INTESTACY
- Intestacy statutes determine who receives a deceased property owner’s property if the owner dies without a valid will or will substitute.
  - Personal property is typically distributed under the laws of the state in which the D was domiciled at death
  - Real property is typically distributed under the laws of the state in which the property is located
  - UPC looks to the law of the designated individual’s domicile for the governing intestacy statute
  - Intestacy statutes are not based on individual situations, they are based on what a typical D would want

UPC:
1. Surviving Spouse
   - 100% if no issue or parents; or 100% if all D’s issue are also issue of surviving spouse and surviving spouse has no other issue; or $200,000 + 75% of rest if no issue but surviving parent; or $150,000 + 50% of rest if all issue are also issue of surviving spouse and surviving spouse has other issue; $100,000 +50% of rest if one or more issue are not issue of surviving spouse

2. Issue
   - Equally Æ per capita at each generation

3. Parents
   - Equally

4. Issue of Parents
   - Equally

5. Grandparents/issue (Doesn’t go beyond 2nd line collaterals)
   - 50% to paternal grandparents or survivor; otherwise to their issue equally; 50% to maternal grandparents or survivor; otherwise to their issue equally; If no surviving grandparents or issue on one side, all to the other side Æ Inheritance is limited to issue of grandparents

6. Escheat to State
   - 100%

Common Law:
1. Surviving Spouse
2. Issue Æ generally either by per stirpes or per capita with representation
3. Parents
4. Issue of Parents
5. Grandparents
6. Issue of grandparents
7. Next-of-Kin
8. Escheat to State

Methods of Distribution:
ISSUE
- With first division Æ give one share to each party who is alive and one share to each party is who dead but survived by issue
- Per Stirpes
  - ALWAYS make the first division of the D’s property at D’s children (whether there are any live takers or not)
  - Dropping shares drop by bloodline
• Per Capita with Representation
  i. Make first division at first generation where there is a live taker
  ii. Dropping shares drop by bloodline

• Per Capita at each Generation
  i. Make first division at first generation where there is a live taker
  ii. Dropping shares drop by pooling—combine them and distribute them equally among the eligible takers at the next generation

COLLATERALS—property flows up to collaterals when there is no surviving spouse or issue
• Parentelic Approach—starts with D’s immediate family and then moves out along collateral lines, starting with the closer lines and moving to the more remote until there is a line with a live taker
• Degree of Kinship Approach—count the degrees of relationship between the D and the relative, and those relatives of the closest degree take to the exclusion of those of a more remote degree.
  o Determining Degree: count from D up to the closest common ancestor and then down to the live relative

Children Born out of Wedlock
• UPC §2-114(c): Person is presumed to be biological child of another if “parent” openly treated the child as his/her own

• Common law: Child born out of wedlock is considered a child of no one—child cannot inherit from or through either natural parent, and neither natural parent can inherit from or through the child

Artificial Conception:
• Uniform Parentage Act—If a woman is artificially inseminated with the sperm of a man who is not her husband, the husband is deemed the child’s father if the husband consented.

Adoption
• UPC §2-114: Adoption creates a parent-child relationship between the adopted child and the adopting parents. Adoption severs the parent-child relationship between the natural parents and the child
  o EXCEPTION: When adoption is by a step-parent: (1) the adoption does not affect the parent-child relationship between the adopted child and the natural parent who is married to the adopting stepparent (2) The adoption establishes a parent-child relationship between the adopting stepparent and the child, with full inheritance rights in both directions (3) The child can still inherit from the natural parent of the same gender as the adopting stepparent, but the natural parent loses his/her right to inherit from his/her child.

• Common law: Stranger to adoption rule—adopted child could not inherit from a stranger to the adoption
  o Majority of states have abolished this rule

• Adult adoptions are typically treated the same as adoptions of children

Stepchildren
• UPC: expressly excludes stepchildren
• Majority: do not provide for stepchildren to inherit from or through their stepparents and vice versa.

Foster children
• Foster children generally receive nothing when their foster parents die intestate
**Equitable Adoption**—permits a foster child in certain instances to inherit from the foster parent as though the child had been legally adopted

- Usually requires clear and convincing evidence either (1) the foster parent agreed to adopt the child or (2) the foster parent tried to adopt the child but failed to comply with the legal requirements for some reason

- Generally does not allow the child to take through the adoptive parent(s), the adoptive parent(s) to take from the child, or cut off inheritance from birth relatives or their right to inherit from the child

**Half Bloods**

- **UPC §2-107/Majority**: Treats whole bloods and half-bloods the same
- **Common Law**: Only whole blood relatives are entitled to inherit

**Disinheritance**

- **UPC §2-101(b)**: D can disinherit an heir by executing a will that expresses such an intent, even if some or all of the D’s property passes through intestacy.
  - The heir is treated as if he/she predeceased the D
  - If the heir is survived by issue, they take unless the will expressly disinherits them as well.

- **Common Law**: D can only disinherit by executing a valid will that disposes of all of the D’s property so that nothing passes through intestacy
  - If the will expresses an intent to disinherit but some or all of the D’s property is distributed through intestacy and the heir qualifies to receive a share, the heir takes

**Advancement**—whether an inter vivos gift D made to an heir should count against the heir’s share of the D’s probate estate

- **UPC §2-109**: Inter vivos gifts do not constitute an advancement unless a writing indicates that the donor intended the gift to constitute an advancement.
  - If donor creates the writing, the writing must be made *contemporaneously* with the inter vivos gift
  - If the donee creates the writing, the writing may be made at *any time*
  - If donee predeceases D, the advancement does NOT count against the share of the donor’s estate going to the donee’s issue unless the writing expressly provides so
  - Inter vivos gift is valued as of the time the donee receives possession or enjoyment of the property, whichever occurred first

- **Common law**: Presumption that the gift constitutes an advancement that counts against the donee’s share of D’s estate
  - Hotchpot: All inter vivos gifts to heirs are added back (on paper) into D’s probate estate to create the Hotchpot. Then the hotchpot is divided equally among the decedent’s heirs. Any advancement received by a child is counted against that child’s share of the hotchpot.
  - If the advancement exceeded the child’s share, the child does not have to repay the estate
  - If the donee predeceases D, the advancement doctrine applies to the share of the donor’s estate going to the donee’s issue.

**Homicide**

- **UPC §2-803**: killer shall not take from his/her victim—killer is treated as if he/she predeceased D
  - May allow children of killer to take under anti-lapse statute

- **Common law**: person should not profit from his own wrongdoing
Disclaimer
• General Rule: Disclaiming party is treated as if he/she predeceased D

WILLS
• Functions formalities serve:
  o Evidentiary ➔ solid evidence of the existence and content of the D’s directions
    ▪ Witnesses might either misremember or deliberately lie about alleged statements of intention by T
    ▪ T is unavailable to testify or clarify other evidence concerning his/her intention
  o Cautionary ➔ some indication that T arrived at these directions with adequate awareness
  o Protective ➔ attempts to assure that the contents and the execution of the will were the product of T’s free choice
  o Channeling ➔ facilitate a substantial degree of standardization in the organization, language and content of most wills, so they can be prepared and administered in a fairly routine matter.

Types of Wills
• Formal
  o Written
  o Signed
  o Witnessed
• Holographic
  o Handwritten
  o Signed
  o Not witnessed
• UPC §§2-502; 2-503: substantial compliance is required—court is authorized to probate will if:
  o Clear and convincing evidence shows that T intended this document to constitute his/her will
  o Clear and convincing evidence shows that the will substantially complies with will formalities
• Common law: required strict compliance with will formalities—any deficiency rendered will invalid

Signature Requirement
• Identifies the will with T
• Shows finality
• Anything T intends as his or her signature
• UPC: T is not required to sign at the end of the will (may cut against signatory intent if T does not); May be signed by another for T in T’s presence and at T’s direction
• Common law: T is required to sign at the end of the will

Witness Requirement
• Witnessing element can be broken down into three requirements:
  1. Will must be witnessed by required number of witnesses
  2. Witness must attest to one of three acts:
    a. T’s signing the will
    b. T acknowledging his/her signature previously placed on the will
    c. T acknowledging the will
  3. Witness must sign the will
Witnesses serve two functions:
- Observatory
- Signatory

Most states and UPC require two witnesses
- UPC: any person generally competent to be a witness may act as a witness to a will
- Some states have minimum age requirements for witnesses
- UPC §2-205: witness does NOT have to be disinterested party
- Common law: witness must be disinterested
  - Remedies:
    - Invalidate entire will
    - Void interested witness’ gift
    - Purge the interested witness’ excess interest under the will

Presence
- UPC: dispenses with presence requirement—witness must sign the will within reasonable time period of witnessing one of the three permissible acts by T
- Some States: require witness sign the will in the presence of T
  - Line of sight test—parties were in each other’s presence only if they literally could see each other
  - Conscious presence test—requires a general awareness (through all of one’s senses) of what is occurring

Self Proving Will—will that has attached to it an affidavit executed under oath by the attesting witness which states that all the required testamentary formalities were satisfied when the will was executed
- UPC: recognizes self proving wills
  - Presence of affidavit creates rebuttable presumption as to most execution requirements but creates conclusive presumption as to signature requirements
  - Signature attached to self proving affidavit attached to a will is considered a signature affixed to the will

Holographic Wills
- No witnesses are necessary
- 3 main issues with holographs:
  1. Date Requirement
     - Helps determine which will was most recent if more than one is found
     - Helps determine if T was competent when will was written
     - UPC: No date requirement
     - Many States: Date requirement
  2. Requirement that holograph be entirely in T’s handwriting
     - UPC requires only that the signature and material (dispositive, administrative) portions of the will be in the T’s handwriting
     - States define “material” differently
     - Some states: entire holograph in T’s writing
  3. Testamentary intent—as opposed to drafts or idle thoughts
     - Document need not be labeled “will,” but use of the word helps to show testamentary intent
     - UPC: Allows testamentary intent to be shown through extrinsic evidence
     - Some States: Require the document offered for probate show testamentary intent without resort to extrinsic evidence
WILL CONTESTS

- A person must have standing to challenge a will
  - A person has standing if he/she has a pecuniary interest if the contest succeeds—mere expectancies or moral interests are insufficient

- Will contests must be brought within the applicable statute of limitations

- Proponent must prove:
  - Formalities:
    - Formal will
    - Holographic will
  - Testamentary capacity
    - Extent of property
    - Objects of bounty
    - Understood will

- Contestants can challenge a will based on:
  - Lack of capacity
    - Legal
    - Testamentary
  - Fraud
  - Undue influence
  - Failure to comply with formalities
  - Revocation

- Typically, the burden of proof is preponderance of evidence
  - Some courts requiring clear and convincing evidence when insane delusion, undue influence or fraud is alleged

Testamentary Capacity

- A contestant alleging lack of testamentary capacity may claim that Tt:
  - Was not of the age required to execute the will
  - Was of unsound mind, or
  - Suffered from an insane delusion—a false belief adhered to against all reason that affected the will’s provisions.

- UPC §2-501 specifies that any individual 18 or older who is of sound mind may make a will
  - If either of these two elements is not satisfied, a will is entirely void, causing the T’s property to pass either under a prior will or by intestacy

- **Sound Mind Test** (not a high standard):
  1. Did T understand the nature and extent of his/her property
  2. Did T know the persons who were the natural objects of his/her bounty
  3. Did T understand the disposition made under his/her will
    - Even if the T is ordinarily of unsound mind, T’s will is valid if executed during a lucid interval
    - A duly executed will is often said to raise a rebuttable presumption of a sound mind. Being placed under a guardianship or conservatorship may give rise to a rebuttable presumption of unsound mind.
**Insane Delusions**
- To establish a claim of insane delusion, the contestant must prove:
  1. T suffered from a false belief (delusion)
  2. That belief was insane (T adhered to the false belief against all reason), and
  3. The belief affected disposition of T’s property under the will
    - The first two elements alone will not invalidate a will
- An insane delusion differs from a mere false belief in that a T who suffers from an insane delusion will not change his belief even when confronted with evidence to the contrary, whereas a T operating under a false belief will change his opinion once presented with convincing evidence demonstrating the belief is incorrect.
  - A mere mistaken belief or an erroneous or unjust conclusion is not an insane delusion if there is some foundation in fact or some basis on which the mental operation of the maker of the will may rest, even though the basis may be regarded by others as wholly insufficient
- A significant break from past wills or dispositions may suggest an insane delusion
- An insane delusion invalidates only the portion of the will that is affected by the T’s false belief

**Incapacity**
- Capacity is often determined from:
  - Expert testimony
  - Testimony from will’s witnesses
- A fact finder might consider an unnatural disposition as evidence of incapacity
  - A disposition which seems unnatural on its face may be upheld when a reason for the disposition appears
- Sudden changes in a T’s wishes are viewed with suspicion
  - Conversely, the fact that a disputed will is similar to prior wills helps to refute claims of incapacity
- A conservator or guardian can be appointed for someone who is incapacitated
  - Conservator takes care of property
  - Guardian takes care of a person

**Undue Influence**—when one influences the T to the extent that the will expresses the influencer’s intent, not T’s intent.
- Elements:
  - Susceptibility
  - Opportunity
  - Motive
  - Causation
- Presumption of Undue Influence arises when:
  - Confidential relationship between T and defendant
  - Defendant was favored in will
  - Undue activity in procurement
- Other factors a court may consider:
  - Age or consideration of health and mental vigor of T
  - Nature or degree of relationship between T and beneficiary
  - Opportunity for exerting an undue influence
  - Naturalness or unnaturalness of will
  - Whether T had independent advice.
• Duress is an extreme form of undue influence and requires an unlawful threat

Fraud
• The core element of a fraud claim is that some deception has been practiced on T. Fraud requires:
  1. Misrepresentation be made to T
  2. Intent to deceive T
  3. T in fact be deceived
  4. As a result, T does something the T otherwise would not have done

• Two Types of Fraud:
  o Fraud in the execution involves an intentional misrepresentation as to either the character or the contents of the instrument itself
  o Fraud in the inducement involves an intentional misrepresentation of facts outside the instrument which causes the T to do something he or she otherwise would not have done

• Promissory fraud—lack of present intent with regard to a promise of future action e.g. stop sleeping with wife’s son
  o Evidence of the promisor’s subsequent failure to keep the promise is not enough to prove promissory fraud—plaintiff must demonstrate promisor had no intention of keeping promise when promise was made

• Fraud invalidates only that portion of the will that is affected by the fraud
  o If the result of the deceiver’s fraud is that a T fails to write a new will or fails to revoke an existing will, the only remedies available are to seek money damages or to impose a constructive trust on the D’s heirs or devisees in favor of the beneficiaries who would have taken but for the fraud

Remedies
1. Constructive trust—if part of the will is ineffective
2. Intestacy—if entire will is invalid

Avoiding Will Contests
1. No-Contest Clause—clause in will that says if a beneficiary under the instrument sues contesting the instrument, the beneficiary loses his/her devise
  o If a will contest succeeds, the no contest clause is invalidated with the rest of the will
  o UPC §§2-517; 3-905/ Majority—refuse to enforce a no contest clause if there is probable cause to support the will contest
  o Minority—no contest clause is enforceable even if probable cause existed for the contest

• Antemortem Probate (Living Probate)—a court proceeding during the T’s life to establish that the will was properly executed and that the T had testamentary capacity and was free of undue influence at the time the will was executed
• Trust—not probated
• Have T evaluated by doctors
• Have T list all relatives not included in will

Replication by Codicil—whenever T executes a valid codicil to a prior valid will, the codicil is said to republish the underlying will, subject to any changes made by the codicil. As a general rule, the legal effect of the republication is to treat the will as though it had been re-executed as of the date of the codicil. The only requirement for republication is that the codicil refer in some manner to the underlying will.
• 3 caveats to general rule:
1. A will can be republished only if it still is physically in existence.
2. A will can only be republished if it was published (validly executed in the first place).
   o If the underlying will is not valid, the codicil is not a codicil but its own freestanding will
   o May be possible to give effect to testamentary wishes expressed in invalid will through incorporation by reference
3. Republication by codicil will not cause the underlying will to be treated as though it had been re-executed as of the date of the codicil if doing so would lead to a result that the T probably would not have wanted.
   - Curative effect: if there were problems in the original will execution ceremony that do not affect its validity in whole (e.g. interested witness or undue influence as to part of will), these problems may be cured by republication by codicil.
     o As long as the problem is not present when the codicil is executed, the codicil’s execution is deemed to re-execute and republish the underlying will, thereby curing the possible problem

Incorporation by Reference—a valid will can incorporate by reference a document that was not executed with will formalities as long as:
1. the will expresses the intent to incorporate the document
2. the will describes the document with reasonable certainty, and
3. the document being incorporated was in existence when the will was executed
   o If the document changes over time, only the document as it existed at the time the will was executed is incorporated by reference (unless the will is re-executed by republication by codicil)
   o UPC §2-513 essentially waives this requirement so long as the document only disposes of T’s tangible personal property
   - If the separate writing constitutes a valid holographic will, incorporation by reference is unnecessary

Acts of Independent Significance—will may dispose of property by reference to acts outside of the will (the referenced act can control either who takes or how much a beneficiary takes) as long as the referenced act has significance independent of its effect upon T’s probate estate
- The referenced act can control who takes and how much without T having to execute a codicil
  o Valid act of independent significance: When T executes her will her daughters are not married but she includes a provision: I give $1,000 to each of my son in laws.
    ▪ Act of marriage has its own independent significance apart from the act that also permits the new son-in-law to receive $1,000 under T’s will
  o Invalid act of independent significance: I leave $10,000 to each of the persons I will identify in a letter I will leave for my executor—T later writes a letter identifying 2 persons
    ▪ The letter does not have its own independent significance apart from its effect upon who takes under T’s will

REVOCATION
- T can revoke will by:
  1. Subsequent will
     o Must comply with all the required formalities for executing a will
     o May revoke in whole or in part
       ▪ Expressly
       ▪ Implicitly by inconsistency
     o Codicil—partially revokes or amends a prior will
       ▪ Must be executed according to will formalities
- Revocation of a codicil does not revoke the underlying will. Revocation of a will revokes all codicils thereto.

2. Physical Act
   - UPC: permits partial revocation by physical act
   - Many states: do not permit partial revocation by physical act
   - UPC: destructive act must affect some part of the will
   - Common law: destructive act must affect some part of the written portion of the will
   - The accidental destruction of a will DOES NOT result in revocation
   - If T crosses something out on a will and writes something new, the question may not be whether the will was partially revoked by a physical act but, is the devise a holograph

- Under either method, T must:
  - Have intent to revoke
  - Comply with the required formalities of revocation
  - Possess the mental capacity to revoke
    - Free from fraud or undue influence

3. Presumption
   - When a will which was in T’s possession cannot be found, or is found in a mutilated condition, after T dies, courts generally presume that the T intended to revoke the will
     - Normally when a will cannot be found and the fact-finder determines that it was not revoked, a copy of the will is probated or other proof is used to establish its contents

4. Operation of Law—Divorce
   - UPC §2-804: divorce automatically and irrebuttably revokes all provisions in T’s will in favor of the ex-spouse, unless the will expressly provides otherwise
     - Applies to will substitutes
     - Revokes provisions in favor of ex-spouse AND provisions in favor of ex-spouse’s relatives
   - Traditional: divorce revoked will but…
     - Revocation did not apply to will substitutes
     - Revocation only applied to ex-spouse

Revival and Dependent Relative Revocation
Four Methods can be used to revive a revoked will:

1. Re-execution—T and required number of witnesses sign or re-sign previously revoked instrument
2. Republication by Codicil—execution of codicil to will #1, despite the execution of an intervening will #2 that revoked will #1
3. Revival by Revocation of the Revoking Instrument—earlier will is revived only if the court concludes from the evidence that the testator revoked the latter instrument with the intent to revive the earlier one
   - Some States: don’t recognize RRI and require T to re-execute will #1
   - UPC §2-509: If first will was wholly revoked by the second, presumption against revival. Burden is on proponent of first will to establish that T intended to revive it. If first will was partially revoked by the second will, presumption is that the revoked part is revived. Burden is on the challenger to demonstrate T did not intend to revive the revoked part.
4. Dependent Relative Revocation—even if a will is validly revoked (in whole or part), it may be possible to probate the will if the revocation was (1) based upon a mistake (of fact or law) and (2) if it appears the testator would not have revoked if the testator had known the truth
   - Requirements:
     i. T’s will must have been revoked
     ii. Revocation must have been induced by some mistake on the part of T
     iii. Revival of the revoked will must be in accordance with T’s most likely desires under the circumstances
   - DRR is most commonly applied in three circumstances:
     o Defective new will
     o States that do not recognize RRI
     o Cross-out and substitution

CONTRACTS RELATING TO WILLS
- Person arguing that there is a contract pertaining to the will must prove the following through evidence OUTSIDE the face of the will:
  - Offer
  - Acceptance
  - Consideration
  - Pruss v. Pruss \(\Rightarrow\) mutual exchange of promises to devise property according to the will is valid consideration to support a mutual irrevocable will contract
- Two situations give rise to a claim that T entered into a contract during life:
  1. T contracted to make a will in someone’s favor
     - UPC: Contract must be evidenced by some writing signed by T
  2. Two Ts enter into a contract not to revoke the wills they have executed
     - Under the law of wills, the surviving spouse cannot be prevented from revoking his or her will and executing a later will that can be admitted to probate. However, the beneficiaries who are damaged can sue for breach of contract.
     - Elective Share Rights vs. Contractual Rights
       - Majority: enforces the terms of the contract not to revoke and let the contract beneficiaries take before the spouse
       - Minority: protect new surviving spouse and let the new spouse take first by voiding the contract not to revoke under the theory it violates public policy by discouraging/restraining the right to marry
     - Can beneficiaries prevent T from transferring assets in a manner inconsistent with the contract?
       - Generally not. The property the beneficiaries are entitled to receive an interest in is the property of the surviving T at the time of his death. Since he has not died, the plaintiffs cannot prove what property he owned at the time of his death. And since they cannot prove that, they can hardly prove that he breached any covenant to give them a percentage of the property he owned at his death.
       - Remedy—constructive trust

Joint Wills
- UPC: Execution of a joint will does not create presumption of a contract not to revoke the will
- Some courts: Infer the existence of a contract not to revoke when two spouses execute a joint will
Mutual Wills—Separate wills executed by spouses at the same time with reciprocal provisions.

- UPC/Majority: Execution of mutual wills does not indicate a presumption of a contract not to revoke

State Restrictions on Testamentary Freedom
1. Required Formalities
2. Rule Against Perpetuities
3. Creditors’ Rights
4. Spouse Elective Share (cf. omitted spouse)
   a. Pre-nuptial agreement can defeat elective share

Protection of the Family

Pretermitted Heirs
- Generally there is NO requirement that a parent leave property to his/her children
  o Why might a parent disinherit a child:
    ▪ Child is so successful, parents decide to split estate between other children
    ▪ Child is a spendthrift
    ▪ Parents spent significantly more on child throughout child’s life and want to try and
      even things out at their death
- Based on the idea that failure to mention a child in a will was an oversight, so the omitted child
  should get a share of the estate in order to fulfill T’s true intent.
  o Pretermitted heir statutes differ on several points:
    1. Are all children covered, or only those born/adopted after the will was executed?
       ▪ UPC §2-302 (and many others): cover only children who were born after the will
         was executed, unless T believed the child was dead
         1. Based on idea that if child born before will was executed was omitted, T
            must have intended to do so because it is very unlikely the T forgot about
            the existence of a child when executing the will
         2. When, after the execution and subsequent birth of a child, a T executes a
            codicil to the earlier will, the child is no longer regarded as after-born
            ▪ Some States: covers children born before and after will was executed [NM]
    2. Is the statute limited to children, or are more remote descendents included?
       ▪ UPC (and many others): Only protect omitted children
       ▪ Minority: Statutes extend beyond children [NM]
    3. What evidence is admissible to rebut presumption of unintentional disinheritance?
       ▪ UPC: Must appear from the will that the omission was intentional unless T
         provided for the child by transfer outside the will which was intended to be in
         lieu of a testamentary provision. This intent can be shown by the T’s statements
         or inferred from the amount of the transfer or other evidence.
       ▪ Massachusetts approach: Court may consider extrinsic evidence
       ▪ Missouri approach: Court may only consider the language of the will itself
    4. What does a pretermitted heir take?
       ▪ UPC: Only allows pretermitted child to take a share equal to that of his/her
         siblings, whose shares abate to make up the pretermitted heir’s share UNLESS
         the will devised all or substantially all of the estate to the other parent of the
omitted child and that other parent survives T and is entitled to take under the will

- Majority: Pretermitted heirs receive their intestate share

  - NOTE: Pretermitted heir statutes do NOT apply to will substitutes

Support Rights of Surviving Spouse

- If will was executed before the marriage, spouse can:
  - Elect against the will
  - Argue marriage revoked the will
    - Property distributed through intestacy
    - Property distributed under elective share statute
  - Prove status as omitted spouse to get intestate share

- If will was executed after the marriage, spouse can:
  - Elect to take under the D’s will
    - Spouse is limited to property devised under the will plus property passing to the spouse by way of will substitutes
  - Elect to take against the will
    - Spouse receives the elective share fixed by statute, in lieu of what he/she would have taken under the D’s will

Omitted Spouse

- UPC §2-301: spouse who marries T after T has executed his/her will is entitled to intestate share.
  
  EXCEPTIONS:
  - Bars the spouse where the will is made in contemplation of marriage
  - Intent not to provide for the spouse may be manifested in the will itself –including language that provisions applies to any subsequent marriages (express disinherance would NOT preclude a claim to an elective share)
  - Bars omitted spouse from taking property which T’s premarital will leaves to children of a prior marriage
    - Theory: failure to provide for spouse in this situation is not likely to be an oversight (Spouse can still claim an elective share)
  - Bars spouse if it appears T made a transfer to the surviving spouse outside the will in lieu of testamentary bequest
    - Sheer magnitude of transfer may serve as evidence transfer was made in lieu of testamentary bequest

- Some states: T’s marriage has no effect on a will
  - Spouses need no other protection than the elective share

- Common law: Omitted spouse presumption arises where (1) T marries after executing his/her will and (2) dies without revising/revoking will
  - Presumption can be rebutted (1) failure to provide for the new spouse was intentional and intent appears from will; (2) testator provided for the spouse outside of will in lieu of testamentary transfer—intent shown through extrinsic evidence

- NOTE: Elective share is typically smaller than intestate share spouse would receive under omitted spouse statute
Elective Share
- If a spouse elects against the will, the remainder of the property is distributed as if the surviving spouse had died (minus whatever the surviving spouse took in his/her elective share)

- Under UPC §2-202, size of elective share is primarily based on the length of the marriage
  - Spouse’s own assets are taken into account
  - Spouses have a limited period in which to choose whether or not to take the elective share
    - 9 months after D’s death or within 6 months after the probate of the D’s will, whichever comes last

- UPC: Includes both probate and non-probate property when computing the elective share
- Some states: Only consider probate property, however courts will examine whether an inter vivos transfer was illusory or testamentary such that the property should be included in determining the elective share:
  - Illusory transfer → Inter vivos transfers may be found to be illusory or testamentary when they diminish the probate estate to the extent that there is nothing left for the surviving spouse to elect against while allowing the transferor to retain dominion and control over the assets placed in trust
  - Intent to defraud → examines whether D, when making the transfer which reduced or defeated the surviving spouse’s share, intended to defraud the surviving spouse or his/her marital right in the estate
  - Present donative intent → transfer must intent to presently make a real gift to the transferee

- UPC: Reduces the spouse’s statutory share by the value of any devise to the spouse
e.g. elective share = $150,000; devise = $100,000; spouse gets devise + $50,000
- Some states: Require the spouse to choose between the elective share and any devise (cannot receive both)

- If the surviving spouse is legally incompetent, a conservator must decide whether to take an elective share on the spouse’s behalf

- Spouse can waive his/her claim to an elective share
  - UPC §2-213: Surviving spouse’s elective share rights may be waived wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the surviving spouse. A waiver is not enforceable if the surviving spouse proves that:
    - He/she did not execute the waiver voluntarily
    - It was unconscionable when executed
    - If, before execution of the waiver, the surviving spouse:
      - Was not provided fair and reasonable disclosure
      - Did not voluntarily and expressly waive any right to disclosure
      - Did not have actual or constructive knowledge of the D’s property or financial obligations

Community Property
- In community property states, each spouse owns 50% the community property
  - Normally spouse gets 50% of community property and whatever is devised to him/her
Construction and Interpretation

- Primary Rule: seek and give effect to T’s intention
  - Initially sought from four corners of will
  - Extrinsic evidence is introduced in some circumstances

- Unlimited inquiry into T’s intent is undesirable because:
  - Spawn endless litigation
  - Make interpretation of documents costly, time consuming and unpredictable → frustrate free transferability of property
  - Clarifying T’s subjective intent through oral testimony might be viewed as adding language to the will without following required formalities

- Ask yourself WHY the extrinsic evidence is being offered:
  - If it is being offered to help determine the validity of a will, the extrinsic evidence is admissible
  - If it is being offered to help construe an admittedly valid will, the courts are reluctant to admit such evidence absent an ambiguity

- Common law: **Plain Meaning Rule**—document that is clear and unambiguous must be read and implemented as written
  - EXCEPTION: Personal Usage—particular term has an unusual meaning peculiar to the particular donor
  - Generally this means that a court will not allow a party to argue that T used a word in a way different from its commonly excepted meaning UNLESS the word as used in the document renders the document ambiguous
    - HOWEVER if strong and credible evidence of T’s actual intent exists, courts try to carry out that intent
    - Legal terms in a will are given their specialized meanings unless there is evidence that the T, especially if the T was not an attorney, used the terms in a different manner
    - Non-legal terms are given their plain and ordinary meanings

- Restatement (Third) Property Donative Transfers rejects the plain meaning rule
  - Both the text of a document and relevant extrinsic evidence may be considered to determine the donor’s intent

- Ambiguity
  - Patent → unclear on its face; no extrinsic evidence is necessary to realize that there is an ambiguity
  - Latent → conveys a sensible meaning on its face but cannot be carried out without further clarification
    - Modern Trend: allow extrinsic evidence to resolve either type of ambiguity
    - Common law: extrinsic evidence was admitted to resolve latent ambiguities but not patent ambiguities

- Construing vs. Rewriting
  - As long as the extrinsic evidence clarifies the express language in the will, the extrinsic evidence is admissible and the court uses it to help it construe the ambiguity in the will
  - HOWEVER, if the extrinsic evidence is inconsistent with the language in the will or requires the court to add words to the will or rewrite the will, the court does not admit the extrinsic evidence.
• If T’s intention cannot be determined, one or more rules of construction will be applied. The rules effectuate what the court believes the T would have wanted had the T pondered the issue.
  
  o If neither extrinsic evidence nor a rule of construction resolves a particular construction question, then the attempted disposition fails—it will pass as part of the residuary estate

Mistakes in Drafting and Execution

  Drafter’s Errors

  • Restatement (Third) of Property Donative Transfers: Allows for the correction of mistakes
    
    o A donative document, though unambiguous, may be reformed to conform the text to the donor’s intention if the following are established by clear and convincing evidence:
      
      ▪ That a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and
      
      ▪ What the donor’s intention was

  • Common law: Parol evidence of intent cannot be admitted to supply a possible defect or omission in a will occurring through mistake or inadvertence whether of the testatrix or scrivener
    
    o Extrinsic evidence is not admissible for the purpose of showing an intention not expressed in the will itself, nor for the purpose of proving a devise or bequest not contained in the will.
    
    o Courts will often reform trusts to correct mistakes

  • Courts disagree re: whether reformation should be permitted if the will’s dispositive provisions are drafted correctly but the lawyer inadvertently hands someone else’s will to the T who signs the wrong will
    
    e.g. husband and wife sign each other’s wills

Mistake in the Inducement

• Will or trust accurately reflects the intention of the T or settlor but that intention is the product of mistake of fact or law

• General Rule: a mistake of law or fact, in the absence of fraud or undue influence, will not defeat the probate of a will, even though T would/might have made a different will if there had been no such mistake inducing T to make the will.

  o HOWEVER if T is fraudulently induced to execute a will, the will is invalid to the extent its provisions are shown to have been affected by the fraud

• Restatement (Third) Property Donative Transfers: mistakes in the inducement may be reformed if clear and convincing evidence establishes:
  
  o A mistake of fact or law affected specific terms of the document and
  
  o What the donor’s intention was

Rules of Construction re: Identity of Beneficiaries

Lapse: Gifts to a Named Individual

• If will is silent about survivorship, ordinarily each devise is considered to be conditioned on the beneficiary’s surviving the T. If a beneficiary fails to satisfy the conditions of survivorship, the devise to that beneficiary lapses.

• What happens when a gift fails:
  
  o Specific gifts: falls to the residuary clause, if there is one, otherwise to intestacy
  
  o General gifts: falls to residuary clause, if there is on, otherwise to intestacy
  
  o Residuary gift: if it fails completely, it falls to intestacy if it fails partially:
- UPC §2-604 and many states reject Common Law Rule—the lapsed share of one of multiple residuary devisees passes not to the T’s heirs but to the remaining residuary devisees.
- Common Law Rule—No Residue of a Residue—if the residuary clause names more than one residuary devisee and a residuary devisee dies before the T, the lapsed share of one of multiple residuary devisees passes by intestate succession to the T’s heirs.

- Saving Failed Gifts—2 doctrines are used to try and save failed gifts:
  1) **Anti-Lapse Statutes**
     - Designed to prevent failure of a devise through operation of the normal lapse rules
     - State anti-lapse statutes vary as to the category of beneficiaries protected by the statute
       - Some have enacted broad anti-lapse statutes that apply to all beneficiaries regardless of their relationship to the T.
     - UPC—words of survivorship are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of the anti-lapse statute
       - Words of survivorship + Extrinsic evidence that the T did NOT intend for the anti-lapse statute to apply, can defeat this provision
     - Majority—where the T uses words of survivorship indicating an intention that the devisee shall take the gift only if he survives the T, the anti-lapse statute does not apply
     - Modern trend—treat void and lapsed devises the same and apply anti-lapse statutes to both
     - Common Law—the law distinguished between a devise to a beneficiary who was already dead when the will was written (void) and a devise to a beneficiary who was alive when the will was written but died before the T (lapse)
       - Under this theory, anti-lapse statutes would not apply to void devises

- UPC §2-603 Anti-lapse; Deceased Devisee; Class Gifts includes a number of innovative features:
  - The anti-lapse provisions cover devises to a *stepchild* of the T, as well as devises to a grandparent or descendant of a grandparent of the T.
  - If the T names an alternate taker who is unable to take for any reason, the anti-lapse rules may apply to the *original devise*
  - The anti-lapse provisions extend not only to devises, but also to appointments made in a T’s will under a POA

Framework:
1. Has the gift lapsed under common law?
   a. Is there an alternate taker in the language of the document?
2. Is there an anti-lapse statute?
   a. Who does it cover?
      i. Lineal descendants
      ii. All beneficiaries
   b. Who is the alternate taker under the anti-lapse statute?
3. Does it apply, generally?
   a. Are there words of survivorship?
4. Class gift?

2) **Class Gift**
   - Group of beneficiaries described by their relationship to the T or to each other by some common characteristic, rather than being listed by name.
Where it is not clear whether T intended a gift to multiple individuals to be a class gift, courts consider four factors:

i. How did the T describe the beneficiaries
   - Where the reference is to the beneficiaries collectively, that argues in favor of finding a class gift
   - Where the T identifies each beneficiary by name, that argues against finding that the T intended the gift to be a class gift

ii. How did the T describe the gift
   - Where the gift is described in the aggregate, that argues in favor of finding that the T intended the gift to be a class gift
   - Where the gift is described in distinct shares, that argues against finding a class gift

iii. Do the beneficiaries share a common characteristic
   - If all the beneficiaries share a common characteristic, that argues in favor of finding a class gift
     - If there are others who share the common characteristic and they are not included in the gift, some courts have concluded this argues against finding a class gift
     - If there is no common characteristic, that argues against finding a class gift
   - Where the T’s overall testamentary scheme—whether in light of everything else the T tried to do with his/her property, it makes more sense to find a class gift
     - Alternate takers—if the failed gift is not a class gift, is there anything in the testamentary scheme that indicates the T would not want the alternative taker to take the property in question. If so, that argues in favor of finding a class gift

iv. Modern Rule: Anti-lapse statute applies to deceased class member’s gift
   - In order for anti-lapse statute to apply, class member must be covered by statute and die leaving issue who survive the T
     - If either condition is not met, common law rule applies
   - Common Law: Deceased class member’s share remains in class
     - No residue of residue rule does NOT apply to residuary class gifts
   - Share of deceased class member passes to residuary ONLY if:
     - No class member survives
     - Anti-lapse statute cannot be applied to any deceased class member

No consensus regarding whether gifts to an individual and a class should be construed as one class or an individual and a class

- Some courts will divide property equally among individual and members of the class
- Some courts may give individual ½ of property and the class members share the other ½

Simultaneous Deaths
- Where there is insufficient evidence as to who survived whom, the property is disposed of as if the beneficiary predeceased T
  - UPC §§2-104; 2-702 require that the beneficiary show by clear and convincing evidence that he/she survived the T for 120 hours
  - Common law: Beneficiary need only have survived T for a millisecond

Framework:
1. Did the claimant actually survive T?
   - Based on fact pattern
2. Did the claimant legally survive T?
   - Did the claimant meet the statutory survival requirement
Rules of Construction re: Changes in Property After Execution of a Will

- What’s to be done about changes in the T’s property depend on the type of gift involved:
  - Specific gifts → gift where the T has a specific item in mind when he/she makes the gift. The T intends for that specific item, and arguably only that specific item to satisfy the gift
    - Gift is typically modified by the word **my**
  - General gifts → gift of general pecuniary value that is satisfied by using any item that fits the general description of the gift
    - Demonstrative gifts → general gifts from a specific source
      - Treated as general gifts for construction purposes
  - Residuary gifts → gives away all of the T’s property that has not otherwise been given away
    - No special language is necessary

- Ademption by Extinction—T makes a specific gift in his or her will and thereafter the item in question is transferred. What if anything should the beneficiary take?
  - UPC §2-606: Non-Ademption Statute
    - Monetary equivalent of any item that is transferred/lost/destroyed if beneficiary can establish this was T’s intent
    - When T owns property at death that was acquired to replace property that was a specific gift in his/her will, the beneficiary of the specific gift gets the replacement property
  - Common law: where T makes a specific gift of an item and thereafter the item is transferred, an irrebuttable presumption arises that the T intended to revoke the gift
    - T’s intent is irrelevant
    - Extrinsic evidence is not admissible
  - Form and Substance Rule → a substantial change in the nature or character of the subject matter of a bequest will operate as an ademption but a merely nominal of formal change will not
    - Formal: moving an account from one bank to another, exchanging stock in one company for stock in another following a merger of two companies
    - Substantial: closing savings account and using the proceeds to acquire certificates of deposit
  - Conservator/Power of Attorney Exception → if the property subject to the specific gift was transferred during conservatorship by an agent acting under a durable power of attorney for an incapacitated individual, the ademption doctrine does not apply
    - The beneficiary receives the general pecuniary value of the specific gift

- Stocks/Accession
  - Stock split
    - UPC §2-605/Modern trend: rejects the specific vs. general gift analysis—allows beneficiary of specific devise and general devise to take additional shares
    - Common law: if gift of stock is specific, beneficiary takes additional shares. If gift of stock is general gift, beneficiary does not take additional shares—additional shares pass to residuary
  - Stock Dividend
    - UPC §2-605/Modern trend: treat stock splits and stock dividends alike—beneficiary is entitled to stock dividends
    - Common law: Specific beneficiary was not entitled to receive stock dividends
• **Satisfaction**—if, after executing a will, the T makes an inter vivos gift to a beneficiary under the will, the issue is whether the inter vivos transfer should count against the beneficiary’s testamentary share of the estate
  - UPC §2-609/Modern trend: reverses the common law presumption—inter vivos gifts made to a beneficiary under the will are presumed not to be in satisfaction absent a writing expressing such an intent
    - Writing can be the will, a writing by the T at the time of the inter vivos gift, or a writing created by the donee anytime
  - Common law: presumption that T intended life time gift to count against beneficiary’s share under the will

• **Exoneration of Liens**
  - UPC §2-607/Modern trend: reverses the presumption—Presumes that the T intended the beneficiary to take the property subject to the accompanying debt
    - General clause in will to pay all the T’s debts is not enough to overcome the UPC/modern trend presumption—express reference to the debt in question is necessary
  - Common law: presumption that beneficiary is to take devised property free and clear of any debt

• **Abatement**—if the T gives away more in his/her will than he/she has to give, the doctrine of abatement provides for which gifts are to be reduced first
  - UPC §3-902—property abates in following order:
    1) Property not disposed of by will
    2) Residuary devises
    3) General devises
    4) Specific devises

**LIFETIME TRANSFERS**—if someone gave something up—do gift analysis
• Don’t need same formalities with gifts as with wills because donor is normally there to testify as to what occurred whereas T is dead

**Requirements for Making a Valid Gift:**
1. Present donative intent on the part of the donor
2. Delivery of the property to the donee, and
3. Acceptance of the gift by the donee

• Promises require consideration
  - A person cannot give property which she expects to inherit; transfers of an expectancy are effective ONLY if supported by consideration

• In most states, if the validity of gift is challenged after donor has died, the donee must prove by clear and convincing evidence that the requirements for a gift were satisfied
  - **Dead Man’s Statutes**—In the trial of any action in which any party sues or defends as the representative of a deceased person, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or to any event which took place in the presence of the deceased.
    - Statute is narrowly construed—only testimony that might impair the estate of the D is excluded, i.e. testimony that would have the effect of reducing the estate of the D
• This may bar the donee’s testimony regarding the purported inter vivos gift

**Capacity**

- A gift is valid if the donor:
  - Has capacity
  - Acts under his/her own free will

- Mental capacity to make a gift requires the transferor:
  - Understand the nature and extent of his/her property
  - Know the natural objects of his/her bounty
  - Understand the disposition of property the transferor is making
    - Some courts require greater mental capacity to make a gift than a will

- Gift can be challenged under:
  - Undue influence
    - Confidential relationship—may give rise to rebuttable presumption of undue influence
    - If the donor is dependent on and makes an improvident gift to the donee that strips the donor of all or virtually all his assets, a presumption arises that the donor did not understand the consequences of his act.
      - In this context, the donee must show the donor had the benefit of competent and disinterested counsel.
      - When the donor is not dependent on the donee, however, independent advice is not a prerequisite to the validity of an improvident gift even though the relationship between parties is one of trust and confidence.

**Donative intent**—must be some indication that transferor meant to make a voluntary gratuitous transfer of an interest in the property to the transferee

- Delivery is an ambiguous act—only constitutes a gift if done with donative intent
  - Inherent ambiguity justifies use of extrinsic evidence to establish whether there was donative intent

- Gifts of future interests are permissible if the donee can establish the donor had a present donative intent to transfer a future interest
  - If the donor intended the gift to have no effect until the donor’s death, the gift is an invalid testamentary transfer

- A promise to make a gift is generally unenforceable—no consideration
  - In rare instances, a donee’s detrimental reliance may transform a hollow gift promise into an enforceable promise

**Delivery**—divests donor of dominion and control over property

- Must occur during donor’s lifetime

- Purpose is to prevent:
  - impulsive gifts
  - mistakes
  - fraud
  - perjury
  - evidentiary—donee’s possession supports the claim of gift

- Courts are usually less strict about delivery requirement and often uphold gifts on the basis of:
**Constructive delivery** donor delivers something that gives the donee access to the place where the property is located

**Symbolic delivery** donor delivers something symbolic of the property, e.g. written instrument of gift

- Courts tend to excuse delivery in situations where it was impossible or very difficult
- The same physical facts may or may not constitute delivery depending on intent

Delivery requirement is flexible and should be construed in light of its purposes

- Delivery can be made by a third person. If third person fails to deliver gift:
  - If third person is working on behalf of the donee, gift is valid because the donor has surrendered dominion and control
  - If third person is working on behalf of donor, gift is invalid because donor has not surrendered dominion or control

- Possession of a deed by a grantee generally creates a presumption of delivery
  - Possession of a deed by the grantor creates a presumption of nondelivery

**Acceptance**—property cannot be forced upon a donee

- Because people generally want to acquire property, acceptance of beneficial gift is usually presumed
  - If donee does not want gift, donee can **disclaim** it

**Types of Gifts**

1. **Conditional Gift**
   - Person who asserts that gift was made on a condition has the burden of establishing the condition
     - Court can apply a fault or no fault test to determine who keeps the conditional gift
       - **No fault** donor recovers gift
       - **Fault** donor only recovers gift if donee unjustifiably breaches condition, agreement is terminated by mutual agreement

2. **Gifts Causa Mortis**
   - Gift made in contemplation of death
     - Donor must fear death is imminent
     - Revocable
     - Gift MUST be of personal, not real property
     - Other requirements for gift must be met
       - However, delivery standard is lower than for regular gift, especially if donor’s intent is clear
       - If third person makes delivery on behalf of donor, may question of did donor relinquish dominion and control may arise (only if donor’s intent is unclear)

- If donor survives peril that induced donor to make the gift:
  - **Majority view** gift is automatically revoked
  - **Minority view** revocable at donor’s discretion
  - **Restatement** if gift is not revoked within reasonable time right of revocation is eliminated; gift causa mortis is effective if donor dies or an unrelated cause, provided the donor was still in imminent fear of death from original peril

- Majority of courts hold that suicide will not support a gift causa mortis
WILL SUBSTITUTES

• Will substitutes allow property to pass automatically to a successor owner at a person’s death, without probate
  o Property owned in joint tenancy
  o Property owned in tenancy by the entirety
  o Multiple party bank accounts
  o Life insurance
  o Retirement plans
  o Benefits payable under contractual arrangements
  o Revocable/irrevocable living trusts

• UPC validates a wide variety of will substitutes

• Pay on death and transfer on death arrangements (UPC §6-101; §6-301 to 6-311)
  o Not testamentary
  o Need not be executed in compliance with the formalities for wills
  o Not subject to probate

• While will substitutes are not required to be executed in compliance with will formalities, will substitutes executed pursuant to contracts MUST be executed, altered, revoked in compliance with the terms of the contract to be valid, e.g. written notice is often required to change life insurance beneficiary

Joint Tenancies
NOTE: Creating a joint ownership may constitute a gift

• Tenancy in Common ➔ each co-tenant owns an undivided interest in the underlying property. Undivided interest can be transferred freely during life and will pass to the co-tenant’s devisees or heirs if retained until death
  o NOT a will substitute because it confers no right of survivorship on the co-tenant(s)

• Joint Tenancy ➔ each joint tenant owns an undivided interest on his/her own behalf while also owning the whole interest as part of a unity
  o Will substitute because it confers a right of survivorship—if joint tenant fails to sever during life, that joint tenant’s interest automatically terminates at death and the surviving tenant(s) owns the whole
  o Can be converted into a tenancy in common if any joint tenant severs his or her proportionate interest during life

• Tenancy by the Entirety ➔ created when husband and wife acquire real property. Neither spouse can sever his or her interest unilaterally during life.
  o Will substitute because it confers a right of survivorship on surviving spouse

Multiple Party Bank Accounts

• Joint Account ➔ account that appears on its face to be owned by two or more individuals
  o Some states have statutes providing that opening a joint account is conclusive evidence that survivorship was intended
    ▪ Some courts have held that these statutes only apply to the depositor’s heirs or devisees and not the depositor
o Absent a statute specifically regulating joint accounts, most courts allow extrinsic evidence to determine whether depositor intended the joint account to confer a right of survivorship
  ▪ If evidence shows that account is mere convenience account, the court will disregard terms of deposit agreement
o Under UPC, sums in a joint account belong to the surviving party or parties against the estate of the D
  ▪ Some states presume survivorship but presumption is rebuttable by clear and convincing evidence that depositor had different intention at the time the account was created
o Under UPC, while parties are alive, joint accounts belong to the party who contributed the funds, unless there is clear and convincing evidence of a different intent.

• Agency Account ➔ Creates an agency relationship between the depositor and a designated agent.
  o The agent has no beneficial interest in the account but is authorized to make deposits and withdrawals for the benefit of the principal during the principal’s lifetime
  o The agency relationship terminates at the death of the principal, therefore the agency account CANNOT serve as a will substitute
  o UPC §6-205: Unless the terms specify otherwise, the authority of the agent survives disability and incapacity

• Agency account is really a special statutory form of the power of attorney
  o Power of attorney ➔ written instrument that creates an agency relationship over one or more assets owned by the principal
    ▪ General ➔ power that extends to all the principal’s assets
    ▪ Special/Limited ➔ power that extends only to specified assets
    ▪ Durable ➔ power continues despite the principal’s incapacity
  o Recognized in all states

• Totten Trust (Bank Account Trust) ➔ During the trustee’s lifetime, only the trustee of a bank account trust (and the trustee’s creditors) may reach the funds in the account. At the trustee’s death, the account passes to the designated beneficiary—beneficiary has no access to account during trustee’s lifetime.
  o When revocation occurs:
    ▪ If the beneficiary dies before the trustee
    ▪ Trustee withdraws the funds and closes the account
    ▪ Trustee properly manifests an intent to revoke
  o Most courts recognize such accounts as a special form of revocable living trust even if the deposit agreement fails to specify the trust terms

• UPC: trustee is not permitted to revoke or alter the bank account trust by will
• Many States: permit trustee to revoke or alter bank account trust by will
• The UPC attempts to discourage bank account trusts by treating them as POD accounts

• Pay on Death Account (POD) ➔ Similar to a bank account trust in that the depositor retains all rights to the account during life but directs that any funds remaining at death be paid to a designated beneficiary.
  • Under the UPC:
    ▪ A POD beneficiary has no rights to the account during the depositor’s life
The depositor has the right during life to revoke the account or change the beneficiary designation but may not do so by will. If the beneficiary survives the depositor, the beneficiary is entitled to the account balance at the depositor’s death, subject to claims against the depositor’s estate.

**Safe Deposit Boxes**

- **Problems:**
  - Arise when a safe deposit box is used as a vehicle for making an inter vivos gift. Such gifts often are challenged on the ground that no delivery was made to the donee.
    - Constructive delivery occurs when a donor gives the donee the key to the place where the property is located.
  - Arise when a safe deposit box is placed in joint names and the survivor claims property that was placed in the box by the D.
    - If the rental agreement does not explicitly confer a right of survivorship in the box’s contents, the prevailing view is that the agreement merely regulates access to the box and does not pass title to the contents at the D’s death.

**Legal Malpractice**

- Two theories under which a third party could sue a D’s attorney:
  - **Negligence**
    - A nonclient may maintain a negligence action against an attorney only when the nonclient can show that he was the primary intended beneficiary of the attorney-client relationship—contract between T and attorney created duty which attorney breached; or
    - Attorney breached professional duty.
  - **Contract**
    - Intended third party beneficiary
      - Lack or privity typically NOT a defense anymore.

- Many courts will toll statute of limitations until:
  - Client dies or
  - Claimant discovered or should have discovered malpractice.

**TRUSTS**

- **Elements of a valid trust:**
  1. **Settlor**
     - a. Capacity
     - b. Intent
  2. **Manifestation of intent to create trust**
     - a. Oral—impermissible for real property due to statute of frauds
     - b. Writing
  3. **Trust property**
  4. **Trustee**
     - a. If third party is serving as trustee, settlor must make effective transfer of the trust property to the trustee.
  5. **One or more trust beneficiaries**
     - a. Named
     - b. Class
     - c. Charity
     - d. Pets
     - e. Cemetery plot
  6. **Lawful purpose**
• Events that terminate a trust:
  o Revocation
  o By its terms
  o Exercise power of appointment
• Wasting Assets—mines, timber
  o When wasting assets are sold, proportion of the proceeds goes to income and a proportion goes to principal
    ▪ Need clear cut rules for this because current beneficiaries and remainder beneficiaries have competing interests
• Due to the **doctrine of merger**, one person cannot be both the *sole* trustee and the *sole* beneficiary of a trust
  o Under the doctrine, when all of the legal and all of the equitable interests in property are held by one individual, the two sets of interests merge, the trust terminates and the individual becomes the owner of the property in fee simple absolute
  o However, person can be the *sole trustee* and the *sole income beneficiary* because the remainder beneficiary’s interest vests when the trust is created
• When a trust agreement is silent with respect to revocability:
  o UTC/Minority—presume trust is revocable
  o Majority—presume trust is irrevocable
• Pourover will—combines a revocable living trust with a will directing T’s residuary probate estate be distributed to the trustee of the living trust, to be administered following T’s death in accordance with trust terms
  o Advantage: the dispositive provisions of the trust can be amended without compliance with the will execution statutes

**Trust Creation**
• Weak words that generally do NOT form a trust:
  o Wish
  o Hope
  o Desire
    ▪ Use SHALL
• Express—trust S creates voluntarily either in writing or orally
• Implied—trust arises by operation of law
  o Constructive trust: equitable remedy granted to prevent unjust enrichment
  o Resulting trust
• A trust cannot exist until the trustee has legal title to at least one item of trust property
  o If settlor is initial trustee, settlor has title and therefore no transfer is required
  o If a settlor fails to transfer intended trust property to a third party trustee, that property is owned by the settlor at death and will become part of the settlor’s probate estate
• Promise to create trust in the future is unenforceable in the absence of consideration for the promise
  o Valid trust arises only if and when the settlor acts to carry out the earlier promise
• Subsequently acquired property—a mere declaration of trust cannot create a valid trust of property yet to be acquired
• BUT a valid trust IS created if the settlor subsequently acquires that property and still manifests an intention to hold it in trust
• Downstream Trust—trust created for remainder beneficiary by settlor’s trust at settlor’s death

Intent to Create Trust
• No magic words are necessary
  o Settlor may create trust without using the words “trust” or “trustee”
  o Trust is created when settlor transfers property with the intent to vest the beneficial ownership in a third person
• At the time the trust is created, settlor must have:
  o Capacity
    ▪ UTC applies capacity standard for wills rather than for lifetime gifts
  o No undue influence/Fraud
• Donee of a failed gift may try and save the gift by re-characterizing the donor’s donative intent as the intent to create a trust—majority of courts reject this argument:
  o Donor expressed intent to create a trust
  o Donor appointed himself/herself trustee
  o Trust will not fail for want of a trustee—court can appoint a new trustee
  o Court appointed trustee should transfer property to the donee

Trust Property
• Virtually any item of property or any interest in property can form the trust res
  o Interest may be less than absolute ownership of an item of property
    ▪ Life estate CAN form trust res (no remainder)
  o Interest in property may be present or future
  o Mere expectancies CANNOT form trust res, e.g. at-will employee’s salary
    ▪ If settlor creates a trust in anticipation of receiving an expectancy and then, in fact, receives the expectancy, the trust IS valid on the date the expected property is put in the trust

Trustee
• No one can be forced to be a trustee
  o A trust CANNOT fail for lack of a trustee
• When there is more than one trustee (co-trustees) and the trust agreement is silent as to how the fiduciary duties and responsibilities of the co-trustees should be allocated:
  • UTC: Permits action based on the vote of a majority of the co-trustees
  • Common law: All the trustees must consent to any proposed action (unless the trust agreement provides otherwise)
  • NOTE: Custodians (adults who manage property on minor’s behalf) have broader spending powers than trustees

Beneficiaries
• Private trust MUST have at least one definite beneficiary—should be objective way to ascertain beneficiary
  o If one such beneficiary is not identifiable, the trust fails
    ▪ “Friends” has been held by most courts to be indefinite
    ▪ Trust creates a fiduciary relationship between beneficiary and trustee, no beneficiary = no fiduciary relationship
o Settlor cannot enforce terms of trust unless settlor is also a beneficiary
o Beneficiary need not be identified by name—may be identified:
  ▪ By their relationship to settlor
  ▪ By their relationship to some other person
  ▪ Characteristic, e.g. class gift

- Charitable trust does not need a definite beneficiary because the public at large is the beneficiary
- Honorary Trust—where the purpose of a trust is such that it is impossible to have ascertainable beneficiaries, if the purpose is specific and honorable, and not capricious or illegal, the trust may continue as long as the trustee is willing to honor the terms of the honorary trust (e.g. trust to take care of a pet, cemetery plot)
  o If the trustee stops honoring the terms of the honorary trust, a resulting trust is imposed
    ▪ UPC: recognizes honorary trusts
    ▪ Some States: do not recognize honorary trusts

Oral Inter Vivos Trusts of Land
- Most commonly an oral inter vivos trust of land is created when a settlor executes a deed that appears on its face to be an absolute conveyance to a third person and then makes oral statements indicating he intends for the third person to hold the land in trust for himself or someone else
- Majority⇒ Oral inter vivos trusts of land are barred by the statute of frauds
  o Constructive trust may be imposed upon the grantee in favor of grantor or 3rd person if:
    1. No/Ineffective memo and
    2. At time of transfer, grantee was in a confidential relationship with grantor
NOTE: Essentially the court will first apply the minority’s four factors and then evaluate the two above factors
- Minority⇒ Oral inter vivos trusts of land are permitted if there is clear and convincing evidence of:
  1. Sufficient words or circumstances showing that settlor intended to create a trust
  2. Definite trust property
  3. An ascertained beneficiary, and
  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

- Most courts believe that the statute of frauds should not be used to perpetrate fraud
  o Most courts will impose a constructive trust to prevent fraud with respect to oral trusts of land
    ▪ However, a grantor may be left without a remedy if a grantee agrees orally at the time of conveyance to carry out the terms of the trust, intending to do so at the time, but then changes his/her mind and later refuses to carry out the terms of the trust.
    ▪ Since no fraud occurred at the time of the original conveyance, the traditional justification for imposing a constructive trust does not exist

Secret and Semi-Secret Trusts
- Secret Trust—T devises property to a person but tells that person to hold the property in trust for a third person
  o Remedy = constructive trust, rather than enforcing oral trust
    ▪ Thus, the person seeking to prove the evidence of a secret trust must also prove that the named devisee has been guilty of wrongdoing. Specifically, the devisee must have been promised explicitly to honor the trust, or must have permitted T to infer from the devisee’s conduct that the devisee would do so.
• **Semi-Secret Trust** \( \rightarrow \) T makes a devise that indicates clearly that the named devisee is intended to hold the subject property as trustee or in trust but fails to identify the trust beneficiary or omits other terms of the trust.
  - Remedy = Resulting trust
  - Restatement (Third) would impose a constructive trust to avoid unjustly enriching the other beneficiaries of T’s estate

**TRUST DISTRIBUTIONS**

• Courts revolve disputes surrounding trust distributions by trying to determine what the settlor intended, as shown by the language of the trust instrument and the circumstances surrounding its execution
  - Factors to consider in determining whether trustee is acting to carry out the settlor’s intent:
    1. The extent of discretion intended to be conferred upon the trustee by the terms of the trust
    2. The existence or nonexistence, the definiteness or indefiniteness, of an internal standard by which the reasonableness of the trustee’s conduct can be judged
    3. The circumstances surrounding the exercise of the power
    4. The motives of the trustee in exercising or refraining from exercising the power
    5. The existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries

• Two types of distributions:
  - Mandatory
    - Most common with respect to trust income
  - Discretionary
    - Ordinarily a court won’t order a trustee to make a discretionary distribution unless it finds an abuse of discretion trustee has acted unreasonably, dishonestly, or from an improper though not dishonest motive or because the trustee has failed to exercise judgment at all
    - The trustee should not exercise such careful discretion that the intent of the settlor is undermined
e.g. trustee probably does not have to exercise discretion standard that is equivalent to a bank lending standard

• **Support trust** \( \rightarrow \) gives trustee an objective standard to follow in determining how to make distributions, e.g. health, education, support and maintenance
  - Courts generally infer that settlor intended beneficiary to maintain his/her accustomed standard of living
  - UTC and Restatement consider this a type of discretionary trust

• **Discretionary Support Trust** \( \rightarrow \) combines language of an objective standard with language conferring broad discretion on the trustee
  - Sometimes courts must consider whether settlor intended trustee to have discretion regarding whether or not to invade the principle to prevent beneficiary from going on public assistance
    - One court has said where there is one beneficiary and beneficiary did not receive public assistance during settlor’s life, court will find assets are available to beneficiary
    - Restatement: Consider beneficiary’s other resources
    - Traditional rule: Disregard to beneficiary’s other income or resources
• **Unitrust** allows income beneficiary to receive a fixed percentage of the current value of the trust principal over a fixed period of time
  o This eliminates the dilemma a trustee might have in acting in a way that benefits the income beneficiaries and remainder beneficiaries impartially

• Often a court will interpret “and” as “or,” however, the court will not do so if that construction would go against the general purpose of the instrument

• Generation Skipping Trusts—S grants benefits to child for life with limited POA (e.g. grandchildren). Because the life beneficiaries of a trust have nothing to transmit to others at death, no death tax is imposed when the life beneficiaries die—thus causing one generation to be “skipped” for death tax purposes.
  o To avoid this situation, Congress enacted the original generation skipping transfer tax in 1976.
  o Skip person two or more generations away
  o The generation skipping tax will be repealed in 2010

• Constructive Trust—broad equitable remedy available to a court in order to prevent unjust enrichment.
  o In effect, the court orders a person holding legal title to property (“trustee”) to convey that property to another person who is rightfully entitled to it (“beneficiary”).
  o The constructive trust must be distinguished from an express trust, which arises because of a manifestation of intent to create a trust and involves an ongoing fiduciary relationship
  o Traditionally, some sort of wrongdoing must have occurred before a court will exercise its equitable powers to impose a constructive trust

• Resulting Trust—trust reverts back to settlor or settlor’s successors. Arises in three situations:
  1. Where a private express trust fails for any reason
     o A court may not find a resulting trust if a trust fails due to an unlawful purpose
  2. Where the res of a private trust proves to exceed what is required to satisfy the trust’s purpose
  3. Where one person pays the consideration for a transfer of real or personal property, but has the title taken in the name of another person [purchase money resulting trust]
     o Generally, a rebuttable presumption arises that the person acquiring title takes as trustee for the person paying the consideration; this presumption can be rebutted by proof that a gift was intended
       ▪ However, if the person acquiring title is a spouse, child, or other natural object of the bounty of the person paying the consideration, an opposite presumption applies: the transaction is rebuttably presumed to be a gift from the payor to the person acquiring title.

**Power of Appointment**
• Power of appointment—right to designate new owner of property
  o Testamentary—appoint only by donee’s will
    ▪ Promise by the donee of a testamentary power to exercise the power in a particular way is unenforceable
  o Presently exercisable—donee may exercise the power currently
• Transferor must manifest an intent to create a POA in order to do so
  o The transferor need not use the words “power” or “appoint”
  o However the transferor’s intent to create a POA must be plainly expressed or clearly implied

• Two types:
  o General→donee can appoint to anyone, including herself and her estate
    ▪ Power to consume = inter vivos general POA
  o Limited/Special→donee can appoint to anyone except:
    ▪ Donee
    ▪ Donee’s estate
    ▪ Donee’s creditors
    ▪ Creditors of donee’s estate

• Power of appointment:
  o Is not an interest in property.
  o Is not transferable by the donee
  o Power of appointment terminates at donee’s death (unless held by a trustee in a fiduciary capacity)
  o Discretionary (generally)
    ▪ POA is mandatory/imperative (aka power in trust) if:
      • Donor fails to specify takers in default
      • The permissible appointees are a defined limited class, and
      • The donor has not manifested an intent that exercise be discretionary
        ▪ Failure to appoint would result in property being distributed among permissible appointees in equal shares

• Donee’s Options:
  1. **Fail to exercise** the power by doing nothing
     o Appointive property eventually will either pass to the takers in default or revert to the donor or the donor’s successors
  2. **Exercise** the power—in order for donee to exercise POA effectively, must be shown that
     o Donee intended to exercise the power and
     o Donee complied with any requirements for exercise imposed by the donor or by law
       ▪ Testamentary POA:
         • Blanket property distribution in will is not sufficient to exercise POA
         • Blending clause in will IS sufficient to exercise POA UNLESS
           o Specific reference is required
           o However, a purported attempt to exercise POA in blending clause may result in an ambiguity such that extrinsic evidence could be admitted
         • General residuary clause (I give the residue of my estate to) is typically insufficient to exercise POA
           o Under UPC §2-608, a general residuary clause will be deemed to exercise a power if:
             ▪ The power is general and
             ▪ The creating instrument specifies no taker in default
               • It seems better to let the property pass under the donee’s will than force it to return to the donor’s estate, for the reason that the donor died before the donee died and it seems better to avoid forcing a reopening of the donor’s estate
3. **Release** the power by irrevocably relinquishing the ability to exercise the power at any future time
   a. Differs from failure to exercise in that a release requires an affirmative action evidencing a donee’s decision to give up the right to appoint the property
   b. Property either passes to takers in default or reverts to donor or donor’s successors
   c. POA can be released in whole or in part

4. **Contract to Exercise**
   a. Power must still be exercised in favor of a permissible appointee
      i. If the donee later purports to exercise the power in favor of someone else, the attempted appointment is a nullity
   b. **NOT valid** in the case of a testamentary power
      i. Intervivos contract may be interpreted as a contract to release if contract is with takers in default

- The exercise of a POA generally **relates back** to the donor, so that the appointee takes directly from the donor

- **NOTE**: UTC and Restatement take the position that an unenforceable trust should be saved as a POA

- **Capture**—If the donee of a general POA: (1) Expresses the intent to exercise the POA and (2) blends the exercise with the distributive provisions of his/her own will, if the appointment fails for any reason, the donee is held to have appointed the failed gift(s) to himself/herself and the failed appointive property is distributed as part of the donee’s general assets

**Donee’s Creditors**
1. Who holds the power?
   a. Retained by donor:
      i. General creditors can get to it
      ii. Limited creditors can get to it especially if POA was created after donor was insolvent—indicates fraud
   b. 3rd Party Donee:
      i. **General Power**
         1. Unexercised
            a. Majority creditors cannot get to it
            b. Minority creditors can get to it
         2. Exercised available to creditors
      ii. **Limited Power** not available to creditors

**Special Rules Applicable to Special Powers of Appointment**
- **General rule**: Presume special POA is exclusive unless the language of the creating instrument indicates otherwise
- **Exclusive**—donee can appoint to one permissible appointee and “exclude” the others
- **Nonexclusive**—if donee chooses to exercise the power, the donee must appoint some property to each of the permissible appointees
  o If the donee of a nonexclusive special power attempts to exclude one or more of the permissible appointees, the attempted appointment will be void
  o The law in some states provides that each of the permissible appointees must receive more than an illusory amount in order for an appointment to be valid
Nature of the property interest that can be appointed:
  o Modernly—permits donee to appoint in any manner, provided the donor has not manifested a contrary intent and the appointment benefits only objects of the power
  o Traditionally—absent language indicating a donor’s intent to the contrary, a special power cannot be exercised to:
    ▪ Appoint property to be held in trust for one or more of the appointees, or
    ▪ To create a new power of appointment

Fraud on the power—seeking indirectly to benefit one who is not a permissible appointee
  o Attempted appointment is invalid

Settlors’ Creditors
  • General Rule: Settlor’s creditors may reach trust property to the maximum extent that the settlor could
    ▪ Thus, creditors cannot reach irrevocable trust to which settlor is not a beneficiary
    ▪ Creditors can reach revocable trust to the extent of a settlor’s right to revoke
    ▪ A spendthrift provision is invalid as to creditors of the settlor (spendthrift provision does not prevent creditors from accessing trust)

Assignment—assign interest in trust to another person.
  o Trustee pays subsequent distributions to the assignee, rather than the beneficiary

Anticipate—sell interest in trust for its present value
  o Beneficiary assigns her interest in the trust to the purchaser, who thereafter receives all payments that otherwise would have gone to the beneficiary

Voluntary Alienation—actions that arise by voluntary action
  o Assignment
  o Anticipate

Involuntary Alienation—court order transfer of a debtor’s interest in trust to satisfy a judgment creditor

Spendthrift Trust—designed to prevent financially irresponsible trust beneficiaries from dissipating the interest given to them under the trust
  o Typically contain language that prohibits both:
    ▪ Voluntary alienation by trust beneficiaries
    ▪ Involuntary alienation by judgment creditors who seek the aid of a court to reach a trust beneficiary’s interest
  o Under UTC spendthrift provision is only valid if it prohibits both voluntary and involuntary transfers
  o Generally, spendthrift clause CANNOT be terminated by the consent of the beneficiaries
  o Restatement: beneficiary’s interest can be reached for child support or alimony even if trust is a spendthrift trust

Asset protection trusts—allow settlor to shield assets from potential creditors while still retaining a beneficial interest in the trust
  o Typically foreign asset protection trusts
Alaska, Delaware, Nevada and Rhode Island recognize domestic asset protection trusts

Creditors of Trust Beneficiary
- General Rule: Creditors can claim only the trust income or principal that the beneficiary is entitled to receive, at the time the beneficiary is entitled to receive it
  - In the absence of specific trust provisions to the contrary, beneficiaries have the right to alienate their interests voluntarily
    - If settlor wants to restrict beneficiary’s ability to alienate interest, settlor can include spendthrift provision
    - Enforceable against both income and principal interests
- Traditional view re: discretionary trusts beneficiary’s creditors cannot compel a distribution from a wholly discretionary trust because the beneficiary has no enforceable interest
  - Similarly, beneficiary’s creditors generally cannot compel a distribution from a support trust if the trust is for the support of the beneficiary only
- At least one court has held that a beneficiary’s interest in a spendthrift trust can be attached by a tort creditor where the claim arose out of the beneficiary’s intentional or grossly negligent conduct

Disclaimer
- \textbf{Disclaimer} unqualifiedly refuse to accept an interest in property that otherwise would pass to him or her by gift, devise, inheritance or by way of a will substitute
  - Generally, the disclaimed property passes to any alternate taker by the transferor
    - If no alternate take has been designated, the property passes by way of resulting trust to the transferor or transferor’s successors
    - Under no circumstances may the disclaimant designate who is to receive the disclaimed interest
- Requirements:
  - Written
  - Filed with appropriate court, individual or legal representative
  - Filed within specified time limit/requirement
    - A disclaimer filed after the specified period is effective, but the disclaimant will be treated as having first received the property and then made a gift of it
  - Disclaimant must not have received any of the benefits of the transferred property
- Traditionally, effective disclaimer is said to relate back to date of original transfer

Trust Modification and Termination
Limits on Trust Duration
- Rule against Perpetuities
  - Repealed and on chopping block in many states
- Generation Skipping Tax
  - Set to be repealed in 2010
- With repeal of Rule against Perpetuities and Generation Skipping Tax, argument can be made that rules for trust modification and termination should become more liberal

Modification and Termination by the Settlor
- Generally settlor can only modify or terminate trust if settlor reserved right to do so
  - UTC if trust instrument is silent, trust is \textit{revocable}
  - Majority If trust instrument is silent, the trust cannot be amended and is irrevocable
Restatement rebuttable presumption of revocability if the settlor has retained beneficial interest in trust

- UTC: settlor may modify or revoke by substantial compliance with the method specified
  - Unless the trust expressly makes the specified method exclusive, settlor may modify or revoke by a will or any other method manifesting clear and convincing evidence of settlor’s intent
- Common law: If trust specifies modification or termination procedure, the settlor can only modify or revoke by following that procedure

If settlor has not retained right to modify or revoke the trust, he nonetheless can do so if all the beneficiaries:
- Are ascertainable and competent to consent
- Do in fact consent
  - If any beneficiary is a minor, incapacitated, or ultimate identity of beneficiaries is unknown, settlor may be left without any means to modify or terminate trust
  - Court could appoint guardian ad litem or apply principle of virtual representation to obtain consent on behalf of beneficiaries who cannot give consent

Modification and Termination by the Beneficiaries

Termination
- Traditionally, courts have only been willing to terminate a trust if:
  - All the beneficiaries consent (personally, through guardian ad litem or virtual representation), and
  - No material purpose of the settlor will be frustrated by the requested termination
    - What constitutes a material purpose is unclear:
      - Not Material:
        - Vast majority: creation of a trust to endure for stated period of time does not indicate a material purpose to keep the property in trust for the entire period
      - Material:
        - Spendthrift provision is considered to indicate a material purpose of settlor to keep property in trust
          - Rejected by UTC and Restatement
        - Discretionary Trust
        - Support Trust
        - Requiring property to remain in trust until beneficiary reaches a stated age
- UTC: if settlor is alive and settlor and beneficiaries agree to modification or termination, modification or revocation can occur even if it’s inconsistent with the material purpose
  - When settlor does not consent or has died then the court considers the material purpose

Modification
- Court may invoke doctrine of equitable deviation (does NOT require all the beneficiaries consent) if:
  1. Circumstances not known to or anticipated by the settlor have arisen and
  2. Compliance with the provision would defeat or substantially impair accomplishment of the trust purposes
- UTC: Court may modify administrative and distributive provisions
- Traditionally: Courts are more willing to modify administrative rather than distributive provisions
UTC: also permits modification if: (1) all the beneficiaries consent and (2) modification is not inconsistent with material purpose of the trust

A trustee’s request for instructions from a court may only relate to the present conduct of the trustee.
  - The court will not instruct the trustee as to questions which may never arise of may arise in the future but which have not arisen yet

**CHARITABLE TRUSTS**

- Distinguishing characteristic and key requirement of a charitable trust is that the trust be made for a charitable purpose
- A charitable trust can be created without a definite or definitely ascertainable beneficiary
  - Must be for community at large or at least a significant subset of the community at large
- Enforcement:
  - UTC: reverses traditional rule—gives standing to enforce a charitable trust to the trust’s settlor
  - Common law: only state attorney general could enforce charitable trust
    - Settlor could reserve the right to enforce the terms of the trust
    - Settlor/settlor’s successor may have standing based on a claim that the charitable gift has failed and they are entitled to the property
- Cy Pres—Where it becomes impossible, impracticable, or illegal to carry out that particular charitable purpose, rather than imposing a resulting trust, the trust purpose is modified to serve another particular charitable purpose within the general charitable purpose
  - Can only be applied if charitable intent is general, rather than specific
  - Factors indicating general charitable intent—court should look to document first and then to extrinsic evidence:
    - No gift over provision
    - Provisions indicating T did not wish will to fail
    - T made specific bequests to heirs and did not include them in the residuary clause
    - Trust was perpetual
    - T had no relationship with charity/organization
      - Supports the theory charity/organization was an agent to effect T’s general charitable intent
  - UTC §413: (1) presume a general charitable purpose and (2) authorize a court to apply cy pres if the particular charitable purpose becomes unlawful, impracticable, impossible or wasteful

**FIDUCIARIES**

- No one can be forced to accept an appointment as a fiduciary
  - UPC→nominee who does not accept a trusteeship within a reasonable period of time is deemed to have rejected the appointment
- All fiduciaries are entitled to compensation for their work

**Personal Representative**

- Duty: settle and distribute the estate of the D in accordance with the terms of any probated and effective will as expeditiously and efficiently as is consistent with the best interests of the estate.
  - Including:
Marshall assets
Pay bills
Make necessary filings
  - Usually a T will authorize independent administration—allows personal representative to administer the estate outside the supervision of the court. He/she will only have to file:
    - Accounting
    - Inventory
Distribute property
Close

The personal representative ordinarily is not required to plan for the long term economic security of beneficiaries and manage assets over the lives of several generations of family members

Trustee
- Ordinarily, a trustee is required to plan for the long term economic security of beneficiaries and manage assets over the lives of several generations of family members
- Duty to account—notify beneficiaries what is going on with the trust
  - This is the only duty that CANNOT be waived
- Duty of impartiality—trustee has duty of loyalty to all the beneficiaries. Trustee must balance the competing interests of the different beneficiaries.
  - Trustee has duty to produce a reasonable income for the life beneficiary while protecting the remainder interest for the remainderman.
- Duty of Prudence—determining what constitutes an appropriate trust investment:
  - Traditional approach: trustees were authorized to make such investments a prudent man would with his own property with an eye towards preserving the principal while producing a reasonable income—only relatively safe investments were deemed appropriate and each investment decision was viewed individually
  - Modern approach: the risk of loss is assessed on a portfolio basis, not individual investments, and the trustee has a duty to diversify his/her investments. The focus is on total rate of return, not individual investments or investment decisions
  - If a trustee has special skills and holds himself out as having special skills, the trustee is expected to use those skills
  - Terms of trust can overcome what statutes generally say is the duty for investments
- Delegation:
  - Traditional approach: Trustee could not delegate those activities and responsibilities that he/she reasonably could be expected to perform
  - Modern approach: Unsophisticated trustee has a duty to delegate investment decisions to professionals who are in a better position to make the necessary investment analysis and decisions
- NOTE: Standard for removing a trustee is higher than for removing a personal representative