I. Intestacy
   Spouse
   Children
      Adopted, StepChildren, Foster Children, Halfblooded
      Nonmarital, Posthumous, Adult Adoption
   Ancestors
   Escheat
      -Advancements

II. Wills
   A. Capacity: 18 years old, sound mind (see below)
   B. Formalities
      Formal Will: Writing, Signed, Witnessed
      Holographic Will: material portions in writing
      Noncupative
         1. Conditional Wills
         2. Incorporation by Reference
         3. Integration
         4. Tangible Personal Property Lists
         5. Acts of Independent Significance
   C. Attacks
      1. Standing (economic interest)
      2. Execution Formalities
         How Closely is necessary
         Strict Compliance, Substantial, Harmless Error (UPC)
      3. Testamentary Capacity
         Nature and Extent of Assets
         Objects of Bounty
         Understands will
      4. Insane Delusion
         -Either irrational and unreasonable or reasonable mistake
      5. Fraud
         Execution
         Inducement
            Knowingly made material false statements
            Intent to deceive
            Actually deceived
            Relied on when making will
      6. Undue Influence
         Coercion
         Confidential Relationship
         Presumptions
      7. Murder
         Felony
         -No Contest Clause
         -Attorney Written into Will
   D. Revoke
      1. Act:
      2. Writing: Intent, formalities (will, codicil), legal capacity to revoke
         -Presumptions: complete v. partial
      3. Law
   E. Revive
      1. Re-Execute
      2. Re-Publish
      3. Revival by Revocation of Revoking Instrument
      4. Dependent Relative Revocation: revoked, based on mistake, likely desires
   F. Contracts Relating to Wills: writing
G: Rights of Surviving Spouse
   Support
   Elective Share
      Illusory Transfer, Present Donative Intent, Intent to Defraud
      Augmented Estate (UPC)
      Waiver
   Community Property
      Quasi Community Property
   Omitted Spouse (v. Elective Share)

I. Rights of Omitted Children

III Inter Vivos Transfers
   A. Intervivos Gifts: Donative Intent, Delivery, Acceptance
      Conditional Gifts
      Gifts Causa Mortis
      Gift Taxes
   B. Challenges
      Mental Deficiency
      Undue Influence
      Fraud
   C. Will Substitutes
      POD Contracts
      Joint Tenancy/Tenancy by Entirety
      Joint Accounts
         Joint Account
         Agency Account
         Totten Trust
      POD account
   Tax Consequences

IV Trusts:
   Res,
   Beneficiaries,
   Intent,
   Writing?
      Charitable or Honorary
      Mandatory or Discretionary
      Revocable or Irrevocable
      Secret, Semi Secret
      Pourover Will
      Remedy
         Constructive Trust
         Reverse Transaction
      Honorary Trusts
      Oral Trusts (land?)
   Tax Consequences

V. Trust Mechanics:
   Powers of Appointment
      Special v. General
      Testamentary v. Presently Exercisable
   Tax Consequences
   Creating
      Intent
   Release
Contracts to Appoint
Exercising
Capture/Marshalling
Rights of Creditors
   Alimony, Government, other

VI. Creditors
Creditors of the Settlor
   -Asset Protection Trusts
   -Fraud in the conveyance
Beneficiary’s creditors
   -Spendthrift trusts
   -Support Trusts

VII. Trust Modification and Termination
By Settlor
By Beneficiaries
Small Trusts
Cy Pres

VIII. Planning for Illness and Death
Advance Medical Directive
Assisted Suicide
Anatomical Gifts

IX: Drafting and Construction of Wills and Trusts
Plain Meaning Rule
Ambiguities
   Extrinsic Evidence
Scrivener’s Errors
   Professional Liability
Identity of Beneficiaries
   Anti-Lapse
   Survival Requirements
   Class Gifts
Changes in Property
   Ademption by Extinction
   Ademption by Satisfaction
Stocks

X. Duties of Trustees and What Not
Duty of Loyalty
Duty to Care for Property
Duty not to Delegate
Duty of Impartiality
Duty to inform and account to beneficiaries

Intestacy (545):
-Apply only to probate property (subject to administration in the probate estate)
   -Will: bequests ($) and devises (real property) (definitions are mostly historical)
-If someone dies partially intestate (their will only accounts for some of their property) the rest of the
  property passes through intestacy
-Choice of law rules are important:
   -Personal property is generally distributed under laws of state where person lived
   -Real property is distributed under laws of state in which property is located

UPC §2-101 (547): Intestate Estate
-Even if you are partially intestate, you can disinherit someone who would inherit under intestacy,
  under the UPC
  Common law you could only disinherit by bequeathing everything
-Spouse’s Share (551)

SPOUSES (551/22)
- Must have gone through a marriage ceremony that at least one partner thinks is valid
  - MINORITY: Common law marriage jurisdictions
  - MINORITY: Some states allow “domestic partnership” registration
- Married but separated still counts as married
  - Spousal abandonment may disqualify from inheriting.

**DECEDENTS** (551)
- Issue of Predeceased children take their place
  - If the issue is living, their issue inherits nothing
- Only blood relatives or adopteds can inherit (no spouses)

*Single Generation*

**UPC 2-103:** By Representation: Everyone at each generation takes the same

**Minority:** Per Stirpes: Divided by number of descendants and then each share is divided by the number of their descendants

*Multiple Generations:

**UPC 2-106:** Per Capita at Each Generation:
  - First Division = Live Taker
  - Drop by Pooling

**Per Capita with Representation:**
  - First Division = Live Taker
  - Drop by Bloodline

**Pure Per Stirpes:** (Only a few states still follow this)
  - First Division = Decedent’s Children
  - Drop by Bloodline

**The UPC is the minority here: Most states do one of the other two**

**Adopted Children** (562)
  - *UPC 2-114:* (568) adopted children are the decedents of their parents and parents’ ancestors
  - Severs the relationship with biological parents
  - Minority: adopted children are still able to inherit from their birth parents, but the parents can’t inherit from the adopted children.
  - Only inherit from parents, not grandparents or other relatives.

**StepParent Adoption**

- *UPC 2-114:* Doesn’t affect parent-child relationship b/w child and natural parent
  - But, natural parent cannot inherit from child
  - Child can still inherit through natural parent
  - *Estate of Seaman* (564): child can inherit from biological parent.
  - If someone is related to D through two lines, they only get the larger share, not both

**Half Blood** *UPC:* Equal to whole blooded relatives

**Minority:** They take less

**Adult Adoptions:** Can adopt spouse to make sure that if you die first they get inheritance.

**Stepchildren and Foster Children:** normally, do not inherit in intestacy
  - You can adopt them
  - see equitable adoption

**Equitable adoption/adoption by estoppel:** permits foster children to inherit as if they had been adopted.
  - AND doesn’t bar them from inheriting from their birth parents.
  - *RULE* Must show they would have been adopted but for legal barriers

**Nonmarital Children** (572)
- Most states recognize full inheritance through mother, but state law varies for fathers.
- Uniform Parentage Act: presumes paternity by a man who was married to the child’s mother, received the child into the home, held the child out as his own, and acknowledged his paternity.
- Authorizes genetic testing to establish paternity forming a rebuttable presumptions
  - *UPC* also says child is child of his or her parents regardless of their marital status

**Posthumous Children** (575):
- A baby born after the father dies is generally able to inherit (both from parents and other relatives) - considered “posthumous”
  - UPA says 300 days

**Children of Assisted Reproduction** (575)
-Ordinarily, the child of the mother who gives birth and her husband, if he provided the sperm or consented to the assisted reproduction NOT the egg or sperm donor.
  -Some suggest it should be based on the intention of the parties
-Posthumous Conception: This is a tricky issue. The UPA says they are the parent only if they consented, but the Restatement of Property says if the child is born within a reasonable time and the decedent would have approved.

**ANCESTORS (577)**

**Parents must openly treat children as children to inherit from them**

Parents and First-Line Collaterals:
Some states give it all to the parents, others split it between parents and siblings.

UPC 2-103: Gives it all to the parents

Decedents’ Other Ancestors and Collateral Kindred (579)
Collateral Kindred: second line are related through grandparents, third line are related through great grandparents, etc. etc.

Two basic approaches: parentelic and degree of relationship

Also degree of relationship with a parentelic tiebreaker

Parentelic: The estate gets divided among the collateral groups (all decedents of parents → all decedents of grandparents etc.). If no one is alive in that group, it goes to next group.

UPC 2-103(4) follows limited parentelic system --> escheats if no second line collaterals can be found. It also divides in half between maternal and paternal sides.

Degree of Relationship: counts the number of steps from you to common relative and number of steps from common relative to person. Everyone with the smallest number divides the estate evenly.

-**Some statutes instead do a tie-breaker of whoever is in the nearest parentelic line. (is the common relative a parent, grandparent, etc.)
-Some states split property 50-50 between paternal and maternal sides

Escheat (583)
Many states give money to even the most remote heirs (laughing heirs) - try to avoid this by searching for heirs, etc.

UPC 2-103, 2-105 approach: If there are no second line collaterals, the money escheats. **Advancements:**

The Effect of Lifetime Gifts Upon Intestate Shares (585)
-Value of the gift at the time it was given
-Hotchpot: Add in the gift, and then divide. Then subtract the gift.
-Focus on intent

-**UPC 2-109** says it is only an advancement if it is declared so in writing
  -If by donor must be contemporaneous, if by donee, whenevs
  -Common law presumed inter vivo gifts to children to be advancements

-If the recipient doesn’t survive the deceased, it is not taken out of what their heirs get.
-UPC applies to people even if they die partially intestate even though this is different from the old version and that of many states.
-UPC also extends to will substitutes.
-You never have to give anything back

**WILLS (589)**

-Two concerns
  1. Statutory formalities (every jurisdiction is different)
    -Writing
    -Signed
    -Witnessed
  2. How closely you must follow them
    -Strict Compliance
    -Substantial Compliance
    -Clear and convincing evidence the decedent intended it to be will
      -C&C evidence they substantially complied w/ formalities
      -Harmless Error (UPC 2-503) (606)
    -Clear and convincing evidence the decedent intended it to be will

-Will is important: 1. Don’t want to transfer all your property during your life, 2. Want a say in where your property goes, 3. Want to chose executor/personal representative/administrator, 4. Want to chose
who takes care of your children or disabled
-Wills are ambulatory: they can be revoked at any time
Propounding a will: presenting it for probate - must prove
1. Formalities of Execution/ Sufficient Compliance
2. Testamentary Capacity: Were they of sound mind
-some families just decide among themselves and don’t follow the will at all. Sometimes failing to produce
a will is a misdemeanor punishable by up to $500

Execution of Wills (592)
Three types of wills:
1. Formal Will: (UPC 2-502)
   - In writing, signed by the testator, and properly witnessed
     Witnesses must witness either (before signing McGurrin)
     1. Signing
     2. Acknowledging signing
     3. Publishing
2. Holographic Will: Handwritten, signed and express testamentary intent
   -(UPC and ½ states recognize this)
3. Nuncupative Will: Oral Will - usually soldiers when death is imminent
   -Typically two witnesses, under peril of death, etc.
   -UPC does not recognize
-Transfer on Death Designations: you don’t want to share it during life, but when you die it just becomes
  theirs (like land you “mutually own”)

FORMAL WILLS
UPC 2-502: Formal wills must be
1. in writing,
   -Videotapes do not qualify
   -Paintings do
2. signed, and
   -Loose (X’s, guided hands, testator’s name at t’s direction in their presence)
   -**Must understand what they were doing and intend to sign
   -UPC does not require it to be signed at the end
3. witnessed.
   Must be witnessed by two people who attest to one of three acts:
   1. Testator’s signing of the will,
   2. Testator’s acknowledging previous signing of the will, or
   3. Testator’s acknowledging the will (publishing).
   -Line of sight test
   -Conscious presence test (Modern trend/UPC)
     (general awareness that act is being performed)
Witnesses must:
1. Be 2 in number,
2. Attest to an act,
3. Sign the will
   -Testator doesn’t have to see witnesses sign
   **Must be part of one ceremony (continuous transaction)
   -*sign within a reasonable time UPC 2-502(a)(3)
   -UPC does not require them to be present at same time
-Most courts have a bright line rule that the witnesses sign prior to the testator’s death, but otherwise it
must just be “within a reasonable time”
-The testator doesn’t have to see the witnesses sign, just the witnesses have to see the testator sign.

Purposes of Formalities:
*Also, wills cannot be against public policy
-If you just miss the will formalities, try the Harmless Error Doctrine UPC 2-503.
  -Still minority

Estate of McGurrin (596) Court of Appeals of Idaho (Followed UPC), 1987
Rule: Witnesses must sign only after they observe something
- Witnesses perform two functions: observatory and signatory they are linked
- Doesn’t require the testator to be present when the witnesses sign, but requires witnesses to “witness” the testator either signing the will, acknowledging the document as a will, or acknowledging their signature on the will.
- This requirement is not overly technical so as to force ordinary people to die intestate

Notes (602):
- The testator may sign the will outside the presence of the witnesses if she later acknowledges to the witnesses that the signature is hers or that the document is her will and they sign as witnesses (official comment to UPC, cited in dissent to SC’s failure to accept the case)
- Some states still require that the will be signed at the “end”
- He also said 5 people, and then listed 4, so they gave the extra share to intestacy.
- Having partial intestacy is not evidence of lack of testamentary capacity

Self Proved Wills (607)
You should really always do this. It is just too easy not to.
- Affidavit attached by the attesting witnesses saying all the requirements were met
  - Signed at the same time by witnesses, testator, and a notary (still sign will)
  - Minority (maybe upc?) is that they don’t have to sign will, but sign anyway
- In most states the self proving affidavit raises a rebuttable presumption
- This is different from an attestation clause: a line in the will that says all the requirements were met. That line doesn’t make the will self-proving
  - In some states, however, this clause DOES raise a rebuttable presumption
  - The attestation clause is not required

Note on Supervising the Execution of Wills (610)
Most states allow wills that are valid in other states
- state in which they lived, state it which it was executed, etc.
However, to be extra sure, you should always follow all the steps.
1. Have your client review the draft of the will (before they come to your office)
2. Have client verify the original will’s contents
   - outside the presence of any possibly interested parties
3. Assemble the required parties
   - Witnesses should not be interested parties or their spouses
4. Question the Client
   - Have you read the document and do you understand that it is your will?
   - Do you understand that your will disposes of your property at you death?
   - Is it your wish that the witnesses act as witnesses to your will?
5. Obtain the Client’s Signature
6. Obtain the Witnesses’ Signature
7. Execute the Self Proving Affidavit
8. Complete the Ceremony
   - Retain a conformed copy (copy with handwritten names)
   - Give original to client or put in a safe place
     - Probably a bad idea for the lawyer to have it
     - Remind client not to mark the original in any way
- If you always follow the procedure then you don’t have to remember each will

WITNESSES
1. Must be competent (general competence)
   - Minors can be competent, but its better to use an adult
2. Should be uninterested (Common law only)
   - Interested party couldn’t inherit or couldn’t inherit more than intestacy → purging
     - Same for spouse Estate of Webster
   - The UPC 2-505 (619) has no purging statute
- It’s good practice to use members of the law office staff.

Estate of Webster (614) Appellate Court of Illinois, 1991
Rule: If you or your spouse witnesses a will, you cannot inherit more from it than you would if the person had died intestate

Other Rulings This is not a bill of attainder, This doesn’t offend the EPC. Spouses aren’t a protected class;
there is a rational basis, There are lots of other arguments, but the law’s ok
-This was a class gift so the other stepdaughter got all the money
**Only the named ones are interested, so like if you are a member of a church that gets money, you aren’t an interested party

**HOLOGRAPHIC WILLS** (621)
-Handwritten (testator’s handwriting), signed, with intent that it be a will
-Some states don’t recognize holographic wills
-They are also often subject to suits to determine the meaning of the words

**UPC 2-502** Holographic Wills (622)
-handwritten (material portions), signature, and witnesses
-Doesn’t need witnesses, doesn’t need to be dated
-Also UPC disavowed “whiting out” (take out printed words and see what it says)

**Estate of Erickson** (623)  Supreme Court of Utah, 1991

**Rule**  Person has to **intend** to sign- one piece of evidence for this is completeness (for something to be complete it doesn’t need to dispose of all property, they just need to be done)
*Will must be complete and must be signed

**Facts**  Erickson had a will from 1955, but then three handwritten notecards dated 1973.  Someone tried to admit the notecards as a holographic will.  His name appeared on the first line, but the cards weren’t signed at the end.

**Holding**  The will doesn’t have sufficient indicia of completeness to justify inferring that the name was intended to be a signature.

**Other Rulings**
- The “intent” is the critical issue of determining whether something is a signature.
- The signature is not required to be at the end.
- There are two types of evidence of intent:
  1.  Extrinsic evidence (witnesses, etc.)
  2.  Intrinsic evidence (inside the document itself)
-Here, the name was written as Erickson signs.
-Completeness doesn’t mean that he disposes of all his property, it just means that there aren’t like pages missing

**Notes:**
- Besides intent to sign, there must be **testamentary intent**.  That means they have to intend for it to be a will.  (not a letter, etc.)
- The notecards would have been a holographic codicil to the statutory will.  That is ok, but you can’t have a will that is half and half.
- This can be a problem with preprinted forms that aren’t witnessed perfectly and what not
- The modern trend is for holographic wills to only require the material portions to be handwritten.

**UPC 2-502** (630):  Holographic wills can be printed on printed will forms if the material portions of the document are handwritten.

**Note on Statutory and Computerized Wills** (630)
A few legislatures have enacted do-it-yourself wills.
-These are still invalid if not properly witnessed.

The Uniform Statutory Will Act has only been adopted by two states
-It allows people to incorporate the act by reference
-Still has to be witnessed and is still relatively inflexible
-Computer programs that make wills also still have to be properly witnessed

**Note on Conditional Wills** (631)
A lot of wills have clauses like “if I die during this operation…”
-It depends on the individual language whether that will be valid in the future.
-Courts **tend** to interpret it as merely stating motivation or inducement rather than a condition precedent
  (the question is always intent)
-This is consistent with a presumption against intestacy

**SCOPE OF THE WILL**

**Incorporation by Reference** (632)
-There are usually certain requirements that have to be met (looking for intent)

**UPC 2-510** (633):
1. Separate writing must be in existence when the will is executed
2. Language of will must manifest intent to incorporate separate writing
3. Must permit the separate writing to be identified with reasonable certainty.

**Estate of McGahee** (633) District Court of Appeal of Florida, 1989 - Same as UPC

Rule Referring to documents as “attached” and attaching them in closed envelope sufficient to show intent to incorporate by reference and to describe sufficiently to permit identification

Other Rulings
- To determine if entire document manifests intent to incorporate, we look at circumstances
  - It doesn’t really make sense that he would revoke other wills unless he intended to make a new one.
  - Intestacies are not favored in the construction of wills
  - So, the court decides this is met

-Dissent: “attached” is not sufficient to incorporate by reference
  - This court has previously held it needs to “be so clearly identified as to preclude all probability of mistake as to the instrument referred to.

**Devises of Tangible Personal Property** (640) - list of tangible things (ring, chair, etc.)

UPC 2-513 (640): It must be tangible things, not $, It must be signed by the testator and describe the items with reasonable certainty, and it must be referred to as one to be in existence at the time of death. It may be prepared before or after the will, altered after preparation and it may have no significance apart from the will.

-KM recommends that if you want to change it you should re-write it, not cross stuff out
- Material part should be handwritten

Integration (641)
- Sometimes there are sheets of paper that aren’t numbered or found in different places.
- A will includes only those pages that were integrated
- Integrated: physically present when the will was executed and were intended by the testator to be part of the will

**Acts of Independent Significance** (642) UPC 2-512: You can refer to acts and events that have significance apart from their effect on the will whether they occur before or after the execution of the will or the death of the testator.

-Courts even give effect to like “contents of my drawer” clauses
- It can be a writing as long as the writing has independent significant apart from will

Pour Over Wills ⇒ UTATA, etc. see trust stuff.

**WILL CONTESTS** (643)
- Usually this is in the probate proceeding itself, but you can also challenge it indirectly
  - Indirect claims like having a constructive trust imposed, seeking a favorable construction of a term, or seeking damages for tortious interference, etc.
  - When: often a short statute of limitations (4-6 months)
  - Who: You need to have standing (see Danforth case), which means you have to be an interested person (direct benefit if successful -- not through a spouse, etc.)
  - *Tulsa Professional Collection Services*: Known creditors must be given actual notice
  - Notice to potential contestants is unsettled
  - Degree of Proof is usually a preponderance of the evidence. Some courts require CandC

**Testamentary Capacity** (646)
- To challenge, show that at the time the will was executed, testator was:
  1. Not of the age required to execute a will (18)
  2. Was of unsound mind
  3. Suffered from an insane delusion
- The first two are generally covered by state statute

UPC 2-501 (646): Who may make a will
- An individual 18 or more years of age who is of sound mind may make a will
- If either of these aren’t met, the entire will is invalid

**Sound Mind** (all states require this):
1. Understand the nature and extent of testator’s property
- The specificity required is unclear. We don’t know until its litigated
  2. Know the natural objects of testator’s bounty (peeps)
  3. Understands the disposition made under the will
- The standard for sound mind is not very high
- Even if they are usually completely insane, if they have a lucid interval it counts
- Often a rebuttable presumption of sound mind, but in California a rebuttable presumption of not sound mind if they can’t manage their own stuff.
* Anything affected by insane delusion, etc. will be struck, but the rest of the will stands

**Insane Delusion**

1. Delusion (false belief)
2. The Delusion was insane (testator adhered to it against all reason)
3. Delusion affected disposition of the property (causation)
   Majority- but for
   Minority - might have affected
- Insane delusion invalidates only that portion of the will affected by the testator’s belief.

Two Standards:

1. Reasonable Person (Majority)
2. Any factual basis to support (Minority)

**Spruance v. Northway** (648) Court of Civil Appeals of Texas, 1980 (reasonable person)

Rule: This case was affirmed on reversible error standard, but the idea was that she was so close to him and flipped out so strangely that if she had been in her right mind she surely would have wanted to leave him something.

**Governing Rule** They were using a “reasonable person” standard

**Facts** Decedent’s daughter died leaving a three year old child, so she raised him as her own. They were very, very close his entire life. When she got sick at age 99, he took her to the doctor. She had a stroke causing her to be agitated and confused. She underwent a total personality change and accused her grandson of trying to get her put away to get her property. She then took him out of her will.

**Issue** Whether the jury instructions were ok.

**Opinion Below** A jury trial found that she did not have testamentary capacity.

**Holding** No reversible error

**In Re Estate of Raney** (652) Supreme Court of Kansas, 1990 (any evidence)

**Rule** The fact that his family set up a conservatorship was enough evidence to make his delusion that they only wanted his money not be an insane delusion

**Governing Rules**: In Kansas, if there are any facts on which the testator could base the belief, no matter how small, it will not be considered an insane delusion.

**Facts** The decedent was an alcoholic and a generally mean person. He got mad at his family because he thought they were trying to get his money, so he took them all out of his will

**Issue** Whether his not leaving anything to his family was based on an insane delusion

**Opinion Below** TC said he had testamentary capacity but suffered from insane delusion

**Holding** Not an insane delusion, because facts exist which would make him believe this

**Other Rulings**

- His children did set up a conservatorship to preserve the estate. Even though his drinking and divorce gave them good cause, it is a small amount of evidence - which here is enough
- It doesn’t matter what the court thinks of their motives, it just matters that there is enough evidence for him to think that, i.e. any evidence

**Notes:**

**It** depends on the state if it is an any evidence standard or reasonable person standard.

**Moral obligation v. Legal obligation**: The moral obligation is taxable

- Attorney Client Privilege: Generally, drafter’s discussions with attorneys are covered, but it can be waived by the personal representative, all the people in the will, the testator, etc. Some states also recognize a testamentary exception that they can testify for will contests.

**Note on Techniques to Avoid Will Contests** (660)

**Get Good Witnesses**

Probate the will before you die - but then its really hard to change it

**No Contest Clauses/InTerrorem Clause**

Says if they challenge will they will lose whatever they would have taken
UPC 2-517: Penalty Clause for Contest - won’t be enforced if there is probable cause.
   - Minority just won’t enforce them
   - A few states have antemortem probate where you can do the court proceeding before the person dies.
   - Tortious interference claims and what not aren’t challenging the will, so this doesn’t kick in

**Fraud** (662) (rare)
- The core element is deception, but it requires
  1. A misrepresentation be made to the testator
  2. Intent to deceive the testator
  3. Testator was in fact deceived
  4. As a result, testator does something testator otherwise wouldn’t have done

Two separate types:
  1. Fraud in the execution - you make them sign the wrong paper, changes something before she signs it, etc.
  2. Fraud in the inducement - misrepresentation of facts outside the instrument

*Fraud invalidates only that portion of the will that is affected by the fraud

**Stacks v. Saunders** (663) Court of Appeals of Tennessee, 1990
**Rule** For tort fraud, the person making the promise must have no intent to keep the promise when the promise was made.

**Governing Rules:**
Extrinsic fraud: keeping someone from court, promising to drop a suit and then not dropping it, etc.
Tort Fraud: 1. An intentional misrepresentation with regard to a material fact, 2. Knowledge of the representation’s falsity, 3. Plaintiff reasonably relied on the misrepresentation, 4. The misrepresentation relates to an existing fact or if a promissory fraud, the misrepresentation embodies a promise of future action without the present intention to carry out the promise.

**Facts** D’s son told his mom that he was having a homosexual affair with her husband (his stepdad). She decided to divorce her husband, but he promised to stop the affair so that she wouldn’t divorce him. She also was going to change her will but decided not to after he promised to stop the affair.

**Other Rulings**
- Two potential causes of action
  1. The father made fraudulent misrepresentations causing the mother to leave him in the will
  2. An action to set aside the will on the basis of extrinsic fraud

- The fraud here is clearly not extrinsic (he didn’t do anything to keep her from court, etc.)
- The other claim is tort fraud - here it would be promissory fraud
- Failure to keep his promise is insufficient to establish this, you have to show he had no intent.
- We really don’t know that he was *lying*
- We don’t have fraud. We have a bad person, but no proof it was a lie.

- There also needs to be a link between lying and intending to get the will changed, but we will talk more about that later

**Danforth v. Danforth** (667) Missouri Court of Appeals, 1983

**Rule** Fraudulently vowing to love and spend the rest of your life is sufficient to invalidate a will made hours after those vows on the basis of fraud.

**Facts** A 21 year old woman married a 75 year old doctor, signed a will giving her half the estate, and then was killed by her boyfriend.

- The fraud is that she made solemn vows with no intention to keep her promises. We have no proof that at the time she made it she didn’t intend to keep it.

**Decedent’s Killer** (673)
Sometimes they make a constructive trust so that person can’t inherit.

- Some states have statutes that if you killed them intentionally and feloniously, you can’t inherit, its just like you were dead. (UPC 2-803) (674)
  - If you aren’t convicted of it, they can do a civil murder trial where the burden of proof is only preponderance of the evidence.

- They are treated like they didn’t survive the deceased
  - Involuntary manslaughter or self defense are not included
  - Assisted suicide is technically included
  - An acquittal in a criminal trial is not the final word because the burden on proof is preponderance of the evidence.
**Jurisdictions are split as to killer’s issue  
UPC allows killer’s issue to take  
UPC applies to all property - non probate, etc. etc.  
Joint tenancy → tenancy in common**

**Undue Influence** (675) (very common)

Undue: Influence that overcomes the testator’s free will.  
-Distinguish from normal influence

**Burden Shifting**
1. Confidential Relationship  
2. Receives bulk of testator’s estate  
3. Testator of weakened intellect/ Active in the procurement or execution of will  
-If you find these things, there is a presumption of undue influence  
In some jurisdictions you just need a (see governing rules from cases)

1. **confidential relationship** and  
2. **suspicious circumstances.**
   -In Burkland, they found the presumption and could not overcome it  
   -In Reed they never found the presumption  
   -Once the presumption is raise you have to overcome it.  
     Sometimes Preponderance, sometimes C&C  
   -Again, the only part that is invalidated is that which is affected by the undue influence

**In Re: Estate of Burkland** (676) Court of Appeals of Washington, 1972

**Rule**: A will that is highly unnatural in favor of someone who was in a confidential relationship with the testator raises a strong presumption of undue influence.  

**Governing Rules**: Need clear cogent, and convincing evidence of fraud:
1. Beneficiary occupied a fiduciary or confidential relation with the testator  
2. Beneficiary actively participated in the preparation or procurement of the will  
3. Beneficiary received an unusually or unnaturally large part of the estate  
One might also consider…
4. Age or condition of health and mental vigor of the testator  
5. Nature or degree of relationship between testator and beneficiary  
6. Opportunity for exerting undue influence  
7. Naturalness or unnaturalness of the will

**Facts**: Burkland had been really close with his family all his life and they were all struggling financially. They had always been in his wills. Then all the sudden he stopped talking to them and only hung out with his girlfriend, Mrs. Hill. He changed his will right before he died and left her everything. He also put in a provision that if she died first, half his estate would go to her sister. She started moving furniture out of his apartment the day after he died.

**Issue**: if Mrs. Hill had undue influence on Mr. Burkland causing him to change his will  
**Opinion Below**: Trial court held that the will was invalid  
**Holding**: Affirmed

**Other Rulings**: Applying the facts to the pieces of undue influence, it is clear this case fits.

**Reed v. Shipp** (680) Supreme Court of Alabama, 1975

**Rule**: Given the fact that there was a relationship (illicit as it may be) some additional evidence, either direct or circumstantial, is necessary to meet the burden of proof

**Governing Rules**: To establish undue influence:
1. A confidential relationship existed  
2. A person was favored under the will or did something that caused people close to her to be favored under the will  
3. The favored beneficiary either for herself or for someone else, did and performed some activity in the procurement of the will  
   -All that is needed to submit a case to a jury is a scintilla of evidence

**Facts**: Reed never married but had a relationship with his neighbor who was married to someone else and treated her children as his own. When he died he left his property to her and her children.

**Other Rulings**:  
-No evidence that property was distributed as a result of restraint, or any other agency which poisoned his mind.
There might have been influence, but there wasn’t any “undue” influence.

**Writing Yourself Into a Will**

- Majority: presumption of undue influence is raised when lawyer write themselves in wills
  - Minority is irrebuttable presumption
  - It can be an ethical violation (conflict of interest)
  - Exception for marriage or if reviewed by independent attorney
  - Might only arise if bulk of estate, so only take a bit.
- The rules say you have to get disinterested advice and what not
- Lawyers have to have things signed saying they told the client they would get an additional fee if they are the administrators of the estate

**REVOCATION OF WILLS (688)**

- A will can be revoked at any time prior to the testator’s death
  1. Subsequent Will
  2. Physical Act
  3. Operation of Law
- For subsequent will or physical act, you need
  1. Intent to revoke
  2. Comply with required formalities of revocation
  3. Possess the legal capacity to revoke

**Revocation by Subsequent Will (689)**

**UPC 2-507 (689)** Subsequent will must qualify as a valid will (attested or holographic)

- Wills may be revoked wholly or partially (codicil)
  - Codicil: Prior will stands to the extent it is not revoked
  - Subsequent wills can revoke either expressly or by inconsistency

**Express:** The best method for revoking a will is expressly “I revoke all prior wills…”

**Pool v. Estate of Shelby (690)** Supreme Court of Oklahoma, 1991

**Rule** It is important to comply with the statutory requirements for express revocation

**Facts** Shelby made a will and then five months later wrote a statement saying that she had never made a will, but if she had, she wanted to now revoke it. - not signed by witnesses etc

**Holding** The revocation was insufficient, not valid

**Dissent:** The absence of an attestation clause wouldn’t make a will invalid, it would just create a higher burden, the evidence supports thinking she meant to do this. The extra requirements can be met now.

**Implied by Inconsistency (694)**

**UPC 2-507(a)(1) (695)** Revocation by Writing or Act

- Complete dispositions create a presumption of it being a new will
- Incomplete dispositions create a presumption that it is a supplement.
- Clear and convincing evidence to overcome presumptions

**Gilbert v. Gilbert (695)** Court of Appeals of Kentucky, 1983

**Rule** Look for intent as to whether they wanted to revoke previous will or merely add to it

**Facts** Gilbert had an 8 page typed will and then a holographic instrument dated a couple of years later. It was written on a stub and the back of a business card

**Holding** Holograph only distributes the money on it, it is a supplement, not an entire will

**Other Rulings**

- The two pieces of paper (the holographic instrument) were folded together (tacked together in the mind of the testator) so they are integrated.
- The second instrument is not a codicil because it doesn’t refer to the first instrument, we will refer to it as a second will (two wills can coexist)
- There is no revocation clause
- We think Gilbert meant to supplement the eight page typed will, not replace it

**Class Notes:**

Arguably, the second paper “20k to J and M the rest to everyone else” could dispose of all the property. Thus, you could argue it was meant to revoke all other wills

The other argument is that the second paper only disposed of the money discussed on the paper folded
with this second paper that said “50k in safe”
-You can have two wills at once under 2-507. So we are looking at this as two wills.
**Revocation by Physical Act** (698) - destructive in nature
-Many states do not permit a partial revocation by physical act
-UPC 2-507 requires intent and for the purpose of revoking
- Someone else can do the act if it is in their presence and by their direction
- Partial burning or tearing is sufficient - some part of will **UPC 205(a)(2)**
- Minority: Must touch words

**In Re Estate of Dickson** (699) District Court of Appeal of Florida, 1991
**Facts** Dickson had a will with a self proof affidavit and at the bottom he wrote a note declaring it void
**Holding** There was sufficient physical act and intent to revoke the will
- The primary goal is to discover their intent, however, **strict compliance** with the statute is required
- No threshold amount of destruction , only symbols of revocation and declared intent.

**Partial Revocation by Physical Act**
Jurisdictions are split
- **UPC** gives effect regardless of whether “new gift” goes to residuary, intestacy, etc.
- If they cross something out and add something new, then the issue is whether the state recognizes holographic wills, because then it could be a holographic codicil.

**Note on Lost Wills and Duplicate Original Wills** (702)
- If a will is lost, there is a presumption it was revoked if:
  1. It was in the testator’s possession prior to death
  2. It cannot be found after the testator’s death
- If the presumption is rebutted or there isn’t a presumption, you can prove the contents of the will by secondary evidence.
- Executing duplicate original wills is usually a bad idea, because if you destroy one, is the other still valid?
  - Revocation by act or writing is fine even if there are duplicates
  - Revocation by presumption is a jurisdiction split
- Generally, an act of revocation must be done on an original. This can be confusing when copies are so good (Maybe write “copy” on copies?)

**Destroying Codicils** (704)
- Cases generally hold that destroying a codicil does not revoke the underlying will
- Cases disagree about whether destroying a will revokes later codicils

**Revocation by Operation of Law** (704)
- Circumstances have changed since the will was executed: Marriage, divorce, child, etc. **UPC 2-804** (706)

**Marriage**
- Most state statutes now provide that a newly married testator’s will is valid, except that the new spouse receives the intestate share.
- Some states still hold that the will is revoked by the marriage - completely intestate
- They also have the option of omitted child or omitted spouse, but intestacy will probably be more

**Divorce**
- Automatically and irrebuttably revokes all provisions to ex spouse
  - **UPC**: Also revokes provisions to ex-spouse’s relatives
  - Minority: Only revokes to ex-spouse
- A divorce will generally effect a partial revocation (as if the spouse had died)
  (but that doesn’t count for a condition precedent)

**Estate of Liles** (708) District of Columbia Court of Appeals, 1981
**Rule** The doctrine of implied revocation applies where there has been a divorce and division of property by the court - it doesn’t matter who leaves whom.
**Facts** Wife left the marriage because he threatened to hurt her, but they ultimately had an amicable divorce. She argued that since she left him, he still loved her and wanted to give her money.
**Holding** Will is revoked in entirety and estate passes as if he died intestate

**Other Rulings**
- If someone wants to give property to their former spouse, they will just have to write a new will
- Presumption is conclusive (you can’t rebut it)
- Contingent beneficiaries, as well, can’t inherit when their inheritance is based on the death of the ex-wife (since she is just un-willed)
- The will should be revoked entirely and the estate pass as if he died intestate

**Notes:**
- Most states allow relatives of ex-spouse to inherit (UPC does not)
- Most states apply the law when the person died, not when they wrote the will, because you don’t have any vested interest until they die. (they can change the will whenever)

**REVIVAL OF REVOKED WILLS** (713)

1. Re-execution: get witnesses and sign (or re-sign) the document (not recommended)
2. Republication by codicil
   - If you publish a codicil to the will, it makes it good again - takes date of codicil
3. Revival by Revocation of the Revoking Instrument
4. Dependent Relative Revocation

**Revival By Revocation of the Revoking Instrument**
- Available in about 30 states
- Most states consider the revocation clause in later wills to be active immediately, so tearing that will up doesn’t mean the old one is effective again
- States with RRI say that if you can show the later will was revoked with intent to revive the old one, then it is revived.
- Recognized under most current UPC 2-509 - intent is the key
- Generally, re-marrying someone you divorced does not revive a will that was void as a matter of law because of the divorce.
  - The UPC says that it does if you marry the same person

**UPC 2-509** (715)
- When the will was wholly revoked, presumption against intent - you have to prove it
- When the will was only partially revoked (codicil), presumption of intent.
- If you revoke the later will by publishing an even later will that says you wish to revive the first one (explicitly) then that happens

**Dependent Relative Revocation** (715)
- This is from common law, not statutory law
- Used to revive a will if it was revoked conditionally or dependent on certain facts that the testator assumed to be true.
- Can revive a will no longer in existence.

Three Requirements:
1. The will was revoked
2. The revocation was induced by some mistake
3. The revival must be in accordance with the most likely desires of the testator

Usually there is also a failed alternative testamentary scheme or the mistake is set forth in the writing that revoked the will and the mistake is beyond the testator’s knowledge.

Three Main Situations:
1. Defective New Will
2. States that don’t recognize RRI
3. Cross-out and substitution

**Carter v. First United Methodist Church** (717) Supreme Court of Georgia, 1980

**Rule** It is the intent of the testator that matters in DRR

**Governing Rules** Presumption of absolute revocation

**DRR: presumed intention**

If the act of cancellation and the making of the new will were one scheme, there is a presumption that they would want the old will. If they were discrete schemes, there is a presumption that the revocation was absolute *McIntyre v. McIntyre*

There should be no distinction between revocation by physical act or subsequent instrument

**Facts** A handwritten instrument dated 1978 was found with a typed and signed 1963 will. Her 1963 will had marks through it and things were relabeled

**Issue** Whether Mrs. Tipton would intend for her 1963 will to be revoked if her new dispositions didn’t become effective

**Opinion Below** The will was probated

**Holding** Presumption against intestacy was not rebutted, so will should be probated

**Other Rulings**
Notes: The UPC says that each court is free to apply its own doctrine of dependent relative revocation (2-507) (Probably because its from case law, not statutes
-The goal is intent
-It is weird that even though they will use DRR to revive old wills, they won’t use the new provisions of a will that mistakenly doesn’t meet requirements. Hmmm….
Class Notes: She clearly wanted to change her will, its just that her attorney was unavailable, so by law, she died intestate
-The court asks if it is more likely she would want to die with her old will or die intestate and the court decides she would probably prefer to die with her old will

**CONTRACTS RELATING TO WILLS (722)**

Two most common situations:
- A claim that the decedent **contracted to make a will** in someone’s favor
- A claim that the decedent entered a **contract not to revoke a will** (two people executed them at the same time
  - reciprocal wills or mutual wills = both designate the same contingent beneficiaries
  - Other times they want to restrict the survivors ability to change the ultimate disposition
    - This can sometimes be done through a living trust
    - Other times through a joint will or a joint and mutual will

**UPC 2-514** (723) requires some writing to establish the contract
1. Provisions of the will stating material provisions of the contract
2. Express Reference
3. Writing signed by decedent
- Statute of frauds also requires writing for real property
- Minority: Clear and Convincing evidence of contract

**Contract Not to Revoke** Surviving spouse cannot be prevented from revoking or changing the will.
However, the people who lose money can sue for breach of contract
UPC says that creating joint or mutual wills does not even create a presumption of a contract not to revoke.
- Courts are reluctant to find one
- Beneficiaries must survive the decedent UNLESS there is a breach (will changed) in which case they can protest right away.

Remedy: Constructive Trust

**Pruss v. Pruss** (724) Supreme Court of Nebraska, 1994 (like UPC 2-514)

**Rule** When one contracts not to change her will and subsequently changes it, she is liable for breach of contract.

**Facts** A died and B made a new will, saying that the attorney (her son) didn’t accurately reflect her wishes in the other will.

**Holding** The contract was valid and B breached her contract. A constructive trust should be placed on her assets so they can be distributed under the November 1980 will.

**Other Rulings**
-A contract doesn’t make the will irrevocable, because wills are always revocable. Rather, it gives cause for a breach of contract suit
-Valid Contract? The mutual promises are sufficient consideration

Notes: Two recent cases have shown that you can’t sue to prevent someone who contracted from giving land before they die even if that is one of the provisions in the will contract

**Surviving Spouse’s Elective Share Statute:** prevents married property owners from disinheriting their surviving spouses. However, they don’t have a claim over anything transferred away during life.
- So there is an issue about this when the will is subject to a contract - jurisdictional split

**Majority:** Contract comes before spouse - they should have known when they married

**Minority:** Protect surviving spouse first

**Gregory v. Estate of Gregory** (731) Supreme Court of Arkansas, 1993

**Rule** Since contracting person is w/o power to change will, the new surviving spouse shouldn’t be able to either

**Facts** A man agreed with his wife not to change their wills. Then she died and he remarried. He got everyone’s permission to will his new wife some land, but that was all. Then he died and the new wife claimed under the surviving spouse’s elective share statute.

**Other Rulings** This case balances the contract and the elective share
Notes: Cases are split on this issue

*Shimp* held that wills are uncertain so they are limited by fact that survivor might remarry

- Just because two wills mirror each other doesn’t make this kind of contract, they have to actually say there is this agreement

**Contracts to Make a Will in Someone’s Favor (738)**

- If these are oral, they might be unenforceable under the statute of frauds
- **UPC** requires the contracts to be in writing anyway
  - Minority rule is clear and convincing evidence (*Estate of Jesmer*)

**Estate of Jesmer v. Rohlev (738)** Appellate Court of Illinois, 1993

*Rule* If someone acts in a way that implies an intention to be bound that can be a contract enforceable on the estate

**Governing Rule**

- Claims against estates for services can come by 1. Express contract, 2. Contracts implied in law, 3. Contracts implied in fact
- Contract implied in fact is one in which contractual duty is imposed by promissory expression which my be inferred from the facts and circumstances and expressions of the promissor which show an intention to be bound

**Facts** A woman went to Chicago to live with this old and dying man. She left her husband in Colorado. According to her, (since she lost on summary judgment we take the facts in the light most favorable to her) she did a lot of cleaning and cooking and helping. She said that she did it on a voluntary basis but that he promised to bring her mom to America and that she would never be poor and things like that

**Issue** Whether someone can sue for services offered when there was not written contract

- Rohlev expected to receive from the estate
- This is also not barred by the statute of frauds

**Rights of the Surviving Spouse (745)**

**Support Rights of the Surviving Spouse**

1. Social Security
2. ERISA
3. Homestead exemption/allowances
   - **UPC** $15,000 (some states more or less)
   - *may* take precedence over creditor claims or devisees
4. Personal property set-aside/tangible personal property exemptions
5. Family allowance.
   - A lump sum or periodic payments to spouse.
   - **UPC** provides $10,000

**Property Rights of the Surviving Spouse (746)**

- Depending on state law,
  1. Dowers (wife) or curtesies (hub)
   - Gender distinctions have been abolished
   - **NOT in upc**
   - Elective share is always bigger, so these are sort of a relic
  2. Elective share
   - In separate property states, claim share of property
  3. Interest in community property,
   - ½ interest in property acquired during marriage in community property state
  4. Omitted spouse

**Surviving Spouse’s Elective Share (746)**

- Spouse can choose whether to take under will or against it (a share fixed by statute)
  - This varies by state statute.
  - Under the **UPC**, it’s the law of whatever state they lived in, but other states say its where the real property was.
- Only spouse can elect. No one can do it in his/her place
  - A custodial trust can be created for an incompetent spouse (**UPC 2-212**)

**Typically, you must**

- file a written election
- notify the decedent’s personal representative
- do it timely (UPC says later of 9 months after death or 6 months after probate)
- Spouse abandonment is NOT grounds for barring elective share. Ouch.
- Has never yet included same sex couples.
  - Contract claims, or domestic partners might work
  - DOMA hurts
- These statutes specify fractions the spouse gets. Often, it is 1/3. The UPC has a sliding scale based on years of marriage. (On the final, it will be 1/3)

**ISSUE:** Question as to whether it applies only to probate estate or to nonprobate as well.

**Common Law** was probate only

Illusory Transfer: focused on how much of an interest the decedent retained
Present Donative Intent: Whether they had a real and present donative intent
  Also considers interest the party gave away
Intent to Defraud: Subjective OR Objective
  - Subjective: did they intend to defraud
  - Objective: did it actually defraud.

*When the inter vivos trust is found to be an illusory transfer, it is NOT invalidated. The amount is added back in to determine the elective share. If necessary, some money will be taken from the transfer to fund the elective share.*

**Johnson v. Farmers & Merchants Bank** (749) Supreme Court of Appeals of WV, 1989

**Rule** Where one retains complete control over a trust, it is illusory and should be added back in when determining the elective share.

**Governing Rules** - WV allows spouses to take against the estate to protect them against the possibility of disinheritance.

- **Illusory Trust Doctrine:** Whether the decedent intended to divest himself or herself of ownership of his or her property. (not whether they intended to deprive spouse)
  - Note the amount of control they retain over the property.

- **Intent to Defraud:** (Minority Approach): Whether the decedent intended to defraud the surviving spouse of his or her marital right in the estate.
  - Consider: proximity in time between transfer and death, proportion of property transferred, absence of consideration, fairness to surviving spouse if the trust is operative.
  - This test is criticized because intent to defraud is hard to prove.

- **Present Donative Intent:** Whether decedent intended to presently make a real gift

**Facts** Mrs. J was a homemaker the entire marriage and really had no idea what was going on with the money. Although he was a millionaire, he gave Mrs. J only $100 every two weeks. Before he died, Mr. J made a trust and a will, though Mrs. J was not aware of either. $250,000 were to go to a trust from which Mrs. J could receive income. The remainder of the money was to go in the trust for Mr. J’s two sons (nothing was to go to Mrs. J’s four daughters). When Mrs. J died, the money in her trust was to be added to his boys’ trusts. Mr. J. also would manage the trust property until his death unequivocally.

**Holding** Since Mr. J had such exclusive control over the assets after he made the trust, the transfer was illusory. The equitable result is to give Mrs. J her elective share.

**Other Rulings**

- No single standard can be applied, but they should all be looked at on a case by case basis.
- We will use the illusory trust doctrine since that is the test adopted by this Court in Davis
  - This was a flexible standard, taking into account all of the circumstances and equities on each side.
  - Examine the amount of control and whether it frauded the rights of the surviving spouse and weigh equitable factors.
- The fact that the wife didn’t know could go to intent to defraud

**Prenuptual Agreements** Before marriage, couples sell their elective share rights.

- If you are representing both husband and wife, you need to explain all this stuff

**UPC Approach: Augmented Estate** **UPC 2-203** (756)

Augmented Estate: Includes decedent’s probate estate, any transfers where spouse retained right to possession, transfers where spouse retained power to revoke or appoint, joint tenancies with anyone other than surviving spouse, gifts to third parties within two years of death in excess of $3,000, property given to surviving spouse.

- Includes property transferred before marriage if substantial control
-Includes both spouse’s property
-Includes life insurance paid to someone other than the spouse
-Interest in life estate will NOT count against elective share
-Includes nonprobate transfers, etc.
  1. Decedents’ net probate estate
  2. Value of intervivos transfers and will substitutes
     -Beneficiary designations, IV trusts, etc. etc.
  3. Value of nonprobate transfers to spouse
  4. Value of surviving spouses’ net assets

-If the elective share is less than the nonprobate transfer to spouse and the spouses’ net assets, then they don’t get anything more.

Elective Share Amount (756)
-The elective share comes out of the augmented estate. That way a spouse who has everything in their name doesn’t receive that much more, but instead it is equal.
- Sliding Scale: Then, the percentage you get of this is based on how long you were married
   3-50 percent. (15 years married)

How the Spouse will Collect the Amount (757)
UPC 2-209: The things and money that are willed to others only contribute to the elective share to the point that the sum isn’t satisfied by the testate or intestate amount the wife receives and the survivors owned assets, etc.
-The Court has to issue an order allowing her to collect.
-Then they reduce the trust for the children (in Johnson)

Waiving Elective Shares (758, 766)
Writing, signed, fair disclosure: Exceptions for involuntary and unconscionable.
Lawyers must be careful of possible conflicts of interest
-Should list party’s assets, say they understand what they are waiving, and be clear that that’s what they are doing.

UPC 2-213:
1. Voluntarily and Expressly waived
2. Can’t be unconscionable
3. Fair and reasonable disclosure
4. Actual or constructive knowledge of property or financial obligations

-There are other options if the spouse won’t do a waiver:
   -convert probate into nonprobate (if the state doesn’t subject nonprobate to the elective share rights)
   -create a testamentary trust with your spouse and beneficiary for life

Rule  A voluntarily signed waiver of right to an elective share is valid and enforceable
Facts  Mr. and Mrs. Briggs’s attorney helped Mrs. Briggs prepare her will. The trust gave Mr. Briggs 1/17 of the estate. He signed off on it voluntarily. He was encouraged to get his own attorney, but said he would do whatever his wife wanted.

Holding  The trust is valid and enforceable. Mr. Briggs waived his right to contest the trust.
-Mr. Briggs voluntarily signed the document and was advised to get an attorney
-Mr. Briggs is bound by the waiver he voluntarily signed
-The law also supports upholding the no contest clause
Concurrence (Thomas): The right to election and waivers only applies to probate property
Dissent (Urbigkit): Waivers should have to be more clearly established unequivocally
-The Laird test that the majority relies upon assumed that a person can understand the document. Legal documents are hard to understand though. The depositions of Mr. Briggs and Mrs. Briggs’ attorney are very different, these present issues of material facts. Mr. Briggs may have never been provided the entire document to read. The attorney who prepared this for Mrs. Briggs had represented Mr. Briggs earlier so he probably had a trusting relationship with him. Mr. Briggs does not even remember being told to seek independent legal advice. The ethical rules might require more from the attorney. Fair disclosure did not occur here.
-The majority concludes the trust is valid without examining it fully. This trust could be an illusory transfer or what not.
Community Property System  Eight states use the community property system.
- In this kind of system, the surviving spouse is considered ½ owner of the community property, but has no claim on the separate property.
- All property acquired during marriage other than by gift or inheritance is community property.
- States are split about whether income from separate property remains separate property.

Characterization of Property (769)  Two items with a lot of variance
1. Life Insurance: CA says it depends on the funds used to pay the premiums, others say it depends on whether it is term or permanent insurance, etc. etc.
2. Employee Benefits: Some use an apportionment theory (looking at the character of the contributions), others use the inception of title rule.

Creditor Rights (770): States vary. Some states say the debt must have been for the benefit of the community to come out of community property.

Management Rights: States vary as to whether members of a community can act alone on behalf of both, etc. etc.

Notes:
- Community property is determined by domicile at the time the property is acquired.
  - If you move from separate property to community property, you are screwed because you won’t get community property, but you won’t get an elective share either
  - If you move from community property to separate property, you would theoretically get both, but the Uniform Disposition of Community Property Rights at Death Act bar elective shares of community property.
- When you move, you can convert property from community property to some other type of ownership.
- There is some crap about taxes that I don’t even want to understand
  - Stepped up basis: only deceased spouse’s share is stepped up in separate
  - All community property is stepped up
- Transmutation: You can convert property from community to separate by agreement
- Rights during marriage: community property spouse has right to property during marriage unlike separate property spouse

Note on Alaska Community Property Act (771)  In traditional community property states, you can opt out of the deal. In Alaska, you can opt in.
- You can enter into a community property agreement to make your property community property
- Also, you can create a community property trust to designate the property as community property. You don’t even have to be a resident, just go through an Alaskan trust company or bank.

Quasi-Community Property: Separate property that would have been community property if they had been in a community property state. This protects migrators

Spouse Omitted from Premarital Will (772)
Majority- If will was enacted before they were married, they get intestate share

Minority, a marriage will have no effect and the spouse only gets her elective share.

UPC: They get their intestate share that was not devised to testator’s issue that is not also the issue of the testator
  - If testator gives all to children from prior marriage, no omitted spouse $
  - Then, look at elective share

UPC 2-301 (780)

a. Spouse who married after the execution of the will gets an intestate share of anything not devised to the child of the testator born before the marriage and who is not a child of the surviving spouse or a descendant of such child. Unless:
  - The will was made in contemplation of the testator’s marriage
  - The will expresses the intention to be effective notwithstanding any subsequent marriage
  - The testator provided for the spouse by transfer outside the will and intended it to be in lieu of a testamentary provision

b. Devises to the surviving spouse are applied first
- Presumption: If they married after the execution of the will and spouse dies without revising or revoking the will.
- Rebuttable by showing:
  - Intentional
    - Testator otherwise provided for the spouse and intended the provision to be in lieu of testamentary
provision.
- If a will mentions “in contemplation of marriage” or whatever
  - Spouse waived right to share of estate.

Evidence: **UPC** broadens common law to allow evidence from will, evidence that will was made in contemplation of marriage, any general provision of will that it is effective notwithstanding subsequent marriages.

* The current version of the UPC eliminates “in capacity of spouse” problem
**UPC 2-301** now doesn’t consider the existence or amount of premarital devises.

**Miles v. Miles** (773) Supreme Court of South Carolina, 1994

**Rule** Absent specific language or sufficient extrinsic evidence that a bequest was made in contemplation of marriage, a spouse has not been provided for under the omitted spouse’s statute.

**Facts** D made a will in 1989 giving his friend Miles his car and a life estate in his home. A year and a half later, D married Miles. 7 months after that he died, without changing his will

**Holding** Reversed, she was not provided for in the capacity of his spouse and thus she can recover under the omitted spouse’s statute.

- Must consider the surviving spouse in that capacity, not any capacity.

**Notes:**
- Spouses can sometimes inherit either the intestate share or the elective share
  - the intestate share is usually a larger fraction, but the elective share may extend to non probate.
  - Thus, local law determines which of these claims is more valuable
  - In this case, we assume she presented her omitted spouse rights because they were more valuable than her elective share rights

- Most courts hold that an omitted spouse statute is overridden by a premarital devise to the spouse only if the testator contemplated marriage when he or she executed the will.
- One way you can do that is acknowledge in the will that you will marry soon.

**Becraft v. Becraft** (transfers outside of the will with the intent to be in lieu of) (776) Supreme Court of Alabama, 1993

**Rule** A transfer outside the will must be intended to be in lieu of testamentary provision. The burden is on those opposing the surviving spouse’s share to show that there was intent.

**Facts** E married a much older man seven months before he died. The will, which was executed before Mr. B. died, left everything to his other wife and if she predeceased him (which she did) to their children. However, Mr. B. left E a $25,000 life insurance policy. The children said he frequently talked about how the kids would inherit the estate.

**Holding** Affirmed. There was evidence on both sides, and we can’t say that granting E the omitted spouse’s share was contrary to the great weight of the evidence.

**Other Rulings**
- The burden was on the surviving spouse to show that she is an omitted spouse.
- Then, the burden is on the others (here, the children) to show that he provided a gift outside the will and intended the gift to be in lieu of a testamentary gift.
- One of the factors weighing against intent was the fact that there were two lawyers in the family who should have advised him to make a codicil if he intended to not leave E anything in the will.
- An inter vivos gift does not have to be as much as the intestate share to show intent to be in lieu of.

**Notes** (779)
- Sheer magnitude can be an indicator as well *In Re Timmerman*
- Allocation of the burden of proof is important
  - Mrs. B had the burden of showing she was an omitted spouse
  - Children had the burden of proof for the statutory exception
- A lawyer who doesn’t address the possible effects of an omitted spouse statute may be sued for malpractice

***The revised UPC would change the outcome of this case. The current version only allows the spouse to take an intestate share of the portion that is not devised to the testator’s children or their descendants.***

**RIGHTS OF SURVIVING DESCENDANTS** (781)

- Unlike spouses, surviving children are not protected from intentional disinheritance
  - even if they are minor and/or dependent.
- Wills should name the individual and explicitly state they are to receive nothing
Otherwise, they might be entitled to a share as a “pretermitted” heir. This means unintentionally disinherited.

Presumption: Where testator has child after executing will and dies without revising or revoking the will, the presumption is created.

Rebuttable: (they would then get their intestate share)
- Failure to provide for new child was intention
- Testator provided for child outside of will...in lieu of
- Testator had one or more children when will was executed and devised substantially all her estate to the other parents of the omitted child.

Evidence:
- Missouri Type: Only the terms of the will. No extrinsic evidence
- Massachusetts Type: Extrinsic evidence is admissible

Scope:
- Can also include children the testator does not know about or children the testator mistakenly believes are dead.
- Minority: also covers the omitted issue of children (grandchildren and what not)

UPC:
- Expressly applies to adopted children
- no extrinsic evidence.
- Expressly includes children thought to be dead
- Does NOT include children the testator did not know about

How much:
- If money goes to omitted child’s other parent, they receive nothing
- If the testator has other children, the $ is redivided around one more
- Otherwise, they get their intestate share.

In Re Estate of Hilton (781) Court of Appeals of New Mexico, 1982 Same as UPC

Rule A clause saying “I have only three children” is sufficient to affirmatively disinherit other children.

Facts H had 4 children from his first marriage. Three were still living, but one was deceased with two living grandchildren. The will left money to his second wife and three daughters (from the first marriage). The will also had a clause that said “I only have three children, if anyone else claims to be an heir of mine, they can have $1.”

Holding Affirmed. The clause is sufficient to show that he intentionally disinherited them

Other Rulings
- This law controls the interpretation and construction of the will even though it was adopted after the will was made.

**CHAPTER 3 LIFETIME TRANSFERS (63)**

INTER VIVOS GIFTS

1. Requirements for Making a Valid Gift
   - Voluntary transfer; Without consideration
   1. Donative Intent: Conditional or Unconditional
      - Show it was not lending, etc. “voluntary gratuitous transfer”
   2. Delivery: Actual, Written, Symbolic: prevents impulsive gifts, fraud, mistake, perjury
      - Distinguishes gifts from promises to give gifts
      - Must vest donee with and divest donor of “dominion and control”
      - If donor is divested to third party, it is ok (turns on agency)
      - should be as perfect as the nature of the property and the circumstances reasonably permit
      - Physical OR constructive or symbolic
         - Access, written instruments, re-registering property, etc. depending on the item
         - Symbolic delivery of painting ok (Gruen v. Gruen)
   - Filing something raises presumption of delivery

3. Acceptance
   - Acceptance of beneficial gifts is usually presumed when gifts are large - otherwise show it
   - DONEES can also “disclaim” gifts, but it is irrevocable
      - Disclaimer is governed by statute, but most often it is in writing within 9 months of their death.
   - Real Property gifts must be in writing because of statute of frauds
   - Tips aren’t gifts, because they are income
**You can’t give something you don’t have. Must be something you have power to give.**

- This will come up in a case where someone has a life interest and tries to give away the property permanently
- Gifts are irrevocable unless they are conditional
- Gifts causa mortis

### II. Property Interest Transferred by the Donor (66)

Sometimes you can argue that a gift is invalid because no “interest” in the property was transferred during the donor’s lifetime

**Gruen v. Gruen** (66) Court of Appeals of New York, 1986

**Rule** Symbolic delivery of future interest in property is ok

**Governing Rules**

- Burden of proof is CAC

**Facts** A father wrote his son a letter on his 21st birthday saying that a certain painting was a gift to him, but that the father wanted to keep it in his possession as long as he was alive.

**Issue** Whether a valid inter vivos gift may be made where the donor has reserved a life estate in the chattel and the donee has never had physical possession

**Holding** Kid gets the painting

**Other Rulings**

- Donative Intent: The gift of the future interest was irrevocable even though physically, the painting was kept by father. The right irrevocably passed with the letter - as intended
- Delivery: flexible requirement. There is no reason to require him to give his son the physical painting and then take it back for the rest of his life.
- Acceptance: The law presumes acceptance because it is a gift of value to him

**Note on Ethical Standards Governing a Lawyer’s Conduct** (72) Lawyers cannot engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, including counseling or assisting a client in conduct that lawyer knows is illegal or fraudulent.

### III. Conditional Gifts (74)

- Presume that gifts are unconditional unless explicitly stated

**Fierro v. Hoel** (74) Court of Appeals of Iowa, 1990

**Rule** A party meets the burden of establishing the conditional nature of an engagement ring by showing by a preponderance of evidence it was given in contemplation of marriage

- This court adopts the minority “no fault” rule - if the wedding is called off, for whatever reason, the gift must be returned to the donor

**Governing Rules**

- Usually, conditional gifts require the person to explicitly state the condition
- Two approaches: fault (whoever gets burned gets ring), and no fault (giver gets it back)

**Facts** Fierro asked Hoel to marry him and gave her a ring. Six months later, he broke off the engagement and wanted the ring back, but she refused to return it.

**Holding** An engagement ring is inherently conditional and should go back to Fierro
- Requiring a donor of an engagement ring to state “in the alternative” is unduly harsh

**Dissent** (Hayden): Fierro has the burden of proving that the gift was conditioned on marriage. He gave another piece of jewelry and specifically said it had to be returned if she didn’t marry him, so he could have done that here as well.

**Notes**: There are lots of things that would make fault hard to determine: pets, inlaws, jobs,

### IV. Gifts Causa Mortis (80)

- Absolute gifts are irrevocable, but if characterized as gift causa mortis it is revocable during life, if she survives
- The gift must be personal property
- **The gift must be made in apprehension of imminent death.**
  - Traditionally they must also die from the feared peril without revoking the gift
  - Restatement allows them to die of something else
  - There is no set period of time.
  - They must actually believe death is imminent, not just an objective danger.
  - Still must be delivery (McCarton), intent, acceptance
  - Delivery need only be as perfect as circumstances and naut
- Like other inter vivos gifts, we still must have intent, delivery, and acceptance.
-Creditor’s may reach property that was given gift cause mortis.

**McCarton v. Estate of Watson** (81) Court of Appeals of Washington, 1984

**Rule** Calling someone and telling them they can have something can be sufficient delivery depending on the circumstances - gifta causa mortis.

**Governing Rules**

**Delivery**: 1. Possessory (manual delivery), 2. Evidentiary (constructive delivery)

-Delivery need only be as complete and perfect as the nature of the property and the circumstances and conditions permit

**Facts** A woman was dying and she called the apartment manager (who she was staying with) and gave him lots of money.

**Other Rulings**

-Here, the donor was incapacitated and near death
-She clearly relinquished her ownership
-Her instructions, in regard to the third party gifts, were clear and unequivocal
-The language indicated a present intent.
-This clearly shows her wishes

*In McCarton, she had to die from what she was afraid of, but the note said differently*

**V. Tax Consequences of Lifetime Gifts** (87)

-There’s like always a gift tax
-A gift must be complete before a gift tax will be imposed.
-Carry over basis if you receive a gift, step up basis if you die - income tax, transfer tax. ugh

**CHALLENGES TO THE DONOR’S CAPACITY TO MAKE A GIFT** (90)

-Transferor must understand the act of transfer and be acting of her own free will.
-You can challenge under
  1. Mental deficiency
  2. Undue Influence
  3. Fraud

-Challenges must be made by
  1. The transferor or her legal representative
  2. Someone with standing.

1. **Mental Capacity**: (same as testamentary capacity)
   1. Nature and extent of her property
   2. Understand the disposition of property she is making
   3. Understand the disposition
      -Transfer can be made during a lucid interval
      -Some courts have held that greater mental capacity is required to make a gift than to write a will.

2. **Undue Influence**: Influence that overcomes the free will of the donor.

-Sometimes, a confidential relationship will give rise to a rebuttable presumption of undue influence. Other jurisdictions require the relationship and suspicious circumstances. Then you can rebut that.

-**The contestant has the ultimate burden**

-A lifetime transfer that results from exertion of undue influence cannot be valid because there is no intent

**Pascale v. Pascale** (92) Supreme Court of New Jersey, 1988

**Rule** Where there is a presumption of undue influence, it can be over come.


**Undue Influence**: The kind of influence that prevents someone from following the dictates of her own mind and instead accepting the domination and influence of another.

-Presumption where there is a confidential relationship

-When the presumption is raised, donee has the burden of showing there was no undue influence.

**Facts** Pascale (father) owned a business and a lot of money. He got divorced and became very close with one of his sons. He transferred him a lot of property to avoid losing it in the divorce. At one point, he transferred ownership of the business to his son. The son got mad at him and fired him, so he brought this suit saying that the transfer was the result of undue influence.

**Issue** Whether there is undue influence when there is a confidential relationship and the same attorney advises both parties. (Whether there was intent)

**Holding** There was a confidential relationship and thus the presumption of undue influence was raised.
This presumption was rebutted however, so we are all clear.

Other Rulings
-Here, Pascale was the dominant person.
-They had a confidential relationship, but they were father and son and that is normal.
-The attorney was in a position of conflict because he was representing both parties.
-However, Pascale was a shrewd business man with previous experience and what not. Thus, the son rebutted the presumption of undue influence.

Notes (100)
-Gifts are ordinarily irrevocable
-Lawyers might want to caution clients to keep ample funds

Non-Testamentary Transfers (104)
Vigil v. Sandoval (106) A woman gave someone her land to be valid upon her death. It would have been invalid as a testamentary deed, but it was valid as a non testamentary transfer.

WILL SUBSTITUTES
Anything that transfers on your death without the need to probate
- Life insurance contracts/POD contracts
- Joint tenancies
- Pension accounts
- Multiple party bank accounts
- Inter vivos trusts
- 401Ks

Validity of Will Substitutes (119) Depends on state law

Joint Tenancy and Tenancy by the Entirety (120)
Tenancy in Common: Not a will substitute - No right of survivorship. Co-tenants own undivided interests that can be transferred
Joint Tenancy: Right of survivorship - so it is a will substitute. If joint tenant didn’t sever interest during life, the other joint tenant got the whole thing
- You can sever this as long as you aren’t married
Tenancy by the Entirety: Special form of survivorship ownership - husband and wife. Neither spouse could sever during life. But served as a will substitute

Neuschafer v. McHale (122): Because they didn’t intend to give it to him immediately, it was intended as a substitute for making a will. Thus, the plaintiff has no present interest in stock or accounts.

Creditors’ Claims against Will Substitutes (127)
-Creditor’s rights are determined by local law.
- When you can’t sever during life, creditors cannot reach mutually owned property
- When you can sever, creditors can get to it because the joint tenant’s interest terminates.

UPC 6-102 subjects many forms of nonprobate to creditors’ claims.

Totten Trusts?
Joint Accounts (128) - There is more on this below
- owned by two or more people with right of survivorship
- Joint accounts are covered by state statutes
Different reasons for opening these:
- Joint tenancy account: carries proportional interest and right of survivorship
- Convenience/Agency Account: help pay bills etc, Doesn’t intended to give access except for party’s benefit and doesn’t intend right of survivorship
- POD account: Only wants right of survivorship and not lifetime access

UPC/Modern Trend: POD accounts are permitted
- UPC 6-201, 6-227 presumes that in life, interest is proportional to contribution and on death there is a right of survivorship
- Clear and convincing evidence to beat presumption
- Express survival requirement
- Courts look at extrinsic evidence to determine which type of account was intended
  * Intent at the time the account was created (C&C evidence)

Hall v. Superior Federal Bank (128) Supreme Court of Arkansas, 1990
Rule When a state statute is conclusive, no extrinsic evidence. When it is not conclusive, evidence is admissible to determine which type of account they wanted to create.
Facts  Ms. Edwards opened two accounts in her name and Ms. Hall’s name. One was a savings account (Superior) and one was with Merrill Lynch.

Other Rulings  
- When opening the Merrill Lynch account, the evidence that they were joint tenants is not conclusive, thus they allow evidence that Ms. Hall was on just to help manage and Ms. Edwards did not intend for her to get anything.
- The state said “shall be conclusive” so the trial court erred in considering extrinsic evidence.
- Since they can’t really void it, they made a constructive trust.
- If she wanted her to not have power after she died, she could have gotten power of attorney for this woman. There is no suggestion anything passes at death.

Notes: This is similar to another case (Edna v. Michelsen) where the bank account went to the estate, but the savings account fell under a different statute that had the conclusive evidence provision, so that was different and went to the joint tenant.
- Then the court awarded the savings account to the estate as well because this woman sued while she was still alive.

Nonlawyers in Estate Planning: Aren’t the banks practicing law?

Constructive Trust as an Equitable Remedy (135): court orders a person holding legal title to property to convey that property to another person. Used like for murder, fraud,
- Extrinsic evidence is generally admitted when seeking to create a constructive trust
- There is a high standard of proof.

Pay on Death Arrangements (136)

UPC 6-101: Allows a lot of pay on death provisions to be valid
- employment, promissory notes, deposit agreements, pension plans, etc.
- Minority sometimes say some of these are testamentary
- Express survival requirement
- States need validating legislation.
- Saying something is nontestamentary (which this does) is a big thing because it says you don’t need witnesses, attestation clause, etc. etc.
- Right to change or cancel plan, but you have to do it according to contract (Klein)

Klein v. Klein (137) Court of Appeals of Texas, 1982

Rule  A life insurance policy is contractual, not testamentary. To change it, you have to do what the contract says.

Facts  A man had a life insurance policy that has his son by his first marriage named as the beneficiary. He had remarried though and his new wife said that he wanted his wife to get the insurance policy. However, it was the policy of the insurance company that to change one’s beneficiary, one had to write the company and let them know.

Holding  Affirmed insomuch as the contract giving the money to the son, but remanded to determine if the contract was property designated in the first place.

Other Rulings  
- The life insurance contract is between to people for the benefit of a third party. Part of the agreement forbids the agent from changing it without the company’s consent.
- The contract creates a duty, not a right, to make payments to a third party.
- The provision helps reduce litigation and keep the company from liability.
- His writing in the will that he wanted the money to go to his wife, did not comply with the contractual provision for altering.

LAW REGULATING WILL SUBSTITUTES (142)
- No revocation by law for will substitutes (divorce, marriage, etc.)
- Life insurance policies are quite commonly awarded to ex-spouses, though courts often look for creative ways to avoid doing that

UPC 2-804 follows Vasconi approach: Apply longstanding testamentary rule that if you divorce her we assume you don’t want her to get your life insurance.

Vasconi v. Guardian Life Insurance Co. of America (143) Supreme Court of NJ, 1991

Rule  In deciding whether a divorce supercedes a life insurance contract, the court should look at whether the parties intended to “wipe the slate clean” when they got divorced.

Facts  P had a group life insurance policy that had his ex-wife identified as the beneficiary.

Holding  The way the divorce worked out, wife has no claim to the life insurance money.
Other Rulings
- If this were a will, she would not have a claim as a matter of law.
- Proceeds of a life insurance policy should be considered as settled in the divorce agreement.
- The facts here demonstrate that after divorce, parties intended to “wipe the slate clean”
- This won’t be a burden on the insurance industry because they won’t be involved in the probate proceedings. They just pay whoever the court tells them to pay.
- The Court should focus on the mutual intent of the parties in the divorce.
Dissent: This goes against all precedent. It is an invitation for litigation. The majority is forgetting that this is a contract and not a will.

*Doctrine of probably intent* : what did he most likely intend by not changing the policy?

Note on Federal Preemption of State Law (152):

_Egelhoff v. Egelhoff_ said that certain pension statutes were preempted by a federal law.

**Multiple Party Bank Accounts** (153)

- Most common form of will substitute. The law is relatively complex, varies widely by state

Four Types of Will Substitute:

1. The joint account
2. The bank account trust (Totten trust)
3. The pay-on-death account
4. The agency account
5ish. Safety deposit boxes (boo)

- Every state recognizes joint bank accounts, but the others vary.

1. The Joint Account (154)
- Absent a statute specifically regulating joint accounts, most courts will admit extrinsic evidence of the depositor’s intent.
- Cases vary widely, and even statutes don’t solve all the litigation
- The new UPC provision, **UPC 6-212(a)** eliminates all reference to intent
- One question is the respective rights of the parties during life
  - In the absence of statute, courts are likely to hold that the funds belong to the depositor
  - **UPC 6-211** says that joint accounts belong to the party who contributed the funds, unless there is clear and convincing evidence of a different intent.

2. The Agency Account (155): An agent is authorized to make deposits and withdrawals, but the relationship terminates on death
- Because the relationship terminates on death, the agency account cannot serve as a will substitute.
- **UPC 6-205**: death terminates agency, agency must be formed in writing
- The agency is just a special statutory form of “power of attorney”
  - Power of Attorney: General (extends to all assets) or Special/Limited (extends only to specific assets)
- Most agencies end upon incapacity of principals
  - However, if there is express language, you can get a _durable_ power of attorney that continues until death

3. The Bank Account Trust (Totten Trust) (156)
- A special form of a revocable living trust
- During the trustee’s life, only the trustee (and the trustee’s creditors) can dip into the fund. Once the trustee dies, the account passes to the designated beneficiary.
  - *beneficiary has no access to the account during the trustee’s lifetime.
- The **UPC** discourages these because there is so much litigation

4. Pay on Death (POD) Account (157): a bank account that directs that any funds remaining at death be paid to a designated beneficiary.
- Still invalid in some states
- **UPC** requires a signed and delivered writing to change multiple party bank accounts

**Safe Deposit Boxes** (158):
- If they are used as a vehicle for inter vives gift, you need delivery
  - Giving someone to key with instructions to take something out
  - Simply giving access might not be enough
- If the box is placed in joint names, the survivor will try to claim what is in it
  - If it is not explicitly in the agreement, it won’t pass title.
TAX CONSEQUENCES of Will Substitutes (158)
-If the donor parts with dominion and control, there is a federal gift tax
  -If the gift is revocable, there is no gift tax
    -revocable living trust, revocable life insurance policy, POD arrangements,
    -When an irrevocable beneficiary designation is made or depositor permits someone to withdraw
      from an account, there is a gift tax
  -joint tenancy, tenancy by entirety, etc.
-Will substitutes are generally NOT an effective means of avoiding death taxes.
  -Date of death value may be included in the donor’s taxable estate.

WILL SUBSTITUTES AND ESTATE PLANNING (159)
-The primary intended target of mistake can sue for malpractice—look at single transaction
1. Advising Clients  Estate planners have to be able to advise clients on goals
2. Legal Malpractice (160) Do NOT forget to integrate will substitutes into overall plan
Majority:  Attorney-client relationship is construed broadly so that intended beneficiaries have standing to
  sue the testator’s attorney for malpractice
  -Lack of privity is no longer a bar to malpractice
  -Modern trend: must be named in estate planning instrument
  -Also, there is professional discipline
  -Many courts extend statute to the client’s death, not when instrument was made

McLane v. Russell (160) Supreme Court of Illinois, 1989
Rule A nonclient who would have received under a will can maintain a malpractice action for her not
taking will substitutes into account.
Facts This was a suit for malpractice.  Two sisters executed wills in which they left everything to each
other.  The lawyer placed their farm in joint tenancy ownership with right of survivorship.  Then, one sister,
Grace, changed her will to leave everything to her sister but to leave McLane her interest in the farm.  The
joint tenancy was never severed.
Other Rulings
  -can consider the beneficiary of single transaction, don’t have to look at entire relationship
  -Grace intended to confer benefit on McLanes, so they are the primary beneficiaries
  -She wanted to give them this regardless of whether she survived her sister or not

CHAPTER 5: TRUSTS
Introduction (167): There is a restatement of trusts, and the Uniform Trust Code
Basic Concepts and Terminology:
- Arrangement under which “trustee” holds legal title to “res/corpus/principal” and manages it for the
  benefit of “trust beneficiaries”
- The creation of a trust is usually a form of gratuitous transfer
  - Can be made during life or at death
  - No consideration is required because it is gratuitous.
Elements of a valid trust
1. A settlor/grantor
2. Some manifestation of intent to create a trust
3. Trust property (funded)
4. A trustee
5. One or more trust beneficiaries
6. Lawful purpose
7. An effective transfer of trust property (if a third party is the trustee)
   - If it includes real property, it must be in writing (SOF)
- The same person can be a trustee and beneficiary.  However, she cannot be both the sole trustee and the
  sole beneficiary. (doctrine of merger)
  -Doctrine of Merger: When all legal and equitable rights are held by the same person, they
    become one and the trust dissipates.
Trust Classifications:
- Mandatory Trust: Trustee must distribute income on regular basis
- Discretionary trust: Trustee has discretion over when to distribute income
- Private Trust: Created to benefit one or more private individuals
- Charitable trust: Created for public (scholarships, etc.)
-Express Trust: Settlor creates voluntarily either in writing or orally
-Implied Trust: Arises by operation of law
  -Constructive Trust: equitable remedy to preclude unjust enrichment
  -Resulting Trust
-Living Trust: Created while the settlor is alive
-Testamentary Trust: Created in their will
-Trust Agreement/Trust Instrument: The written instrument (if there is one)
  -Many states have statute of frauds for land trusts
  -Just to be safe, they should probably be in writing.
-Self Trusted/Self Declared Trust: settlor named themself as trustee
  -Declaration of Trust: oral or written statement creating this kind of trust
-Deed of Trust: oral or written statement creating third party trust.
  -Then there is a requirement of transfer of legal title to trust property
  -This is often seen as contract
-Revocable Living Trust: settlor retains power during life to cancel
-Irrevocable Living Trust: Settler retains no power
  -This is the default if there is no express provision
  -when you create a trust, you bifurcate the legal claim from the equitable claim.
-Trusts are typically in writing and look a lot like a contract

Other Interesting Things About Trusts (170)
-A trust creates a fiduciary relationship - must perform certain duties
  -no one can be forced to be a trustee
-Settlor has almost unlimited freedom to decide on trust terms
  -If the trust is silent, look to applicable statutes or case law

Origins of Trusts (171) Helps explain the distinctions between the legal and equitable interests in the trust
  res. Began with friars because they couldn’t own property, other stuff happened that involved a king

Uses of Trusts in Modern Estate Planning (173)
I. Assure proper financial management (Especially if the settlor becomes incapacitated)
II. To avoid probate (privacy, saves time and expense, that’s when pourover wills help)
III. To add flexibility
  -Free to retain rights during her life
  -provide for older beneficiary, while ensuring bulk goes to someone else
  -Can appoint someone even to decide who gets what
IV. To save taxes (gift taxes can be minimized and its better than income & estate taxes)
V. Influence beneficiaries behavior
VI. Save property for a minor

Creating a Trust (187)
-Trust does not exist until the trustee has legal title to at least one item of trust property
-Once the trust has been created, the settlor can transfer additional property to the trust either during life or at death
  -Some trust instruments allow third parties to transfer additional property

Estate of Brenner (188) Colorado Court of Appeals, 1976
Rule Where an individual manifests an intention to create a trust in property to be acquired in the future, and thereafter confirms intent by taking steps necessary to transfer the property to trust, the property so transferred becomes subject to the terms of the trust.

Governing Rules To establish a valid express trust, it must appear that
  1. He had the capacity to create a trust
  2. He intended to create a trust
  3. He took the steps necessary to declare a trust
  4. There was an identifiable trust estate
  5. There was a trustee
  6. There were identifiable beneficiaries.

Facts Brenner declared himself trustee of the real property in his trust. He referred to an attached exhibit. However, when he made the trust, he didn’t own the things in the exhibit - he acquired them later. There was a one dollar bill attached
Holding: Conveyance of property to Brenner five days after he executed the trust instrument validated the trust.

Other Rulings:
- Evidence shows an intent to establish the trust
- Retention of powers of control are ok in creating a trust.

Notes:
Mr. Brenner was his own trustee. Modern view is that that is valid
- Because trusts are treated as nontestamentary transfers, in most states they do not have to be executed with the same formalities as a will.
- Merger doesn’t destroy this because Brenner was one of many beneficiaries
- A promise to create a trust is unenforceable without consideration
  - A trust isn’t valid until something you acquire is transferred in

Third Parties: If, instead of being the trustee, you designate a third party trustee, the trust will come into existence only if the settlor transfers property to the named trustee
- Anything not transferred will pass with the estate (residue devisees or intestacy)
- Estate planners have a duty to see that the trustee receives legal title

Pizel v. Zuspann (192) Supreme Court of Kansas, 1990 - malpractice suit

Rule: Attorneys may be liable to someone who they aren’t in privity of contract with based on a balancing test.

1. The extent to which the transaction was intended to affect the plaintiffs
2. The foresee ability of harm to the plaintiffs
3. The degree of certainty that plaintiffs suffered injury
4. The closeness of the connection between attorney’s conduct and injury
5. Policy of preventing future harm
6. Burden on the profession of recognizing liability

Governing Rules
Rule requiring privity of contract to sue for malpractice is relaxed in wills - you can do it if you are a beneficiary

Facts: Pizel owned a huge farm. He wanted to transfer the farm to his nephews, but his lawyer, Z, suggested a trust. They made one and Z told P he could cancel it at any time. So they made the trust and then the lawyer joined a new partnership. So, P went to this new partnership and added another nephew in his place in the trust. P wanted to keep the trust a secret, so he told the attorney not to record the deeds until after his death.

Holding: Appellants state a valid claim against Whalen

Other Rulings:
- An expert lawyer testified that during P’s lifetime, the deed to the trust should have been recorded or delivered or something. A different expert said this method was fine
- Just because Z stopped representing him and someone else take over does not relieve him of liability
- SOL had not run because it didn’t begin to toll until the trust was declared invalid in court. When the court denied review, it tolled. SO they are within the two years.
- On remand, the attorneys used the defense of contributory negligence, so they still won
- Trust instruments should designate who will serve if one of the named trustees is unable or unwilling to serve.

* If they had stapled a $20 bill to the trust, it would have been valid

Elements of a Trust (200)
- Remedial trusts come from law, and are not subject to these requirements
  1. A settlor
  2. Some manifestation of intent to create a trust
  3. Trust property
  4. A trustee
  5. One or more trust beneficiaries
  6. A lawful purpose
  7. Make an effective transfer of the property to the trustee
    - If it is you, you must transfer equitable title, or declare or something
    - Real property, must be in writing (SOF)

* Intent to Create a Trust (200)
- Don’t need to even use the word “trust.” Just make clear you intend to establish a trust
Precatory Language (wishful, but not instructive, language “I hope they will…”)
-You have to be clear either way to make sure they take

-Trusts may be invalidated for mental incompetency

Jimenez v. Lee (201) Supreme Court of Oregon, 1976
Rule A trustee has a duty to maintain and render accurate accounts.
Facts Two people each gave a father some money to be used for daughter’s education.
Holding A trust was created for the benefit of the plaintiff. Remanded for accounting.
-The respective donors did not expressly direct that the money be held in “trust”, but that is not legally
required to create a trust relationship.
-Clearly there is intent here to create a trust for her education.
-Since there was a trust for her education, the Uniform Gift to Minors Act was ineffectual to expand
defendant’s powers over the trust.
-Plaintiff is entitled to any dividends or interest from the money.
-D did not keep separate records of income and expenditures of the trust.

Custodianship: The uniform gifts to minors act and the Uniform Transfers to Minors Act allow custodians
to manage property.

Trust Property (209) **Before trust can exist, it must have at least one item of property
-Trustee must receive a sufficient interest in the property. May be legal or equitable
-In order to transfer it, the settlor must own a transferable interest in the property
- Have a right to convey it. They have to have it!
-They must have some enforceable interest in subject property and not mere expectancy.

Kully v. Goldman (210) Supreme Court of Nebraska
Rule Where there is no legally recognized res, there can be no trust. Annual opportunity to buy tickets,
where there is no contractual right, is not a legally recognized res.

Governing Rules Must be a defined interest or ascertainable object of ownership

Facts Two men had an oral agreement whereby one would buy tickets for the other and he would pay him
for them. This was because the one guy, Goldman, had been able to in the past and they weren’t allowing
new people to get tickets.

Holding We affirm for the 1979 tickets, but we dismiss the rest of the action because there is no legally
recognized res.
-No continuing annually resulting trust could arise where the promise is not supported by consideration.
- Specific performance of an agreement ought not to be granted if it can be made nugatory by the
action of a third party.
-Mere expectancies cannot be held in trust

Unfunded Revocable Life Insurance Trusts and Pourover Wills (213)
-An enforceable contract right to receive property is sufficient, even though the contract right is not
exercisable until some time in the future.
-This is an unfunded revocable lie insurance trust
- The only res consists of rights under life insurance policies which are contracts
- Most states recognize this as a valid trust

Pourover Will: Directs that the residuary probate estate be transferred into trust as it exists at the testator’s
death
-Then trust can be amended without compliance with the will execution statutes.

*A dry trust can be the recipient of a pour-over will
-This is made legal by Uniform Testamentary Additions to Trusts Act - UPC 2-511 (218):
-Example of a pour over will (215)

Trust Beneficiaries (219)
- A private, express trust must have at least one definite beneficiary
- Otherwise, there is no one who can enforce the terms
- Settlor has no right to enforce terms of the trust unless she is also a beneficiary
-For a charitable trust, the beneficiary is the public at large.
-They don’t have to be identified by name
-Class Gifts: Go to groups like “my children, etc.”
- *The class must have sufficiently definite beneficiaries to make the trust valid
-definite (every who took KM’s final, but NOT everyone who enjoyed his class (that is not definable))
Ascertainable standard
- Unborn children exception
In Clark v. Campbell, he said to give it to his “Friends” → not ok

Powers of Appointment:
- If the person with power of appointment doesn’t exercise their power in writing, it just goes as it would go in the trust. Whoever has the power can jump in and trump the trust
  - That’s the difference between being a power of attorney and a trustee
  - PoA is a passive power until you chose to exercise it
- General Power of Appointment: they could even benefit themselves, just take it all
- Limited/Special Power of Appointment means you can give it to anyone, but you can’t give it to yourself, your creditors, etc.
  - These distinctions are more important for tax purposes.

So many classes have to be definable. Typically they are families. Most trusts and wills have definition statutes. You can leave it to friends if you define friends.

Clark v. Campbell (220) Supreme Court of New Hampshire, 1926
Rule A class must be defined specifically so the Court knows who is in the class
Governing Rules
- For private trusts, there cannot be a valid bequest to an indefinite person
  - Public trusts its ok (AG can enforce it)
Facts A man wrote in his will that he wanted his property to go to his friends.
Holding Not sufficient criterion to govern the selection of individuals for the class
Thus, the property will become a resulting trust for the next taker under the will or the next of kin
  - The language clearly shows an intention of creating a trust
  - The other side says it was an absolute gift
  - The word “friends” unlike the word “relations” has no precise sense to it
    - Words like kin, relations, etc. have been given meaning as people who would inherit under intestacy
Notes (222):
- Some courts have validated kinship words to mean “heirs”
- The Restatement also says that an unenforceable trust should be saved as a power of appointment.
- If he had left out the word “trust” that’s what would have happened here

RESULTING TRUSTS (224)
- In Clark, they made a resulting trust. This, like constructive trusts, is an implied trust.
- 3 different situations, all of which are when the person who holds legal title to property was not the intended beneficiary
  1. When a private express trust fails (Clark)
    - If the settlor has designated an alternate, no resulting trust is required
  2. Res in a private express trust exceeds what is required to satisfy the trust’s purpose (Estate of Cancik)
  3. One person pays consideration for a transfer but has the title taken in a third person’s name
    - Purpose of a resulting trust is to carry out what settlor probably would have wanted.
    - The only fiduciary duty is to convey the property
Notes:
People are critical that a gift to friends as a class of trust beneficiaries is invalid
- People think there should be an honorary trust

HONORARY TRUSTS
- Usually for the benefit of a pet or to maintain a gravesite
  - If the purpose is specific and honorable, not capricious or illegal, the trust may continue as long as the trustee is willing to honor the terms of the honorary trust
  - If the trustee fails, a resulting trust will be imposed.
- Honorary trusts are not enforceable by an identifiable beneficiary, but is valid as long as the trustee chooses to carry out the trust purpose.
- This is a common technique when the beneficiary is not a legal person.
* Watch out for Rule Against Perpetuities
  - Charitable trusts aren’t subject to it, but honorary trusts are

In Re: Searight’s Estate (226) Court of Appeals of Ohio, 1950
Rule As long as it does not violate the RAP, you can leave money for the care of your pet
Governing Rules
-Absence of a beneficiary who can enforce the trust makes the trust fail
-Then, the money transfers but no trust is created. They have the power to apply the property to the designated purpose.

Facts A man left $1000 in a trust fund from which 75 cents per day was to pay for the care of his pet, Trixie. There were also people designated in case Trixie died before the trust fund was used up.

Holding
-1. This is not a trust in the traditional sense, but it can be a valid transfer as an honorary trust or something else
-2. It doesn’t matter if we call it an honorary trust or a gift with a power.
-3. This does not violate the rule against perpetuities, because with the amount of money in the trust it won’t last more than five years.

Other Rulings
-This is not a charitable trust (benefiting dogs in general) but rather a specific trust for the care of a specific dog.
-She has accepted the gift and agreed to care for the pet
-A trust of this nature could violate the rap with animals of long longevity.
-If this were a precatory trust, it would not be enforceable

Honorary Trust:
-They except and are willing to care for the animal
-Enforceable
-Rule against perpetuities
-Many states don’t have RAP anymore
-UPC 409: care of cemetery plots etc.

UTC validates honorary trusts but makes them enforceable rather than dependent on the trustee’s willingness to honor the settlors wishes.

UTC 408 (229): Trust for an animal
-the animal must be alive during settlor’s lifetime
-the trust terminates upon the death of the last surviving animal
-May be enforced by anyone with interest in the wellbeing of the animal
-Property not used must go back to the settlor or to the successors in interest

UTC 409 (230): Noncharitable Trust Without Ascertainable Beneficiary
-May not be enforced for more than 21 years
-May be enforced by a person appointed in the trust or appointed by the court
-Property may be applied only to its intended use or else it reverts back to settlor or settlor’s successors in interest

409 authorizes both general noncharitable purposes and specific noncharitable purposes.
-Rule Against Perpetuities: Can’t be any possibility that will remain contingent past one or more human lives in being at the date future interest is created plus 21 years.

Note on Estate Planning for Animals (231)
-To watch out for RAP, just say it expires 21 years after trust comes into existence
-Outright devises to animals are usually void
-Devises to people conditioned on them caring for the pet is usually construed as an absolute devise.
-Often, the best thing to do is just to ask someone you trust to care for the pet.
-You can also make an agreement with an animal rescue organization or the like.
-You can make a trust that makes distributions to cover pet’s expenses.

UPC 2-907 authorizes honorary trusts for lawful noncharitable purposes for a maximum of 21 years.
-It is important to fund the trust with a sum that is not excessive

In Re Estate of Cancik (232) Supreme Court of Illinois, 1985
Rule Unless we can ascertain beyond a reasonable doubt what they would have wanted with their property, any surplus property from an express trust goes into a resulting trust and passes through intestacy.

Governing Rules Where estate property is placed in an express testamentary trust and the entire estate is not required to accomplish the trust purpose, a resulting trust arises
-The terms of the will control the distribution of the excess estate.
-If the will fails to specifically provide for the distribution of the excess property, it passes by
intestate succession
- Try to give effect to the intent of the testator, presumption against intestacy, etc.
- A gift by implication will be sustained only where there is no reasonable doubt as to the testator’s intent to make the gift

**Facts**
A man died and left $200,000 to care for a cemetery plot. Everything else he left to one particular cousin, specifically mentioning that he left nothing to his other cousins for personal reasons. The cemetery only needed $10,000 to care for the plot.

**Holding**
Since his only stated concern is the upkeep of the mausoleum, we can’t say it is implied without reasonable doubt that he intended to give the surplus to Charles. The surplus property should pass through intestacy.

**Other Rulings**
- No express clause for what to do with residuary estate and Charles claims that it is implied that he should get it.
- The other heirs were not disinherited, they just didn’t get anything he had left.
  - He didn’t dispose of his entire estate

**Class Notes:**
- It depends on the state whether they accept negative devises
  - In some states you have to distribute all your property
- The court here says NO to negative devises. Since all the property wasn’t distributed, it goes through intestacy.

**Notes (235):**
1. UTC 408(c) and UTC 409(c) both provide that excess funds not otherwise disposed of under trust terms must be distributed to the settlor or, if the settlor is not living, to the settlor’s successors.
2. A negative devise is usually insufficient to disinherit. Rather, the testator’s will must effectively devise the entire estate to other beneficiaries.
   - This approach is criticized as defeating the testator’s intent.

**Oral Inter vivos Trusts of Land (236)**
- Property owners try to create a trust orally.
  - They declare orally that they are now holding the land for the benefit of someone else
  - They give the land to someone orally stating that they should hold it for the benefit of some third party.
  - The key inquiry is whether the statute of frauds allows the oral agreement to stand
    - SoF says transfers of land have to be in writing.
    - Common law would then let the trustee keep the land
      - It is possible for a constructive trust to be created

**Minority:**
- Allow oral inter vivos trusts of land.
  - Allow evidence of oral statements, but high standard of proof
- It is best just to always put these in writing.

**Class Notes:**
The issue is the statute of frauds problem that comes from an oral trust that deals with real property.
- What is the remedy if it is invalid under the SOF?
  - You can reverse it and give it back
  - Otherwise, if you can prove the agreement was there but just invalid because of the SOF, you can get a constructive trust. But you don’t really want to go there

**Ellis v. Vespoint (237)**
Court of Appeals of North Carolina, 1991

**Rule**
Plaintiff must show by clear, cogent, and convincing evidence there was oral trust

**Governing Rules**
- The requirements of a parol trust in this situation is
  1. Sufficient words or circumstances showing settlor intended to create a trust
  2. Definite trust property
  3. An ascertained beneficiary
  4. A promise by the trustee to hold the trust property in trust for the beneficiary at or before acquiring the legal title to the trust property.

**Facts**
A mom, Ellis, owned a bunch of land. She lent it to one of her children to take a loan on to do business stuff. So, there was an outright transfer to D1 (the daughter). They orally agreed, however, that though she was giving it in only one of their names, all of the children would get equal shares of the land. We had reaffirmation in the 80s. Then there was a border dispute between the son of D1 (Queen’s grandson) and the two sons. D1 refused to give up any shares.

**Holding**
The evidence of intent to create a parole trust was sufficient to withstand the defendant’s directed
verdict motion.

Other Rulings
- Defendant orally promised Ellis she would hold the land in parole trust for her.
- Evidence of fraud, undue influence, etc. is only necessary when a trust is created in favor of a grantor.

Class Notes:
- There is definitely beneficiaries and property. The court found intent. So, she had to give the property back.
- She should have submitted a bill for trustees fees.

Notes (240)
- The undue influence, fraud rule (the when grantor is the beneficiary you have to show this) is a minority rule.
- The witnesses couldn’t talk about things Queen Ellis herself said because of the **dead man’s statutes**

Notes (241)
- The Statute of frauds is intended to keep a grantor from defrauding a grantee, but these kinds of situations usually involve a grantee trying to defraud because of the statute of frauds.
- Since the SoF’s language was absolute, they couldn’t enforce the trust, so to be fair, they impose constructive trusts.
- If actual fraud can be proven, courts will impose a constructive trust. However, the difficulty arises when at the time of the transfer they intended to follow through and then only later changed their minds.
- The majority of courts would still impose a constructive trust, but would demand proof of a confidential relationship with the grantor.

**Intent must be sufficiently expressed (for any oral trust)**

**Ashton v. Ashton** (242) Supreme Court of Utah, 1987

Rule

Governing Rules
- Constructive trusts are equitable remedies which arise by operation of law to prevent unjust enrichment
- Parole evidence (C&C) may be introduced to establish a constructive trust
- Restatement Second of Trusts 45: if there is an oral agreement to pass land, a constructive trust will be made, only if the transferee and the transferor were in a confidential relationship at the time of the transfer.
- Parks: Found that the confidential relation thing only applies to express trusts.

Facts A man left his two brothers half of his property each. However, since one of them had a pending divorce, the property was all put in the one brother’s name with the intention that it be given to the other brother as soon as the divorce was over.

Holding It was proper to impose a constructive trust.

Other Rulings
- An oral express trust was created here so section 45 of the Restatement Second of Trusts is controlling
- The findings show a confidential relationship, but no evidence of writing.

**Land contracts must be in writing (Statute of Frauds)**

**Secret and Semi-Secret Trusts**
- Testator may wish to create a testamentary trust but keep it secret.
  
  So, they make an outright trust to someone who promises to give it to someone else or distribute it a certain way.

- Remedy in secret trust cases is a constructive trust - not enforcing the oral express trust.
  - Thus, you also have to prove the devisee is guilty of wrongdoing (to justify the constructive trust.
  - The devisee must have explicitly promised to honor something or permitted the testator to infer from their conduct that they would.

- Really, a better way to do this would be an inter vivos trust or pourover will.

Secret Trusts (paper doesn’t even show they are trustee) → Constructive Trust
- They have to allow extrinsic evidence, so they can create this

Semi-Secret Trusts → Resulting Trust (property goes back to settlor)
- No extrinsic evidence necessary, so it can’t come in, so property goes back

**Modern Trend/Minority**: Restatement: Constructive trust for secret and semi secret

**Kamberos v. Magnuson** (248)

Governing Rules

Dead Man’s Act: No adverse party or person directly interested in the action can testify to any conversation with the deceased (against the deceased’s estate)
**Facts** When Abens died, he gave his money to Magnuson asking that Magnuson take care of Murray. It wasn’t an explicit condition on the money, but Magnuson promised that Murray would be taken care of. After Abens’ death, Magnuson gave Murray $1,000.  

**Holding** The Dead Man’s Statutes were applied. Since the petitioners then have no evidence, summary judgment was correct.  

**Dead Man’s Statutes:**
1. Witness must be a party  
2. Against the personal representative of the decedent in her fiduciary capacity  
3. Only testimony that might impair the estate is excluded.  

**Semisecret Trusts:** When the devisee indicates clearly that the person only gets the property in “trust” but doesn’t say who the intended beneficiary is.  
- In *Olliffe* the court held that the trust failed for lack of an identifiable beneficiary. They created a resulting trust for the benefit of the testator’s heirs.  

**TRUST DISTRIBUTIONS** (253)  
A well drafted trust should include  
1. Who gets the income  
2. Who, if anyone, can invade the principal  
3. When does the trust terminate  
4. Who gets what is left  
- Whether any beneficiary has **power of appointment**  

**Trust Distribution Provisions:**  
- **Spray:** One form of trustee discretion - they get to pick how much goes to whom but it has to all go within the group.  
- **Support Trust:** Gives some objective standard for how to distribute money  
  - Distribute to my children as may be required for their health and education  
  - Trusts that use broad language like “happiness” are often litigated but courts tend to uphold the trustee’s actions  
  - **Normally this means their accustomed standard of living**  
- **Mandatory Trust:** Beneficiary’s interest in income is mandatory  
- **Simple Discretion:** The trust just says “discretion” with no adjective  
  - Must act reasonably and in good faith (objective and subjective)  
  - Duty to inquire to their status and needs  
- **Unlimited Discretion:** words like “absolute and uncontrolled”  
  - eliminates duty to act reasonably, but must still act in good faith  
- **Discretionary Support Trust:** combines language giving broad discretion with language imposing an objective standard.  
  - Presumption that trustee intended to provide regardless of beneficiary’s other resources  
- **Unitrust:** Life beneficiary gets fixed annual percentage  
  - Leaves trustee free to pursue any investment  
- **Dynasty Trust:** lasts forever giving a stream of income  

**Pollok v. Phillips** (256) Supreme Court of Appeals of West Virginia  

**Rule** Under certain conditions, a absolute discretion trustee has a duty to make distributions to guardian of an incompetent beneficiary.  

**Governing Rules**  
- **Emmert:** A trustee’s duty, though couched in discretionary language, was to provide for the beneficiary where the beneficiary was in necessitudinous circumstances.  
- **Trustee must act reasonably**  
- **Fact that trustee has an interest conflicting with beneficiary is proper evidence**  

**Facts** The trustee was supposed to pay from a trust for a woman’s incompetent trust as much as “her sole discretion shall determine.” The trustee refused to pay any money whatsoever.  

**Holding** Remand. The court should determine the amount of reasonable disbursements.  

**Other Rulings**  
- The primary object of this settlor was to provide for her husband her son.  
- Normally, a court will not order a trustee to make a discretionary distribution unless it finds an abuse of discretion.  
- The existence of a conflict of interest on the part of a trustee is a circumstance that may be considered in determining whether the trustee has acted from an improper motive in exercising a discretionary
power.

**Stuart v. Wilmington Trust Co.** (261) Supreme Court of Delaware, 1984

Rule “Support, maintenance, benefit, and education” does not include jet planes

Facts The trust allowed for invasions for support, maintenance, benefit, and education.

Other Rulings

- The trust agreement allowed trustees to borrow money from the trust rather than sell the stock in the company
- It is obvious that the dominating purpose and function of the trust was to preserve the position of the Stuart family with respect to the affairs of the Carnation Company

**Estate of Sillman** (266) Surrogates Court, New York County, 1980

Rule Even when trustees get absolute and uncontrolled discretion, they must give real consideration to the essential plan of the testator.

Governing Rules Court will not interfere with trustees who have discretion unless the trustee acts dishonestly, or with an improper even though no dishonest motive, fails to use judgment, or acts beyond the bounds of reasonable judgment.

Facts There was a very large trust that allowed for invasions proportional to the age of the men invading. One man asked for $145,000 and the other for $150,000. When the men tried to get money, the trustees determine that the amounts were reasonable but were not needed. The trust gave the trustees absolute and uncontrolled discretion

Holding Intent of testator would have been different from what the trustees were doing.

Other Rulings

- There was no condition of necessity on invasion
- It was the grandfather’s intention that they be reasonably comfortable as well as free of creditors. They are not being hounded by creditors, so they should get reasonable invasions
- The increments by age thing demonstrates that the settlor intended the beneficiaries to invade sometimes.
- This was a generation skipping trust intended to evade taxes. If they took out too much money, it would be taxed in their estates. However, they are not trying to get out huge amounts of money. The withdrawals would be less than 2% of the principle.
- The intention of the settlor was to keep the grandchildren from falling prey to people who just wanted their money. (creditors, suitors, etc.)
- There is no need to remove these trustees. They just need guidance and redirections.

Notes (271)

- They use a reasonableness standard to decide if there was an abuse of discretion-There is some controversy though about whether the reasonableness standard applies to absolute and uncontrolled discretion.
- Then, all that matters is that the trustee acted in a state of mind in which it was contemplated by the settlor that they would act.
- **If you want to have a better trust, write whether the percentage is of the then-remaining trust or of the original trust.
- Watch out for the Rule Against Perpetuities with generation skipping trusts.
- The advantage of generation skipping trusts is that no death tax is imposed on the intermediate generation -Now, Congress has a generation skipping transfer tax. It still gives you like $1 million free.

**Public Health Benefits**

- If the applicant created the trust the rules tend to favor including trust property
- If they did not, it is usually included only to the extent the beneficiary could compel the trustee to make a payment

**Estate of Rosenberg v. Department of Public Welfare** (274) SC of PA, 1996

Rule Whether a trust should be counted against someone’s eligibility for public benefits turns on whether the person is the sole beneficiary or shares it, whether they received public benefits during life, and to what extent they could force payment.

*turns on intent (not really, but just say that)

Governing Rules

- *Lang*: one trust to benefit all the children. The settlor had gotten assistance during his lifetime for the son. Thus, the intent of the settlor was that the son continue to receive state assistance. Thus, the principal was not an available resource
- *Snyder*: Again, the principal was not an available resource. The single trust had two beneficiaries and
need to benefit both of them. Also, at the time of her death, the settlor knew her daughter received public benefits.

-Commonwealth Bank: the trust fund here was determined yes to be available resource. The beneficiary was only the mother. She was not receiving public funds until she applied 15 years after the settlor’s death. Facts This widow got an outright gift and then there was a Discretionary Support Trust fund. She used all her outright gift to pay for medical care. She then applied for public benefits but was denied because she had this money in a trust fund. The trustee of the trust fund was directed to pay in come quarterly and use it for the comfort welfare, maintenance, and support, etc. etc. of her.

Holding The assets were available to her so she did not require public funding

-This case is more like Commonwealth Bank than Lang or Snyder.
-However, the factors from these cases were not meant to exhaust the possible indications of the settlor’s intent.

Notes (280)
-This is an example of the “discretionary support trust” that so often leads to litigation
-In the No cases, it was adult children, but the Yes cases were a mom and a wife. Does that matter?
-Most states have statutes like PN statute saying that children must pay to support their parents if they are financially available. However, most states don’t use them.
-One issue that comes up is whether and to what extent, the trustee may or must consider other income or resources available to the beneficiary in deciding whether to exercise the trustee’s discretion
- In Commonwealth they said they couldn't consider public benefits.
-right now in Missouri, there is no requirement to help an adult child (once they turn 18)
- In PN, you are required to help support adult children with disabilities

Total Return Trusts (281) This won’t be on the exam. Sweet action.
-You could avoid paying someone who was supposed to get interest income by investing in something like land where it increases in value but there is no income
-That’s why we have total return trusts
-Revalues trusts annually and gives a percentage of it yearly to the lifetime beneficiary
-This removes the tension between interests of remainderman and lifetime beneficiary

POWERS OF APPOINTMENT (282)
Authority to designate who will receive beneficial interests in particular property
Donor, Donee/Powerholder, Permissible appointees, appointees, takers in default
-Usually powers of appointment are made in connection to a trust
-Non transferable
-Discretionary: donee is permitted but not required to exercise the power
  1. Fail to exercise: just chill
  2. Exercise: do their thing
  3. Release: affirmatively give up power
  4. Contract to exercise:

Two ways to classify
  1. Identity of permissible appointees (Special v. General)
  2. Time when donee may exercise the power (Testamentary v. Presently)
-General means it is exercisable in favor of the donee, the donee’s estate, the donee’s creditors, or the creditors of the donee’s estate.
-If it can be only exercised during life it is “by deed” and if it can continue after death it is “by deed or will”

Example of trust language on 284

Leach v. Hyatt (285) Supreme Court of Virginia
Rule Minority Limited powers of appointment should be upheld when the donor’s intent to establish the power is unambiguously expressed.
Facts The clause said that if the will didn’t dispose of everything in the will, the Executor could chose in her sole and absolute discretion
Other Rulings
-Generally, donors may impose particular conditions and requirements upon a power of appointment.
-Powers of appointment must be construed in accordance with the intention of the donor.
-A donee’s exercise of the power is valid as long as it does not exceed the authority given the donee in the grant of power.
- The issue is that we don’t have ascertainable beneficiaries. This guy gets to choose who gets however much
- **This is a minority case**
  - The majority would say that in a will you can’t give a power of appointment to someone without telling her what the class of beneficiaries is.
- Who takes in default in the will? Nobody, so then it would go through intestacy (nephew)
- How do they find intent?
  - They look at the language of the clause. It is clear that he wanted his personal representative to have this power
- If the representative had said she didn’t want the power, the property would have passed through intestacy
- **Limited Power**: a special power of appointment where the donee is explicitly prohibited from appointing the property to the donee or the donee’s estate but otherwise has discretion to appoint anyone.
- **Majority** says without beneficiaries you can’t have limited power - they have to have the option of giving it to everyone including themselves or defined beneficiaries

**Tax Consequences of Powers of Appointment** (288) NOT ON EXAM
- Distinction between general and special powers of appointment are important for taxes.
  - The donee of a general power might be taxed on income, estate tax, gift tax,
  - They are treated as the owner of the property
  - The donee of a special power doesn’t have the tax problem.
- General powers of appointment are quite common with revocable living trusts or with married couples who have large estates.

**Qualified Terminable Interest Property Trust (QTIP):**
- Marital trust that allows decedent to designate ultimate recipient of property.
- Allows married people to obtain the marital deduction without granting the surviving spouse a general power of appointment
- The marital trust creates a general testamentary power while the bypass trust creates a special testamentary power.

**CREATING POWERS OF APPOINTMENT** (291)
- No magic words, just have to manifest an intent to create a power of appointment
- Must be over specific property
- You may need to specify who can receive the property
- You can only give the power to a live person

**In Re: Estate of Lewis** (292) Supreme Court of Utah, 1987

**Rule**

**Governing Rules**
- The preferred method of interpreting a will is to avoid intestacy
- To create a power of appointment you have
  1. Intent to create a power
  2. Indicate by whom the power is held
  3. Specify the property over which the power is to be executed.

**Facts** This guy had a holographic will that said he wanted his wife’s comfort, security and fair portion provided for. He then appointed his brother as executor.

**Holding** DC did not err by determining that the will failed to dispose of assets.

**Other Rulings**
- Testator’s use of “insure for her comfort, etc.” was insufficient to support the requisite intention to create a power of appointment.
- Rules of construction are secondary to just trying to figure out the testator’s intent.

**Notes** (297)
- Ordinarily, the power of appointment is discretionary.
- Under some circumstances, a special power of attorney may be mandatory.
  - Then it is called an imperative power or a power in trust.
**Internal Inconsistency**
- Sometimes the language is ambiguous
  - If it is ambiguous as to whether it is a life interest or a fee simple, the presence of a general power of appointment may cause a court to conclude it was a fee simple
  - If it is a fee simple with a restricted power of appointment, it may cause the court to think it was
actually only a life estate.
- Rule of Repugnancy: purported gift is invalid because it is repugnant to an absolute devise accompanied by an unrestricted power of disposal.
  (You can’t give someone a remainder of property when you have given someone else the right to dispose of it)

**Release and Contracts to Appoint** (298)
- Donee of a power of appointment is free at any time to release the power (irrevocable)
- May be released in whole or in part
- Any words or actions communicating intent to release
- Many courts enforce contracts to appoint as inter vivos releases

**In Re Green** (Contract to Appoint v. Release) (299) Court of Appeals, 6th Circuit, 1993

**Rule** Sometimes contracts to appoint are valid inter vivos releases

**Governing Rules** Restatement and Kentucky allowed for written releases of PoA

**Facts** Man died and left a trust for the benefit of his wife. At her death, each child was to get an equal share that they could then apportion among their descendents. After his death, Mrs. Headly (the wife) and the children entered into an agreement (the Fayette Agreements). Mrs. Green, one of the children, agreed to exercise her powers of appointment in favor of her five children equally with the right to amend her will. Then one of HER children got really far in debt, so Mrs. Green changed her will to shield that property from his creditors. However, you can’t transfer property to shield it from creditors, so now she is arguing that the Fayette Agreements were void because they violated Mr. Headleys original intent

**Holding** The agreements were a valid release of Mrs. Green’s power of appointment, not a contract to appoint.

**Other Rulings**
- Mrs. Green had a special power of appointment because she could only bequeath her interest to a limited number of people (her issue).
  - The power was testamentary because she could only do it by will
- Mrs. Green had to exercise her power by will, not by contract
- The takers in default were the children, so when she released the intent of the donor was not defeated, the kids got the land, etc. etc.
- We must also remember that Mrs. Green is attempting to void a contract into which she voluntarily entered.
- There is another problem in that she voluntarily entered the agreement so then she can’t challenge it.

**Courts of equity care about “clean hands” thing**

**Relation Back Doctrine:** donee is treated as the agent of the donor
- They are just “filling in the blank”
- It’s as if the donor made the appointment on that date
- Donee of a presently exercisable PoA may enter into a contract to appoint
- However, when it is testamentary (as it was here) they can’t contract during life.
  - Any contract entered into during life is void
  - There is still some restitution a promisee can receive.

**EXERCISE OF A POWER OF APPOINTMENT** (304)

In order to exercise the power, donee must show
1. Donee intended to exercise the power
2. Donee complied with requirements for exercise imposed by donor or by law

**Example on 305**

**Standard Residuary Clauses - no reference to any power of attorney**

- **Majority:** If it does no make reference to the PoA it does not exercise either a general or special power
  - split: some majority jurisdictions allow extrinsic evidence to prove

- **Minority:** Standard residuary clause adequately expresses into the exercise PoA

**UPC 2-608.** (311) Residuary clause expresses the intent to exercise power if
1. Power is general power AND creating instrument does not contain a gift over in event power is not exercised, OR
2. Testator’s will manifests an intention to include the property subject to the power
   - Of course, if there are specific reference requirements, this won’t work

**Blended Residuary Clauses:** includes any power over which I might…
UPC: This isn’t enough for the second test. It must be explicit.
-This is also unwise for many reasons, one being tax consequences.
-Some powers of appointment require that they be exercised by specific reference to the power. Then a blending clause would not work.

Lapse and Anti-Lapse Courts have applied when appointee predeceases donee

Schwartz v. Bank Merrimack Valley (306) Appeals Court of Massachusetts, 1983

Rule Where a power of appointment requires specific formalities, the donee must at a bare minimum make an approximation that would satisfy its basic purpose.

Governing Rules
-Generally, when the donor of a power of appointment prescribes a specific formality for the exercise of the power, there will be no effective appointment in the absence of the donee’s compliance with the formalities dictated by the donor.
-Failure to satisfy the formal requirements will not cause the appointment to fail if the donee’s action reasonably approximates the prescribed manner.
-Shine (Mass. 1968): the clause said “including the property of which I have a power of appointment” and was found to be an effective exercise.
-McKelvy (Mass. 1976): Including any property over which I may have a power of appointment” was found to be sufficient.

Facts A woman was given power of appointment over property only if she specifically referred to it. There was a taker in default in case she didn’t exercise the power. The donee’s will disposed of more than she had, but it didn’t refer to the power specifically. It had a residuary clause.

Holding Will did not follow the requisite requirements so she failed to exercise power.

Other Rulings
-Requirement for a specific reference ordinarily requires an affirmative act at least approximating the indicated formality.
-The critical inquiry is not whether the donee intended to appoint, but rather whether the donee manifested her intent in the manner prescribed by the donor.
-The residuary clause of Dorothy’s will made no reference at all to any power.
-Just because her bequests exceeded her assets doesn’t mean she meant to exercise power.
-They might have been kind and called a general reference substantial compliance with the requirements, but she didn’t even have that.

Capture (312) General Powers
Capture applies when the donee of a general power “manifests an intent to assume control of the appointive property for all purposes and not merely for the limited purpose of giving effect to the expressed appointment.
-One way this happens is a blending clause.

Marshaling/Allocation (313) Special Power
-The donee’s will must have a blending clause.
-If some things can only go to some groups of people, the property is allocated so it looks like what is in the will but more from one fund goes to certain people, etc.

Rights of Donee’s Creditors (313)
-State law varies.
-If the power is special, donee’s creditors cannot reach the appointive property, whether or not the donee exercises the power.
-If the power is general AND the donee is also the donor, the donee’s creditors can reach the appointive property if the donee’s other assets are not sufficient.
-If the power is general AND donee is NOT the donor of the property, the rights traditionally depend on whether the donee has exercise the power.
-Most states say if someone has not exercised the power, creditors can’t reach it
-If exercises by will, most states say creditors can reach it
-if exercise inter vivos, creditors can only reach it to the extent it was a fraudulent conveyance.
-Restatement says if there is a general power that is presently exercisable, creditors can reach the property.
-If the power is testamentary, creditors can reach it upon donee’s death.

Elective Share: UPC’s augmented estate includes power over which they had a PoA.

Special Rules Applicable to Special Powers of Appointment (314)
-Exclusive: you can appoint some of the class and exclude others.
-Non exclusive: donee must appoint to each person
  -Many states say it has to be more than an illusory amount
-The presumption is that a special power is exclusive, but it depends on the language.
  -one or more v. among
-What is the nature of the property interest that can be appointed?
  -The old rule is not to appoint property in trust
  -The modern rule is that the donee can appoint in any manner she wants.
-Fraud in the Power: Attempting to donate to someone they aren’t allowed to
  -Entire appointment is invalid
-Sometimes the power is mandatory: aka. Imperative power or power in trust
  1. Donor fails to specify any takers in default
  2. Permissible appointees are defined limited class
  3. Donor has not manifested an intent that the power be discretionary
    -If they fail to exercise the power, it splits among the class evenly.

**CREDITORS’ RIGHTS (316)**

Depends on settlor’s or the donee’s creditors, provisions of trust instrument, and state law

**Creditors of the Settlor (316)**
- The general rule is that a settlor’s creditors may reach trust property to the maximum extent that the settlor herself could.
- Creditor’s generally cannot reach gifted property unless the creditors can prove it was a fraudulent conveyance (transfer made with intent to defraud creditors)
  - “Badges of fraud”
- If the gift is revocable, the creditors can reach it to the extent of the donor’s right to revoke.
- You can make a voluntary written assignment of your interest in a trust to a creditor
- You can also anticipate your interest by selling it for present value
- Assignment and anticipation are both voluntary alienation
- There is also involuntary alienation which is court ordered or what not

**Deposit Guaranty National Bank v. Walter E. Heller (318) SC of Mississippi, 1967**

Rule: Spendthrift trusts are not allowed. Creditors can access money to extent debtor can.

**Governing Rules CJS Trusts: a spendthrift trust for the benefit of the grantor is invalid, both as to past and future creditors, even though there is a provision for a contingent remainder in a third person.**

**Facts:** A man was judged mentally incompetent when he returned from Vietnam. He made some bad investments and almost lost his family’s fortune. So, his guardian created a trust fund for him, where he had to get permission to get money from the trust but could get out up to 25% of the money per year.

**Other Rulings:** This was intended to be a spendthrift trust
- It is against public policy to allow someone to tie up property so creditors can’t reach it
- If he had the right to reach the funds, even though he didn’t, his creditors should also have the right to reach them.
- A debtor should not be able to have funds available to him and at the same time bar his creditors from reaching them.
- No intent to defraud is necessary, but its just not fair to the creditors

**Note on Asset Protection Trusts (324)** Used by wealthy people to shield their assets
- It used to be they used offshore asset protection trusts which allowed people to have trusts in other countries. These trusts allowed them to receive protection from creditors without totally surrendering trust assets
- Then states started allowing domestic asset protection trusts. However, domestic ones still have greater risk of access.
- Commentaries think the whole business is immoral
- Usually so long as you aren’t insolvent when you create the trust…you can hide your assets from future creditors
- This is good for people like doctors who might be subject to large malpractice claims

**2. Creditors of a Trust Beneficiary (327)**
* Creditor steps into shoes of beneficiary and receives whatever interest the beneficiary has in trust
  - Mandatory trusts: creditor can force trustee to distribute
  - Discretionary trust: creditor can’t force any more than beneficiary can
- Generally, creditors of a trust beneficiary can claim only the trust income or principal that the beneficiary
is entitled to receive and at the time the beneficiary is entitled to receive it.

**Spendthrift Trusts:** some states up hold it, some don’t (generally valid)
- if they do, it is the right of the donee to do what she wants with her $$
- if they don’t, its because its not fair to creditors
- When they are valid, usually there are exceptions for alimony, child support, tax claims and providers of basic necessities.
  - Some limit shields to amount necessary for support and education
  - Some permit creditors to reach fixed percentage
  - Some have a fixed dollar cap creditors can reach
- Spendthrift clauses may protect from bankruptcy as well
- In the absence of a specific provision otherwise, beneficiaries have the right to alienate their interests voluntarily.
  - You can sell your income or remainder interest at present value if you need $$
  - That’s where spendthrift provisions come it
- The balance is public policy against abiding by donors wishes
- Spendthrift clauses can be very good when someone is actually a spendthrift, but they should not be used without discretion
  - They cannot be terminated by agreement of all the beneficiaries
  - Sometimes they preclude income beneficiary from estate planning

**Scott v. Bank One Trust Co.** (328) Supreme Court of Ohio, 1991

**Rule** Spendthrift clauses ARE enforceable under Ohio law.

**Governing Rules** Spendthrift Trust: A trust that imposes a restraint on the voluntary and involuntary transfer of the beneficiary’s interest in the trust property

**Facts** This woman wanted to leave money to her son, but was afraid it would just go to his creditors because he was in debt. So, she put a clause in the trust saying that he couldn’t get the money if he was insolvent, had filed bankruptcy, or would not personally enjoy the assets.

**Other Rulings**
- She clearly intended this to be a spendthrift trust so it was correctly characterized as such
- We have weigh the donor’s right to donate the property as she chooses with the creditor’s right to the money.
- Brewer had no obligation to satisfy McCombe’s debts with her own property
- Spendthrift clause takes nothing from creditors to which they previously had the right

**Council v Owens** (334) Court of Appeals of Arkansas, 1989

**Rule** Income distributable from a spendthrift trust can be reached to satisfy claims for child support and alimony.

**Governing Rules** Restatement has this exception too, but jurisdictional split

**Facts** The parties were divorced and the husband was supposed to pay the wife $700 per month in alimony. At time of death he owed $26,800

**Holding** The trustee should pay the alimony

**UTC 504** (338) exceptions for alimony and child support
- Sometimes there is an exception for tort judgments, but not in Scheffel v. Krueger

**Disclaimers** (341) Refusing to accept an interest so it passes on to issue or whoever
- The person is then treated as if they predeceased

**Uniform Disclaimer of Property Interests Act**:
- Written
  - Filed with appropriate court
  - Short time period (6 to 9 months)
  - May not have received any benefits
  - Disclaimant can’t designate who gets it.
- Relates back to date of original transfer
  - No gift taxes
  - Not considered a fraudulent conveyance.
- However, does not insulate property from a federal tax lien against disclaimant

**TRUST MODIFICATION AND TERMINATION** (343)
- Settlor can revoke revocable trusts at any time
- Rule Against Perpetuities in some states allows dynasty trusts anyway
Modification and Termination by the Settlor
-Generally, a trust cannot be modified or terminated by settlor, unless it was reserved
-If settlor and all beneficiaries agree, they can usually modify (even over trustee)
-ALL beneficiaries must consent
  -Guardian ad litem: minors and unborn beneficiaries
  -Traditionally, they only looked at $$, now they look holistically.
  -Virtual representation: when someone else’s interests line up

UTC 411: permits modification without requiring consent of all beneficiaries

Modification and Termination by Trust Beneficiaries
-If the trustee and all beneficiaries consent, they can modify.
If only beneficiaries consent, jurisdictions are split
Claflin doctrine: The trustee can block premature termination of the trust if the trust has an unfulfilled material purpose.
Material Purpose is very fact sensitive
  -discretionary trusts
  -spendthrift trusts
  -support trusts
  -trusts when they have to reach a certain age

UTC 411 Consent (348): may be terminated/modified upon consent of all beneficiaries if it is not necessary to achieve any material purpose
  -Spendthrift clause is not a material purpose
Equitable Deviation: does not require all beneficiaries to consent -equitable remedy
Administrative Deviation:
  -Circumstances unknown or unanticipated by settlor
  -Compliance with provision would defeat or substantially impair accomplishment of trust purpose
  -Cannot apply to disparities provisions
Distributive Deviation: modify disparities provisions in order to carry out primary purpose

UTC 412 Unanticipated Circumstances (349): May be terminated/modified (administrative or disparities) to further purposes of trust because of circumstances unanticipated - looking for settler’s probable intention
Cy Pres: Charitable trusts: when it becomes impossible, impractical, or illegal to carry out that particular charitable purpose, they modify the trust.
  -If the settlor explicitly provides what will happen if the trust fails, Cy Pres does not apply
  -UTC B408(b) allows if charitable purpose becomes unlawful, impractical, impossible, or wasteful
*Can modify if unforeseen change of circumstances that would defeat or substantially frustrate settler’s intent and all the beneficiaries consent
  -The modifications must further settler’s intent
  -Unforeseen change is extremely fact sensitive.
  *Being advantageous to beneficiaries is not enough
-UTC and Restatement allow modification because of tax minimizing objectives

In Re Harrell (350): Court of Appeals of Oregon, 1990
Rule The court will not modify a trust only to make it more advantageous to the beneficiaries.

Governing Rules
We rely on common law
1. All beneficiaries agree
2. None of the beneficiaries is under a legal disability
3. Trust’s purposes would not be frustrated

Restatement: circumstances not known to settlor, not anticipated, would not defeat or substantially impair the accomplishment of the purpose of the trust.

Facts Woman wanted to modify a trust so that money didn’t go to someone who needed to qualify for public benefits.
-Supplemental needs or special needs trust: only meant to supplement government benefits.
-After this case, the legislature authorized beneficiaries to enter a written agreement modifying the trust.
-Generally, the court will not authorize invasion of trust unless all beneficiaries agree

-UTC 416: Explicitly authorizes modification to achieve tax purposes.
Courts are reluctant to ignore settlers intent

**Himmelfarb v. Horwitz**: (357) DC Court of Appeals, 1987
- Here, they allowed beneficiaries to ignore an explicit provision
  
  The trust was for the benefit of the grandchildren but only if they were married to people of Jewish faith and religion. Everyone except the GALs agreed it should be changed. Court found that Morton could receive $$

- This was something of a compromise or a settlement. Courts like these.

### Terminating Small Trusts (361)
Controlled by state statute.

**UTC 414(a)** may terminate below $50,000, or if it is insufficient to justify cost of administration. Must be distributed in accordance with purposes of trust.

**Combining Small Trusts** (361): State statute controls, or a provision in trust

### Planning for Illness and Death (485) - 185 of study aid

#### Advance Medical Directives (488):
- Advance Medical Directives specify how health care decisions should be made if one becomes incapacitated
  1. Living Will/Directive to Physicians: Instructions regarding the withholding or withdrawing of life sustaining treatment
     - Really only used to refuse extraordinary care that prolongs life
  2. Power of Attorney for Health Care: Choosing an agent to make decisions
     - Formalities of execution must be strictly observed
     Combines living will and PoA into single document. Also instructions regarding organ and tissue donation and designation of a primary physician

Patient Self Determination Act: requires institutional health care providers to furnish patients with information about advance directives

#### Making Decisions in the Absence of Advance Directives (491)

**Cruzan v. Director Missouri Department of Health**, SC, 1990 (491)

Nancy Cruzan was on life support with virtually no chance of regaining her mental faculties
- A competent person would have a constitutionally protected right to refuse life support
- Missouri requires clear and convincing evidence that a person wishes to die. This standard is constitutional. The state is free to shift the level of burden to have errors in one way or another.
- On remand, they found there was clear and convincing evidence and she was taken off life support

**Variation:**
- Substituted Judgment Standard: court tries to determine what they would decide
- Best Interest Standard
- Surrogate Decisionmaking Statutes: statute says person can decide (fam, spouse)

#### Determination of Death Act (2/3 of states have adopted)
1. Irreversible cessation of circulatory and respiratory functions
2. Irreversible cessation of all functions of the entire brain

#### Assisted Suicide (505)
* No Due Process right to hasten our deaths
  - Look at history and see long time prejudice against suicide

**Washington v. Blacksburg** (506) Supreme Court, 1997

Washington had a statute prohibiting “Causing or aiding a suicide” It was challenged under the 14th Amendment and upheld
- The right to commit suicide or right to assist others in doing so are not protected by due process clause.
- This is a large extension of the right to refuse unwanted medical treatment
- The law is rationally related to goal of protecting life/ preventing suicide
  - Protecting vulnerable groups
  - Protecting integrity and ethics of medical profession

- Society and law has historically rejected suicide.
- The experiment in the Netherlands has not gone so well

**Vacco v. Quill** (515) Supreme Court, 1997

New York had a statute making it a crime to aid another in committing suicide. It was challenged under the Equal Protection Clause and 14th Amendment. Against, it was upheld.
- This doesn’t treat anyone differently. The distinction between assisting suicide and withdrawing life sustaining treatment is serious and rational.
Assisted Suicide: Third Party provides patient with means of taking his or her own life, but patient actually kills herself
Active Euthanasia: is when the third party actually administers the agent producing
- Lethal injection is quite common in the Netherlands
- American Medical Association is strongly against physician assisted suicide
- Some think it is the first step to involuntary euthanasia
- There is a lot of suffering though before people die.

Legislation Authorizing Physician Assisted Suicide (530)
- Vacco and Washington were both statutes against physician assisted suicide.
- Oregon has a statute ALLOWING it. The Ninth circuit upheld the Death with Dignity Act
- Nine authors have also put together a Model State Act
  - Mandatory review by mental health professional
  - Consultation with Social Worker about nonmedical options
  - Physical liability for intentional or negligent misconduct, etc.

ANATOMICAL GIFTS (536)
Uniform Anatomical Gift Act (1968)
- any individual who is age 18 or older can execute a document authorizing an anatomical gift
  - doesn’t need to be witnessed
  - consent of relatives is not required
  - hospitals are required to inquire routinely
- Some countries have presumed consent with an opt out
- Lawyers should raise and discuss the issue with clients

Rights to the Human Body (539)
- Moore v. Regents of University of CA: person does not “own” an interest in excised cells
- What about frozen embryos. Davis v. Davis found that fathers interest in no procreating outweighed mother’s interest in donating frozen embryos to childless couple.
- A few states have statutes regulating reproductive material
  - Lawyers should look at these

Chapter 12: DRAFTING AND CONSTRUCTION OF WILLS AND TRUSTS
Section A: The Methodology of Interpretation (801)
- Biggest goal of construction is to determine and give effect to property owner’s intent
  ** Extrinsic evidence is admissible only to show what the testator meant by what he said, not to show what he meant to say.
  Plain Meaning Rule: Document that is clear and unambiguous must be read and implemented as written.
  - If the meaning of a word or provision is ambiguous, courts first try to interpret it by looking within the four corners of the document.
  - If it is STILL unclear, courts can look at extrinsic evidence.
  * Extrinsic evidence is only admissible if there is an ambiguity in the will
  Issue: How to determine if provisions of will are clear and unambiguous or ambiguous?
  In Re: Estate of Russell (803) Supreme Court of California, 1968
  Rule Extrinsic evidence is admissible to show a latent ambiguity
  - Only extrinsic evidence that is consistent with one of the possible reasonable interpretations of the ambiguity is admissible.
  * IF a provision is not susceptible to more than one meaning, no extrinsic evidence.

Governing Rules
- Paramount rule is to look for the intention of the testator
- Extrinsic evidence is admissible to explain any ambiguity arising on the face of a will OR to resolve a latent ambiguity which does not so appear.
- A latent ambiguity is one which is not apparent on the face of the will but is disclosed by some fact collateral to it.
- The making of a will raises a presumption that a testator intended to dispose of all his property.

Facts: A woman left a small card that said on one side “Turn the card. I leave everything to Chester H. Quinn and Roxy Russell” On the back it said some other dumb stuff. The problem was that Roxy Russell was the testatrix’ Airedale dog.

Holding: The testatrix intended to make a disposition of all the residue of the estate to Quinn and the dog
in equal shares - as tenants in common. But, the attempted gift to Roxy Russell is void. The lapsed gift passes by intestacy.

**Other Rulings**

- Two classes of latent ambiguities
  1. Two or more persons or things exactly measuring up to the description
  2. No person or thing exactly answers the descriptions, but two or more people come close
- In order to determine initially whether the instrument is clear and unambiguous, the court must examine the instrument in light of the circumstances surrounding its execution.
  - Consider the circumstances under which the will was made
- Nothing in this will says anything about a duty of Quinn.

**Emmert v. Hearn** (811) Court of Appeals of Maryland, 1987

**Rule** When there is only one way to construe a word, it is not ambiguous and extrinsic evidence should not be allowed.

**Governing Rules**

- The paramount concern in will construction is the testator's intent.
- This should ordinarily be gathered from the four corners of the will.
- The words should be given their plain meaning and import.
- Legal words should be given their legal meaning unless there is evidence IN THE WILL ITSELF that shows he or she meant something else by the term.

**Facts** The will at various times talked about tangible personal property and intangible property, but in one instance just said “all my personal property”

**Holding** Extrinsic evidence should be excluded.

**Other Rulings**

- There is no difference between legal and common definitions of “personal property”
- There is no ambiguity about the meaning of the words “personal property”

**Notes and Questions** (816)

- Not all courts have come to this same conclusion. This is actually a commonly litigated phrase, especially because it was used twice in the same document in a way that was confusing.
- When drafting wills and trusts, attorneys should pay special attention to defining personal property.
- For income tax purposes, it is important for tangible personal property to pass as a specific, rather than residuary gift.

**Common Types of Ambiguities** (818)

- **Patent Ambiguities**: Those that are obvious from the language of the document
- **Latent Ambiguities**: Those that are not manifest in the language of the document itself, but appear only when additional information external to the document is known
- **Equivocation**: When a beneficiary might be either of two people
- **Misdescription**: no person meets the description.
- **Omission**: scrivener forgets residuary clause or something
  - **Common Law**: Extrinsic evidence admissible for latent ambiguities, but not patent
  - **Modern**: most courts consider extrinsic evidence for either type of ambiguity.
    - Look at circumstances
    - *Still must be an ambiguity
    - Only allows extrinsic evidence consistent with on reasonable interpretation

**Rules of Construction** If extrinsic evidence is not sufficient to resolve an ambiguity

**In Re: Trust of Killian** (820) Supreme Court of Iowa, 1990

**Rule** Since some people are described by relationship and others named individually, the ones named individually are probably intended to be more generic. (intent)

**Governing Rules**

- Testator’s intent must prevail. Courts should resort to technical rules of construction only if ambiguous language in will or trust creates uncertainty about maker’s intent.
  - Intent must be found from within the four corners of the will
- In the absence of a showing of intent, there are cases that provide a technical rule that the term “Wife” refers to the beneficiary’s wife at the time the will was executed rather than a subsequent wife.

**Facts** Anne Killian created a trust from which she received income and the principal would go to her husband and her two children upon her death. It said that her son could appoint by will or trust to his wife any amount within his 1/3. When the trust was established, her son, John, was married to a woman named
Donna. By the time of her death, John was married to someone else. John ended up leaving Jan all of the interest he had in Anne’s trust.

**Holding** “Wife” refers to whoever John was married to when he executed the power.

**Other Rulings**
- Jan and John were not even married until 14 years after Anne’s death.
- Anne specifically names her children, but uses generic words to describe their spouses.
- **Wells Fargo Bank** “My son’s wife, if he has one” The son later got married and predeceased his wife. The court allowed his widow to inherit.
- **Breckheimer v. Kraft** “Nephew Raymond Schneikert and Mabet Schneikert his wife. However, he was married to a woman named Evelyn when the will was executed. The court took out the name and read it as “Raymond Schneikert and his wife.” They said that no words could be inserted but words could be removed.
- **Personal Usage**: Exception to the plain meaning rule to find that a particular term has an unusual meaning peculiar to the particular donor.

**SCRIVENER’S ERROR: Mistakes in Drafting and Execution** (826)

**Modern**: Where there is clear and convincing evidence that there was a scrivener’s error, and clear and convincing evidence of its effect upon testator’s intent, extrinsic evidence is admissible to establish and correct the mistake.

*This is a new doctrine and has only been used once!*

(This was in study aid and not in book, so maybe don’t say it - **Erickson v Erickson**)

**New Jersey**: Doctrine of Probable Intent: Unforeseen change → extrinsic evidence

**Restatement**: Reforming donative documents (clear and convincing evidence)

**See notes below on wills v. trusts**

**Connecticut Junior Republic v. Sharon Hospital** (826) Supreme Court of CN, 1982

**Rule**: Extrinsic evidence is not permissible to show the error of a scrivener (or the testator) no matter the type of proceeding of the desired remedy, unless it is necessary because of an ambiguity on the face of the instrument.

“The question is not what he meant to say, but what is meant by what he did say”

**Facts**: A man had a will and two codicils. In the first codicil, he switched which charities were to get his money. Then, when he had the bank make changes, they accidentally substituted the charities from before, so that’s what was in his will at the end.

**Holding**
-Unless there is an ambiguity on the face of the will or codicil itself, extrinsic evidence of a testators intent cannot be admitted.

We will apply the same evidentiary rules to both types of proceedings (probate and will construction)

**Other Rulings**
- No different between probate hearing and will construction proceeding
- Extrinsic evidence is not admissible to indicate testator’s intention. That intention should be expressed in the will itself.
- The plaintiff’s claim that there was ambiguity because of the two lists of charities. No.

**Dissent (Peters)**: This case should be treated like a **fraud or undue influence** case. The instrument substantially misrepresents the true intent of the testator. We allow extrinsic evidence to show fraud, undue influence, or incapacity. While there should be a presumption of accuracy because the person signed the will, that presumption is a rebuttable one.

**Notes** (836)
- **Charitable remainder trusts** are fee from estate taxes, so that’s what he was going for.
- Eventually, the lawyer who drafted this will was unsuccessfully sued for **malpractice**.
- In 1988, CN reversed this and adopted the dissent’s argument that extrinsic evidence should be admissible if the scrivener’s error misled the testator.
- However, the majority’s rule is still the majority rule in the country for **wills**
- Courts are more likely to reform **trusts**
- **Snide**: Two people signed each others wills. The supreme court of PN said they lacked testamentary intent with respect to the document that bore each’s signature.

**Restatement** §34.7 (837)
- Says that mistakes relating to identities of intended donees from drafting errors should allow reformation.
- Needs clear and convincing evidence of the donors intent and that there was a mistake that
affected the specific terms.

**Professional Liability for Drafting Errors** (840)
- Disappointed beneficiaries can sue for malpractice!

**Hale v. Groce** (840) Supreme Court of Oregon, 1987
Attorney forgot to include gift to plaintiff in the will. He was sued for negligence and breach of contract.
- Some states allow third party beneficiaries or negligently injured parties to sue
- Holding: complaint states claims for damages on both theories. As the intended beneficiary, this person can sue.

**Notes**
- Other courts haven’t allowed third party beneficiaries to sue

Two possible approaches to drafting errors
  1. Permit reformation of will by extrinsic evidence
  2. Deny reformation but allow malpractice suit

**Mistake in the Inducement** (846)
- When a will accurately reflect the testator’s intent, but the intent was the product of a mistake of law or fact

**Carpenter v. Tinney** (846)
A will was attacked on the grounds that the testator was of unsound mind. She had left two of her children and husband $5 each and her other two children the rest of her estate. She had believed that her husband had left everything in his will to the $5 children, but that was untrue.
- Generally, a mistake of fact or law, in the absence of fraud or undue influence, will not defeat the probate of the will.
- Since there was no fraud or undue influence, we will not reform the will.

**RULES OF CONSTRUCTION REGARDING IDENTITY OF BENEFICIARIES**
- You should always make survival a requirement and name alternative takers
- Ordinarily, a devise is conditioned on survival
- Otherwise, it lapses → residue → intestacy
  - No residue of a residue - a lapsed residuary gift wouldn’t go to other residuary
  - Most states have rejected this.

**UPC 2-604** (852)
- Lapsed gifts become part of the residue
- Lapsed residuary gifts go to other residuary takers
  - Must survive by 120 hours

**Anti-lapse Statutes**
- Saves gifts by redirecting property to beneficiary’s issue
- A few states’ statutes apply to *all* beneficiaries, but usually you need a close relative
- Modern trend has no distinction between void and lapsed
  - Dead when will was written = void

**In Re Estate of Rehwinkel** (854)
Testator’s niece, who was named in the will, died a month before him. Her son claimed her share under the anti lapse statute. His will had a clause that said “to those of the following who are living…”

Issue: whether such language was sufficient to preclude anti-lapse statute
- Testators are presumed to be aware of anti-lapse statute, so for it not to apply, they must *clearly show intent* that it not apply.

Holding: This language is sufficient to preclude the anti-lapse statute

**Notes** (857)
- Even when statutes are silent, courts often interpret them as allowing someone to preempt them

**RULE:** Most courts allow language like “alive” or “survive”
- You can also add a clause like “if any of these fail, it should go to my residuary”

**UPC 2-603:** (858) Rejects majority view:
- “my surviving children” is NOT sufficient

**SURVIVAL REQUIREMENTS**
**ISSUE:** What if the circumstances of death make it impossible to tell whether the testator or the beneficiary died first?

**In Re: Estate of Stroble** (860) Court of Appeals of Kansas, 1981

Governing Rules
Kansas Uniform Simultaneous Death Law: When you can’t tell who died first, the property will be disposed of as if the devisee had predeceased the devisor.

Kansas Anti-Lapse Statute: When a devisee predeceases a devisor and no alternative taker is named, the issue of the devisee should inherit that property.

Facts: A woman (Patricia) and her mother (Mary) died in such a way that it was impossible to determine who died first. Patricia’s will left everything to her mother with a clause that said “if she shall survive me by 30 days. She also intentionally disinherited her husband, Charles, from whom she was separated.

Holding: Anti-lapse statute should not apply here. Because bequest lapsed when devisee did not survive the devisor by 30 days, all the property should pass through intestacy.

Other Rulings:
- Express provisions in a will trump the anti-lapse statute.
- Generally, when a testator uses words of survivorship in the will expressing an intent that the legatee take the gift only if she outlives the testator, the statute against lapses is not applicable and the expressed intent of the testator is controlling.
- The fact that a person is disinherited by a will does not prevent her from sharing as an heir at law, in property the testamentary disposition of which has failed by lapse.
- Express provisions in a will trump the anti-lapse statute.

Simultaneous Death (865):
Specified Periods of Time: Well drafted wills typically require beneficiaries to survive by a specific amount of time. This prevents the burden of two successive probates within a short time period.
- Estate planning documents might also contain presumptions
  - Can do this so that less wealthy spouse always survives which saves tax $$
  - Beneficiary Deemed to have died before the testator
    - Statute in this case treats the person as if they actually had died first.
- There are two other situations where this construction is seen
  1. State requires beneficiaries to survive by a number of days
  2. Testator’s will contains survivorship language.

Doctrine of Probable Intent (867):
- Allows you to introduce evidence showing what their probable intent would have been. New Jersey is the only state with this doctrine.

Brundige v. Alexander (868) Supreme Court of Tennessee, 1976
Anti-Lapse AND Uniform Simultaneous Death Act

Governing Rules:
- Anti-Lapse Statute: Everything goes to the issue if you die first
- Uniform Simultaneous Death Act: If you can’t determine that times of death, the property is distributed as if the devisee predeceased.

Facts: A married couple died together. The wife had numerous charitable donations and a residuary clause leaving everything to her husband.

Holding: The anti-lapse statute does apply and forces the court to construe the will as if Mr. Condra had predeceased. The property goes to the surviving issue of Mr. Condra under the antilapse statute.

Other Rulings:
- Anti Lapse Statutes ONLY apply if the beneficiary dies before the testator.
- Court is committed to giving the statute a liberal construction of the anti-lapse statute.
- The statute presumes in a simultaneous death that the person you are probating survived the other person.
  SO then we have the anti-lapse statute - it goes to his issue.
- That was all probate property

So THEN we have the tenancy in entirety: joint property with a right of survivorship in the marital setting.
- That means you can’t sue for severance.
- Usually, this doesn’t pass through the will
- But TN says “we already have an odd treatment because of a the simultaneous death statute, so we are just
going to assume that each one controls half.
-NORMALLY this doesn’t happen. It’s just because of the legal fiction that each predeceased each.
-Since they had already changed the normal application of the law, they just had each will control half the property
-Because of the anti-lapse statute, the wife’s half interest in the property goes to the children.
***You can vary these rules
***There will be a test question about this. About each saying the less wealthy spouse predeceased to save tax money or something ***
-Tennessee anti-lapse statute is very broad. It extends to any devisee. The UPC and other states generally have a more narrow group of people that the statute applies to.

**Uniform Simultaneous Death Act** (874)
-Default rule that deems beneficiary predeceased when order of death is unascertainable.
-Really, it has just changed the issue to be litigated from the question of who died first to the question of whether there was sufficient evidence to avoid the statute.
-In 1991, the revised Uniform Simultaneous Death Act extended the application of the original one to situations in which there IS sufficient evidence that one individual survived the other, if the period is relatively short.

**RULE:**
-Requires clear and convincing evidence of survival by 120 hours (five days)

**Uniform Simultaneous Death Act*** (printed on pg 875) **UPC 2-104** (876):
-Brundige said antilapse statute did not apply to property held as tenants in the entirety.
-It passes to the surviving co owner and becomes part of their estate.

**Also, a will can have an express clause that changes this**
-Death: Esed to be when there was no more circulatory and respiratory functions, but the modern trend is when there is irreversible cessation of total brain activity.

Class Notes: We don’t care if they died in the same event, we care that they died at the same TIME. Be careful to check the statute to see whether it is tied to an event or to a time.

**CLASS GIFTS** (879)
Failed share is redivided among members of class
-Look at intent to create class or intent to name individuals
  -How were beneficiaries described?
  -Do they have a common characteristic
  -What is the overall scheme
  -How was the gift described
-Class closes as soon as one member has legal right to receive, possess, or enjoy

**Anti-Lapse Statutes**
-Without these, when a donee predeceased the gift would lapse
  -Specific gifts ➔ residuary clause ➔ intestacy
  -No residue of residue: common law said if part of residuary failed it went to intestacy (not to other residuary taker), but **UPC** says the rest of residuary catches

**UPC 2-603: Antilapse** (887) if there is a close enough relationship, it goes to their issue
- Applies to treated as predeceased as well as actually predeceasing
-Lineal descendant of grandparents or closer
- Applies to stepchildren
- Rebuttable in will, but mere words of survivorship are not sufficient
  -If the will names an alternate taker and that taker cannot take, the antilapse statute gives it to the issue of the ORIGINAL taker.
- Applies not only to devises but also to appointments.

**Class Gifts and Anti-Lapse**
**UPC 2-605** (1969) and **Majority**: Anti Lapse applies first, THEN class gift
-Also, applies only if they are part of the class AND died leaving issue.
-If the share of the deceased class member is not saved by an anti-lapse statute, it passes to the surviving class members

**ISSUE:** Did the will create a class gift or a gift to several individual beneficiaries.
**Sullivan v. Sullivan** (881) Appeals Court of Massachusetts, 1988
**Rule** To determine whether a gift is to a class or to individuals, the relevant inquiry is whether the testator
subjectively considered the people named as a class.

**Governing Rules**: General rule is that if you name them, they are individuals.

**Facts**: “All my property to my nephews, marshall, david, and martha.” Marshall died.

**Issue**: If Marshall’s share would be split between david and Martha or go to his heirs.

**Holding**: Will is ambiguous. Extrinsic evidence should have been considered → class

-We first have to look at the four corners of the will to see if it is clear whether it was a class gift or a gift to individuals.

-It helped that the failed gift would have resulted in intestacy because there is a presumption against intestacy.

**Notes and Questions**

-Other courts have decided this issue differently.

  -Some courts say that naming people individually creates a construction preference for individual gifts that can be rebutted with contrary evidence.

-There are two options in this situation

  1. Find it is a class gift and the gift goes to the surviving class members
  2. The property lapses and passes through intestacy to the testators heirs.

-What about anti lapse statutes? I think this is a third option if it applies.

-Courts generally find that the presence of a named beneficiary does not affect the determination of whether the remaining beneficiaries are a class.

-The named beneficiary normally is not included in the class for purposes of construction and what not. (sarah and my cousins)

-The common law rule of “no residue of a residue” usually does not apply to class gifts.

-Antilapse Statutes and class gifts:

  -The UPC draws no distinction between those class members who were dead when the will was executed and those who died afterwards, but some states hold that antilapse statutes don’t apply to them

  -Remember that anti-lapse statutes often apply to class gifts, but not always.

**Class Gifts to “Children”, “Descendants,” or “Other Relatives” (890)**

-Default rules only apply when a will or trust fails to address a particular question.

**Adoption**: Common Law: Not included Modern: Yes, included

-Court still may apply the “stranger to the adoption” rule (that only the parents are legally bound to the adopted children)

-Many states have statutes or case law providing that a person must be adopted before a certain age to be included within a class gift.

-Step children are generally NOT entitled to share in class gifts (No legal relationship)

-A nonmarital child is not universally considered to be the child of her father for purposes of a class gift in a will or trust.

**RULES OF CONSTRUCTION REGARDING CHANGES IN PROPERTY AFTER EXECUTION OF A WILL (892)**

-“Specific devise” a devise of a specific, identifiable item of property

-“General devise”: a devise payable out of the general assets of the estate

  -The personal representative must go out an acquire the property

-“Demonstrative devise”: a devise payable first from a specific source and then supplemented from the general estate.

-These three are all grouped as “preresiduary devises” (they aren’t residuary)

-There are also “Residuary devises”

**Ademption by Extinction (893) (Specific Gifts)**

-Traditionally, if a specific devise were no longer in the estate, it failed

  -Testator’s intent is irrelevant; Extrinsic evidence is not admissible

  -Important to advise clients to distribute their estates by percentage shares rather than a house to one and a car to the other for this very reason

**McGee v. McGee (895)** Supreme Court of Rhode Island, 1980

**Rule**: Extinction of property of a specific bequest works an ademption regardless of the testator’s intent.

**Governing Rules**

Two fold test for Ademption

  1. Whether the gift was a specific legacy
Whether it is found in the estate.

Possible exception for merely formal changes in property (stocks merge or what not)

**Facts**

Deceased left all money standing on deposit in her name to be divided among her children. Five weeks before her death, one of her children, pursuant to power of attorney, took the money out and put it in bonds.

**Holding**

This was a specific devise and was not found in the estate so it fails. It was an error to admit any extrinsic evidence.

**Other Rulings**

- The specificity of the twelfth clause shows that it was a specific devise.
- The clause did not say “or proceeds from a sale of the same”
- The change was not merely formal but was substantial
- The fact that Mrs. McGee did not herself purchase the bonds is not significant.

**Notes (901)**

- A specific devise is not adeemed if the property devised has changed in form rather than in substance subsequent to the will’s execution.
- Later decisions show that it doesn’t matter that she was competent when she was told about the sale. Even if she hadn’t been it would not have made it valid.
- Under the traditional view, however, sale made by a guardian or conservator of the estate (as opposed to power of attorney) does NOT cause ademption, but rather the sale proceeds go to devisee.
- Traditionally, ademption by extinction has only been applied to wills, though it could also apply to trusts.
- Acts of independent significance: if you will your “Lincoln” but when you die it’s a different one, the new one can qualify.

**Avoidance Doctrines**

Characterize gift as general, not specific, characterize the change in form, not in substance, or construe will at time of death

- Many states now have **Non ademption statutes**.
  - If it was sold be a conservator, no ademption or whatever

**UPC 2-606: Nonademption of Specific Devises (903)**

- Testator’s intent
- ALLOWS extrinsic evidence.
- Adopts replacement property doctrine: Whatever was acquired to replace the property goes to that person
- (mild presumption against ademption)
- Outstanding balance doctrine: If testator is owed money for it or whatever
  - Conservatorship Excetion

**Ademption by Satisfaction (904) (General Gifts)**

- If you already gave her something worth that much, it is adeemed as satisfied.
- Doctrine of ademption by satisfaction applies to lifetime transfers of people who die testate. Compare to advancements which apply to intestate.

**UPC/Modern:** Presumed to be not satisfied absent a writing (UPC 2-609)

**UPC 2-609 (905) Ademption by Satisfaction**

- Will provides for deduction
- Testator declared in writing gift was satisfaction, or
- Devisee acknowledged in writing the gift as satisfaction

- Partial satisfaction, you can deduct part. **UPC**
- Gives any balance of the purchase price. So if you sell the specific gift, they get the money you got from it.

**Stock Dividends and Stock Splits (906)**

**Modern trend/UPC 2-605** is to give benefit of changes in stock (UPC) same percentage

- No distinction between general and specific
- Also dividends

**Common Law** Courts award additional shares from stocks splits in specific devise cases.

- In general devise cases, they don’t, so it is very important how it is classified.
- No dividends

**Other Matters Affecting Payment of Devises (908)**

Liens, abatement, and tax apportionment
Exoneration of Liens (908)
- The traditional view is that you take property free of mortgage (exoneration of liens)
- **UPC 2-607** (909) reverses this. Many states have statutes like this
  - Property passes subject to mortgage
- Testator can explicitly say whatever they want in their will. This is default rule.
  - The typical rule is that a statement like “pay all my debts” doesn’t mean pay the mortgage before
giving away your property.
  - If you really want it paid, be specific

Abatement (909)
- When there isn’t enough money to go around, the will must **abate** (be reduced)
- The issue is the order of abatement

**UPC 3-902** (909) Order in which assets appropriated; abatement
- Property not disposed of by the will (partial intestacy)
  - Residuary devises
  - General devises
  - Specific devises

Tax Apportionment (911)
- There are death taxes (state), estate taxes (federal), inheritance taxes (state), etc.
- **UPC 3-916** is identical to **Uniform Estate Tax Apportionment Act**
- There are different approaches
  - Apportion to each beneficiary based on value of received property
  - Take all taxes from probate residue
  - Apportion no probate assets and pay probate taxes out of probate residue.
- Unless otherwise stated, every gift would be reduced by the proportional tax. Its cheaper that way too

**UPC 3-203**: You can remove a personal representative who is unsuitable
- Comments define this further.

1058: 706: removal of trustee
- Have to keep funds separate
Pg 1062: S7-303: You have to tell them about the account
- A trustee with special skills has a duty to use those special skills