Trusts & Estates Outline – Foster

GENERALLY
I Inheritance & Its Limitations
   A. Gen’l Rule – Testator can place conditions on inheritance b/c there is not a natural/Constitutional right to receive property
   B. Limits on Conditions
   C. Reoccurring Issue – Conflict b/t deadhand and interests of descendants/society
II The Probate Process
   A. Probate v. Non-probate property
   B. Transfers
   C. Closing the Estate

INTESTATE SUCCESSION
I Generally
   A. Intestate = Passage of probate property when decedent dies w/out will
   B. Governed by Statute of the State
II Intestacy Rights of Surviving Spouse & Children
   A. Gen’l Rule: Surviving spouse usually gets most of the estate.
   B. Defining “Spouse”
   C. Defining “Children”
III Distribution to Descendents
   A. Analytical Approach
   B. Three Schemes Used by States
   C. Disinheritance
IV Intestacy Rights of Ancestors & Collaterals
   A. This Only Comes Into Play if Decedent has no Descendants/Issue!!!
   B. Ancestors
   C. First Line Collaterals
   D. Second Line Collaterals
V Bars to Succession
   A. Advancements
   B. Disclaimer
   C. Homicide
   D. Other Unworthy Heirs – Neglect, Abuse, Fraud, ect.

WILLS
I Requirements for ALL Valid Wills (Statutory Execution Requirements)
   A. Testamentary Capacity
   B. Freedom from 3rd Pty Interference
   C. Testamentary Intent
II Attested Wills: Additional Statutory Requirements
   A. Function of Formalities
   B. Requirements – 3 of them
   C. Examples
D. What State Law Governs the Statutory Requirements..................................12
E. Curative Doctrines for Mistake in Execution – Wills that Don’t Meet the Strict Statutory Requirements

III Unattested Wills: Statutory Requirements.................................................13
A. Oral/Nuncupative Wills
B. Holographic Wills

IV Revocation & Revival of Wills.................................................................14
A. Revocation in Entirety
B. Partial Revocation.................................................................15
C. Revival – 3 Approaches.................................................................17

V Will Components – How to Get Outside Documents Included in Will.............18
A. Integration – When Documents are Considered to be Part of Will
B. Incorporation by Reference – Terms of Document are Considered Part of Will
C. Republication by Codicil – Codicil Treated as if Re-executes Will...............19
D. Tangible Personal Property Document
E. Acts of Independent Significance
F. Pour-Over Wills

VI Construction of Wills..............................................................................20
A. Mistakes
B. Lapse – Death of a Beneficiary before Death of T.................................22
C. Change in Property after Execution of Will...........................................23

VII Restrictions on Power of Disposition: Family Protection..........................24
A. Protection of Spouse
B. Protection of Children.................................................................28
C. Extension of Slayer Statutes.................................................................29

TRUSTS

I Generally.................................................................................................30
A. Definition
B. Inter Vivos Trust
C. Testamentary Trust

II Requirements for Creation of Trusts
A. Valid Purpose
B. Settlor – Must have Legal and Mental Capacity
C. Transfer of Property
D. Trustee.................................................................31
E. Intent
F. Trust Instrument – Written v. Oral
G. Trust Property..................................................................................32
H. Beneficiaries – 2 Requirements

III Types of Express Private Trusts.............................................................34
A. Two General Types (Mandatory and Discretionary)
B. Trusts Created for Special Purposes.....................................................33
C. Trusts with Unstated Express Terms.....................................................36

IV Charitable Trusts....................................................................................36
A. Same Requirements as Creation for All Trusts, But:
B. 3 Things Distinguish Charitable Trusts from Private Trusts.........................37
C. Supervision........................................................................................................38

V Trusts by Operation of Law
A. Constructive Trusts
B. Resulting Trusts..................................................................................................39

VI Modification and Termination of Trusts
A. Automatic Termination
B. Voluntary Modification or Termination
C. Trustee Removal..................................................................................................40

FIDUCIARY ADMINISTRATION

I Fiduciary Powers.....................................................................................................41
A. Executors
B. Trustees

II Fiduciary Duties – Judicial and Statutory Limits on Fiduciary Powers
A. Duty of Loyalty
B. Duty to Follow the Terms of the Will/Trust.........................................................42
C. Duty of Prudence in Administering Trust/Estate Property

III Remedies for Breach of Fiduciary Duties.............................................................44
A. Co-Trustee Liability
B. Remedy Options
C. Exculpatory Clauses...............................................................................................45

INTERVIVOS TRANSFERS OF PROPERTY

I Contract to Make a Will..........................................................................................46
A. Rule – Anybody can Make a Contract to Make a Will
B. Common Fact Pattern
C. Ways to Prove K
D. Remedy

II Gifts
A. Elements of Inter Vivos Gift
B. Causa Mortis
I Inheritance & Its Limitations
A. Gen’l Rule – Testator can place conditions on inheritance b/c there is no natural/Constitutional right to receive property (Shapira)
   1. Called “dead hand”
B. Limits on Conditions – Testator CANNOT place an unreasonable restraint on behavior that public policy favors (e.g., marriage, freedom of religion, etc.)
   1. Factors in determining resonableness
      a. Size of population to choose from
      b. Length of time to make the satisfy the condition
   2. Ex. – Condition that can’t marry is unreasonable restrain, but condition that marry Jewish girl NOT unreasonable restrain on marriage b/c lots of Jewish girls to choose from (Shapira)
C. Reoccurring Issue – Conflict b/t deadhand/testamentary intent and interests of decedents/society at large
   1. Called “problem of the deadhand”

II The Probate Process
A. Probate v. Non-Probate Property
   1. Probate = property that passes by decedent’s will or intestacy
   2. Non-Probate = property that passes by another instrument (e.g., joint tenancy, life insurance, contracts payable at death, interest in a trust)
B. Transfers – Transfer of probate property must take place pursuant to court order, transfer of non-probate property doesn’t require court order b/c govern by terms of non-probate transfer instrument.
C. Closing the Estate – 3 things must always be done b/f probate estate closed
   1. Creditors must be paid
   2. Titles must be cleared
   3. Taxes must be paid
INTESTATE SUCCESSION

I Generally
A. Intestate = Passage of probate property when decedent dies w/out will
B. Governed by Statute of the State
   1. Purpose of statute is to do what most decedents would have done if died w/ a will (carry out decedent’s probable intent)

II Intestacy Rights of Surviving Spouse & Children
A. Gen’l Rule: Surviving spouse usually gets most of the estate. Could be entire estate, percentage of estate, or flat amount and percentage of estate
   1. Rat
      a. Primary: Marriage is economic partnership, most ppl. would want surviving spouse to have majority (if not all) of estate
      b. Secondary: Family protection, ensure economic health of family after death
   2. Policy Issues
      a. Couple might not have been married very long
      b. Decedent could have child from previous marriage that spouse would neglect
   3. Solutions – most states provide for separate share for decedent’s children from previous marriage and sometimes decedent’s parents
      a. Ex – UPC §2-102: Surviving spouse gets everything, unless decedent has surviving children or parents, then estate apportioned

B. Defining “Spouse”
      a. Putative Spouse Rule – If 2d spouse doesn’t know about 1st marriage (innocent), then ct. likely to give putative spouse a share b/c policy of stat. (probable intent of decedent) is met
         i. Requirements
            a. Marriage in good faith
            b. Marriage was duly solemnized
         ii. NOTE – But this still depends on the jurisdiction. Some states may not give putative spouse a dime
      b. Theories on apportionment
         i. Ration – Split estate depending on how much time decedent spent with each spouse
         ii. Equity – Look at which spouse needs the money more
         iii. Partnership – What each wife contributed to the estate
   2. Unmarried Co-habitants
      a. Majority approach – no intestacy rights b/c not legally married
      b. Minority approach
         i. Common law marriage states – intestacy rights if: public reputation, cohabitation, mutual consent to marry, and competency
            a. But this wouldn’t apply in states that don’t allow gay marriage b/c not competency
         ii. UPC §2-102(B) – intestacy rights for “committed partners”
a. Committed partner = sharing common household w/ decedent in marriage like relationship  
b. NOTE – This is the only theory that would allow unwed gay couples to inherit through intestacy.  
i. BUT majority of states don’t allow adoption of lover  

C. Defining “Children”  

1. Adopted Children  
a. Dual inheritance approach (TX) – Can inherit from natural AND adopted parents  
b. Rebirth approach (MD) – Can only inherit from adopted side (connection to natural side is severed at adoption)  
c. **UPC §2-113, 114** Stepparent exception – Same as MD, except when adopted parent is spouse of natural parent (step parent), then can inherit from both  
i. NOTE – This wouldn’t apply if adopted parent was just domestic partner of natural parent  
d. Equitable Adoption – In states that don’t require formal adoption, could argue decedent acted like adopted parent (treated same as formal contract to adopt)  
e. NOTE – For jurisdictions that allow adult adoption, gay lovers could adopt each other to provide for intestate transfer  

2. Nonmarital Children – child can inherit through mother without additional proof. But some states require additional proof to inherit from father  
a. How to prove parenthood  
i. Subsequent marriage by parents  
ii. Acknowledgement by father  
iii. DNA testing  

3. *Posthumously conceived children* (child born after decedent’s death)  
a. Rebuttable presumption of parenthood if born w/in 280 days after parent’s death  
b. Child born more than 280 days after parent’s death has burden of proving parenthood  
c. Children born from reproductive technology  
i. Policy Issues  
a. Did decedent intend to have these children inherent form the estate  
b. Interest in closing the estate w/out child coming forward 20 yrs. later  
ii. Majority approach – Sperm donor is not treated as father. Father = husband of the mother  
a. No real uniformity with other issues (e.g., cloning)  

III Distribution to Descendents (after deduct spouse’s share)  

A. Analytical Approach  

1. Three questions to always ask  
a. What is the probate estate  
b. Who are the heirs – see “Golden Rules”  
c. What are the shares
2. **Golden rules to determining the heirs**
   a. Must be alive
      i. If not alive, and has children, then see schemes below
      ii. If not alive, and has not children, then portion of inheritance is divided equally in the same generation among living members, or dead members w/ living heirs
   b. Relatives by marriage/affinity do not inherit
      i. Unless surviving spouse of decedent OR state has made an exception
   c. Rule of non-competition: Potential heirs can’t take if they have a living ancestor closer to the “top of the line”

B. **Three schemes employed by states** *(NOTE – MORE EXAMPLES OF THESE APPROACHES ON SEPARATE PAGE, pg. 7 of notes)*

1. **Per Stirpes**
   a. Divide estate b/t heirs at first generation below the decedent, even if every heir is dead
   b. If heir is dead, then the children of the dead heir divide the heir’s portion equally.
   c. And so on
   d. Example (dead people underlined)

   
   \[
   \begin{array}{cccc}
   & B & (1/2) & C (0) & D (1/2) \\
   E & (1/4) & F & (1/4) & G & H \\
   \end{array}
   \]

2. **Per Capita w/ Representation** *(most common – when in doubt, use this)*
   a. Divide estate equally at closest generation with a living person
   b. Then go through steps of per stirpes
   c. Example (dead people underlined)

   
   \[
   \begin{array}{cccc}
   & B & C & D \\
   E & (1/4) & F & (1/4) & G & (1/4) & H & (1/4) \\
   I & (1/8) & J & (1/8) & K & L & M & (1/4) \\
   \end{array}
   \]

3. **Per Capita at each generation** *(UPC approach)*
   a. Divide estate equally at closest generation w/ a living person (same as step 1 of per capita w/ representation)
   b. Portion of estate belonging to dead members is divided equally among the next generation, rather than having living children stand in place of dead parent/heir
   c. Example (dead people underlined)
4. NOTE: To divide fraction by whole number: Invert the whole number and multiply.
   a. Example: \( \frac{1}{2} / 3 = \frac{1}{2} / \frac{3}{1} = \frac{1}{2} * \frac{1}{3} = \frac{1}{6} \)
5. Breakdown of states
   a. Per Stirpes – DE, IL
   b. Per Capita w/ Representation – MO (but uses per stirpes if somebody in first generation is alive); TX
   c. Per Capita at Each Generation – NY; UT

C. Disinheritance – To disinherit an heir, you must affirmatively pass that heir’s share to somebody else
   1. Reason is because if don’t pass that heirs share to somebody else, then it will pass to the heir by intestacy anyway

IV Intestacy Rights of Ancestors & Collaterals
A. This only comes into play if decedent has no descendants (issue)!!!
B. Ancestors
   1. If decedent has no descendant’s (issue), then estate divided among decedent’s parents, if living
   2. Only one parent
      a. UPC – all goes to parents, even if only one parent and multiple siblings
      b. Other jurisdictions – some goes to single parent and some goes to siblings
C. First Line Collaterals
   1. Def. – Decedent’s parent’s issue (decedent’s sibling)
   2. Rule: If decedent’s parent’s are dead, then estate divided equally among first line collaterals (decedent’s siblings).
      a. Dead sibling’s issue take by representation in same manner as decedent’s issue would have taken if there had been any
D. Second Line Collaterals
   1. Def – Decedent’s grandparent’s issue, other than decedent’s parents and first line collaterals (decedent’s siblings and their issue)
   2. Rule: Second line collaterals only take if there are not first line collaterals. States differ on system used
      a. Parentalic – estate is split; half goes to maternal grandparent’s side and other half to paternal grandparent’s side
         i. If grandparent’s dead → goes to grandparent’s issue
      b. Degree of relationship – Passes to closest kinship, counting degrees of relationship.
i. Count up to nearest ancestor, then count down (see chart, pg. 79 of CB)

3. Laughing Heirs – Does the connection to decedent eventually reach a point that is so remote, than should not inherit, or should kin always be able to inherit no matter what?

4. Half Bloods – Half siblings, and their heirs
   a. Majority and UPC approach – half sibling and heirs are treated same as whole sibling
   b. Minority approaches
      i. VA - Half sibling and heirs only given half share
      ii. Miss – Half sibling takes only when no whole sibling at the same generation
      iii. OK – Same as Miss., except can only be excluded from portion of decedent’s estate that came from inheritances from an ancestor not related to the half sibling.

V Bars To Succession

A. Advancements – Inter vivos gifts to heir(s) deducted from that heir’s share of estate after death
   1. Common law – any lifetime gift to children is presumed to be an advancement
      a. Advancement added to total amount of estate, estate distributed, then advancement deducted from advancee heir’s share
      b. Heir has burden of overcoming presumption w/ proof that gift was absolute
      c. Rat – Most people would want estate divided equally among heirs and true equality can only be reach if lifetime gifts are included in estate
   2. UPC approach – lifetime gifts are not treated as advancements, unless decedent contemporaneously put in writing that gift was an advancement
      a. UPC approach (reverse presumption of common law) is trend in most states
      b. Rat – too hard for child to meet burden to overcome presumption

B. Disclaimer – Heir declines to take inheritance
   1. Common law & UPC – Treated as if title passed to disclaiming heir, then to heir’s successor (just like per stirpes)
   2. Minority approach - Disclaiming heir treated as if predeceased decedent
      a. Problem – allows wealthy heirs to avoid tax consequences by passing title directly to their children

C. Homicide – Heir caused death of decedent
   1. Competing public policy – heir shouldn’t be rewarded for causing decedent’s death v. heir shouldn’t be deprived of inheritance w/out just cause
   2. Treatment
      a. Common law
         i. Probate courts do not have the power to deprive an heir of its inheritance
         ii. But ct. of equity can impose a constructive trust on the inheritance to prevent unjust enrichment (Estate of Mahoney)
a. Constructive trust = unworthy heir doesn’t have access to the estate, must hold the inheritance for somebody else’s use
   iii. Killing must be voluntary to justify depriving heir of inheritance (Estate of Mahoney – manslaughter not enough)
b. Slayer statutes – majority of states enacted statutes to prevent killer from inheriting from victim
   i. **UPC § 2-1106** – killer treated as if predeceased decedent
   ii. Ct’s split as to whether estate can pass to killer’s heirs

**D. Other unworthy heirs – Neglect, Abuse, Fraud, etc.**
1. Majority approach – heir does not forfeit inheritance for bad behavior
2. Minority approach (CA Code) – those that abuse or scam decedent are treated as having predeceased decedent (forfeit inheritance)
   a. This is the approach taken in some other countries, like China, rewards those that treat decedent well (even non-relatives) and punishes wide variety of bad behavior
   b. Drawback – highly time intensive inquiry
WILLS

I. Requirements For ALL Valid Will (Execution Requirements)

A. Testamentary Capacity
   1. Legal Capacity – must be a certain age (usually 18) to execute a will
   2. Mental Capacity
      a. Test for mental capacity – Capable of knowing (not actual knowledge):
         i. The nature and extent of own property
         ii. The natural objects of bounty
         iii. The disposition you are making of the property
         iv. Forming an orderly desire regarding the disposition of property
      b. Legal presumption in favor of mental capacity, especially where will is
         witnesses (Estate of Wright – Ct. held mental capacity, even where
         multiple individuals, including some of the witnesses, testified that T was
         crazy)
         i. Ct. very skeptical of witness/drafter who later claims that T was
            incompetent
      c. Why require mental capacity?
         i. Will should be given effect only if reflects T’s true intent
         ii. Mentally incompetent person is not considered a “person” legally, so
             they can’t sign the will
         iii. Gives legitimacy to the legal process
         iv. Assures a sane person that intent will be given effect, even if person
             later becomes incompetent
         v. Protects T’s family, who provided love and support during T’s life
         vi. Protects T from exploitation
         vii. Protects society at large from irrational acts
   3. Insane Delusion
      a. Def – A false conception of reality, which T adheres to against all
         evidence and reason to the contrary
         i. If any evidence supporting T’s belief = no delusion
         ii. This is a legal, not psychiatric concept
      b. Effect – only portion of the will effected by the insane delusion will fail
         i. Test: The will (or portion thereof) must be direct product of the
            delusion
      c. NOTE: Ct. might find insane delusion, even where there is some evid. to
         support T’s belief, in order to redress an inequity (In re Honigman – held
         disinherited wife put forth enough evid. of insane delusion of her infidelity
         to put question to jury, even though evid. to support T’s belief of
         infidelity)

B. Freedom from 3d pty Interference
   1. Undue Influence – 2 ways to prove
      a. Directly – 3 elements
         i. Testator – must be susceptible
            a. Failing health/living in poor conditions = susceptible
         ii. Influencer – had the disposition/motive AND opportunity to do the
            influencing
iii. Will – disposition is product of the undue influence
b. Facts that give rise to presumption
   i. Test to trigger the presumption
      a. Confidential relationship AND
      b. Something else (depends on jurisdiction) – usually suspicious circumstances is enough
c. To rebut the presumption
   i. Good faith AND
   ii. Will made free of influence
d. NOTE – Some states have presumption of undue influence where atty is drafter and beneficiary. Though can still rebut, should always advice T to get independent counsel if atty is drafter and beneficiary

2. Duress – just like undue influence, but involves physical harm, or threats of physical harm
3. Fraud
   a. 3 things to look at
      i. Fraudster – must have:
         a. Intent to deceive
         b. Purpose to influence the testamentary disposition
      ii. Testator – must have reasonable belief
      iii. Will – must be “fruit of the fraud (causation)"
   b. 2 kinds of fraud
      i. Fraud in the inducement – person misrepresents facts, thereby causing T to execute, revoke, or refrain from either of these, that T otherwise would not have done
      ii. Fraud in the execution – person misrepresents character or contents of the will, so that will doesn’t actually carry out T’s intent

4. Tortious interference w/ expectancy
   a. Elements (vary drastically by jurisdiction, some jurisdictions don’t allow this claim at all)
      i. Existence of an expectancy
      ii. Intentional interference w/ that expectancy
      iii. Tortious conduct involved w/ the interference
         a. Must show one of the above act (e.g., fraud, duress, etc.)
      iv. But for the interference, reasonable certainty that expectancy would have been realized
   b. When to bring this type of suit
      i. When don’t have standing to contest will b/c no pecuniary interest in the will
         a. Only those w/ pecuniary interest in the will have standing to bring will contest
         b. Only those named in the will have standing to sue the atty/drafter for malpractice (Azcunce – Omitted child couldn’t bring malpractice suit against drafter b/c she was not named in will)
      ii. Want to recover punitive damages
      iii. Want to avoid a “no contest” clause
c. Sue tortfeasor directly – doesn’t involve T’s capacity

5. Remedies
   a. Only portion of the will affected by 3d pty interference will be struck down
   b. If probate court can’t do anything, ct. of equity may step in to impose a constructive trust

6. No-Contest clauses – clause in will that provides if any beneficiaries contest the will, they lose their inheritance
   a. A good way to save costs of litigation and family relationship
   b. To use this, you must give people who you think might contest the will at least some money so that they will get a benefit out of not contesting

C. Testamentary Intent
   1. Rule: Must be in writing AND T must present expresses intent that the writing by used as his will.
      a. T’s intent must be PRESENT intent (this is my will) not future intent (lawyer, I want you to make the following changes to my will)
   2. Fake wills – T must have the intent that the will be valid when he signed it
      (Fleming – Will not valid where T drafted and executed just to get beneficiary to have sex with him)
      a. Ct. looks at parole evidence in these cases
   3. Conditional Wills – If will written to become operative after a certain event occurs → ct. usually interpret conditional language to be just an introduction and will is operative even if the condition doesn’t occur (Eaton – Will giving all to son if T didn’t return from journey held valid when T died 10 yrs. after returning from the journey)
      a. Rat – no reason to presume T would favor one person if dies a certain way, but another person if doesn’t die that way.

II Attested Wills: Additional Statutory Execution Requirements

A. Function of formalities
   1. Ritual – make sure testator aware of nature of action
   3. Protective – protects testator from undue influence
   4. Channeling – ensures T’s wishes area carried out at death

B. Requirements – 3 of them
   1. Writing
      a. No requirement for what kind of surface will has to be written on (one case probated will etched on tractor fender)
      b. But becomes more unclear if use video tape → strong argument that video recording IS NOT writing
   2. Signature by testator
      a. Location
         i. Subscription – will must be signed at the bottom
            a. Required by Wills Act and some jurisdictions
         ii. Statute of Frauds, UPC, and other jurisdictions allow will to be signed anywhere
            iii. NOTE – Can’t add anything after you sign
b. Form
   i. “Signature” is interpreted broadly to include any symbol T adopts w/ present intent to authenticate will (e.g., initials, nickname, symbol)
      a. Ct. may look to how T usually signs his name
      b. NOTE: digitized signature or rubber stamp probably requires something more
   ii. UPC and some jurisdictions allow others to sign T’s name for him (proxy) if:
      a. T present when name being signed
      b. Name is being signed at T’s direction

3. Attestation by witnesses
   a. Number
      i. Statute of Frauds – requires 3 witnesses
      ii. Wills Act, UPC, and majority of states– requires 2 witnesses
   b. Competence
      i. Legal capacity – no limit on age
      ii. Mental capacity – must be able to testify in court (understand the meaning of an “oath”)
      iii. Disinterested: An interested witness (stands to gain if will held valid) is suspect b/c motive to lie. States take 5 diff. approaches where an interested witness is involved:
         a. Supernumerary exception only (MA)
            i. Interested witness can’t take (will held valid, but interested witness’s share is purged), unless there are at least 2 other disinterested witnesses.
            ii. NOTE – MA is only state that says spouse of an interested party can’t attest either b/c that person is also interested
         b. Supernumerary exception, or if that doesn’t work, use the lesser of the following two:
            i. 1st Will or 2d Will (CA during Parsons Case) - Look at which gift would be smaller, under first will (that interested witness didn’t attest to) or second will (that interested witness did attest to) and interested witness gets that amount
            ii. Under the Will or intestacy (MO) – Compare what interested witness would get under will and intestacy, and interested witness takes smaller of the two.
         c. Rebuttable presumption of undue influence. If interested witness can’t rebut, then use lesser of the two outlined above (CA today)
         d. Interested witness is not purged of share. Doesn’t matter that witness is interested (UPC & majority approach)
         e. No witnesses are required (PA)
   c. Intent to attest – witness must intend to give validity to the document
   d. Timing - Witness must sign AFTER T signs or acknowledges (depending on what statute requires)
      i. Witnesses can’t attest first, then have T acknowledge (In re Colling)
   e. Presence
i. Witness must be present when T signs or acknowledges
   a. Witness can’t leave in the middle, then attest (In re Colling)

ii. T must be present when witnesses attest – 2 tests to determine T’s presence (states differ)
   a. line of sight – T is capable of seeing witnesses sign (must be able to see pen on paper)
   b. conscious presence – T comprehends witnesses signing through sight, hearing, or general consciousness

iii. States differ as to whether witnesses must attest in front of each other
   a. States following the Wills Act (e.g., W. Va. require this)

f. **Location of attestation**
   i. State’s split as to whether subscription (attesting AFTER T’s signature is required)

ii. **Self proving affidavit v. attestation clause**
   a. Self proving affidavit is document attached to will, signed by witnesses, where witnesses swearing that will was duly executed
      i. Purpose – prevents witness from later having to testify if will is contested. It does not serve as an attestation clause itself.

C. **Examples** (see pgs. 26-29 of CB)

<table>
<thead>
<tr>
<th>Wills Act</th>
<th>W.Va.</th>
<th>Old UPC</th>
<th>New UPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Writing</td>
<td>1. Writing</td>
<td>1. Writing</td>
<td>1. Writing</td>
</tr>
<tr>
<td>2. Signature by T at foot/end</td>
<td>2. Signed by T</td>
<td>2. Signed by T</td>
<td>2. Signed by T</td>
</tr>
<tr>
<td>3. 2 witnesses</td>
<td>3. 2 witnesses</td>
<td>3. 2 witnesses</td>
<td>3. 2 witnesses</td>
</tr>
<tr>
<td>4. Sign in front of both witnesses</td>
<td>4. Sign or acknow’lge in front of both W’s</td>
<td>4. Sign or acknow’lge in front of both W’s</td>
<td>4. Sign or acknow’lge in front of W’s</td>
</tr>
<tr>
<td>5. W’s sign in front of T</td>
<td>5. W’s sign in front of W’s</td>
<td>5. W’s sign in front of W’s</td>
<td>5. W’s sign in front of W’s</td>
</tr>
</tbody>
</table>

D. **What states law governs the statutory requirements?**
   1. Disposition of personal property – governed by law of decedent’s domicile at death
   2. Disposition of real property – governed by law of state where property located
   3. Exception – **UPC & most states** have laws holding will valid if meets requirements of:
      a. State where decedent domiciled at death or
      b. State where will executed or
      c. State where decedent domiciled when will executed
   4. POINT – Execute will so that meets requirements of even the strictest states

E. **Curative doctrines for mistake in execution** – Wills that don’t meet strict statutory requirements
   1. **Substantial Compliance (NJ Old)** – If will comes close to meeting statutory requirements, but there is a procedural error, court will overlook
      a. Requires clear and convincing evidence of witnesses intent to attest
         i. Note – not looking at T’s intent at all
      b. Key is how close the witness came to complying with statutory requirements (Ranney Case – Witness not attesting at end of will, but
signing an attached self proving affidavit is substantial compliance b/c purpose of self proving affidavit same as purpose of attestation clause

2. **Dispensing Power** (harmless error) *(NJ today)* – Ignore statutory requirements if proponent establishes that T intended the instrument to be his will
   a. Requires clear and convincing evidence of T’s intent – look to document itself and surrounding circumstances
   b. Facts est. T’s intent *(Hall Case* – Unattested will with handwritten edits held valid)
      i. T destroyed previous will
      ii. Witnesses testify that T intended will to be valid
      iii. Instrument itself contains an express revocation clause
   c. Trend in substantial compliance states to dispensing power

3. **Hybrid approach** *(CO)* – Ct. will apply dispensing power only if substantial compliance met *(Wiltfong* – Dispensing power not applied to birthday card expressing desire to leave all to partner, even through read allowed to group of friends, bec/ not witnesses as required by stat./no substantial compliance)

4. **NOTE** – most states require strict statutory compliance and no curative doctrines allowed

5. **Specific Applications of the Doctrines**
   a. **Oral wills**
      i. Not under substantial compliance b/c doesn’t meet any stat. requirements
      ii. Probably not under dispensing power b/c most states still require will in writing
   b. **Video taped & switched wills**
      i. Not under substantial compliance b/c not signed by T
      ii. Argument could be made for dispensing power b/c T’s intent
   c. **Holographic wills in jurisdictions that do not expressly allow holographic wills**
      i. More likely under dispensing power than statutory compliance, but need to be able to prove T’s intent

**III Unattested Wills: Statutory Execution Requirements**

A. **Oral/Noncupative Wills**
   1. Normally not permitted, even under dispensing power
   2. May be allowed if an emergency (e.g., military personnel, sailors at sea, on deathbed). Even when allowed, must
      a. Only devise personal property of small value
      b. Be uttered b/f 3 persons
      c. Reduced to writing w/in specified time

B. **Holographic Wills**
   1. Allowed in only about ½ states
   2. Like all wills, must be free from 3d pty interference and T must have present intent for instrument to be a will. It can’t simply be an instruction to somebody else or state a future intent.
      i. Should state “I devise” or “I give”
ii. Evid. of testamentary intent in letter (Kimmel’s Estate)
   a. Told children to keep letter safe
   b. Made disposition of assets conditional on death
   c. Context of letter made clear that T worried he wouldn’t survive through the winter

3. **Statutory Requirements** (in addition to present testamentary intent)
   a. **Handwritten by T**
      i. First generation statutes – The entire will must be handwritten by T
         a. Some wills struck down even if just a couple words were printed/stamped or if will written on stationary w/ pre-printed info
      ii. Second generation statutes/Old UPC – Only material provisions of the will must be in T’s handwriting
         a. 5 states still require this
      iii. Third generation statues/New UPC – Only material portions of will must be in T’s handwriting
         a. Only most important words must be in T’s handwriting
   b. **Dated** – Ct.s pretty strict about requiring full date
   c. **Signed by T** – All statutes require signature in T’s handwriting (considered a material portion)
      i. Location – states differ as to whether signature required at bottom
         a. If no signature required at bottom, usually okay if will just says “last will and testament of [John Doe]” w/ no signature at end
      ii. Form – Nicknames and other odd forms of signature okay
   d. **NOTE** – **Witnesses not required**

4. **Holographic wills that do not meet statutory requirements**
   a. **Partial typed, partial handwritten**
      i. Present intent – Will valid holograph if T did not intent to include the typed portions
      ii. Mere surplusage – Will valid holograph if can exclude typed portion and will still makes sense
   b. **Strange surfaces** – Will can be written on strange surface, but the surface can be evidence against testamentary intent
      i. Ex. – Will written on eggshell is evid. against testamentary intent b/c fragile nature of surface and egg may easily be thrown away

**IV Revocation & Revival of Wills (hardest material to understand – will be on test)**
A. **Revocation in Entirety**
   1. By subsequent writing
      a. **Express** – 2 elements
         i. Present intent to revoke – can’t be instruction to revoke in future (McGill – ltr to atty telling to destroy no good)
         ii. Meet statutory formalities
      b. **Inconsistency** – subsequent document that disposes of the ENTIRE estate
         i. If subsequent document only disposes of some, but not all, assets – read as a CODICIL, which is not inconsistent w/ will, only adds to will
         ii. If will destroyed → codicil destroyed; but if codicil destroy → will not destroyed
2. **By physical act**
   a. 2 elements (same as express revocation)
      i. Intent to revoke
      ii. Statutory revokatory act
         a. UPC – revokatory act good, even if burns, tears, lines, etc. fail to touch any of the words of the will
   b. Destruction must be done by T or by somebody else at T’s direction and in T’s presence
      i. If proxy fools T by destroying a copy and retaining original → likely no revocation b/c statutory act not completed, but ct. probably use constructive trust to prevent unjust enrichment
      ii. If will missing after death or found with marks on it → rebuttable presumption that D revoked
         i. Policy – a bit disturbing that interest pty can find and destroy T’s will w/out telling anybody

3. NOTE – Ct. could still use dispensing power in these situations if T intends to revoke but doesn’t meet the statutory requirements

4. **By operation of law** – certain subsequent events which automatically revoke will b/c presumed that is what T intended
   a. **Common law** – see also Restrictions on Power of Disposition portion of outline
      i. Marriage – If execute will, then get married, previous will revoked in favor of subsequent spouse’s statutorily specified share, unless evid. that T intentionally omitted the spouse (b/c presumption is that T would have included spouse if would have thought about it)
         a. Modern trend – can also rebut presumption of unintentionally omission if show T contemplating marriage at time will executed
         b. UPC – wife gets intestate share, less amt. will gives issue
         c. Note – this only applies if will executed BEFORE marriage
      ii. Pretermitted heirs – If execute will, then have a child, previous will revoked in favor of subsequent child’s statutorily specified share.
         a. See child support section of outline for details – some states allow claims by all issues omitted from will, even if born before execution
         iii. Slayer statutes – could be statutorily revoked, or ct. will impose constructive trust
         iv. Death of beneficiary – See Lapse portion of outline
   b. **Modern trend** – ct. unlikely to revoke entire will, modern trend towards partial revocation (see below) of portion preempted by law

**B. Partial Revocation**

1. **By subsequent writing**
   a. **Express** – same as entire revocation, but subsequent instrument only revokes portion of previous will
   b. **Inconsistency**
      i. **Subsequent codicils** – 2 possible outcomes
a. **Substitutional codicils** – revokes previous gifts, and substitutes w/ gifts devised in codicil
   i. Circumstances that support finding of substitutional
      a. Codicil says it revokes previous gift
      b. Gift in previous instrument and this codicil are both of same nature (both specific or both general)
         i. Specific gift = refers to actual possession or property (e.g., my Cartier watch)
         ii. General gift = refers to something that can’t be specifically identified (e.g., amounts of money)
   b. **Cumulative codicils** – gifts in previous will stand, gifts in codicil simply in addition to gifts devised by previous will
      i. Circumstances that support finding of cumulative
         a. Gift in previous instrument and this codicil are different in nature (one specific, the other general)
   c. Rule – *Can’t admit extrinsic evid. of T’s intent as to whether gift substitutional or cumulative, but can look at evid. of T’s circumstances (Gould v. Chamberlain)*
      ii. **Inconsistency w/in same instrument:**
         a. Specific gift given to 2 diff. ppl. in same instrument
            i. “Later in time” prevails
            ii. Gift could have been given jointly
            iii. Ct. could choose to not give it to either beneficiary and drop it to residue
         b. Specific and gen’l gift given to same person – beneficiary probably takes both gifts b/c diff. in nature
         c. More than one specific gift given to same person – ct. will probably give beneficiary both gifts
         d. More than one general gift of same amt. given to same person – ct. will probably view as substitution and view it as mistaken repetition
         e. More than one gen’l gift of different amt. given to same person – ct. probably view as cumulative and give both gifts to beneficiary

2. **By physical act** – 3 approaches
   a. If jurisdiction does not allow → will probated as originally written and ignores revocatory marks
      i. Reasons why many states don’t allow:
         a. Partial revocation results in a gift being made to someone else, which can only be done by a subsequent written instrument
         b. Increases opportunity for fraud
   b. If jurisdiction allows (**UPC and majority**) → will probated w/out giving effect to those provisions that have been revoked. Revoked gifts are dropped to the residue
      i. But must be intent to revoke and statutory revocatory act (outlined above)
c. If jurisdiction allows, but partial revocation also increases a beneficiaries gift (Malloy Rule, WA) → probated as originally written
   i. Basically saying that partial revocation must result in the revoked gift going to the residue, if not, the partial revocation won’t be given effect
d. NOTE – if partial revocation is made to valid holographic will, it is always allowed b/c holographic wills can continuously be edited

3. By operation of law – Change in family circumstances, see above
   a. Divorce – If get a divorce after executing will, provisions of will that gift to previous spouse revoked
      i. UPC – relative of divorce spouse also purged
      ii. Majority approach – relative of divorce spouse can still take
   b. Other changes in family circumstances outlined above – used to be entire will revoked, but now trend is towards just revoking portion in favor of the family member whose status has changed after execution of the will

C. Revival – 3 approaches
   1. Common law (minority approach) – Whatever will is around at death governs
      a. Ex. T executes Will 1. T then executes Will 2, which revokes Will 1. T then burns Will 2, and dies. Will 1 governs b/c that is only will at death
   2. No revival approach – Once a will has been validly revoked, it can not be revived, unless it is re-executed using all of the statutory formalities
      a. Exception: Dependant Relative Revocation - If T revokes his will upon a mistaken belief of law or fact, the court will ignore the revocation (revive the revoked will) if T would not have revoked the will if he had know the truth
         i. Rat – Ct. is attempting to rescue misguided T
         ii. Ex: T revokes old will b/c thinks new will is valid. For some reason, new will is not valid. If ct. learns T would not have revoked old will if knew new will not valid, ct. will cancel the revocation and probate the old will rather than probating as intestate (as it would otherwise have to do).
      iii. How to determine whether DRR should apply
         a. Is their previous will that was validly revoked? If not, then no need to apply DRR b/c previous will stands
         b. Previous will must have been revoked by a subsequent writing that is either:
            i. A will which turns out to be invalid for some reason
            ii. Writing recites the mistaken belief of fact that motivated the revocation of the previous
            iii. NOTE – If subsequent will is neither invalid, nor recites mistaken reason for revoking the previous will, then the subsequent will stands
      c. Are provisions under old will OR intestacy closer to what T provided for in new will (which isn’t valid).
         i. If old will is closer to new will → apply DRR
ii. If intestacy is closer to new will → don’t apply DRR and hold old will revoked

iii. Note – just looking at which is CLOSER, it probably won’t be the same and somebody is likely to get left out, but that’s okay

iv. Mistake of law
a. Could be mistake re. validity of NEW will: (LaCroix- Will 1 gave estate to nephew and friend. Subsequent codicil revokes Will 1, but makes same devise. Codicil not valid, however, because signed by beneficiaries husband (interested pty). Ct. applies DRR b/c Will 1 closer to Will 2, then if estate passed intestacy)
b. Could be mistake re. validity of OLD will: (Alburn – Will 1 executed. Later Will 2 executed and expressly revoked Will 1. Later Will 2 revoked, T thinking it would revive Will 1, but it didn’t b/c that jurisdiction doesn’t allow revival that way. Ct. couldn’t apply DRR to Will 1 b/c validly revoked and not a mistake. Ct. applied DRR to revive Will 2 b/c closer to Will 1 then if estate passed intestacy)
c. Ct. will admit any evidence as to T’s intent in making the revocation

v. Mistake of fact (or indocument) – mistaken fact must be recited in revoking instrument for DRR to apply
a. Ct’s take a rigid approach to this

vi. NOTE – Ct. can also use dispensing power or substantial compliance doctrine as a substitute for DRR

3. Revival approach (UPC and majority) – Court allow validly revoked will to be revived if T intended to revive the previous will by revoking a subsequent will
a. Focus on T’s intent
b. Ct.’s consider all evidence
c. NOTE – REVIVAL ONLY ALLOWED IF ENTIRE WILL REVOKED. If only partial revocation, revival is inapplicable and need to apply DRR

V Will Components – How to get outside documents included in a will
A. Integration - When Documents are Considered to be Part of the Will
1. Elements
a. Documents present at time of execution of will
b. Documents intended to be part of will
c. Some ct.s require the documents to be attached to the will
2. For courts that require subscription (signature at END of will) – entire will invalid, unless signature at end of last page attached to will

B. Incorporation by Reference – Terms of a Document are Considered Part of a Will
1. Elements
a. The will has been properly executed;
b. T intends the terms of the document to be integrated into the will;
c. The document whose terms you want incorporated is:
   i. In writing (but doesn’t have to meet execution requirements)
ii. In existence at time will is executed
   a. This includes in existence at time will republished by codicil (see above)
iii. Is described in the will w/ sufficient clarity
iv. Conforms sufficiently to the description in the will
   a. Ct. may relax the description requirement to prevent an inequity (Clark – doc. described in will as “memorandum” disposing of personal property held to sufficiently describe a notebook T kept which disposed of her painting b/c “honors the intentions of the testator” and executor was trying to keep the painting as part of the residue rather than distribute

C. Republication by Codicil – Codicil Treated as if Re-Executes the Will as of Date of Codicil
   1. Elements
      a. Must be validly executed will
      b. Must be validly executed codicil
         i. Same elements of validly executed codicil are same a validly executed will
      c. Only re-executes those terms of the will that are not inconsistent with the codicil

D. Tangible Personal Property Document
   1. Rule: Will can refer to a separate writing to dispose of tangible personal property, other than money if items described w/ sufficient clarity AND:
      a. New UPC - Separate writing is signed (but doesn’t have to be dated)
      b. Old UPC – Separate writing is dated (but doesn’t have to be signed)
   2. Benefit
      a. Separate writing doesn’t have to be in existence when will executed (as required for incorporation by reference and integration)
      b. Separate writing can be altered and amended (as with incorporation by reference)

E. Acts of Independent Significance
   1. Rule: Allows beneficiaries or property to be identified by acts/events, rather than by specific description in the will if:
      a. The act referred to must have a significance independent of simply completing the will
      b. Ex. Will devises “my car at my death to my nephew” and “$1K to each of my employees at my death.”
         i. Effect – the car that is disposed of and the beneficiaries of the $1K can be changed after execution b/c purchase of a car and/or hiring somebody has a purpose other than to simply to complete the will.
   2. Benefit: Allows beneficiaries/dispositions to be changed without having to alter the will.

F. Pour-Over Wills
   1. Rule: T sets up an inter vivos trust. T then makes clause in will devising some or all of his assets to the trust upon his death (pour-over by will of probate assets to an inter vivos trust)
a. Ex. I leave the residue of my estate in trust to the trustee of the Support Trust for [T’s] Children.

2. Why this doctrine is needed:
   a. Allows inter vivos trust to be created or amended after the will (not allowed by incorporation by reference b/c that requires existence at time of execution)
   b. Allows trust to be funded by the devise poured-over by the will (not allowed under acts of independent significance b/c a trust is not in existence until it is funded)

VI Construction of Wills

A. Mistakes
   1. Mistake in Execution – see substantial compliance & dispensing power, above
   2. Mistake in Revocation – See DRR and revival above
   3. Ambiguity/Mistakes in Drafting
      a. Traditional approach
         i. **No reformation rule** - If term is not ambiguous, then ct. can only apply plain meaning of the term, even if drafter and/or T admits that term was a mistake (Mahoney – T leaving all to “heir” went to aunt, even though T stated that thought he had 25 cousins who wanted to split estate)
            a. No extrinsic evid. admitted
         ii. **Patent** (obvious) – term used in the will is unclear on its face and does not convey one clear meaning
            i. Ex. Will devises same specific gift to 2 diff. people
            ii. Treatments – depends on jurisdiction
               a. Traditional – no extrinsic evid. permitted and will fails
               b. Modern – permit extrinsic evid. of facts and circumstances to show T’s intent, but no evid. of T’s direct statements or evid. contrary to language of the will
               c. Hybrid – no extrinsic evid. permitted, but construe in manner that saves will (e.g., strike provision and drop to residue, partial revocation by inconsistency and last in time takes, work out some sort of sharing)
         b. **Latent** (hidden) – term appears clear on its face, but can’t be carried out without further clarification
            i. Ex. Will devises gift to identified person, but no one perfectly meets the description of that person
            ii. Treatment – Extrinsic evid., including T’s statements to the drafter, are permitted to determine T’s intent
         c. **Equivocation** (a type of latent ambiguity) – term appears clear on its face, but two or more persons or things fit the description
            i. Ex. Will devises gift to identified person, but more than one people fit the description
ii. Treatment – Ct’s are most lenient with this, including allowing evid. of T’s statements of intent to 3d ptys

iii. Note – always want to argue latent ambiguity over any other kind of mistake b/c the rules of evid. are most lenient w/ that (don’t want to admit that word was a “mistake”)

iv. Problems w/ traditional approach
   a. No more harm in allowing extrinsic evid. in patent ambiguities as there is in latent ambiguities
      i. Both share the danger of replacing T’s written intentions w/ oral statements of intention
   b. How ambiguity is classified may vary depending on the reader
      i. Ex. Will devises estate to Miami University in FL. Unknowing reader may think this is latent ambiguity, but knowing reader know this is patent b/c Miami University is in Ohio and University of Miami is in FL.

b. Movement away from “no reformation” rule
   i. Ct.s trying to redress inequity that if mistake intentionally caused by 3d pty there is a remedy (e.g., fraud, duress, etc.) but if mistake innocently caused by 3d pty (mistaken word drafter puts in will) there is not remedy

ii. Approaches
   a. Ignore mis-description if can still identify gift and beneficiary without using the mis-description (Arnheiter, NJ)
      i. Can ignore words in will, but can’t change or add words
   b. Wisconsin Rule – Ignore details of the matter identified (e.g., house number, middle initial) if they are incorrect, especially if person/property identified is in large urban area where mis-description would be easy
      i. Prof. says this never really caught on)
   c. Doctrine of probable intent – Ct’s sit in T’s position and will change or add terms if determine that is what T would have done
      i. Prof. says this is going to far b/c ignoring terms is one thing, but ct’s shouldn’t change or add terms to will

c. Trend toward Open Reformation of Mistakes in Will
   i. Erickson Rule: Extrinsic evid. of drafter’s mistake admissible to allow probate of gift if est. by clear and convincing evid. that drafter’s error defeats T’s intent (Erikson, Conn – Will executed just b/f marriage not invalided by subsequent marriage b/c didn’t provide for contingency of marriage where evid. that drafter made mistake by not including contingency of marriage)
      a. Limits
         i. Only admit evid. of drafter’s error
         ii. Must show that error is contrary to T’s intent by clear and convincing evid.
         iii. Only applies to “contingency of marriage cases”
      b. Justification for reformation
i. Justification for reformation of wills w/ intentional 3d pty interference (e.g., fraud, durres) apply equally to reformation w/ innocent 3d pty interference (mistake of drafter)

ii. Want to give effect to T’s intent

iii. Problem of admitting extrinsic evid. not present w/ drafter’s mistake

iv. No fear of increasing litigation b/c rule limited only to mistakes made by drafter

ii. **Restatements** – Unambiguous will can be reformed to confirm to T’s intent if can est. by clear and convincing evid."

a. Mistake of fact or law affected terms of the will

b. What T’s intent was

c. Note – this is Erikson rule, but broadened outside of drafter’s error and contingency of marriage

B. Lapse - Death of Beneficiary Before Death of T

1. Rule: Devissee must survive T or else gift “lapses.” This same rule applies if devissee dead at execution, or if gift made to ineligible taker (“void” gifts)

2. **Effect of lapse/void (default rules)**

a. If specific or general devissee predeceases → gift drops to residue

b. If residuary devissee predeceases

   i. Common law – residue passes by intestacy

   a. Called “no residue of a residue” (DC)

   ii. Majority – residue split b/t other residuary devisees (MO, NY)

   c. If class member predeceases → class gift split b/t remaining class members

   i. Determining whether gift is class gift or individual gift:

   a. Language that indicates individual gift: Number, names, shares

   b. Language that indicates a class gift: Group labels

   c. If description uses labels and names → rebuttable presumption of individual gift

3. **Exceptions**

a. T specifies otherwise in the will – called a “gift over”

   i. Ex. Blackacre to Y if she survives me, otherwise to X

   ii. How to prove gift over:

   a. Majority: “if she survives me” = intent not to have antilapse statute apply

   b. UPC & minority: must be “if she survives me” plus more (who the gift should go to) to = intent to not have the antilapse statute apply

b. **State has an antilapse statute** – goal is distribute class gift as T would have done if he had thought devissee would predecease

   i. This comes into play only if T did not put a gift over provision in will.

   If T does have gift over, then antilapse statute doesn’t apply b/c gift over = intent not to have devissee’s heirs stand in her place

4. **Antilapse statutes** – differ b/t states. Always 2 relationships need to look at to determine if the state’s antilapse statute applies:

a. Relationship b/t T and predeceased devisee
i. UPC – antilapse statute applies only to gifts to grandparents or lineal descendants of grandparents (i.e., not friends)

ii. TX – antilapse statute applies only to gifts to T’s and T’s parents lineal descendents

b. Relationship b/t predeceased devisee and person who stands to inherit if no lapse

i. UPC – antilapse statute applies only to issue of the predeceased devisee

c. If both relationships met, apply the statute – usually calls for a per stirpes, per capita by representation, or per capita at each generation approach

d. Other things to watch out for in some states:

i. Some states require that predeceased survive T for a specified amount of time for antilapse statute to apply (MO, UPC – 120 hrs.)

ii. Some states require that predeceases be alive at execution (antilapse statute won’t apply to void gifts)

iii. Some states don’t apply antilapse statutes to class gifts

C. Changes in Property After Execution of Will

1. Ademption by extinction - Specific gift devised in will, but at death T no longer owns that specific property

a. Treatment - Two approach

i. Identity theory (traditional approach) – If mere change in form of the specific gift, then devisee gets the new form, but if change in substance, then the gift fails

a. Stock mergers are regarded as change in form

b. Ex. Devise blackacre to A. T sells blackacre during life. When die, devise of blackacre fails and A does not get proceeds of the sale

ii. Intent theory (minority) – Even if change in substance, give the changed gift to devisee if evid. that is what T intended

a. Ex. Devise blackacre to A. T sells blackacre during life. When die, devise of blackacre converts to proceeds from sale if evid. that is what T intended

b. Applies only to specific gifts, not general or demonstrative (hybrid) gifts

i. To avoid ademption, can classify gift in will as something other than specific or provide what want to have happen if gift no longer exists

2. Ademption by satisfaction – Gen’l gift devised in will, but during life T gives devisee portion of that gen’l gift

a. Treatment

i. Satisfaction (traditional) – deduct amt. given inter vivos from what devisee would take at T’s death if T intended that the inter vivos gift to satisfy the testamentary gift

a. Common Law - Presumption of intent to satisfy where gift made from parent to child

b. Modern trend – No presumption of intent to satisfy

ii. UPC & Modern trend – only apply satisfaction if T put IN WRITING intent to have inter vivos gift satisfy testamentary gift
b. **Applies only to gen’l gifts of the same nature.** If gift were specific, ademption by extinction would apply b/c T would no longer have the gift at death.
   i. Doesn’t apply to gen’l gifts of different nature
   ii. **Some courts also apply to demonstrative/residuary gifts** (money from sale of specific gift)

3. **Exoneration** – Specific gift is subject to encumbrances
   a. Common law – presumption that gift is given free and clear. All encumbrances must be paid out of residue
   b. Modern trend – all gifts are given subject to liens

4. **Issues specific to stocks**
   a. Stock splits/mergers
      i. If the gift is specific (e.g., “my stock”) → considered a mere change in form, so get increased number of shares
      ii. If gift is general (e.g., “stock”) → only get number of shares specified
   b. Stock dividends
      i. Cash - If dividend paid b/f T’s death → goes to residue. If dividend paid after T’s death → goes to devisee of the stock.
         a. Ownership theory
      ii. Stock – Treated same as stock split. But if stock dividend paid b/f T’s death → goes to residue

5. **Abatement** – Estate has insufficient assets to pay all debts and/or devises
   a. Default rules:
      i. Residue devises are reduced first
      ii. Gen’l devises are reduced second
      iii. Specific and demonstrative devises are reduced last, pro rata
         a. Pro rata calculated by determining total dollar amt. of gifts given to the the class members (e.g., all specific gifts). Then figure out what percentage each class member took from the total class amount. The class members’ pro rata share is that percentage of the new amount available to distribution to the class (after debts have been deducted).
            a. **Do examples on attached pages**
         b. **UPC** – use default rules, unless should abate in some other order to give effect to T’s intent
            i. Important b/c T’s often leave the residue to their most loved ones
         c. Note – most states have abatement statues which control over the default rules

VII **Restrictions On The Power of Disposition: Family Protection**

A. Protection of Spouse
   1. **Right of surviving spouse to support** – surviving spouse entitled to number of things for support after death; probate ct. sets it aside
      a. Decedent’s social security benefits
      b. Decedent’s employee private pension plans (can’t waive by pre-nup)
      c. Homestead – gives surviving spouse life estate in homestead, even against creditor’s claims
i. State’s differ as to how much value can be set aside for homestead
d. Personal property – statutory proscribed amount of decedent’s personal
   property set aside for spouse’s use against creditor’s claims
e. Set amt. of personal allowance for family support and maintenance set
   aside from creditor’s claims

2. Right of surviving spouse to share of decedent’s estate
   a. 4 systems used by states
      i. No marital rights (GA) – Spouse not entitled to share of decedent’s
         estate, unless provided by will or passes intestate
      ii. Elective share (UPC) – Spouse entitled to either take under the will,
          or opt for statutorily set share of decedent’s estate; most states set
          elective share at 1/3
      iii. Community property – Spouse entitled to half of each item of
           property acquired during marriage (but not ½ of aggregate of property)
      iv. Couple can choose whether want separate property (elective share) or
           community property (AK)
   b. Elective share
      i. This is the most generous type b/c it includes decedent’s property
         before marriage (separate property)
      ii. Rationale
          a. Partnership view of marriage – primary justification
          b. Provide support for spouse
      iii. Policy problems:
          a. Why should spouse be favored over surviving children or parents
          b. What is the appropriate share
          c. Should the length of marriage matter
          d. Should decedent’s inter vivos gifts be used as satisfaction
      iv. Contributions to elective share – 2 schemes
         a. Majority & UPC – pro rata from all beneficiaries
            i. Pro rata calculated by determining total amount of gifts given
               to the non-spouse beneficiaries (i.e., entire estate less any
               amount that was given to the spouse). Then figure out what
               percentage each beneficiary took from that total amount given.
               The beneficiary’s pro rata share is that percentage applied to
               the total amount of the estate after the elective share is
               deducted.
               a. Maybe provide examples.
            b. Minority – uses ordinary rules of abatement (deduct from residue
               first)
            c. Note – this is the big diff. b/t spouse opting for elective share or
               taking by operation of law as omitted spouse (if will executed b/f
               marriage)
               i. Elective share – comes pro rata from beneficiaries
               ii. Omitted spouse – ordinary rules of abatement
               iii. Point – BIG impact on how rest of beneficiaries are impacted
   v. Property subject to elective share
a. All of the probate estate; including assets gained b/f marriage
b. “Augmented estate” (UPC & some states) – inter vivos gifts
decedent made to 3d ptys included in calculating elective share if:
   i. Illusory transfer (MA, NY, UPC, majority) - decedent
      retained the right to possession, control, or income from the
      property (Sullivan v. Burkin, MA – surviving wife can
      recapture assets distributed by decedent through inter vivos
      trust to 3d pty where husband retained power of appointment
      over the trust)
         a. But (Bongaards – wife couldn’t recapture decedent’s
            support trust b/c created by 3d pty)
   ii. Intent to defraud (MO)– looks at whether decedent retained
       control of the gift, time b/t transfer and death, how much
       property surviving spouse is left with
         a. This is modern trend → some ct.s look at evid.
            subjectively, but trend towards looking objectivley
   iii. Present donative intent – same factors as intent to defraud, but
       look at what decedent intended, rather than what control he
       maintained
   iv. Purpose of augmented estate
      a. Prevent decedent from disinheriting surviving spouse by
         reducing probate estate through inter vivos gifts
      b. Implement partnership theory of marriage
vi. Deductions from elective share (addressing unfairness above):
   a. Common law – None, not even inter vivos gifts
   b. Old UPC – Inter vivos gifts count as satisfaction
   c. New UPC – Same as Old UPC AND
      i. Surviving spouse’s assets deduced from estate b/f elective
         share calculated
      ii. Sliding scale of elective share based on length of marriage
vii. Waiver – can waive all or part of right to spousal support, gifts under
      previously executed will, and elective share. Usually done through
      pre-nuptial agreement
   a. Ct’s scrutinize pre-nump b/c strong public policy against waiving
      elected share.
      i. Garbade – pre-nups given same presumption of legality as
         other contracts
         a. Modern trend
      ii. Grieff – if spouse show inequality by enforcing waiver,
         proponent of waiver has burden to show no fraud
   b. Things ct. looks at to ensure K made at arms length and with
      full/fair disclosure (no fraud)
      i. Spouse provided w/ list of other spouse’s assets and net worth
      ii. Spouse advised to get independent counsel
   c. Post-nuptial waiver – arguments could be made whether to
      consider more or less harshly than pre-nup
i. If one spouse earned most of $ during marriage → lots of duress on other spouse to sign
ii. Both ptys more mature and experience after marriage → understand consequences of waiver better
c. **Community property**
   i. This is good only if marriage lasted a long time and got married young
      a. But doesn’t seem fair if decedent contributed to most of the marital assets and surviving spouse contributed little
      b. Theory comes from England common law
   ii. Property included in community property – owning and acquisitions from each spouse during the marriage
      a. Doesn’t include separate property – property acquired before
   iii. Tracing – Property has been commingled by spouses or acquired through community and separate funds
      a. Each state has own rule on how to characterize property acquired through commingled funds
      b. Where characterization of property is unclear – strong presumption in favor of community property
      c. Pts can enter K on how to characterize the property
   iv. Transferring community property to a 3d pty – once spouse can sell community property to a 3d pty for consideration w/out the consent of the other spouse, but can’t give it away
d. **Migrating spouses – How to determine spousal rights when couple moves b/t separate and community property states.**
   i. Always ask 2 questions
      a. **Characterization of property** (whether community or separate)
         i. Real property – determined by law of state where property is located
         ii. Personal property – determined by law of state where couple lives when property acquired
      b. **Marital rights** (whether community or elective share)
         i. Real property – governed by law of state where property located
         ii. Personal property - governed by law of state where domiciled at death
   ii. Application
      a. **Couple acquires property in community property state, then moves and dies in separate property state**
         i. Real property
            a. Characterized – community b/c that’s law where prop. located
            b. Spousal rights – community (1/2) b/c that’s law were prop. located
         ii. Personal property
            a. Characterized – community b/c that’s law where prop. acquired
b. Spousal rights – separate (elective share) b/c that’s law where lived w/ decedent died

iii. Outcome – Spouse gets ½ of all prop. acquired in other state b/c property doesn’t change its characterization after it moves AND elective share of total estate

iv. Problem – Spouse receives a windfall, which is unfair to other heirs
   a. Solution - Some states don’t allow community property brought into the state to be subject to an elective share

b. Couple acquires property in separate property state, then moves and dies in community property state

i. Real property
   a. Characterized – separate b/c that’s law where prop. located
   b. Spousal rights – separate (elective share) b/c that’s law where prop. located

ii. Personal property
   a. Characterized – separate b/c that’s law where prop. acquired
   b. Spousal rights – community property (none) b/c that’s law where domiciled at decedent’s death

iii. Outcome – Spouse gets elective share of real prop. in other state, but no community share of personal prop. acquired in other state b/c prop. retains its separate property status

iv. Problem – Unfair ‘cause could leave spouse w/out support if haven’t acquired any property in the community prop. state b/f death.
   a. Solution – Qausi- Community prop: give spouse ½ value of personal prop. acquired in separate prop. state (basically treating separate prop. as community prop. at death)

B. Protection of Children

1. Children have no right against intentional disinheriance by their parent (in all states but LA)

2. States have developed statutes to prevent unintentional omission
   a. Analysis in applying the statutes of the various state:
      i. Who is covered?
         a. Majority (FL)– Only T’s children, but minority covers all of T’s omitted issue
         b. Majority (FL) – Only covered if born after execution of will
            i. Republication – If born after execution, but will subsequently republished by codicil, that will kill the claim (Azcunce – Omitted child treated as born before execution where will republished by codicil after birth, even though child still omitted)
               a. Note – But codicil doesn’t republish the will if it is inconsistent w/ codicil (e.g., Will provides for then born child; another child is born; will republished w/out mention
of subsequent child → not treated as re-published b/c inconsistent w/ T’s intent)

ii. Inequity – what if child born before execution, but T doesn’t know about the child. This rule leaves that child out. Even worse if T adopts after execution b/c then adopted child treated better than real child.

iii. CA – recognizes the inequity and allows unknown child to take

   c. Minority (MA) – All children omitted from the will, no matter when born

ii. **How much does omitted child get?**

   a. Majority – intestate share
   
   b. Minority (WA) – smaller share if keeping w/ T’s intent
   
   c. UPC – same as what was left to other children

iii. **Who contributes to that child’s share?**

   a. Majority – ordinary rules of abatement apply
   
   b. UPC – abate pro rata from shares T gave to other children

iv. **Contrary intent in the will?** Omitted child does not take if evid. that T intentionally left him out of the will.

   a. **MO type** stat. – Can only show contrary intent if present on the face of the will. Can’t admit extrinsic evid.
   
   i. Ex. If T told friend that intentionally left child out, but was silent as to omission in the will → Child would take b/c T’s statements couldn’t get in and plain language of will doesn’t show contrary intent

   b. **MA type** stat. – extrinsic evid. permitted to show omission was “intentional and not occasioned by mistake”

   b. **Point** – If don’t want to include children in will, need to state in will that intentionally excluding to avoid claim under pretermitted child statutes

3. **Family Maintenance approach** (New Zealand, Australia, UK, Canada)

   a. Uses discretionary approach to provide for needs of omitted spouses and children

   i. **Test** – Ct. places looks to all circumstances surrounding the estate and omitted spouses/children’s needs, then places itself in T’s position and does what a “wise or just, rather than fond or foolish” T would do

   (Lambeff, Australia – Ct. gave share to omitted child born before execution to provide for support for “advancement of life”)

   b. **This approach** looks at need over merit

C. Some states extend slayer statutes (used in intestacy) to will beneficiaries/spousal property rights
TRUSTS

I  Generally (see pg. 348 of E&E)
   A. Def – Settlor creates a trust by giving legal title of property to trustee, with fiduciary responsibility to use for benefit of beneficiaries, who hold equitable title.
   B. Inter Vivos Trust
      1. Trust that settlor creates to take effect while the settler is still alive
   C. Testamentary Trust
      1. Trust settlor creates to take effect upon his death

II Requirements For Creation of Trusts
   A. Valid Purpose
      1. Settlor can create trust for any purpose
         a. Settlor can also place conditions on what beneficiary has to do in order to take under the trust (e.g., maintain a “B” average)
      2. Limits on purpose/conditions (Restatements, UTC) - Trust invalid if:
         a. Purpose is unlawful or calls for commission of criminal/tortious acts
            i. This includes fraud (e.g., defraud creditors)
         b. Contrary to public policy
            i. Includes limits on religious freedom, encourages divorce, limits freedom to marry (Nye – Condition that spouse not remarry to take as a beneficiary is invalid b/c contrary to public policy)
            ii. UPC – “Frivolous or Capricious” = against public policy
               a. Trust requiring erection of 500 statutes of cats on prop → probably capricious
               b. Strong arg. that trust of tons of $ for care of a pet is capricious
         c. Some states require can’t violate RAP – trust can’t last longer than life of person in existence when trust created + 21 yrs.
            i. Modern trend away from RAP → trusts can last indefinitely
            ii. Some states putting set length on trust or focusing on relationship b/t settlor and beneficiary (trust ends when no longer a connection b/t settlor and beneficiary)
         d. Many states have statutes, or use common law (from either trust or wills law) to determine what conditions are invalid (Nye – used testamentary law)
      3. If a condition in the trust is invalid, only that condition is invalidated, not the entire trust
   B. Settlor – Must have legal and mental capacity
      1. Same inquiry as testamentary capacity
         a. Legal – Can’t be a minor and must be competent
         b. Mental - Can’t have undue 3d pty influence (e.g., duress, undue influence, etc)
   C. Transfer of Property
      1. Inter vivos trusts – can be created in 2 ways
         a. Declaration of trust – settlor declares that he holds certain property in trust (settlor is trustee)
            i. Settlor retains legal title to the property
b. Deed of trust – settlor transfer property to another person (trustee) to use for a 3d pty’s benefit
   i. Settlor must either:
      a. Deed the property over to the trust OR
      b. Deliver the physical property to the trustee

2. Testamentary trusts – disposes of property in trust at death (usually created in a will)
   a. Some states require to meet statutory formalities of a will.

D. Trustee
1. Appointment
   a. Settlor appoints - can be the settlor, the beneficiary, or a 3d pty
   b. Ct. appoints if settlor did not appoint anybody, or if appointed trustees have failed (a trust will not fail for lack of a a trustee)
2. Acceptance – person must accept the position voluntarily
3. Resignation – once accepted, a trustee can not resign w/out consent of all the beneficiaries or the court
4. Duties – because trustee holds legal title to trust property, owes fiduciary duties to beneficiary who hold equitable title
   a. Fiduciaries duties – duty of loyalty, duty of prudence, subsidiary duties
   b. Trustee must always have duties, or else the trust will be passive and legal title will pass to beneficiaries
5. Liability
   a. Trustee is personally liable for breach of fiduciary duties (including not distributing trust property in accordance w/ settlor’s instructions)
      i. But beneficiaries claims against trustee has no higher priority than claims of other creditors of trustee → may not adequately protect harmed beneficiaries
   b. Beneficiaries can also recover improperly distributed trust assets if they are traceable back to the trust
      i. Beneficiaries (but not creditors) are the only parties who can reach the trust property

E. Intent
1. No special words needed to create a trust
2. Only need to give property (or title) to a person w/ intent for that person to hold the property for the benefit of somebody else (Jimez – father liable for breaching fiduciary duties as trustee for gifts his mother (grandma) gave him to use for education of father’s children)

F. Trust Instrument – Writing v. Oral
1. Oral intention to create trust - can only be used for trusts of personal property
   a. Rat - statute of frauds requires that transfers of real property be done in writing
   b. Stocks – majority approach is to treat as personal property
   c. Risks come w/ oral trusts
      i. Might not be clear what settlor’s intent was
      ii. Trustee could lie to keep the property
iii. Beneficiary could lie
d. Ct’s resp. to counteract risks of oral trusts
   i. **Allow extrinsic evid. to establish the trust**
   ii. Standard of proof is clear and convincing evid. in majority of states
   iii. Some ct.’s don’t allow oral trusts (PA)
   iv. No other country in the world allows oral trusts

2. **Written** intention to create trust– **must be used for trusts of real property**
   and can be used for trust of personal property
   a. Rat - statute of fraud requires that transfers of real property be done in writing
   b. **Exception** – Ct. may impose **constructive trust** on the real property if
      trust created orally rather in invalidate all together (Hiebel – Thinking she
      was going to die, mom gave title to house to son w/ oral promise to give
      back to mom if she lived. When son refused to give back, ct. imposed
      constructive trust)
      i. Requirements for ct. to impose constructive trust instead of
         invalidating:
            a. Confidential relationship b/t settlor and trustee (e.g., familial, 
               atty/client);
            b. Settlor in weakened condition
            c. Trustee promised that he would comply w/ oral agreement
            d. Trustee is unjustly enriched by not reconveying
            e. Purpose of the conveyance WAS NOT fraudulent (Pappas – Ct.
               refused to impose a constructive trust where settlor conveyed to
               son w/ oral promise to give back in order to avoid wife taking the
               property in divorce)

G. **Trust Property**
   1. Trust can be created out of anything defined as property (personal, real, or
      intangible) OR any interest in a property that can be transferred (e.g., contract
      rights, expectancies, or debts). But must meet 2 requirements:
   2. In **existence** – the property put in trust must exist at the time the trust is
      created (Brainarad – Can’t place expected profits from stock in a trust
      because those profits don’t exist at time trust created)
      a. Exception – Pour over wills ➔ trust is created before death, but trust
         property isn’t transferred to the trust until after death
   3. **Identifiable** – the property must be clearly identified in the terms of the trust
      a. No extrinsic evid. is admitted to determine the identify of the trust
         property
         i. Ex. “I live my bank account in trust for Alice.” If there is more than
            one bank account, the trust will fail b/c property not identifiable from
            terms of will
         ii. Note – Rule for wills is more lenient b/c ct. will admit extrinsic evid.
            under latent ambiguity rules to determine identity of bank account.

H. **Beneficiary(ies)** – 2 Requirements
   1. **Must designate at least one identifiable beneficiary** or class of beneficiaries
      when trust created
a. Identifiable = beneficiary or class of beneficiaries described in such a way that it can be determined that the claimant meets the description (Clark - “friends” is not an identifiable class of beneficiaries)
   i. Sometimes identifiable classes are defined by statute (e.g., relative, brothers and sisters)
   ii. Reason why court won’t guess – want to be sure that ct. understands the class the same as settlor understood it.

b. Exceptions
   i. Charitable trusts – requires indefinite beneficiaries
   ii. Unborn beneficiaries (but must still be identifiable)

2. **Beneficiary must be human** – beneficiary must be a human or else there would be nobody capable of enforcing the trust if trustee breaches duties
   a. See how this requirement can be avoided, below
   b. Exception – A number of states have created statutory exceptions for trusts to care for animals (non-human beneficiaries)
      i. Some only cover domestic pets, other cover all animals
      ii. Identifiable requirement is still in effect
      iii. States differ as to whether RAP applies, or last as long as life of pet
         a. If RAP applies, this could be a problem for pets that live a long time
         iv. States differ as to who can enforce the trusts (b/c the animal can’t do it)
         v. Some states limit the amount of money that can be put in the trust

3. **Remedies** when trust fails for lack of identifiably human beneficiary
   a. Trust property drops to residue (Clark)

4. **How to avoid trust failing when want to devise property to non-identifiable or non-human beneficiary**
   a. **Precatory language** – Make an outright gift to a 3d pty w/ “hope and expectation” that that 3d pty uses the property for a certain purpose
      i. No legal duty on the 3d pty to use the property for stated purpose, but imposes moral duty
   b. **Power of appointment** – Give property in trust to a defined beneficiary and give that beneficiary a “discretionary power of appointment” to chose among a designated class to give the property to
      i. No fiduciary duty to dispose of the property is imposed on the beneficiary.
   c. **Honorary trust** - Leave property to a person to use for the benefit of a non-human, non-charity (most common example is to use to care for an animal)
      i. This is basically the same thing as an absolute gift w/ a power to use that gift for a designated purpose (Searight – Gift to friend to use to care for decedent’s dog was a valid honorary trust).
      ii. **Limits:**
         a. There must be a designated purpose for the convenience (e.g., use to care for my dog “Trixie” or “build a monument”)

33
i. This is because the justification for the convenience is that even though there is not a human beneficiary, there is still a definite purpose
b. The purpose can’t be capricious
c. The honorary trust is only valid as long as the purpose can be fulfilled (if pet dies, trust no longer valid)
i. If beneficiary doesn’t use the gift for the designated purpose or designated purpose no longer becomes possible → resulting trust is created for benefit of T’s residue or goes by intestacy if no will
ii. Lesson – don’t designate your residuary takers as honorary trustees or else they have motivation to kill your pet, or otherwise cause the honorary trust to fail so that they will take the gift outright.
d. CL – Trust can’t violate RAP – Trust invalid if it could last longer than the life of any relevant human + 21 yrs. alive at time trust created
i. Point – Have to tie termination of a trust to a person’s life + 21 years.

d. Other options for animals
i. Put the animal and money in trust w/ condition that beneficiary take care of the animal in order to receive trust benefits
ii. Make a contract w/ caregiver to take care of animal
iii. Kansas State University – If donate money to school, school will take pet upon death and give to a student to take care of along with a scholarship

III Types Of Private Express Trusts
A. Two General Types
1. Mandatory – Settlor sets provisions which require trustee to make pre-designated distributions regardless of the circumstances.
   a. Creditors – Can’t reach the amount due the beneficiary until the beneficiary is able to access the money
2. Discretionary – Settlor expressly provides beneficiary w/ discretion over distribution of trust income and/or principle.
   a. Settlor can provide broad discretion or can limit the discretion (e.g., must provide for support)
   b. Rule – No such thing as absolute discretion, even when expressly conferred by settlor.
      i. Trustee still must act in good faith to uphold trust duties, and settlor can’t relieve trustee of those duties (Marsman – broad discretion and exculpatory clause in trust instrument doesn’t relieve trustee of duty to in inquiry into beneficiaries status in support trust)
      ii. Determining good faith
          a. Could look at subjective standard, reasonableness standard, or needs of beneficiaries
b. But probably best to look to terms/purposes of trust and settlers intent → better b/c tailors the test to trust at hand
c. Note – Should be understanding that trustee area likely conservative with the trust b/c increase their liability if aren’t responsible w/ preserving trust property
c. **Creditors** – Can’t reach the amount the trustee *could give* the beneficiary, only the amount the trustee *actually gives* the beneficiary
i. This is better b/c trustee could just hold the money until the beneficiary is no longer in default or claims have been settled, then distribute.

B. **Trusts Created for Special Purposes**
1. **Support and/or education** – Type of trust to provide for support of beneficiaries
   a. Standard of support can be express (only basic or extravagant needs) or discretionary (only make payments when deem necessary).
   b. Even where discretionary, trustee under **duty to inquire** whether beneficiary needs funds to maintain comfort and support
   i. How to satisfy duty to inquire
      a. Be familiar w/ standard of living beneficiary accustom to
      b. Contact beneficiary regularly to ask whether needs are being met
         i. Trend towards putting a set requirement on number of meets b/t beneficiary and trustee
         ii. Sending out a questionnaire to the beneficiary is not enough (Marman)
   ii. How to determine whether comfort and support being met
      a. Must determine by looking at beneficiary’s individual needs
      b. Look to beneficiaries standard of living before trust established

c. **Benefits of this type of trust**
   i. Keeps beneficiary from spending money on frivolous things (irresponsible beneficiary)
   ii. Saves money for beneficiaries future, unforeseen needs
d. **Creditors** – can’t reach the support amount due unless the claim by the creditor is for support it gave the beneficiary (e.g., unpaid hospital bills)
2. **Spendthrift** – Settlor creates condition in trust that beneficiary can’t voluntarily alienate her interests in the trust
   a. Express spendthrift – created by just calling it a spendthrift or including clause that beneficiary can’t alienate her interests
   i. **Creditors** – can’t reach the beneficiary’s interests
      a. Exceptions (special claimants)
         i. Party who has furnished necessary support the beneficiary (e.g., hostipals)
         ii. Federal tax lien
         iii. Child support claims – can only reach mandatory distributions, but not discretionary (Shelly)
            a. Public policy won’t allow tax payers to pay for child rearing while beneficiary gets off Scott free
iv. Alimony – treated same as child support
   b. Tort judgments – majority approach is can’t reach
b. Self-settled spendthrift – spendthrift trust w/ settlor as beneficiary
   i. Traditional view – Can’t do this because public policy against
      shielding your own assets from creditors
   ii. Exception - Offshore Asset Protection Trusts: Settlor/beneficiary
      puts money in trust in “offshore” bank w/ bank as trustee. Trustee
      refuses to distribute money when creditors come calling b/c duress.
      Because ct. can’t reach the offshore bank/trustee to compel it to
      distribute, creditors can’t reach the money
      a. Treatment – If settlor/beneficiary has any affirmative powers over
         the trust, ct. can hold in contempt for not forcing trustee to
         distribute (Affordable Media – Ct. held settlor/beneficiary in
         contempt b/c once found out creditors coming after offshore trust,
         it removed itself as co-trustee of the trust → caused the
         impossibility to access funds)
      i. Note – If settlor/beneficiary never had any affirmative powers
         over the trust, likely ct. would have no remedy b/c it would be
         impossible for settlor/beneficiary to force trustee to turn over
         trust funds
   iii. Modern trend – Some states now adopting self settling spendthrift
         trusts (they operate as “offshore asset protection plans)
         a. Focus on argument that settlor can place conditions on trust if
            wants
         b. Encourages people to go into risk y profession by protecting their
            assets from creditors

C. Trusts with Unstated Express Terms
   1. Secret – Face of instrument indicates property is to be conveyed through an
      outright gift to 3d pty, but settlor orally tells the 3d pty to use that gift for the
      benefit of a certain person
      a. Ex. I leave $$ to Frank. But settlor orally told Frank to give the $$ to
         Betsy.
      b. Result – admit extrinsic evid. and impose constructive trust for benefit of
         Betsy
   2. Semi-Secret – Face of the instrument indicates property is to be held in trust
      by a trustee, but does not identify beneficiaries
      a. Ex. I leave $$ in trust to Frank to use to carry out my wishes as we have
         discussed”
      b. Result
         i. Majority - trust fails and property drops to residue b/c no identifiable
            beneficiaries and extrinsic evid. not allowed
         ii. Minority – allow extrinsic evid. to determine identity of beneficiaries
            and uphold trust

IV Charitable Trusts
   A. Same Requirements for Creation as All Trusts BUT:
1. Except not subject to RAP (that is why a lot of people try to argue trust is charitable → keep it from being invalidated by RAP)

B. 3 Things Distinguish Charitable Trust from Private Trusts

1. Charitable Purpose
   a. Types of charitable purposes
      i. Relief of poverty
         a. Need to give money to only those in need, not everybody (Marsh)
      ii. Advancement of education
      iii. Advancement of religion
         a. “Advancement” test = reasonable person could find benefit from the purpose of the trust (Rosser – Money to publish book experts said was worthless still deemed charitable for religion/education b/c reasonable person could find that some could benefit from the book)
      iv. Promotion of health
      v. Gov’t or municipal purposes
   vi. Other purposes beneficial to community
      a. Marsh - Gen’l enrichment to public as a whole is not charitable b/c people could use the money for unbeneficial things (e.g., buy drugs)
         i. But would be charitable if only gave money to the needy (look to individual needs of donees)

2. Indefinite Beneficiaries – 2 possible ways to satisfy
   a. Class of possible takers is large.
      i. But can still give preference to small group (e.g., family members) so long as potential class is large enough to benefit society as whole
   b. Class of possible takes is small (maybe even 1), but purpose indirectly benefits society as a whole.
      i. E.g., charitable trust for education of attorneys → society is benefited by well educated attorneys and reformation of laws
   c. But CAN NOT actually name or identify the beneficiaries

3. Charitable Intent – Must intend to the trust property to be used to accomplish the charitable purpose
   a. Rule: If intent can no longer be accomplished b/c impossible, impractical, or illegal → trust fails
   b. Exception: Cy Pres – Ct. will direct the trust to be used for a charitable purpose that falls under settlors’ general charitable intent
      i. Elements
         a. Must be valid charitable trust or outright gift to a charity
         b. Particular purpose of the trust has become impossible, impractical, or illegal
            i. Common law - That trust is inefficient is not valid reason to apply cy pres (Buck – Trust for lots of money to be spent only on poor people of small very wealthy county not entitled to cy pres to be used more efficiently)
            ii. UTC – “Waste” is a valid reason to apply cy pres
c. Ct. is able to determine a general charitable intent for the trust
   i. Evid. of gen’l intent (Obermery – trust to dental school can
got to med. school after dental school merged)
   a. No gift over provision in will
   b. Gift is outright (rather than in trust)
   c. Settlor’s has given gifts to the general charity before
   d. Particular charitable purpose has merged w/ larger purpose
ii. Specific intent = trust to be applied only in a particular way
   a. If specific intent → ct. can’t apply cy pres b/c no
   justification for accomplishing settlor’s intent by applying
   will to another charity
   d. Ct. directs application of the trust to another particular purpose that
   falls w/in the general charitable intent
   e. Unless settlor expressed a contrary intent or gift over (settlor stated
   in trust instrument what should happen to trust if charitable
   purpose no longer possible)

C. Supervision
   1. Traditional Rule: State’s attorney general is only party that can enforce
charitable trusts (has standing to sue trustee).
      a. Justification for the limited standing
         i. Charitable trusts have not definite beneficiaries, so AG represents the
interests of the indefinite beneficiaries.
         ii. Limit standing to just AG to prevent vexatious litigation (lots of pty’s
trying to bring suit)
      b. Problems - AG has limited resources to investigate and enforce charitable
trusts
   2. Solutions
      a. Settlor could give part of gift, and threaten not to give the rest if donee
doesn’t comply with restrictions (avoid litigation all together)
      b. Settlor could expressly reserve the right to sue (this is done by stating that
restrictions on the gifts can’t be changed)
         i. UTC gives donor right to sue, but right dies with the donor
      c. If settlor dies, settlor’s estate would have standing to bring his claim
         (Russell – Settlor’s wife, as executor of estate, had standing to sue school
who was not using settlor’s gift as he had so restricted)
         i. This is a minority rule
      d. Beneficiaries w/ “special interests” have the right to sue
         i. “Special interest” = right to receive a benefit under the trust that is not
available to the public at large
         a. Ex. Resident of charitable nursing home had right to sue board of
trustees of the home. Unsettled whether students have right to sue
      e. Could create governmental agency outside of AG’s office to have standing

V Trusts By Operation Of Law (not really trusts at all)
   A. Constructive Trust – Ct. order that beneficiary hold the property in trust for
innocent/deserving pty
      a. Equitable remedy used to prevent unjust enrichment of the beneficiary
B. Resulting Trust – The outcome when a trust fails
   1. Failed inter vivos trust – trust property goes back to settlor
   2. Failed testamentary trust – trust property drops to the residue
   3. Trust in a failed will – trust property passes by intestacy

VI Modification And Termination of Trusts

A. Automatic Termination
   1. Trust invalid because product of unlawful 3d pty interference (e.g., duress, fraud, undue influence, etc)
   2. Merger – Trustee and sole beneficiary are the same person
      a. Rat – No longer anybody left to hold trustee accountable
      b. Note – There is NEVER a merger if multiple beneficiaries, even if one of them is a trustee
   3. Trust duration expires (e.g., trust continues until Frances turns 60)
   4. Trust purpose is accomplished (e.g., trust for purpose of education and all beneficiaries have been fully educated)

B. Voluntary Modification or Termination
   1. Power to modify or terminate expressly granted in trust instrument
      a. Settlor can reserve the power for himself
      b. Settlor grants the power to a 3d pty (the 3d pty could be anybody)
   2. Settlor and ALL beneficiaries consent (even if trust is irrevocable)
      a. The settlor must be alive and competent to consent
      b. All beneficiaries must be alive and legally competent to consent
         i. Exceptions in some jurisdictions where beneficiaries are unborn/minor/incompetent:
            a. Appoint a guardian to represent the incompetent/unascertained beneficiary
            b. Virtual representation of incompetent/unascertained beneficiary by another beneficiary who has identical interests
   3. Settlor dead and ALL beneficiaries agree in certain circumstances
      a. Modification – 2 types
         i. Deviation - Ct. will modify terms of trust instrument if:
            a. There has been changed circumstances that settlor didn’t anticipate AND
            b. Deviation is necessary to prevent settlor’s purpose from being defeated or impaired
               i. Focus on what settlor would have wanted had he known about the circumstances that changed after his death
               ii. Deviation not allowed simply to make trust more advantageous to the beneficiaries (Stuchell – Wouldn’t allow deviation to prevent beneficiary from being disqualified from welfare)
            c. Ct. more likely to allow deviation from administrative provisions of the trust (e.g., change in from of trust property) rather than dispositive/distributive provisions (e.g., timing of the distributions)
               i. Barnes – Trust of artwork was very restrictive about how artwork could be viewed. Ct. allowed deviation from almost
all administrative terms on how artwork could be viewed b/c
trustees were running out of money

ii. **Reformation** – Ct. will modify terms of trust to conform to what
settlor actually intended
   a. Focus on what settlor actually intended at time trust executed
      i. Changed circumstances is not an issue here
   iii. UTC – Settlor including express terms to prevent modification is not
given effect if beneficiaries show deviation or reformation is needed
      a. Policy question – will ct.’s allowance of modification dissuade
settlers from making trusts???

b. **Termination**
   i. UTC – Applies the same modification rules above to termination
   ii. **Claflin Doctrine** – Can’t terminate trust if contrary to material
   purpose
      a. Material = All trusts that are spendthrift, discretionary, support,
      and trust not to be distributed until beneficiary reaches a certain
      age
      b. Even if some purposes have been accomplished, so long as one
      outstanding purpose remains, trust can’t be terminated (**Brown** –
      Trust for education and lifelong support of nephew couldn’t be
      terminated because nephew still alive)
   iii. **Exception** – Many states have statutes allowing termination, even if
   not all purposes accomplished, where principal of trust so low that
administration is no longer economical

4. **Charitable trust** – see **Cy Pres** under charitable trusts heading
C. **Trustee Removal**
   1. **Trust instrument can expressly grant power of removal** to settlor,
      beneficiary, or 3d pty
      a. Power given to 3d pty is call “trust protector”
      b. If power to replacement given to settlor – run risk of trust being deemed
      “illusory”
   2. **Court can also remove trustee.** Circumstances that warrant trustee removal
by court :
      a. Traditional rule - Trustee only removed if dishonest or SERIOUS breach
      of trust
      b. UTC – serious breach of trust OR lack of cooperation among co-trustee;
      persistent failure of trustee to administer trust effectively; deviation test
      (above) met for changed circumstances
   3. **Circumstances that decrease likelihood of ct. removal**
      a. Settlor, as opposed to ct., appointed the trustee
      b. Settlor aware of grounds that beneficiaries claim warrant removal when
settlor appointed
      c. Breach of trust was not serious or merely disagreement b/t beneficiaries
and trustee
FIDUCIARY ADMINISTRATION OF TRUSTS AND ESTATES

I Fiduciary Powers

A. Executors
   1. Inherent power to:
      a. Collect decedent’s property
      b. Pay debts
      c. Distribute decedent’s property
   2. All other powers conferred by the will or statute

B. Trustees
   1. No inherent powers
   2. Only power is what is granted by trust instrument or statute
      a. Many states moving towards granting trustees inherent statutory powers
      b. UTC – Grants trustees “the broadest possible powers”

II Fiduciary Duties – Judicial and Statutory Limits on Fiduciary Powers

A. Duties owed Beneficiaries
   1. Duty of Loyalty
      a. This is the fiduciary’s most fundamental, overarching duty
      b. Must give undivided loyalty to the beneficiaries, including refraining from:
         i. Self dealing – Fiduciary conducts business dealings with the estate/trust in his personal capacity
            a. Fiduciary’s spouse is subject to the same limitation (Hartman – Executor/Trustee charged w/ selling the estate property can’t sell it to his wife)
               i. Other states have extended to all relatives and fiduciary’s attorney
               ii. But UTC – Fiduciary’s relatives and attorney are presumptively subject to self dealing rule, but can overcome the presumption of self dealing by showing transaction was fair and reasonable
            b. No further inquiry – If self dealing is show, that the transaction was in good faith or in the best interest of the estate/trust is not a defense (Gleeson – Trustee holding over as tenant on trust property until could be sold was self dealing breach, even though in best interest of trust)
            c. Only defense to self dealing is that the settlor/testator authorized the act, or that all beneficiaries consented
         ii. Conflict of interests – Fiduciary conducts business dealings w/ a 3d pty who he has a personal interest with (Rothko – Executors selling estate property to company that they were on board = conflict)
            a. Diff. from self dealing b/c here fiduciary is not on both sides of the transaction, but has in interest in the party on the other side of the transaction
            b. Ct. will conduct inquiry and invalidate transaction only if terms were not fair and reasonable
2. **Duty to Inform and Account**
   a. Must maintain records of trust assets in such an accurate way so that trustee can show his faithfulness to his fiduciary duties
      i. Burden on trustee to show expenditures made for trust purposes and not for any other purposes (Jimenez – Trustee have to account to show expenditures made for purposes of support trust rather than parent’s moral duty to pay for child’s education)
   b. Records must be complete and accurate and shown to beneficiary (Jiminez – Trustee breached duty by not showing record of trust assets to beneficiary until she turned 21 and only saying that trust assets had been invested)
      i. Complete = show name of investments of trust assets
      ii. Accurate = show true value of investments/trust assets

3. **Duty to Inquire**
   a. Make sure beneficiary is who he says he is
   b. Make sure conditions on distribution are not illegal or against public policy (Nye – Condition that prohibits re-marriage will not be valid)
   c. Discretionary/Support trusts – make sure beneficiary’s needs are being met; look to individual needs of the beneficiary (Marsman – In support trust, trustee has to check in regularly w/ beneficiary to make sure needs being met)
      i. Need to equally look at needs of income beneficiary’s and remainderman

4. **Duty of Impartiality**
   a. Rule: Trustee must manage trust w/out favor to interests of life tenants or remainderman over the other (Dennis – Trustee breached by retaining trust property (apt. building) that was declining in value so that life tenants would continue to get income, but remaindernen interests harmed)
   b. Settlor expresses intent for trustee to favor one class of beneficiaries over another
      i. Traditional view – Trustee can not follow those instructions and must remain impartial
      ii. Modern trend – Favor settlor’s intent and waive duty if impartiality

B. **Duty to Follow the Terms of the Will/Trust**
   1. Must act in **good faith** in administering the estate/trust and w/ beneficiaries interests in mind
   2. This is the duty owed to the testator/settlor
   3. Exception – If instrument calls for fiduciary to do something against public policy (e.g., wastefully destroy property), fiduciary doesn’t have to comply.

C. **Duty of Prudence in Administering Trust/Estate Property**
   1. Imposes reasonable standard of care on the fiduciary
   2. Duties included w/in reasonable standard of care and order that they attach:
      a. **Duty to collect**
         i. First duty to kick-in
         ii. Should collect and inspect property as promptly as circumstances permit
a. Should check to make sure property is what it says it is
   iii. Includes duty to sue to collect property if it has unlawfully been taken or given away

b. Duty to protect and preserve
   i. Second duty to kick-in
   ii. Need to make sure in safe place and insured

c. Duty to earmark
   i. Need to designate somehow as trust property rather than trustee’s own
   ii. Prevents trustee from later claiming that investments that proved favorable where his own, and ones that did not were from trust
   iii. Remedy for breach
      a. Traditional view – Trustee strictly liable for any loss resulting from an investment
      b. Modern trend – Trustee liable for any loss that results from failure to earmark, but not liable for loss resulting from gen’l economic conditions

d. Duty not to commingle
   i. Insure that trust property remains separate from fiduciary’s personal assets
      a. Rat – prevents trustee’s personal creditors from going after trust assets by claiming they are fiduciary’s personal assets
      ii. Trend towards relaxing the requirement for corporate fiduciaries who invest trust assets in common trust fund
         a. UTC – All trustees (not just corporate) can do this
   iii. Remedy for breaches
      a. Traditional – strict liability
      b. Modern – only liable to the extent that commingling is what caused the breach

e. Duty to make trust property productive
   i. Prudent investor standard – 3 different formulations
      a. Classic formulation – trustee must manage funds as a prudent man would of his own funds
         i. Conservative standard w/ emphasis on safe investments that preserve the estate/trust
         ii. Set bright line limits on certain types of investments there were not allowed
      b. Revised standard – trustee must manage funds as a person would manage the funds of another
      c. Modern standard – trustee must manage funds as a prudent investor would; take into account all circumstances; exercise reasonable skill, caution, and care
         i. Most relaxed b/c no brightline limits on types of investment trustee can pursue
         ii. View investments not in isolation, but in context of investment portfolio
ii. **Social investing** – trustee makes investments based on a social cause rather than profitability (e.g., refuses to invest in companies that pollute)
   a. If profitable, probably okay; but if unprofitable beneficiaries could argue breach of duty of loyalty
   b. Ct.s split whether trustee must follow settlor’s express directions to socially invest when certain investment will be unprofitable
   c. **Best solution** – petition court for instructions

iii. **Duty to diversify** – Trustee must diversify investments, unless purposes of trust best served by not diversifying
   a. Avoids needless risk

f. **Duty to/not to Delegate**
   i. Traditional rule: **Duty not to delegate** tasks which trustee can reasonably perform (includes power to select investments)
      a. Trustee must consult w/ outside sources if unfamiliar w/ investments, but must retain ultimate decision making authority (Gardiner – Unskilled trustee breached duty by delegating investment decisions to a broker)
   ii. Modern rule (UTC): **Trustee may delegate if** prudent trustee would do so
      a. But then **duty of selection** kicks in – exercising prudence in selecting the agent requires
         i. Duty of selection – using reasonable care in selecting the agent
         ii. Duty of instruction – must set terms of the delegation
         iii. Duty of monitoring – must regularly review the agent’s actions

III Remedies For Breach of Fiduciary Duties

A. Co-Trustee Liability
   1. Co-trustee liable for other co-trustee’s breach if knew about the breach and took no action to stop it.
      a. This is so, even if sought advice of counsel (Rothko)

B. Remedy Options
   1. Remove trustee and appoint a new one
   2. Deny trustee fees – only in the most egregious circumstances
   3. Order the trustee to personally make payments caused by damage of breach
      a. Causation test is not “but for”; the loss must have been foreseeable by the breach (Gardnier – Trustee who breached duty to not delegate not liable for damages caused by embezzlement of pty trustee delegated to)
   4. Discourage profits trustee made off of the breach
   5. Trust pursuit rule – If trustee has wrongly disposed of trust property:
      a. Trustee acquires other property in exchange for the trust property → ct. will impose constructive trust on trustee’s new property for benefit of beneficiaries
      b. Transfer must return the trust property if:
         i. Had notice that the transfer was a breach of trust
         ii. Didn’t have to give value of the trust property, even if didn’t know there was a breach involved
6. Surcharge (appreciated damages – if trust property can’t be returned, trustee liable for increase in value to trust property since date of unlawful transfer

7. If beneficiary no longer alive to be compensated, impose constructive trust on trust property in favor of beneficiary’s heir (Marsman – Beneficiary (Cappy) had died, so ct. imposed constructive trust in favor of his wife for amount of money Cappy should have received in support payments during his life)

C. Exculpatory Clauses – Settlor can include clause protecting trustee from personal liability for negligence (Marsman – Trustee not personally liable for damages from breach of duty to inquire b/c exculpatory clause)

1. UTC – If drafter of trust is also trustee, duty on drafter to prove exculpatory clause was explained to the settlor

2. Limit – Trustee must still act in good faith, can’t be exculpated from that duty
INTER VIVOS TRANSFERS OF PROPERTY

I Contract To Make A Will

A. Rule – Anybody can make a contract to make a will or to not revoke a will
   1. Must bring suit under law of K, not will contest
   2. Elements of K to make a will
      a. Offer by decedent to make a will leaving the proponent a portion of the estate
      b. Acceptance by proponent of decedent’s offer
      c. Consideration given to decedent by proponent (usually in the form of care, love and affection, etc.)

B. Common Fact Pattern
   1. T makes a will, but not validly executed. Potential beneficiary can’t take through intestacy b/c not related by blood to T. Sue under law of K, that unexecuted will was actually a K to make a devise.

C. Ways to Prove K:
   1. Validly executed will that states provisions of the K
   2. Validly executed will that references a K AND extrinsic evid. proving the terms of the K.
   3. Most common type:
      a. Writing signed by the decedent
         i. This is usually the will that does not meet the statutory execution requirements, but has still been signed by decedent
      b. The writing evidences intent to make leave a devise
      c. Extrinsic evid. permitted to prove all elements of the K (i.e., offer, acceptance, and consideration), if not clear from the writing

D. Remedy
   1. Proponent gets specific performance (the devise) or a constructive trust where specific performance is not possible
   2. Exception – Decedent’s duties to support spouse/child are still in effect. K not valid if serves to disinherit spouse/child of their statutory shares.

II Gifts

A. Elements of Inter Vivos Gifts
   1. Delivery of Personal Property (real property must be writing)
      a. Actual delivery is usually required
      b. Where actual delivery impractical b/c object is took bulky in inaccessible:
         i. Constructive delivery – Transfer something that gives donee physical access or control over the object
            a. Ex. Give a key that opens safe deposit box or heavy chest
         ii. Symbolic – Transfer something that is symbolic of the object
            a. Ex. Give written instrument that says “I give you my grand piano”
   2. Intent to Make the Gift
      a. Presumption of intent, where there has been delivery
   3. Acceptance of the Gift

B. Causa Mortis (in apprehension of death)
   1. Gift made in apprehension of death
a. Traditional rule – must meet all requirements of gift, including actual delivery
b. Modern approach – constructive/symbolic delivery allowed, even were object could have been actually delivered, where intent to make gift is clear (Scherer – Endorsing check and leaving note saying check should go to friend = gift even though check just left in decedent’s apartment (no actual delivery))
c. Jurisdictions differ whether suicide qualifies as apprehension of death
2. Gift is legally revoked if donor doesn’t actually die