust residue to Sally.

*There was an ethical problem about Farr as atty representing everyone.

**Availability of Beneficiary’s Interest to Creditors**

Beneficiary’s creditors rarely have the ability to reach the beneficiary’s interest in the trust.  Almost all trusts contain spendthrift provisions that prevent the creditors from obtaining equitable interest.  Also some states have statutes restricting a creditor’s ability to pursue trust interests.

A **Spendthrift Clause** is a provision of a trust that 1) prohibits the beneficiary from selling, giving away, or otherwise transferring the beneficiary’s interest and 2) prevents the beneficiary’s creditors from reaching the beneficiary’s interest in trust.

*once the trust distributes income to the beneficiary, the clause does not protect that and creditors can reach the distributed amounts.

**The vast majority of states enforce spendthrift provisions.**  Some states don’t enforce these clauses because it takes away the rights of legitimate creditors and thus deemed against public policy.  –also critized bc can encourage irresponsible behavior.

Self-settled trusts: A spendthrift trust cannot be set up by the settlor for the settlor’s own benefit.  Creditors of the settlor can reach the settlor’s interest in income or principal in a mandatory trust.  In a discretionary trust, creditors can reach the maximum amount the trustee could, in the trustee’s discretion, pay the settlor or apply for the settlor’s benefits.  Alaska and Delaware will enforce spendthrift trusts where the settlor is a discretionary beneficiary of income or principal, if the trust is not created to defraud creditors.

Exceptions to Spendthrift clauses: special claminats
-Judgements for child or spousal support can be enforced against the debtor’s interest in spendthrift trusts in the majority of the states. A minority of states do not allow children or ex-spouses to reach the trust to satisfy their judgment when there is a spendthrift. Some states permit courts to order child and spousal support payments from spendthrift or discretionary trusts. For Alimony: can get income, but not the principal. Child support can get both income and the principal.

-creditors with claims for necessaries such as for food, clothing, shelter and medical care have a good chance of breaking through clause. [a person who has furnished necessary services or support can reach the beneficiary’s interest in a spendthrift trust] Also can break through for state and federal taxes.

--several states allow the beneficiary’s creditors to reach the part of a spendthrift trust income in excess of amount needed for the support and education of the beneficiary. To determine what is necessary for the support of the beneficiary and what is excess (and thus reachable by creditors) is a court developed test: station-in-life rule. Creditors can reach only the amount in excess of what is needed to maintain the beneficiary in his station in life—problem with this, is that most kids who get trust funds are very wealthy and thus are use to an expensive life style.

--It is not settled whether a tort creditor can reach past a spendthrift.

--Support trusts: a trust that requires the trustee to make payments of income (or id specified, of prinicpal also) to the beneficiary in an amount necessary for the education or support of the beneficiary in accordance with an ascertainable standard. This is whatever is required to support the beneficiary –no more and no less. Creditors of the beneficiary cannot reach the beneficiary’s interest—except suppliers of necessaries may recover through the beneficiary’s right.

Offshore Asset Protection Trusts

D. Modification and Termination

Possible ways to modify:

1. Merger – Trust Instrument
   a) If trust provides for modification or revocation in trust instrument. (settlor reserves the right to modify or terminate)
   b) If trust instrument grants right to alter or terminate trust to 3rd party
   c) If trust instrument has a specified duration and that period expires
   d) If trust purpose is accomplished

2. Settlor and all the beneficiaries consent. Problem with “all.” If beneficiary is legally disabled, minor or unborn their consent could be problematic. Some jurisdictions would appoint a guardian ad litem or recognize virtual representation (if 1 adult in category then that individual can consent for everyone). The trustee has no beneficial interest and cannot object. Such a right exists even if the trust contains a spendthrift clause.

Another issue: settlor is dead and the trust in place no longer fits current circumstances that the settlor could not have anticipated. Can the beneficiaries modify or terminate if they all agree?

Stuchell
Trust provided for income to beneficiaries and 1 of the beneficiaries was mentally retarded and as the trust stood, the extra income would have severely limited the beneficiary’s needed public assistance. Petitioner requests to modify the trust so that beneficiary would still get money, but in such a way that
wouldn’t compromise his public assistance. Everyone consented, but needed the court approval for this beneficiary who couldn’t consent. [this is also an issue for non determined unborn children]. Crt will look at the changed circumstances, not anticipated by the settlor, and because of changed circumstances would apply trust when result would be to defeat or substantially impair accomplishment of the trust purpose. Crt held that it won’t modify bc doesn’t have authority to do so when modification just to advantage the beneficiaries more so than compliance would advantage them. This is a hard line approach.

*in recent years, courts in several states have reformed or modified a trust so as to obtain income or estate tax advantages. Sometimes courts have corrected a lawyer’s drafting error at other times crts will modify for changed circumstances. Several modification cases have involved cases where a widow cannot live comfortably on the income from a trust created by her husband and asks a court to permit invasion of principal for support. Unless all the remainder beneficiaries consent (again unborn child problem), relief is denied unless the trust is constructed with a power to invade, express or implied. Crts have been more liberal in permitting trustees to deviate from administrative directions in the trust, because of changed circumstances, then they have been permitting modification of distributive provisions. Some states have passed statutes to try and broaden courts’ authority to modify trust to benefit a minor or disabled child.

**Termination of Trusts**

**Clafin Doctrine:** in the us, the great weight of authority holds that a trust cannot be terminated prior to the time fixed for termination, even if all the beneficiaries consent, if termination would be contrary to a material purpose of the settlor. In Clafin, a trust was established for testator’s son with principal to be paid to the son at age 30. After age 21, the son sued to terminate the trust, pointing out that he was the sole beneficiary. The court refused to terminate the trust because this would violate the settlor’s intent.

**Generally, a trust cannot be terminated if it is a spendthrift trust, if the beneficiary is not to receive the principal until attaining a specified age, if it is a discretionary trust, or if it is a trust for support of the beneficiary. Such provisions are deemed to state a material purpose of the settlor.**

**Estate of Brown**
Trust gave income to beneficiaries, but also stated that shall distribute the income as may be necessary. Trustee supposed to manage trust and manage/ supervise material purpose of the trust—so the purpose of the trust was not finished.

*Calif statute—if trust has become uneconomical—can terminate.

**Removing Trustees**
Unless the trustee has been guilty of a breach of fid duty or has been unfit (excessive compensation also) can’t be removed. Standard rule is that since the settlor reposed special confidence in the designated trustee, the crt will not change merely because the beneficiaries want to.

**E. Charitable Trusts**
Trust established for the benefit of the community as a whole or for a relatively large segment of the community. Can have mixed private and charitable trusts. Private trusts can’t have an indefinite period because will violate the Rule Against Preps. Charitable trusts are excluded from RAP.

**Shenandoah Valley v. Taylor**
Trust to 1st, 2nd, and 3rd graders at Easter and Christmas for educational purposes. Crt held that this was not a charitable trust because not really for education—the trust would just pay money to the kids and then the kids could do what they want with it, there was no control. Since the trust was not charitable, but rather private—it was void bc it valid the RAP.

For valid charitable trust there must be a valid charitable purpose:
5 widely recognized categories of charitable purposes are: 1) relief of poverty; 2) advancements of education; 3) religion; 4) health; 5) public purposes (museums, parks). Crts retain a lot of power to decide whether a particular purpose is or is not beneficial to the community.

To be classified as charitable, a trust is for the benefit of a class of persons and not for the benefit of the community at large must be for relief of poverty, advancement of health, education, etc… A trust is not charitable merely because it is for the benefit of a class of people—example: trust for benefit of sick employees is charitable where as trust for all employees is not charitable. A trust to educate the descendents of the settlor is not charitable. A trust to educate a particular named person is not charitable. But a trust awarding scholarships is chart. A trust to promote the success if a particular political party is not charitable. But a trust to improve the method and structure of gov’t could be charitable. When drafting trust should be specific and don’t just state for benevolent or philanthropic reasons because if settlor’s intent is just benevolent, the trust will not be charitable.

Modification of Charitable Trusts: Cy Pres
Cy pres is a judicial doctrine a court will use to modify a charitable trust if purpose becomes impracticable or illegal.

Need:
1) valid charitable trust;
2) particular charitable purpose;
3) becomes impossible, impracticable or illegal (or even wasteful)
4) general charitable purpose that crt can refashion into;
5) there is no gift over

Block
Trust to san francisco group that oversaw 4 counties in San Fran. Settlor left trust to particular county—Marin. After her death the trust grew substantially and the group wanted to distribute the money to the other counties. Crt would not let them change the trust, bc settlor’s purpose was to benefit just Marin.

Nesher
Trust left land and money to build a hospital in her name. The county already had a good hospital and the money she left couldn’t have built one of she wanted—the crt looked at the will as a whole and constructed the settlor’s intention was “to give the property for a general charitable purpose rather than a particular charitable purpose—and this can be changed through cy pres to carry out the general purpose when the specific means trust wanted to do it is impossible.

Non-profit law
1) why do people give?
2) What makes a trust charitable? -purpose; -indefinite beneficiaries
3) Are the donoer’s wishes sacred? –dead donor; living; cy pres; wasteful; deviation
4) Who supervises?
**Barnes**
Trust of art collection with many restrictions on who can see the works (only working class people); no admission fees; no moving or re-arranging the paintings; no color re-prints; only open on Sundays. The trust became unworkable because there was no way to get money to keep up the paintings. Trustees wanted to deviate from the original directions. Crt allowed bc became unworkable-so trustees broke almost all the rules (except kept paintings hung as he wanted).

Who can enforce terms? Supervise?

**Herzog**
Donor can’t bring an action to enforce terms of completed charitable gift if the donor did not expressly reserve that right in the terms of the trust (like clause for right to reverter).

**Bishop**–Hawaii Trust fund
Trustees abusing the trust. AG is supposed to montitor and enforce charitable trusts but this highlights problems. Here newspaper story exposed the scandal, not the AG. Must AG’s don’t even know that a trust exists, have an accounting or have the personal to supervise. Some Acts now change this and require trustees of large charitable foundations to register with the AG and submit annual financial reporting.

**V. Fiduciary Adminstration**
Trustees have fid duties and beneficiaries can sue and make them personally liable.

**In re Rothko**
3 Trustees who disposed of Rothko paintings quickly and in 2 contracts. Rothko’s daughter and son sued. Standing to sue: daughter and AG. Fid duties violated: conflict of interest vs self-dealing. Different standards. Self-dealing: on both sides of the transaction. This standard is the no further inquiry rule: doesn’t matter if the dealing is fair or reasonable or that the trustees transacted in good faith. Reasonableness of the dealings is irrelevant. The beneficiaries can hold the trustees accountable for self-dealing. The only way out is if beneficiaries say deal is ok, or expressly provided for.

The 3 trustees: Reis: officer of the collection sold paintings [self-dealing]
Stamos: artist who benefited from being in good w/collection
Levine: he had no conflict, but was misconduct bc knew about the other conflicts and didn’t do anything—he failed to prevent the abuse.

Damages for the breach: Regis and Stamos had to pay the appreciated value of the painting at the time of trial while Levine had to pay the appreciated value of the paintings at the time of sale. Daughter couldn’t recover paintings bc sold to a bona fide purchaser for value who had no notice of the breach—innocent purchaser.

**Co-Trustees:** if there is more than 1 trustee, the trustees of a private, noncharitable trust must act as a group with unanimint, unless the trust instrument provides otherwise. 1 co-trustee may delegate to another co-trustee ministerial functions that do not require exercise of discretion. A co-trustee may not delegate to the others any discretionary powers. Since co-trustees must act jointly, a co-trustee is liable for the wrongful behavior of the other trustees. It is improper for one trustee to leave the others the custody and control of the trust property. For charitable trusts, unanimity is not requires of the trustees. Action by the majority is valid. Restatment permits a majority to act if there are more than 3 trustees.
Fiduciary duties:

--The duty of loyalty is the biggest fid duty.
--Duty of inquiry into needs of beneficiary: Cappy
--Duty to Follow terms of trust instrument
--Duty to Collect, Protect and Preserve Trust Property
--Duty to Earmark Trust Property
--Duty not to Commingle Trust Funds with Trustee’s own property
--Duty Not to Delegate/ Duty to Delegate
--Duty of Impartiality
--Duty to Inform and Account [Jimenez v. Lee]
--Duty to Make Trust Property Productive
--Duty to Diversify

Duty to collect and protect property
Trustee has duty of obtaining possession of the trust assets without unnecessary delay. Must examine assets and act as a prudent investor in preserving it.

Duty to Earmark
If the property is not earmarked, a trustee might later claim that the investment that proved profitable were the trustee’s own investment. Older view is where a trustee commits a breach of trust by failing to earmark a trust instrument, a trustee is strictly liable for any loss resulting from the investment. Here doesn’t matter that the failure to earmark didn’t cause the loss. More modern view (Restatement of Trusts) is that the trustee is only liable for such loss as results from the failure to earmark and is not liable for such loss as results from general economic conditions.

Duty not to mingle funds with the trustee’s own
Trustee is guilty of this breach if mixes funds, even though trustee doesn’t use the trust funds for its own purposes. Reason: commingled funds become more difficult to trace and hence subject to risk that personal creditors of trustee can reach them. For breach—older view is that a trustee is strictly liable, even though loss would have occurred had there been no commingling. More modern holds that a trustee is only liable to the extent the commingling caused the loss.

Duty not to delegate:

Shriner’s Hospital
MJ is trustee; 2nd Alternative is Charles and 3rd Alternative is Robert. MJ was not knowledgeable about investments so she put money into account at Dean Witter and let Charles invest with it, Charles ended up embezzling money from the trust. Issue: is MJ personally liable for the amt Charles embezzled?
Crt: MJ breached her duty not to delegate. A trustee can delegate investments—and in fact would breach her fid duty as well if didn’t ask for help/advice in managing account when she knew she didn’t know what to do with it—so can, and should delegate—but still need to keep a check on it and exercise control. She had a duty to get advice, but needed to make her own judgments and use her discretion. Here she completely delegated all her investment decisions so breached her duty. Good to get advice, but can’t delegate investment authority. Standard is objective. Even though trust instrument gave her broad powers—can’t breach state statutes/fid duty.

What is the standard of the trustee? 3 different views:
1) “prudent investor with the property of others” [strict—this case];
2) how a prudent investor would manage their own affairs [Harvard college]
3) how a prudent investor would manage given the circumstances of the trust [least strict-more modern]
But MJ was not liable for damages because her breach of delegation did not proximately cause the loss. Look to the relationship between the delegation and the loss. Her breach would have caused the loss is loss happened from poor investments—but here embezzlement so breach wasn’t cause. Not a “but for” standard. *Questionable whether liable if investment fell because act of g-d?

**The nondelegation rule has been abrogated in the Restatement of Trusts. This authority imposes upon the trustee a duty of using care, skill, and caution in selecting an agent, when delegating to obtain the advantage of the agent’s specialized investment or other skills. Trustee must view periodically the agent’s compliance. Here crt would look to why MJ choose who she did, anything put her on notice that he was untrustworthy. Crt would probably place weight on fact that settlor made charles a 2nd alternative.

Remedy: Robert was removed as a trustee because he was liable for the acts of his preceessors and also needed to be removed because he was MJ’s legal guardian and would have needed to sue her for this breach—this creates a conflict of interest.

Trust does not fail for lack of trustees—crt will just appoint a new one.

Example: Trust dictates that investments made by computer program? Trustee would have to aleast check out program, that is reliable, no viruses, etc..

Duty of Impartiality
A trustee has a duty to deal with both the income beneficiaries and the remaindermen impartially. The trust property must produce a reasonable income while being preserved fro the remaindermand.

Dennis
Commercial bldg in RI that depreciated to the point that it was delapatated. Trustees were squeezing out the max value from the bldgs and failed to keep up the bldgs for future. No upkeep, Trustees were on notice in 1950 that value was going down and neighborhood goes down, that should have sold then. Trustees violated duty of impartiality—they acted unfairly between the income beneficiaries (got most value) and the remiandermen (didn’t leave anything). They failed to consider the future interest of the bldg. Another problem—also no accounting of property in 55 years.

Remedy: Surcharge on the trustees for the decline in value. Charged them the value of the bldg in 1950—point when fairly on notice needed to sell.

Violated duties: prudent manager, impartiality, protect and preserve, delegate, ratain depreciated assets, account, prudent manager, diversify.

Removal of trustees: Rothko: removed for misconduct (violate loyalty)
Shriner: conflict of interest, innocent, but potential problem
Dennis: ill feeling—difficult to maintain a realtionship

Investment of Trust Funds—Duty to Diversify
Can’t put all funds in 1 investment—need to diversify portfolio to reduce the risk.

Collins
Standard---harvard college, as a prudent investor would manage own affairs. There is an exculpatory clause—some crts would enforce but few crts would have let these trustees off regardless of clause because they did everything wrong. The trustees invested money without checking the investors, put all money into 1 bond, investors were the trustee’s client-conflict of interest, violate duty of loyalty.
VI. Lifetime Transfers with Post-Mortem Consequences

A. Contract to devise: (how to ensure lifelong care and affection)

Fritz
Promised ½ estate to friend if he took care of him. He performed his obligation, but testator never included him in his will. Crts will still enforce the promise and give him ½ estate if there is a writing of an express agreement (there was) and consideration (he did his part of the promise). This was satisfied—so crt will enforce promise.
*must be clear and convincing evidence of an actual express agreement—not a mere unexecuted intention. Even though document didn’t statisfy the testamentary requirments—it statisfied the requirments to contract.

B. Gifts of Personal Property

For valid gift: need intent and delivery (hand it over physically or symbolically)

Gift causa mortis is a gift made when the donor is in apprehension of impending death or his death is apparent. If the donor doesn’t die, then the gift is revoked. Deleievry is essential here as well. Gift causa mortis is a death-bed substitute for a will.

Scherer: women left check to friend in their apartment, she endorsed it and left letter saying leaving it to him. She then locked door and killed her self. Crt: there is intent (letter, endorsed check) and delievery is ok (left letter in place he could find—on table in his apartment ) and was impending death (suicide). Gift is valid.