I. INTRODUCTION
   A. The Right to Inheritance.
      1. Indian Land Consolidation Act was unconstitutional as authorizing a seizure of property without just compensation. Plaintiffs had standing to challenge provision, and Provision effected a "taking" of plaintiffs' decedents' property without just compensation: Hodel v. Irving
      2. The upholding and enforcement of provisions of will conditioning bequests to sons upon their marrying Jewish girls does not offend State or Federal Constitution, and that such conditions are reasonable restrictions upon marriage and do not violate public policy. Shapiro v. Union National Bank
   B. The Probate Process
      1. Probate – Property that passes under the decedent’s will or by intestacy.
         i. Personal Representative – When a person dies, and probate is necessary, the first step is the appointment of a personal representative (either executor or administrator) to oversee the decedent’s affairs.
            1. Duties of Personal Representative:
               a. Inventory and collect assets of the decedent
               b. Manage the assets during administration
               c. Receive and pay the claims of creditors and collect taxes
               d. Distribute the remaining assets to those entitled
            a. Wills
               i. Executor – If the decedent dies testate (leaving a will) and in the will names the person who is to carry out the terms of the will and administer the probate estate. The executor must give the bond, unless the will waives the bond.
               ii. A person dying testate devises real property to devisees and bequeaths personal property to legatees. "I give" is an excellent substitute for "I devise."
            b. Intestacy
               i. Administrator – The person in charge of administering the estate of the will, but not
named in the will. The person appointed as administrator must give bond.

ii. Real Property *descends to heirs*; personal property is distributed to *next-of-kin*.

- Why avoid probate?
  i. Attorney’s fees
  ii. Commission
  iii. Court Fees (filing fees)
  iv. Time (uncertainty)

2. **Non-Probate** – Property passing under an instrument other than a will, which became effective before death.
   a. **Trusts** – When property is transferred in trust, the trustee holds the property for the benefit of the named beneficiaries.
   b. **Life Insurance** – Life insurance proceeds of a policy on a decedent’s life are paid to the beneficiary.
   c. **Joint Tenancy** – The decedent’s interest vanishes at death, and the other joint tenant acquires the decedent’s interest by right of survivorship.
   d. **Retirement** –

3. **Small Estates**
4. **Community Property**

C. **Who May Inherit** – State Definitions of Family

1. **Who qualifies as surviving spouse**
   a. **Status** = State defines who is in or who is out as far as hetero and homosexual partners.
      1. Surviving spouse = Husband or wife.
         Homosexual activity is not a fundamental right. In re estate of Cooper (New York)
      2. Same-sex partners are “family members” for purposes of rent control regulations. Braschi v. Stahl Assoc.
   b. **Contract Law** – In some states, the surviving unmarried partner of a life partnership may have rights against the estate of the decedent under *contract law*, if a K to share assets, express or implied, was made by the partners.
   c. **Social Security Benefits**
      1. No social security benefits for same-sex cohabitation.
      2. How about different sex cohabitation?
         i. Must be surviving spouse or heir to decedent. Homosexual relationship does not create surviving partner as a “spouse” for the purposes of receiving benefits. Peffley-Warner
ii. Common law – Must have mutual agreement.


d. Spouse – A person is treated as a spouse only if the person is in a marriage recognized by the state. In Vermont and Hawaii, same-sex partners are treated as a spouse.
   1. No matter how much the relationship functions as a marriage, it is not a marriage for the purposes of inheritance.
      i. Exception: Common Law marriages, but only in states that do not allow same-sex marriages.

2. Who Qualifies as a Descendant: Status Categories of Children

a. Posthumous Children
   1. Natural or Genetic Children
      i. Marriage – Child presumed to be child of husband.
      ii. Uniform Parentage Act § 4 – Presumes that a child born to a woman w/in 300 days after the death of her husband is a child of that husband.

b. Non-Marital Children
   1. Deceased parent must consent to:
      i. Posthumous reproduction
      ii. To support of child
   2. By acting in intercourse, consent is presumed by parents.

c. Adopted Children
   A. Same Sex Adoption not allowed.
   B. Adoption of a Lover not allowed.
   C. 3rd Parties are not allowed to adopt.
      1. The right to receive property by devise or descent is not a natural right, but a privilege granted by the state. A state may deny the privilege or may impose whatever restrictions or conditions upon the grant it deems appropriate. Hall v. Vallandingham
      i. Family Law Art. §5-308(b)(1)(ii): Entitles an adopted person to all the rights and privileges of a natural child, but adoption does not confer upon the adopted child more rights and privileges than those possessed by a natural child.
ii. **UPC §2-114(b)** – If UPC 2-114(b) had been applicable in Hall, the adopted children by their stepfather would have inherited from their natural father’s brother.

2. **Uniform Probate Code (1990)**
   i. **§2-113 Individuals Related to Decedent Through Two Lines** – An individual who is related to the decedent through 2 lines of relationship is entitled to *only a single share* based on the relationship that would entitle the individual to the larger share.
   
   ii. **§2-114 Parent and Child Relationship**
      a. Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, *an individual is the child of his or her natural parents, regardless of their marital status.*
      
      b. An adopted individual is the child of his or her adopting parent or parents and not of his or her natural parents, but adoption of a child by the spouse of either natural parent has no effect on:
         1. *the relationship between the child and that natural parent or,*
         2. *the right of the child or a descendant of the child to inherit from or through the other natural parent.*
      
      c. Inheritance from or through a child by either natural parent or his or her kindred is precluded unless that natural parent has openly treated the child as his or hers, and has not refused to support the child.

3. **Texas** – An adoptive child inherits from both adoptive parents and natural parents and their relatives.

4. **MacDullum v. Seymour** – Denial of an adopted person’s right to inherit through the adoptive parents from ancestors or collateral kin of the adoptive parents is unconstitutional.

5. **Johnson v. Calvert (Calif)** – Parenthood in surrogate mother cases should not be determined by who gave birth or who contributed genetic material,
but should turn on the intent of the parties as shown by the surrogacy contract.

II. The Default: Intestate Succession

A. Introduction: Generally speaking, the law of the state where the decedent was domiciled at death governs the disposition of personal property, and the law of the state where the decedent’s real property is located governs the disposition of the real property.

1. Basic Scheme

a. **UPC (1990) §2-101 Intestate Estate**

   a. Any part of a decedent’s estate not effectively disposed of by will passes by **intestate succession** (look up this term) to the decedent’s heirs as prescribed in this code, except as modified by the decedent’s will.

   b. A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent’s intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his or her intestate share.

b. **UPC (1990) §2-102 Share of Spouse**

a. The intestate share of the decedent’s surviving spouse is:

   1. The entire intestate estate if:
      i. no descendant or parent of the decedent survives the decedent, or
      ii. all of the decedent’s surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent.

   2. The first $200,000, plus ¾ of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent.

   3. The first $150,000, plus ½ of any balance of the intestate estate, if all of the decedent’s surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent.
4. The first $100,000, plus ½ of any balance of the intestate estate, if one of more of the decedent’s surviving descendants are not descendants of the surviving spouse.

c. **UPC (1990) §2-103 Share of Heirs Other Than Surviving Spouse**
   
a. Any part of the intestate estate not passing to the decedent’s surviving spouse under §2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:
   
   1. To the decedent’s descendants by representation;  
   2. If there is no surviving descendant, to the decedent’s parents equally if both survive, or to the surviving parent;  
   3. If there is no surviving descendant or parent, to the descendants of the decedent’s parents or either of them by representation;  
   4. If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants or grandparents, half of the estate passes to the decedent’s paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent’s paternal grandparents, or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent’s maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent’s relatives on the other side in the same manner as the half.

d. **UPC (1990) §2-10 No Taker**
   
a. If there is no taker under the provisions of this Article, the intestate estate passes to the state.

2. **Hypothetical pages 49-59**

**B. Share of Surviving Spouse**

a. **The Uniform Simultaneous Death Act**
   
   1. Must establish survivorship by 120 hours (5 days) by clear and convincing evidence of the order of deaths, the beneficiary is deemed to have predeceased the benefactor. An heir or devisee or life insurance beneficiary who fails to
survive by 120 hours (5 days) is deemed to have predeceased the decedent. The Act further provides that if two joint tenants, A and B die simultaneously, one-half of the property is distributed as if A survived and one-half if distributed as if B survived. The same rule is applied to property held in tenancy by the entirety or community property. **UPC is parallel to the USDA.**

C. **Share of Descendants**

1. **Generally**

   a. **Per Stirpes** – For a PS system, you begin by dividing the estate at the first generation under the deceased, meaning the children of the deceased. You make the initial division by counting the number of surviving members of that generation plus deceased members of that generation who left issue. Then for **PS and PCR**, the descendants of the deceased members take by representation, meaning they divide what their parents would have taken. Note that this means that **PS and PCR** divisions will be the same when there is a member of the first generation still alive.

   b. **Per Capita With Representation** - For PCR and PCG systems, you begin by dividing the estate at the nearest generation where there are surviving members. For all three systems, you make the initial division by counting the number of surviving members of that generation plus deceased members of that generation who left issue. Then for **PS and PCR**, the descendants of the deceased members take by representation, meaning they divide what their parents would have taken. Note that this means that **PS and PCR** divisions will be the same when there is a member of the first generation still alive.

   c. **Per Capita at Each Generation** - For PCR and PCG systems, you begin by dividing the estate at the nearest generation where there are surviving members. For all three systems, you make the initial division by counting the number of surviving members of that generation plus deceased members of that generation who left issue. For **PCG**, the shares of the deceased members are treated as one pot and divided equally among the deceased members’ representatives at the next generational level.

      1. **Per Capita at Each Generation** you count people who are alive plus people who are dead who left descendants.

   d. **§2-106 UPC Probate Code (1990)** – A decedent’s intestate estate or a part thereof passes by representation to the decedent’s descendants, the estate or part thereof is
divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

1. Under 1990 UPC §2-106, the initial division of shares is made at the level where one or more descendants are alive (as under modern per stirpes), but the shares of deceased persons on that level are treated as one pot and are dropped down and divided equally among the representatives on the next generational level.

2. UPC stops at grandparents. Parentilic – passes to grandparents and their descendants

3. UPC usually takes per capita at each generation approach.

2. Advancements

a. If any child wishes to share in the intestate distribution of a deceased parent’s estate, the child must permit the administrator to include in the determination of the distributive shares the value of any property that the decedent, while living, gave the child by way of an advancement.

   1. When a parent makes an advancement to the child and the child predeceases the parent, the amount of the advancement is deducted from the shares of such child’s descendants if other children of the parent survive.

   2. If a gift is treated as an advancement, the donee must allow its value to be bought into hotchpot if the donee wants to share in the decedent’s estate. Look to page 129 for hotchpot.

b. States reversing the common law presumption of advancement.

   i. In these states a lifetime gift is presumed not to be an advancement unless it is shown to have been intended as such.

   ii. In other states, statutes declare that a gift is not an advancement unless it is declared as such in a writing signed by the grantor or grantee.

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   ii. In other states, statutes declare that a gift is not an advancement unless it is declared as such in a writing signed by the grantor or grantee.

2. Advancements
i. If an individual dies intestate as to all or a portion of his or her estate, property the decedent gave during the decedent’s lifetime to an individual who, at the decedent’s death, is an heir\(^1\) is treated as an advancement against the heir’s intestate share only if (i) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement or (ii) the decedent’s contemporaneous writing or the heir’s written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent’s intestate estate.

ii. For purposes of subsection (a), property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent’s death, whichever first occurs.

iii. If the recipient of the property fails to survive the decedent the property is not taken into account in computing the division and distribution of the decedent’s intestate estate, unless the decedent’s contemporaneous writing provides otherwise.

3. Special Issues Regarding Transfers to Minors

a. Managing a minor’s property

i. Guardian of a person has the responsibility for the minor child’s custody and care. A guardian of the person has no authority to deal w/ the child’s property. The guardian has the duty of preserving the specific property left the minor and delivering it to the ward (a minor who is under guardianship change) at age 18, unless the court approves a sale, lease, or mortgage. Second, the guardian ordinarily can use only the income from the property to support the ward.

1. Conservator – In many states, guardianship laws have been reformed. The guardian of the property has been renamed conservator and given title as trustee to the protected person’s property, as well as the same investment powers trustees have. Appointment and supervision by a court is still required, but the conservator has far more flexible powers than a guardian.

ii. Custodianship: A custodian is a person who is given property to hold for the benefit of a minor under the state Uniform Transfers to Minors Act (1983) or Uniform Gifts to Minors Act (1956 revised 1966).

\(^{1}\) UPC §2-109 applies to advancements made to spouses and collaterals (such as nephews and nieces) as well as to lineal descendants. In most states, only gifts to lineal descendants are considered advancements.
Under these acts, property may be transferred to a person (including the donor) as custodian for the benefit of the minor. A devise or gift may be made to X as custodian for (name of minor) under the (name of state) Uniform Transfers to Minors Act,” thereby incorporating the provisions of the state’s uniform act and eliminating the necessity of drafting a trust instrument.

1. To the extent that the custodial property is not so expended, the custodian is required to transfer the property to the minor on his attaining the age of 21 or, if the minor dies before attaining the age of 21, to the estate of the minor.

2. The custodian has the right to manage the property and to reinvest it. However, the custodian is a fiduciary and is subject to the standard of care that would be observed by a prudent person dealing with property of another.

3. A custodian is useful for modest gifts to a minor, but when a large amount of property is involved, a trust is usually preferable.

iii. Trust: The 3rd alternative for property management on behalf of a minor is to establish a trust for the child. A trust is the most flexible of all property arrangements.
1. Under a guardianship or conservatorship, the child must receive the property at 18 and, under a custodianship, at 21, but a trust can postpone the property until the donor thinks the child is competent to manage the property.

D. Share of Ascendants and Collaterals
1. When the intestate is survived by a descendant, the decedent’s ancestors and collaterals do not take. When there is no descendant, after deducting the spouse’s share, the rest of the intestate’s property is usually distributed to the decedent’s parents, as under the UPC.

a. Collateral Kindred: All persons who are related by blood to the decedent but who are not descendants or ancestors are called collateral kindred.

b. First-Line Collaterals: Descendants of the decedent’s parents, other than the decedent and the decedent’s issue, are called first-line collaterals.

c. Second-Line Collaterals: Descendants of the decedent’s grandparents, other than decedent’s parents and
their issue, are called second-line collaterals. Look at table of consanguinity on page 92.

1. If there are no first-line collaterals, the states differ as to who is next in line of succession. Two types:
   a. Parentelic System: Under the parentelic system, the intestate estate passes to grandparents and their descendants, and if none to great-grandparents and their descendants, and if none to great-great-grandparents and their descendants, and so on down each line (parentela) descended from an ancestor until an heir is found.
   b. Degree of Relationship System: The intestate estate passes to the closest of kin, counting degrees of kinship. To determine the degree of relationship of the decedent to the claimant you count the steps (counting one for each generation) up from the decedent to the nearest common ancestor of the decedent and the claimant, and then you count the steps down to the claimant from the common ancestor. The total # of steps is the degree of relationship.

   d. If the decedent is not survived by a spouse, descendant, or parent, in all jurisdictions intestate property passes to brothers and sisters and their descendants. The descendants of any deceased brothers and sisters (nephews and nieces) take by representation in the same manner as decedent’s descendants, discussed at pages 86-90 and UPC §2-106(b) page 88.

E. Special Issues Regarding Half-Bloods
1. In a large majority of states, a relative of half-blood (e.g. half sister) is treated the same as a relative of whole-blood. This is the position of the UPC §2-107.
2. In a few states (Virginia) a half-blood is given a half share.
3. In other states (Mississippi) a half-blood takes only when there are no whole-blood relatives of the same degree.
4. In Oklahoma, half-bloods are excluded when there are whole blooded kindred n the same degree and the inheritance came to the decedent by an ancestor and the half-blood is not a descendant of the ancestor.

F. Bars to Succession
1. Two ways from being barred to Intestate Succession
   a. State says no – cannot get share
   b. Homicide
i. **Intestacy Statute** – The Legal Title passed to the slayer and may be retained by him in spite of his crime.

1. **UPC §2-803** – Bars the killer from succeeding to non-probate as well as probate property. It also provides that a wrongful acquisition of property must be treated in accordance w/ the principle that a killer cannot profit from his wrong.

2. **If the killer is barred from taking, who takes?** The UPC provides that the killer is treated as having disclaimed the property (and under the UPC disclaimer statute, §2-801, the disclaimant is treated as having predeceased the decedent).

ii. **Equity** – The legal title will not pass to the slayer because of the equitable principle that no one should be permitted to profit by his own fraud, or take advantage and profit as a result of his own wrong or crime.

iii. **Constructive Trust** – The legal title passes to the slayer but equity holds him to be a constructive trustee for the heirs or next of kin of the decedent. Estate of Mahoney

1. The principle to be applied is that the slayer should not be permitted to improve his position by the killing, but should not be compelled to surrender property to which he would have been entitled if there had been no killing.

2. A trust imposed by a court on equitable grounds against one who has obtained property by wrongdoing thereby preventing the wrongful holder from being unjustly enriched.

2. **Disclaimer** – Almost all states have enacted disclaimer legislation that provides that he disclaimant is treated as having predeceased the decedent. Thus, the decedent’s property does not pass to the disclaimant and the disclaimant makes not transfer of it.

a. **Reasons why disclaiming is advantageous**

i. **Avoiding taxes**

1. Cannot avoid federal taxes by disclaiming.

2. State taxes

ii. **Avoiding creditors**
III. Attempting to Manifest Intent: Wills (or Testate Succession)

A. Executing Wills

1. Mental Capacity – Specific Requirements
   a. The testator only has to have the ability to know
      i. the nature and extent of the testator's property
      ii. the persons who are the natural objects of the testator's bounty
      iii. the disposition the testator is making, and
      iv. how these elements relate so as to form an orderly plan for the disposition of the testator's property
   b. The testator does not have to have average intelligence as this would incapacitate almost half the people making wills, but the testator must have mind and memory relevant to the four matters mentioned. The testator must understand the significance of the act.
   c. Testamentary capacity cannot be destroyed by showing a few isolated acts, mental irregularities or departures from the norm, unless they directly bear upon and have influenced the testamentary act. Estate of Wright

2. Insane Delusion – A person may have sufficient mental capacity to execute a will, but may be suffering from an insane delusion so as to cause a particular provision in the will or the entire will to fail for lack of testamentary capacity.
   a. A delusion is insane even if there is some factual basis for it if a rational person in the testator's situation could not have drawn the conclusion reached by the testator.
   b. If a person believes supposed facts which have no real existence & against all evidence, that person is insane in those subjects. However, if the will is struck down because of an insane delusion, his estate would go through intestacy, and under the statute ½ to his wife, and ½ to his brothers and sisters. In re Honnigan

3. Undue Influence
   a. Test: Whether such control was exercised over the mind of the testatrix as to overcome her free will and to substitute the will of another so as to cause the testatrix to do what she would not otherwise have done but for such control. A separate document in the testator’s words would be sufficient to overcome the presumption that her will was the result of undue influence. Lipper v. Weslow
   i. To avoid Lipper problems:
      1. Provide a statement by the testator
      2. Insert an effective no contest clause
a. A no contest clause provides that a beneficiary who contests the will shall take nothing, or a small amount.
   i. A no-contest clause is enforced unless there is probable cause for the contest. The probable cause rule is adopted by UPC §2-517 and §3-905.

3. Give less money to person drafting will, because if the person drafting the will receives more than the spouse suspicion is raised.
   ii. A rule applied to undue influence is:
      1. A person has a confidential relationship, and
      2. Receives the bulk of the testator's property
      3. From the testator of weakened intellect, the burden of proof shifts to the person occupying the confidential relation to prove affirmatively the absence of undue influence.
   iii. If a part of a will is the product of undue influence, those portions of the will that are the product of undue influence may be stricken and the remainder of the will allowed to stand if the invalid portions can be separated w/out defeating the testator's intent.

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

c. Sexual Relationships – Sexual relationships between the testator and the attorney/draftsmen could give rise to undue influence on part of the attorney/draftsmen. Subservience and dominance can also give rise to undue influence by the draftsman of the will. But if you are in a sexual relationship (hetero, or homo) you can do certain things to make sure the will is not invalidated, such as:
   i. Provide more proof that this is the true intention of the testator.
   ii. Continually update letter or affidavit
   iii. Be sensible when updating your will
   iv. Provide an inter-vivos transfer or trust

4. Fraud – Fraud occurs where the testator is deceived by a misrepresentation and that which the testator would not have done had had the misrepresentation not been made. Misrepresentation must be made w/ both the intent to
deceive the testator and the purpose of influencing the testamentary disposition.

a. When an heir or devisee (a recipient of property by will) in a will prevents the testator from providing for one for whom he would have provided but for the interference of the heir or devisee, such heir or devisee will be deemed a trustee of the property, to the amount that the defrauded party would have received had not the intention of the deceased been interfered with.

b. Types:
   i. Fraud in the inducement – Occurs when a person misrepresents facts, thereby causing the testator to execute a will, by including:
      1. Provisions in the wrongdoer’s favor, or
      2. To cause testator to refrain from revoking a will, or
      3. To cause testator not to execute a will.
   ii. Fraud in the execution – Occurs when a person misrepresents the character or contents of the instrument signed by the testator, which does not in fact carry-out the testator’s intent.

c. Tortious Interference with Expectancy – A tort action for tortuous interference w/ an expectancy is not a will contest. It does not challenge the probate or validity or a will but rather seeks to recover tort damages from a third party or tortuous interference. But the tort statute of limitations starts running on the action at the time the plaintiff discovered or should have discovered the fraud or undue influence.

   i. Plaintiff must prove:
      1. The existence of an expectancy (promises made to receive in the will, and
      2. A reasonable certainty that the expectancy would have been realized but for the interference, and
      4. Intentional interference with that expectancy, and
      5. Tortious conduct involved with the interference, and
      6. Damages

5. Sham Wills – Occur when the testator does not intend the will what it is purported to be. In other words, when the testator signs the will and has his witnesses sign the will, he does not intend this will to be his last will and testament, but intended to have the devisees of the will to believe it was the testator’s last will and testament.
a. Witnesses must witness signing of the will by the testator and witness the testator saying that what is in the will is what he actually meant to be his last will and testament. Fleming v. Morrison

6. Ambiguous Intent occurs when the provisions of the will are susceptible to two or more meanings.
   a. Latent ambiguity - is one which is not apparent on the face of the will, but is disclosed by some fact collateral to it.
      i. Extrinsic evidence – may be introduced in order to show that under the circumstances of a particular case the seemingly clear language of a will actually represents a latent ambiguity.
   b. Patent ambiguity – An ambiguity that clearly appears on the face of the document arising from the language itself. When an uncertainty arises upon the face of a will as to the meaning of any of its provisions, the testator’s intent is to be ascertained from the words of the will, but the circumstances of the execution may be taken into consideration.

2. Statutory Requirements
   a. Attested Wills

<table>
<thead>
<tr>
<th>UPC States</th>
<th>Other States</th>
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</thead>
<tbody>
<tr>
<td>1. In Writing</td>
<td>1. In Writing</td>
</tr>
<tr>
<td>2. Signed by the testator or in the testator’s name by some other individual in the testator's conscious presence and by the testator’s direction.</td>
<td>However a few states permit oral wills under limited circumstances (e.g., during last sickness when an Individual orally devises personal property b-4 3 people who later reduce the utterance to writing)</td>
</tr>
<tr>
<td>3. Signed by two individuals within a reasonable time after witnessing testator’s signature/ acknowledgement of signature</td>
<td>2. Signed at foot or end by testator or other in testator’s direction. -Anything in testator’s writing Valid if intended as signature. -if not signed at foot/end, some states deny probate to entire will. Other states (NY) order will probated with material after signature stricken.</td>
</tr>
<tr>
<td>4. Witnesses not required to presence at testator’s sign in testator’s presence.</td>
<td>3. Signed in testator’s presence by two individuals</td>
</tr>
<tr>
<td>5. Witnesses may be interested, but some states (CA) provide that a devise to a witness creates a presumption of undue influence.</td>
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VMC
after they witness, at the same time, testator’s signature/acknowledgement (except VT requires 3 witnesses; L.A. two witnesses plus notary).

- If both witnesses not present when testator signs/acknowledges, then will is denied probate (Groffman).
- To determine presence, some states employ line of sight test, which provides that the testator does not actually have to see the witnesses, but must be able to see them were the testator to look.
- Other states employ the conscious presence test which provides that the witness is in the presence of the testator if the testator, through sight, hearing, or general consciousness of events comprehends that the witness is in the act of signing.
- If someone incapacitated asks for assistance to sign, signature requirement met. But, if someone just comes up & signs the will w/out the testator’s request, the signature requirement is not met.
- Some states penalize interested witnesses through purging statutes which void entire gift (MA) or void any gift in excess of what witness would otherwise be entitled (old CA rule at issue in Parsons).
- Probate code 51 (page 237): Disclaimer is treated as predeceased. The fact that the witness later disclaims does not change the witness received money. The witness money who disclaims his money goes into intestacy.

ii. Execution/Proof/Safeguarding – If the procedure set forth below is followed, the instrument will be valid in all states, no matter in which state the testator is domiciled at the date of execution or at the death or where the property is located.

1. If the will consists of more than one page, the pages are fastened together securely. The will specifies the exact number of pages of which it consists.
2. The lawyer should be certain that the testator has read the will and understands its contents.
3. The lawyer, the testator, two disinterested witnesses and a notary are brought together in a room from which everyone else is excluded. (If the lawyer is a notary, an additional notary is unnecessary.) The door to the room is closed. No one enters or leaves the room until the ceremony is finished.
4. The lawyer asks the testator the following 3 questions:
   a. Is this your will?
   b. Have you read it and do you understand it?
   c. Does it dispose of your property in accordance with your wishes?
5. After each question the testator should answer “Yes” in a voice
that can be heard by the two witnesses and the notary. It is neither necessary nor customary for the witnesses to know the terms of the will. If, however, the lawyer foresees a possible will contest, added precautions might be taken at this time.

6. The lawyer asks the testator the following questions. “Do you request ___________ and ____________ (the two witnesses) to witness the signing of your will”? The testator should answer “Yes” in a voice audible to the witnesses.

7. The witnesses should be standing or sitting so that all can see the testator sign. The testator signs on the margin of each page of the will. This is done for purposes of identification and to prevent subsequent substitution of pages. The testator then signs his or her name at the end of the will.

8. One of the witnesses reads aloud the attestation clause, which attests that the foregoing things were done. Page 244

9. Each of the witnesses then signs and writes his or her address next to the signature.

10. A self-proving affidavit, typed at the end of the will, swearing b-4 a notary that the will has been duly executed, is then signed by the testator and the witnesses b-4 a notary, who in turn signs and attaches the required seal.
   b. **UPC §2-504(a) (1990)** authorizes a combined attestation clause and self-proving affidavit, so that the testator and the witnesses (and the notary) sign their names only once.
   c. **UPC §2-504(b) (1990)** authorizes a self-proving affidavit to be affixed to a will already signed and attested, which affidavit must be signed by the testator and witnesses in front of a notary after the testator has signed the will and the witnesses have signed the attestation clause.

11. Safeguarding a Will
   a. A common practice, after the will is done, is to give the will to the client together w/ instructions that it be kept in a safe place, such as in a safe deposit box or among valuable papers at the client’s home.
   b. Some attorneys follow the practice of retaining the client’s will in their files. The client is given an unexecuted copy of the will on which the location of the original will is noted.

12. Curing Mistakes
      i. Although a document or writing added upon a document was not executed in compliance w/ section 2-502, the document or writing is treated as if it had been executed in compliance w/ that section if the proponent of the
document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

1. The decedent’s will
2. A partial or complete revocation of the will
3. An addition to or an alteration of the will, or
4. A partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

b. Substantial Compliance Test
   i. If the witnesses, with the intent to attest, sign a self-proving affidavit, but do not sign the will or an attestation clause, clear and convincing evidence of their intent should be adduced to establish substantial compliance with the statute.

c. How does harmless error differ from substantial compliance?
   i. The difference is that under the substantial compliance test, you must comply with all the standards, but under UPC you must establish by clear and convincing evidence that the decedent intended the document to be her last will and testament.

b. Unattested Wills
   i. Holographic Wills – A holographic will is a will written by the testator’s hand and signed by the testator; attesting witnesses are not required.
      1. A few states require that a holographic will be dated, which means a full date of day, month and year.
      2. In almost all states permitting holographic wills, the will may be signed at the end, at the beginning or anywhere on the will, but if not signed at the end there may be doubt about whether the decedent intended his name to be a signature and attested like any other will.
      3. Can use a form will and be valid as a holographic will. Most of the time form wills are valid as long as they are witnessed.
         a. UPC §2-502© (1990) – Testamentary intent can be established for a holographic will by looking at the portions of the document that are not in the testator’s handwriting. A holographic will may be written on a printed will form if the material portions of the document are handwritten, and must be signed and attested like any other will.

ii. Can a will be a will if there are no gifts provided for?
    Beats the fuck out of me.
    1. A will does 3 things:
       a. Distributes property, or
b. Name an executor or personal representative, or
c. Revoke a prior will

B. Will Components

1. Integration of Wills – All papers present at the time of execution, intended to be a part of the will, are integrated into the will. The pages physically connected with a staple or ribbon or, if not stapled or ribboned, there is a sufficient connection of language carrying over from page to page to show an internal coherence of the provisions.

2. Reproduction by Codicil – A will is treated as re-executed (republished) as of the date of the properly executed (signed and dated) codicil.
   a. If the testator revokes the 1st will by a 2nd will and then executes a codicil to the first will. The 1st will is republished, and thus the 2nd will is revoked by implication.
   b. The doctrine of reproduction by codicil is not applied automatically, but only when updating the will carries out the testator’s intent.

3. Incorporation By Reference (not recognized in CT, LA, and N.Y.) – Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification. Incorporation by reference can be used in conjunction w/ reproduction by codicil, in that when the codicil is executed after the will, the will which the codicil refers to is republished and the executed codicil is incorporated by reference into the republished will.
   a. The fundamental difference between reproduction by codicil and the doctrine of incorporation by reference, is that reproduction applies only to a prior validly executed will, whereas incorporation by reference applies to incorporate into a will instruments that have never been validly executed.

4. Acts of Independent Significance – If the beneficiary or property designations are identified by acts or events that have a lifetime motive and significance apart from their effect on the will, the gift will be upheld under the doctrine of independent significance.
   a. UPC §2-512 Events of Independent Significance
      i. A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur b-4 or after the execution of the will or b-4 or after the testator’s death. The execution or revocation of another individual’s will is such an event.
C. Will Construction

1. Admission of Extrinsic Evidence
   a. Mistake in Drafting
      i. Test
         1. There must be an error by the attorney/draftsman,
         2. Established by clear & convincing evidence that there is an
            Error, and
         3. The testator was misled by the mistake.
      ii. Only where the testamentary language is not clear that
          extrinsic evidence may be introduced as to the
          circumstances upon its meaning. Mahoney is seen as
          mistake of testator, instead of mistake of drafter. Mahoney v.
          Grainger (Mass)
      iii. Personal usage exception – If the extrinsic evidence
          shows that the testator always referred to a person in an
          personal manner, the evidence is admissible to show that
          the testator meant someone other than the person w/ the
          legal name of the legatee.
   b. Ambiguity
      i. Ambiguous Intent occurs when the provisions of the will
         are susceptible to two or more meanings.
         a. Latent ambiguity - is one which is not apparent on the
            face of the will, but is disclosed by some fact collateral to it.
            1. Extrinsic evidence – may be introduced in order to
               show that under the circumstances of a particular
               case the seemingly clear language of a will actually
               represents a latent ambiguity.
            2. Oral Declarations of intent to the scrivener are
               admitted in most jurisdictions in a case of latent
               ambiguity.
         b. Patent ambiguity – An ambiguity that clearly appears
            on the face of the document arising from the language itself.
            When an uncertainty arises upon the face of a will as to the
            meaning of any of its provisions, the testator’s intent is to be
            ascertained from the words of the will, but the circumstances
            of the execution may be taken into consideration.
   c. Correcting Errors
      i. Given that extrinsic evidence is admissible to prove that a
         will was executed by the testator in reliance on erroneous
         beliefs induced by fraud, duress, or undue influence, there is
         no discernable difference between that case and a case in
         which a will is executed in reliance on mistaken beliefs
         induced by innocent error, by innocent misrepresentation, of
         the scrivener of a will. Extrinsic evidence established by
         clear and convincing evidence is therefore allowed to show
         the testator’s true intent.
2. Changes in Condition or Status of Beneficiaries
   a. Anti-lapse statutes
      i. Is there a lapse? If yes, will go through residuary beneficiary, or through intestacy, unless
         1. Anti-lapse statute applies
         2. The will provides for substitute
         3. Can be construed as a gift
      ii. If a devisee does not survive the testator, the devise lapses (fails). All gifts made by will are subject to a requirement that the devisee survive the testator, unless the testator specifies otherwise. In nearly all states, however, anti-lapse statutes have been enacted which, under certain specified circumstances, substitute another beneficiary for the predeceased devisee.
      iii. An anti-lapse statute applies to a lapsed devise only if the devisee bears the particular relationship to the testator specified in the statute. The anti-lapse statute in the UPC applies only to devises to a grandparent or a lineal descendant of a grandparent, or a devise to a stepchild.
         1. §2-605 Anti-Lapse; Deceased Devises; Class Gifts – If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee under a class gift if the had survived the testator is treated as a devisee for the purposes of this action whether his death occurred b-4 or after the execution of the will.
         a. UPC 1990 revised the 1969 UPC section 2-605 and provides that the words of survivorship, such as in a devise to an individual, “if he survives me”, or in a devise to “my children” are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.
         iv. Allen v. Talley: “I give devise and bequeath unto my living brothers and sisters.” If this means, living upon execution of the will, the anti-lapse statute applies, but if she meant living at the time of death, remaining siblings split estate in half.

VMC  VMC 22
v. Rule of Construction – Permits an “and” to be read as an “or” when to do so will carry-out the testator’s intent.

vi. “To her and her heirs”, is ambiguous enough to allow extrinsic evidence.

b. Class Gifts – The test is said to be whether the testator is group minded. The testator is thought to be group minded if he uses a class label in describing the beneficiaries, such as to A’s children or “to my nephews and nieces.” But a class label is not necessary for a class gift. Beneficiaries described by their individual names, but forming a natural class, may be deemed a class gift if the court decides, after admitting extrinsic evidence, that the testator would want the survivors to divided the property.

i. Not a class if:
   1. Not all members named
   2. Shows testator’s knowledge of how to make a class gift and did not:
      a. specify interest to individuals, and
      b. didn’t call it a class

ii. In determining whether a devise is to a class or to individuals depends upon the language of the will.
   1. If from such language it appears that the amounts of their shares are uncertain until the devise or bequest takes effect, the beneficiaries will generally be held to take a class,
   2. But where at the time of making the gifts the number of beneficiaries is certain and the share of each is to receive is also certain, and in no way depends for its amount upon the number who shall survive, it is not a class gift. Dawson v. Yacus

iii. If a class gift, you do not have to divide it equally, but generally you have to define the distributor.

3. Changes in Property
   a. Ademption – The destruction or extinction of a legacy or bequest by reason of bequeathed assets ceasing to be part of the estate at the time of the testator's death; a beneficiary's forfeiture of a legacy or bequest that is no longer operative.
      i. When a testator disposes, during his lifetime, of the subject of a specific legacy or devise in his will, that legacy or devise is held to be adeemed. Wasserman v. Cohen
   ii. Exceptions to Ademption:
      1. Classify the devise as general or demonstrative rather than specific. A bequest of $10,000 or more or less, entered in by bank book, has been held demonstrative.
      2. Classify the inter vivos disposition as a change in form, not in substance. Most courts hold that corporate merger
or reorganization is only a change in form, not in substance

3. **Construe the meaning of the will as of the time of death rather than as of the time of execution.** A bequest of "my Lincoln automobile" passed a 1989 Lincoln owned by testator at her death, though at the time the will was executed testator owned a 1984 Lincoln.

**D. Revoking Wills**

1. **Revocation in Entirety: Revoke a will By:**
   a. **Subsequent Writing**
   b. **Physical Act**
      i. Burning
      ii. Tearing
         1. Testator must do the act of burning or tearing
      iii. Canceling
         1. Common Law – Alter the words of the will
         2. UPC – Act of canceling can take place anywhere in the will
   iv. Under **UPC §2-509(a)**, if a subsequent will that completely revoked the previous will is itself revoked by physical act, the presumption is that he previous will remains revoked.
   v. On the other hand, if a subsequent will that partly revoked the previous will is itself revoked, the presumption is that the previous will is revived.

c. **Operation of Law**
   i. What happens when the testator leaves a will, then there is a divorce? The divorce revokes the gift to the spouse, but the divorce doesn’t revoke the entire will.
      1. Most states would revoke gift to spouse, but would not revoke will to family members.

2. **Partial Revocation – Can be considered a revocation or a tentative act, such as using light pencil, or white-out to cross-out a name.**
   a. **UPC §2-507: Revocation By Writing or By Act**
      i. A will or any part thereof is revoked:
         1. by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or
         2. by performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will, or part of or if another individual performed the act in the testator’s conscious presence and by the testator’s direction. Revocatory act on the will includes burning, tearing, or canceling, obliterating or destroying the will. Burning, tearing, canceling, or destroying the will is a revocatory act whether or not the act touched any of the words on the will.

   b. In a state that does not recognize partial revocation, when there is a specific gift crossed-out you just give the gift back to the will,
and divide it among the remaining relatives.

3. Dependent Relative Revocation – If the testator claims to revoke his will upon a mistaken belief of law or fact, and the revocation is ineffective, but for this mistake the testator would have not revoked the will had he known the truth.

A. Elements
   a. A revocation,
   b. A Mistake
   c. Intent — Would have the testator intended for the original to apply if not for the mistaken revocation?

B. Ineffective New Disposition is Crucial
   a. The doctrine of D.R.R applies only if there is an ineffective alternative disposition. It does not apply where the testator revokes his will by mistake and makes an effective new disposition by will.

C. Problems Under D.R.R
   a. Does the state recognize a holographic codicil?
   b. Does the state recognize partial revocation?
   c. D.R.R

D. Revocation by Physical Act
   a. What qualifies as a mistake?
      i. An alternative disposition that fails.
         1. The alternative that fails is almost always an ineffective will. The cases are split if the alternative is intestacy.
         ii. The recited mistake is on the terms of the revoking instrument or is established by clear and convincing evidence.
   b. Revocation and Making New Will Must be Simultaneous
      i. D.R.R does not apply where the revocation is followed by an uncompleted plan to make a new will, but is conditional on the new will.

E. Express Revocation by Subsequent Instrument
   a. The older cases held that D.R.R applies only where the revocation is by a physical act, but modern cases apply D.R.R. to revocation by subsequent instrument (w/ or w/out an express revocation clause) on the theory that if the evidence is admissible to show the instrument was not intended to be effective at all (e.g., was a joke or the testator was high on drugs), evidence should be admissible to show a conditional intent. However, the doctrine is limited more sharply than in cases of revocation by physical act.
   b. Express Revocation Clause
      i. When there is an express revocation clause, the mistake must appear on the face of the latter instrument or be inferable from the face of the two wills. The mistake cannot be shown by extrinsic evidence, as it can be when the
revocation is by physical act. **Rationale:** **Extrinsic Evidence** cannot be admitted to vary terms of a written instrument.

4. **Revival of Revoked Wills:** UPC §2-509 Revival of Revoked Will
   - The problem of revival occurs in this fact situation: Will-1 is executed. Will-2 is executed, and Will-1 is either expressly or impliedly revoked in whole or in part by Will-2. Then, Will-2 is revoked. Is Will-1 now admissible to probate as originally executed? Or, to put it differently, is Will-1 revived? Usually the question of revival occurs where the testator has revoked Will-2 by physical act.
   
   **a. Previous will remains revoked:** If a subsequent will that completely revoked a previous will is thereafter revoked by a revocatory act under Section 2-507(a)(2), the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the testator’s contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

   **b. If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act under Section 2-507(a)(2), a revoked part of the previous will is revived unless it is evident from the circumstances of the revocation of the subsequent will or from the testator’s contemporary or subsequent declarations that the testator did not intend the revoked part to take effect as executed.**

   **c. If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later, will the previous will remains revoked in whole or in part, unless it or its revoked part is revived.** The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect.

E. **Restrictions on the Power of Disposition**

   1. Protection of the Spouse
      
      **a. Rights of the Surviving Spouse to Support**
      
      **i. Social Security** – The social security system incorporates the principle of community property that the benefits of earnings should be shared by husband and wife.

      **ii. Private Pension Plans** – ERISA requires that the spouse of an employee **must have survivorship rights** if the employee predeceases the spouse.

      **iii. Homestead** – A statute exempting a homestead from executing or judicial sale for debt, unless all owners, usually husband and wife have jointly mortgaged the property or otherwise subjected it to creditors’ claims. Homestead laws are designed to secure the family home to the surviving spouse and minor children, free of claims of creditors. Such a
homestead is called a probated homestead

iv. Personal Property Set Aside – Related to homestead is the right of the surviving spouse (and sometimes the minor children) to have set aside to her certain tangible personal property of the decedent up to a certain value. **UPC §2-403 (1990)** sets the limit at $10,000. These items, which are usually exempt from creditors’ claims, usually include a car, and farm animals

v. Family Allowance – Every state has a statute authorizing the probate court to award a family allowance for maintenance and support of the surviving spouse. The allowance may be limited by the statute to a fixed period (typically one year), or it may continue thereafter while the will is being contested or for the entire period of administration.

vi. Dower – Dower entitles the widow to a life estate in 1/3 of her husband’s qualifying land

b. Rights of Surviving Spouse to Share – Elective Share
   i. Rationale – The underlying policy is that the surviving spouse contributed to the decedent’s acquisition of wealth and deserves to have a portion of it. This policy is carried out by statutes giving the surviving spouse an *elective share* (sometimes called a *forced share*) of the decedent’s property. These statutes provide the surviving spouse w/ an election: The spouse can take under the decedent’s will or can renounce the will and take a fractional share of the decedent’s estate. Under an elective share system, the wife must survive her husband in order to share the partnership property.

   1. **UPC 1990** – gives the surviving spouse a sliding scale percentage of the elective share amount, based upon the duration of the marriage (3 percent after one year, with 3 percent annual accruals for the next ten years, and 4 percent annual accruals thereafter until 50 percent is reached after 15 years.

   ii. Property Subject

   1. Assets of Inter-Vivos Trust
      a. A trust is not testamentary and invalid for failure to comply w/ the requirements of the Statute of Wills merely because the settlor-trustee reserves a beneficial life interest and power to revoke and modify the trust. *The fact that as trustee he controls the administration of the trust does not invalidate it.*

      2. Illusory Revocable Trust – An illusory revocable trust is not totally invalid, but merely counts as part of the
decedent’s assets subject to the elective share; the trustee may have to contribute some of the trust assets to make up the elective share.

3. **Intent to Defraud Test** – Some states found the illusory transfer test itself illusory and adopted the intent to defraud test. In determining whether the decedent intended to defraud his surviving spouse of her elective share, some look for subjective intent.

4. **Present Donative Intent Test** – Whether the decedent had a present donative intent to transfer a present interest in the property. This test focuses not on what the transferor retained, but on whether the transferor intended to make a present gift.

iii. **Waiver** – A spouse may execute a waiver of a right to receive property or benefits from the other spouse’s estate. The right may be waived b-4 or during the marriage.

A. The spouse may waive, in whole or in part, the right to any of the following property or benefits from the estate.

1. Property that would pass from the decedent by intestate succession.
2. Property that would pass from the decedent by testamentary disposition in a will executed b-4 the waiver.
3. The right to be appointed as the executor or administrator of the decedent’s estate.
4. The right to take the statutory share of an omitted spouse.
5. An interest in property that is the subject of a non-probate transfer. (i.e., life insurance, trust)

B. **UPC §2-213 Waiver of Right to Elect and of Other Rights:**

1) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, b-4 or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

2) A surviving spouse’s waiver is not enforceable if the surviving spouse proves that:
   a. He or she did not execute the waiver voluntarily, or
   b. The waiver was unconscionable when it was executed and, b-4 execution of the waiver, he or she:
      i. was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;
      ii. did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial
obligations of the decedent beyond the disclosure provided.

iii. did not have, or reasonably could not have had, and adequate knowledge of the property or financial obligations of the decedent.

C. Prenuptial Agreements – A duly executed prenuptial agreement is given the same presumption of legality as any other K, commercial or otherwise. The party attacking the prenup has the burden of coming forward w/ evidence of fraud, which, in the absence of facts from which concealment may reasonably be inferred, will not be presumed.

c. Rights of Surviving Spouse in Community Property – Husband and wife own the earnings and acquisitions from earnings of both spouses during marriage in undivided equal shares. Whatever is bought w/ earnings is community property.

i. All property that is not community property is the separate property of one spouse of the other, or in the case of a tenancy in common or joint tenancy of both. Separate property includes property acquired b-4 marriage and property acquired during marriage by gift or inheritance.

ii. Where property has been commingled by the spouse, or acquired from both separate and community funds, states have acquired a rule for insurance policies.

1. Inception-of-Title Rule – An insurance policy remains the husband’s separate property and the community is entitled only to a return of premiums paid w/ interest.

2. Pro-Rata Share Rule – Dividing the policy proceeds between separate and community property according to the proportion of payments paid.

iii. Upon Death – The deceased spouse can dispose of his or her own half of the community assets. The surviving spouse owns the other half, which is not, of course, subject to testamentary disposition by the deceased spouse. The ½ of the community property belonging to the deceased spouse may be divided to whomever decedent pleases, the same as separate property.

iv. Putting the Survivor to an Election – The widow’s election (which applies to widower’s as well) is this: H attempts by his will to dispose of all the community property. Since ½ of the community property already belongs to W, he can dispose of her half only w/ her consent. Therefore, he puts her to an election between taking her half of the community property or taking what he gives her by his will.
1. **Example:** H’s will may give W a life estate in the entire community property, provided she gives up her half interest. Or, H may give W a life estate in all his separate property as well as in all the community property, if she agrees not to claim her half of the community property.

d. **Migrating Couples and Multi-State Property Holdings**

i. **Classic Conflict of Law Rules Used to Determine Which State Law Governs Marital Property:**

1. The law of testator’s domicile at death determines the validity of will insofar as it disposes of **personal property**.

2. The law of the state where the **real property** is located determines the disposition of the real property.

3. The of the **marital domicile at the death of one spouse** controls the survivor’s marital rights.

ii. **Moving from Separate Property State to Community Property State:**

1. The **ownership of movable property** is determined by the **laws of the state where the couple is domiciled** when the property is acquired.

   a. If the husband is the wage earner, all of the property is the husband’s in a separate property state.

   b. The wife is protected by the elective share scheme.

   c. When the couple moves to a community property state, the property remains the husband’s and is now characterized as the husband’s separate property.

   d. If the couple remains domiciled in the community property state until the husband dies, the law of the state of domicile at date of death governs the disposition of movable property.

   e. As a result of the move, the wife loses protection of the elective share system provided by the state where the movable property was acquired and is not protected by the system of community property.

2. **Quasi-Community Property – The property owned by the husband or the wife acquired while domiciled elsewhere, which would have been characterized as community property if the couple had been domiciled in the community property state when the property was acquired.**

   a. **Upon death,** of the acquiring spouse, ½ of the quasi-community property belongs to the surviving spouse, and the other half is subject to testamentary disposition by the decedent. If the non-acquiring spouse dies first, the quasi-community property belongs absolutely to the acquiring spouse.
ii. Moving from Community Property State to Separate Property State:
1. Generally, a change in domicile from a community property state to a separate property state does not change the preexisting property rights of the husband or wife, unless the spouse have agreed to convert it into separate property.

e. Spouses Omitted from Premarital Will
i. UPC §2-301: Entitlement of Spouse; Premarital Will
1. If a testator's surviving spouse married the testator after the testator executed his will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he would have received if the testator had died intestate as to that of the testator's estate, if any, that is neither devised to a child of the testator who was born b-4 the testator married the surviving spouse and who is not a child of the surviving spouse nor devised to a descendant of such a child or passes under sections 2-603 or 2-604 to such a child or to descendant of such a child unless:
   a. It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;
   b. The will expresses the intention that it is to be effective notwithstanding any subsequent marriage, or
   c. The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.
   ii. A spouse omitted from a will b-4 marriage is not able to reach non probate assets; her share is solely of the probate estate.

2. Protection of Children – In all states, except Louisiana, a child or other descendants has no statutory protection against disinheriance by a parent. There is no requirement that a testator leave any property to a child.
   i. Two Ways Children are Omitted:
      a. Accidental
         i. After born, or
         ii. Not named, or
         iii. Mistakenly believed to be dead
      b. Intentional – Very difficult to intentionally disinherit pretermitted (after born) child:
         i. Silent in the Will
         ii. Name w/ Intent to disinherit
         iii. If you want to disinherit a child, transfer your assets.
ii. Pretermitted Child Statutes
   a. Republication by Codicil
      1. A will is treated as if it were executed when its most recent codicil was executed, whether or not the codicil expressly republishes the prior will, unless the effect of so treating it would be inconsistent w/ the testator's intent.
      
      i. Azcunce: The execution of a codicil to a will has the effect of republishing the prior will as of the date of the codicil. The testator’s 2nd codicil republished the original will and 1st codicil because the 2nd codicil expressly so states. If the testator had wished to provide for the child, he would have done so in the 2nd codicil as she had been born by that time.

   Patent ambiguity – An ambiguity that clearly appears on the face of the document arising from the language itself. When an uncertainty arises upon the face of a will as to the meaning of any of its provisions, the testator’s intent is to be ascertained from the words of the will, but the circumstances of the execution may be taken into consideration.

   Latent ambiguity - is one which is not apparent on the face of the will, but is disclosed by some fact collateral to it.

   a. Extrinsic evidence – may be introduced in order to show that under the circumstances of a particular case the seemingly clear language of a will actually represents a latent ambiguity.

   b. UPC §2-302 Omitted Children – NO Extrinsic Evidence Permitted to Show That the Omission was Intentional:

      i. If a testator fails to provide in his will for any of his children born or adopted after the execution of the will, the omitted after-born (pretermitted) or after-adopted child receives a share in the estate as follows:

         a. If the testator had no children living when he executed the will, and omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

         b. If the testator had one or more children living when he executed the will and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator’s estate as follows:
1. the portion of the testator’s estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator’s then-living children under the will.

2. The omitted after-born or after-adopted child is entitled to receive the share of the testator’s estate, as limited in subparagraph (i), that the child would have received had the testator included all omitted after-born and after-adopted children w/ the children whom devises were made under the will and had given an equal share of the estate to each child.

c. Pretermitted Heir Statutes:
   i. Missouri-Type Statute
      1. Under a Missouri-Type statute, the statute usually is drawn to benefit the children “not named or provided for in the will. Consequently, it must appear from the will itself that omission of the child or other heir was intentional. Extrinsic Evidence of intent is not admissible.

   ii. Massachusetts-Type Statute
      2. Under a Massachusetts-Type Statute, the child takes unless it appears that such omission was intentional and not because of any mistake. Extrinsic Evidence IS admissible to show both the presence or absence of intent.

   iii. Estate of Laura – When a testator’s child has been named, referred to, or is a devisee or legatee under the will, the child’s issue cannot invoke the statute even if the issue are neither named, referred to, nor devisee’s or legatees under the will.

d. Wills Review Problem 10/21
   i. UPC §2-505 – (a)Any person generally competent to be a witness may act as a witness to a will. (b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

   ii. California Probate Code Section 51 – All beneficial devises, bequests and legacies to a subscribing witness are void unless there are two other and disinterested subscribing witnesses to the will, except that if such interested witness would be entitled to any share of the estate of the testator in case the will were not established, he shall take such proportion of the devise or bequest made to him in the will as does not exceed the share of the
estate which would be distributed to him if the will were not established."

iii. Vermont and Louisiana – Vermont requires three witnesses rather than two, and Louisiana requires two witnesses plus a notary.

iv. Uniform Parentage Act (1973) – The parent and child relationship extends to every parent and child, regardless of the marital status of the parents. When the father and mother do not marry or attempt to marry, a parent-child relationship is presumed to exist between a father and a child if (1) while the child is a minor, the father receives the child into his home and openly holds out the child as his natural child, or (2) the father acknowledges his paternity in writing filed w/ an appropriate court or administrative agency.
   1. Uniform Parentage Act §4 – If a father and child relationship is presumed to exist, an action to determine its existence may be brought at any time; if a child has no presumed father, an action to establish a parent and child relationship must be brought w/in three years after the child reaches majority.

IV. Will Substitutes: Non-probate Transfers
   A. Contracts w/ Payable-on-Death Provisions
      1. The court in Wilhoit strikes down a payable-on-death. Designation in a contract of deposit because it is a testamentary act not executed w/ the formalities required by the Wills Act. The Wilhoit case applies the traditional rule, still followed in some states, that payable-on-death designations in contracts other than life insurance contracts are invalid.
      2. The insured must do all that is within his power or all that reasonably could have been expected of him to comply w/ the policy provisions respecting a change of beneficiary. Cook v. Equitable Life
   3. UPC §6-101 Non-Probate Transfers on Death
      i. A provision for a non-probate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or un-certificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed or gift, marital property agreement, or other written instrument of a similar nature is non-testamentary. This section includes a written provision that;
         a. money or other benefits due to controlled by, or owned by a decedent b-4 death must be paid after the decedent’s death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either b-4 or at the same time as the instrument, or later;
b. money due or to become due under the instrument ceases to be payable in the event or death of the promissee or the promisor b-4 payment on demand; or
c. any property controlled by or owned by the decedent b-4 death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either b-4 or at the same time as the instrument, or later,

ii. This section does not limit rights of creditors under other laws of this state.

iii. Although UPC §6-101 does not require survivorship by Payable- on-Death provisions, beneficiaries of contracts, when The beneficiary is a close relative of the benefactor of UPC anti-Lapse statute, which applies to non-probate transfers as well as to wills, substitutes the issue of the named beneficiary who does not survive the benefactor, UPC §2-706 (1990) page 446.

iv. UPC §6-101 provides that if the contract permits the owner to change the beneficiary by will, the owner may do so. But if the power to change the beneficiary by will is not retained, UPC §6-101 is silent on whether the beneficiary may be changed by will.

4. Under the Law of Wills, a devisee is required to survive the testator in order to take; if the devisee predeceases, the gift lapses.

5. In most states, divorce revokes a will in favor of spouse but does not revoke the designation of the spouse as life insurance beneficiary. UPC §2-804 (1990) (page 299) changes this rule and provides that divorce revokes the designation of the divorced spouse as beneficiary of an insurance policy or pension plan or other contract.

B. Multiple-Party Bank Accounts

1. Multiple-Party bank accounts include a joint and survivor account, a payable-on-death account, an agency account, and a savings account trust, or Trotten Trust

i. Joint and Survivor Account – The instrument creating a joint tenancy account presumably speaks the whole truth. In order to go behind the terms of the agreement, the one claming adversely thereto has the burden of establishing by clear and convincing evidence that a gift was not intended. Each case involving a joint tenancy account must be evaluated on its own facts and the intention of the depositors between themselves.

a. UPC provision for multiple-party bank accounts are found in §6-201 through §6-227. The UPC authorizes a joint tenancy account w/ the right of survivorship, an agency account, and a payable-on-death account. Extrinsic evidence is admissible to show that a joint account was opened solely for the convenience of the depositor.
C. Joint Tenancies

1. A joint tenancy or a tenancy by the entirety in land is common and popular method of avoiding the cost and delay of probate. Most family homes are owned by husband and wife either in joint tenancy or tenancy by the entirety.

i. Upon death of one joint tenant or tenant by the entirety, the survivor owns the property absolutely, freed of any participation by the decedent, and therefore no probate is necessary because no interest passes to the survivor at death.

ii. The creation of joint tenancy in land gives the joint tenants equal interests upon creation. A person who transfers land into a joint tenancy cannot, during life, revoke the transfer and cancel the interests given the other joint tenant. In contrast, payable-on-death designations can be changed by the owner during life, and, under the UPC, a joint bank account can be revoked by a depositor who furnishes all the funds. A joint tenant cannot devise his or her share by will. If a joint tenant wants someone other than the co-tenant to take his share at death, he must sever the joint tenancy during life, converting it into a tenancy in common. Most of the joint tenants select the tenancy precisely because of the high degree of assurance of no entanglement with probate. To continue this assurance of no entanglement, the right of testamentary disposition must be denied, and the few attempts by ignorant testators to devise their joint tenancy property must fail.

V. Trusts

A. Testamentary versus Inter Vivos Trusts

1. Revocable Trusts

i. The question in a revocable trust is where the settlor is the trustee, is Does the settlor owe any fiduciary duties to anyone other than himself. If not, there is no trust. The trustee can be one of the beneficiaries, but if the trustee is the sole beneficiary, there is no trust, because the trustee owes not duties to anyone except himself.

ii. A revocable inter vivos trust is the most flexible of all will substitutes because the revocable trust is not a will, and does not have to comply w/ the Statute of Wills, and thus an interest passes to the beneficiary during the settlor’s life. The interest merely becomes possessory on the settlor’s death. The interest can be revoked or divested during the settlor’s life, but it passes subject to revocation. On the settlor’s death, the trust assets are to be distributed to or held in further trust for other beneficiaries.

iii. A revocable trust can be created by a declaration of trust, whereby the settlor becomes the trustee of the trust property. In the trust instrument, the settlor should name a successor trustee to take over the trusteeship upon the settlor’s death or incompentency.
At the settlor’s death, the successor trustee automatically takes over.

iv. A revocable trust can also be created by a deed of trust, naming a 3rd party as trustee. The settlor can be co-trustee if desired.

v. Keeping Title Clear – A revocable trust is useful in keeping separate and apart property that a husband and wife or both want not to be commingled with their property other assets.

vi. A revocable trust can be used to plan for the contingency of incapacity, or incompetency.

vii. Consequences at Death of a Settlor: Avoidance of Probate
   a. Costs – Assets transferred during life to a revocable trust avoid probate because legal title to the assets passes to the trustee, and there is no need to change the title to the trust assets by probate administration on the settlor’s death
   b. Creditors – In probate a short-term statute of limitations is applicable to creditors (page 41). There is no short-term statute of limitations applicable to revocable trusts; the limitations period is the normal one applicable to the particular claim.
   c. As a general rule, the settlor of an inter-vivos trust of personal property may choose the state law is to govern the trust. (If a trust asset is land, the law of the state where the land is located governs.) The settlor may choose the law of the domicile of the settlor or of the beneficiaries, or the law of the state where the trust is administered.

viii. Can an inter-vivos trust, in which a deceased spouse retained a limited power of appointment, constitute a testamentary substitute in violation of the surviving spouse’s right of election?
   a. Yes: The settlor can retain power of appointment, even if limited, thus leaving the settlor with meaningful control over the trust during her lifetime. Because he settlor, despite her relinquishment of title and ownership of the property, was free to designate any person, charity or entity as a beneficiary of the trust except for herself, spouse, or her estate and creditors, she possessed personal power to execute what were essentially testamentary transfers to any number of other specific beneficiaries of her choosing. In re Reynolds

2. Trust Requirements
   i. Intent to Create a Trust/Device
   a. The settlor’s manifestation to create a trust may be by written or spoken words or by conduct, and it need not be manifested in any particular form of language. An oral trust of personal property is valid in all jurisdictions. A moral obligation is not enforceable and does not create a trust.
   1. Exceptions to the Writing Requirement of Trust: Resulting and Constructive Trusts
i. **Resulting and Constructive Trusts** do not arise by a settlor’s express declaration of trust. They are **implied by law** or **imposed by the courts**.

a. A **resulting trust** is a trust that arises out of operation of law in one of the two situations:
   1. where an express trust fails or makes an incomplete disposition, or
   2. where one person pays the purchase price for property and causes title to the property to be taken in the name of another person who is not a natural object of the bounty of the purchaser.

b. A **constructive trust** is not really a trust at all. Rather a constructive trust is the name given to a flexible remedy imposed by a court of equity to prevent unjust enrichment of one person at the expense of another as the result of **wrongful conduct**, such as fraud, undue influence, or breach of fiduciary duty. The constructive trustee’s only duty is to convey the property to the person who would have owned it but for the wrongful conduct. **Elements:**
   1. A confidential or fiduciary relationship
   2. A promise express or implied, by the transferee
   3. A transfer of property in reliance on the promise
   4. Unjust enrichment of the transferee

2. **Oral Inter-Vivos Trusts of Land**
   i. When O conveys land to X upon an oral trust to pay the income to A for life and upon A’s death to convey then land to B, the Statute of Frauds prevents enforcement of the express trust. Is X permitted to keep the land? The cases are split between permitting X to retain the land, on the ground that the Statute of Frauds forbids proof of the oral trust, and imposing a constructive trust on X to prevent his unjust enrichment.

3. **Oral Trusts for Disposition of Death**
   i. If a person procure an absolute devise or bequest to himself by orally promising the testator that he will convey the property to or hold it for the benefit of a 3rd person, and afterwards refuse to perform his promise, a trust arises out of the confidence given to him by the testator and of his own fraud, which a court of equity, upon clear and satisfactory proof of facts, will enforce against him at the suit of such 3rd persons.

b. **To create a trust**, a property owner (**The Settlor**) transfers assets to a trustee, w/ the trust instrument setting forth the terms of the trust. **The trust document itself creates an intent to create**
a trust except in N.Y. It is enough if the transfer of property is made with the intent to vest (put definition here) the beneficial ownership in a 3rd person.

1. **Jimenez v. Lee** – Trustee vs. Custodianship. If a custodianship, must be for the general benefit of a minor, and custodianship dissolves @ 21, custodian has some duties but not as heightened as a trust, and the statute of limitations runs 2 years after breach of custodian (in this case, 2 years after reaching age of 21). When it is unclear whether the instrument designates a trust or a custodianship, what is the default? → If someone gives money to a parent for the benefit of a child, the instrument must specifically state that you want a custodianship, otherwise a trust will be created by the document itself.

1. The trust may be created **during the settlor’s life**, in which case it is an inter-vivos trust, or
   
i. **An inter-vivos trust** may be created by declaration of trust (in which the settlor declares that he holds certain property in trust, or
   a. A **declaration of trust** of personal property requires neither delivery nor a deed of gift. All that is necessary is that the donor manifest an intention to hold the property in trust.
   
b. A **declaration of trust** of real property requires, under the Statute of Frauds, a written instrument
   
i. **An inter-vivos trust** may be created either by a deed of trust (in which the settlor transfers property to another person as trustee).

2. The trust may be created by will, in which case it is a testamentary trust.

   ii. **Purpose**
      a. Any law purpose will constitute a valid purpose. An intended trust is invalid if:
         1. it is illegal
            i. defrauding spouse
            ii. invalidate rule of perpetuities
            iii. encouraging discrimination
            iv. discouraging marriage
            v. setting up trust just to defraud creditors

   iii. **Trustee**
      a. **Trustee must have some Duties**
         1. The trustee is under a duty to administer the trust solely for the interest of the beneficiaries. The trustee must preserve the property, make it productive, and where required by the trust instrument, pay the income to the beneficiary. The trustee holds legal title to the trust property.
b. Trustee must accept role → Legal title enough
   1. As long as the settlor has made sufficient delivery, the trust is valid & established even though the trustee has not accepted.
   2. Acceptance by the trustee can be through words, or conduct.

c. Trustee must be old enough and competent

d. There may be one trustee, several trustees or the trustee may be a corporation.

e. The trustee may be the settlor, a 3rd party, or the beneficiary.

f. If the settlor intends to create a trust but fails to name a trustee, a court will appoint a trustee to carry out the trust. This rule is sometimes stated: A trust will not fail for want of a trustee

d. Property – May be any type, but must known and identifiable:
   a. The property may be real, personal, tangible, intangible, legal or equitable, and it may be either a present interest or a future interest, whether vested or contingent.
      1. Unthank v. Rippstein: “I bind my estate” Is there an identifiable amount of property? The gift is his estate everything he owns, or the testator’s property.
         i. Estate can mean:
            a. Probate estate
            b. All testator’s property (a known identifiable piece of land)
      2. Brainard v. Commissioner: If a person shows an intention to become a trustee a later time, his conduct at that later time considered in connection w/ his original showing of intent to create the trust, may be a sufficient showing of intention at that later time to create a trust. The act of acquiring the property coupled w/ the earlier showing of intent to create the trust may be sufficient showing of an intention to create a trust at the time of property was acquired.

v. Beneficiary
   a. The beneficiary must be definite, identifiable and have legal standing.
      1. Clark v. Campbell: Status over Function: Can a testator devise a bequest to the beneficiaries by referring to them as “friends” w/in the trust? No → No statutory meaning of friends, and there is no case law defining friends. Testator had people who functioned as friends, but the court did not think a valid trust was created.

      2. In re Searight’s Estate: Is the testamentary bequest for the care of a dog valid? Where the owner of property (the $) attempts to create a trust for a non-charitable purpose and there is no definite beneficiary designated (a dog), no trust is created; but the transferee (the person named, which is to receive the money to care for the dog), has the power to use...
the property for the designated purpose, unless it is authorized by the terms of the intended trust so to apply the property beyond the period of the rule of perpetuities. The validity of the gift will be upheld where the person to whom the power is given is willing to carry-out the testator’s wishes. And, even though the testator did not specify a time limit, simple mathematical computation of the sum of money to be expended by the rate determined by the testator will show if the administration of the trust will continue longer than the maximum period (21 years) allowed by the rule of perpetuities.

b. There must be someone whom the trustee owes a fiduciary duty, someone who can call the trustee to account. There are exceptions to this rule:
   1. The beneficiaries may be unborn or unascertained when the trust is created.

c. A valid power of appointment may have a definite class of beneficiaries (e.g. “my issue”) or it may not (e.g. “any one except the donee or her creditors or her estate”). The test of validity is: If the class of beneficiaries is so described that some person might reasonably be said to answer the description, the power is valid. An appointment is invalid, however, if it cannot be determined whether the appointee answers the descriptions.

d. The beneficiary holds equitable, and have a personal claim against the trustee for breach of trust. This personal claim has no higher priority than the claim of other creditors of the trustee and thus might not protect the beneficiaries if it were their only remedy.

e. **Personal Creditors** of the trustee, other than the trust beneficiaries, *cannot* reach the trust property. If the trustee wrongfully disposes of the trust property, the beneficiaries can recover the trust property, unless it has come into the hands of a bona fide purchaser for value.

3. Special Types of Private Express Trusts
   i. **Discretionary Trusts** – In a discretionary trust, the trustee has discretion over payment of either the income or the principal or both. Discretionary powers of a trustee may be drafted in limitless variety.
      a. A duty of inquiry into the needs of the beneficiary follows from the requirement that the trustee’s power must be exercised with that soundness of judgment which follows from a due appreciation of trust responsibility.
      b. **Creditors**
         1. **Before the trustee exercises discretion** to make payments to the beneficiary, the beneficiary’s interest is not assignible and cannot be reached by his creditors. The theory is that, because the beneficiary has no right to payment he can
enforce against the trustee, there is nothing for the creditors to reach. After the trustee exercises his discretion and elects to make payments to the beneficiary, the trustee must make those payments not to the beneficiary if the trustee has notice of assignment or attachment by the creditors.

c. Creditors may reach the retained interest, where the discretionary trust is created for the settlor himself.

ii. Spendthrift Trusts – In a spendthrift trust, the beneficiaries cannot voluntarily alienate their interests nor can their creditors reach their interests. It is created by imposing a disabling restraint upon the beneficiaries and their creditors.

a. Creditors cannot reach the beneficiary’s interest in the sense of selling it as a means of realizing upon and anticipating his future rights. However, the restraint on alienation does not apply to the income after it has been paid out to the beneficiary. Thus, the property in the beneficiary’s hands after distribution is no longer protected by the spendthrift clause and is subject to the claims of his creditors, or wife and/or child

b. Exceptions to the Spendthrift trust

1. Self-Settled Trusts – A spendthrift trust cannot be set up by the settlor for the settlor’s own benefits

2. Child Support and Alimony – Judgments for child or spousal support can be enforced against the beneficiary’s interest in spendthrift trusts in the majority of states.

3. Furnishing Necessary Support – A person who has furnished necessary services or support can reach the beneficiary’s interest in a spendthrift trust.

4. Federal Tax Lien – The United States or states can reach the beneficiary’s interest to satisfy a tax claim against the beneficiary. Federal tax law trumps state spendthrift trust rules.

4. Modification and Termination of Trusts

i. If the settlor and all the beneficiaries consent, a trust may be modified or terminated. No one else has a beneficial interest in the trust. However, if the settlor is dead or does not consent to the modification or termination of the trust, the question arises whether the beneficiaries can modify or terminate the trust if they all agree.

a. On occasion, the settlor’s purpose in creating the trust is not clear and in such situations, the court will permit the trustee to deviate from a term of the trust if the modification or termination will not interfere w/ a material purpose of the trust. However, an active trust may not be terminated, even w/ the consent of all the beneficiaries, if a material purpose of the settlor remains to be accomplished.

b. Generally, a trust cannot be terminated if it is a spendthrift trust, if the beneficiary is not to receive the principal until attaining a
specified age, if it is a discretionary trust, or if it is a trust for support of the beneficiary.

c. Removing trustee – Even if all the beneficiaries are dissatisfied w/ the performance of the trustee or are dissatisfied w/ the fees charged, the beneficiaries cannot remove the trustee unless the trustee has been guilty of breach of trust or has shown unfitness.

5. Powers of Appointment – Powers that give beneficiaries, trustee the ability to deal flexibly w/ changing circumstances in the future:

A. Creation of A Power of Appointment

i. Intent to Create a Power

a. To create a power of appointment, the donor must manifest an intent to do so, either expressly or by implication. No particular form of words is necessary. It is not necessary that the words “power of appointment” or “appoint” be used. A power of appointment confers discretion on the donee, who may choose to exercise the power or not, and is to be distinguished from a direct nondiscretionary disposition by the donor. A power of appointment cannot be created in a dead person.

B. Definition of Power of Appointment – The term power of appointment includes all powers which are in substance and effect powers of appointment regardless of the classification used in creating the power and regardless of local property law connotations. For example, if a trust instrument provides that the beneficiary may appropriate or consume the principal of the trust, the power to consume or appropriate is a power of appointment.

C. Types of Powers

i. Terminology and Relationships:

a. The person who creates the power of appointment is the donor of the power.

b. The person who holds the power is the donee.

1. Spouse of a Donee – If the surviving spouse of the donee seeks to reach the appointive property at the donee’s death under elective share statutes, the donee of a general power, as well as the donee of a special power, is not, in most states, treated as owning the property. The surviving spouse has a claim against the donee’s probate estate, and since the appointive assets are not in the donee’s probate estate, the spouse may not reach them.

c. The persons in whose favor the power may be exercised are the objects of the power.

d. When a power is exercised n favor of a person, such person becomes an appointee.

e. The instrument creating the power may provide for takers in default of appointment if the donee fails to exercise the
power.

ii. General Powers – A power, which is exercisable in favor of the
decedent (donee), his estate, his creditors, or the creditors of his
estate. Any power that is not a general power is a special power.

iii. Special Powers – A power that is not exercisable in favor of the
donee, his estate, his creditors, or the creditors of his estate.

a. General creditors of a donee of a special power cannot reach
the property subject to the power because the donor did not
intend that the property be used for the donee’s benefit.

D. Does the Appointive Property Belong to the Donor or the
Donee?

i. Under Common Law, property subject to a power of appointment
was viewed as owned by the donor, and the power was conceived
as merely authority of the donee to do an act for the donor. The
donee was thought as having a power to fill in a blank in the
donor’s will. This was known as the relation-back doctrine.

E. Release of Power of Appointment – A testamentary power has a
as one of its purposes keeping the donee free to exercise discretion
up until the moment of death. Consequently, the donee of a
testamentary power of appointment cannot legally contract to make
an appointment in the future. A releasable power may be released
w/ respect to the whole or any part of the appointive property and
may also be released in such manner as to reduce or limit the
permissible appointees.

6. Charitable Trusts

i. Charitable Purpose

a. Nature of Charitable Purposes

1. Must be for a charitable purpose and public in nature
   i. the relief of poverty
   ii. the advancement of education
      a. a trust to educate a particular person or named person
         is not charitable.
      b. a trust to educate the descendants of a settlor is not
         charitable.
   iii. the advancement of religion
   iv. the promotion of health
   v. governmental or municipal purposes; and
      a. It is against public policy to endow perpetually a
         political party; hence, a trust to promote the success of
         a particular political party is not charitable.
   vi. other purposes the accomplishment of which is beneficial
to the community

2. Must be for an indefinite Group. Usually, cannot be for 1
   individual.

3. In general, a charitable trust is exempt form the rule
   against perpetuities and may endure forever.
ii. Modification: Cy Pres
   a. Cy pres doctrine – If the property in trust to be applied to a particular charitable purpose and it becomes impossible to give the settlor’s intention effect, the court may redirect the trust to a purpose as near as possible to the charitable endeavor.
      1. Uniform Trust Act §408(b) (1999) provides that a court may apply the cy pres doctrine if a particular charitable purpose becomes unlawful, impracticable, impossible to fulfill, or wasteful.
   b. Administrative Deviation – Cy pres should be contrasted w/ administrative deviation. A court will permit deviation in the administrative terms of a trust when compliance would defeat or substantially impair the accomplishment of the purposes of the trust.
   c. Racially or Gender Restrictive Charitable Trusts – If the trustee of a racially restrictive trust is a governmental body (such as a public school granting scholarships to whites), courts have held that the administration of the trust in a racially discriminatory manner is discriminatory state action forbidden by the Equal Protection Clause.
      1. Where the trust is a private individual and not a public body, enforcing the racial restriction or gender restriction is not unconstitutional as discriminatory state action.

iii. Supervision of Charitable Trusts
   a. The donor may place restrictions on his gift which the donee institution must honor. However, the general rule at common law is that a donor has no standing to enforce the terms of a completed charitable gift unless the donor had expressly reserved a property interest in the gift.

7. Trust Duration: The Rule Against Perpetuities
   i. Introduction
      a. All contingent future interests created in transferees are subject to the Rule of Perpetuities, and all contingent remainders (A remainder that is either given to unascertained person or made subject to a condition precedent,
      1. Example: To A for life, and then, if B ahs married b-4 A dies, to B.
         and
         executory interests also fall w/in the rule. However, future interests retained by the transferor, such as reversions, possibility of reverter, and rights of entry are not subject to the rule of perpetuities.
   b. Rule of Perpetuities: Elements
      1. There must be a Contingent Interest
      2. The contingent interest must vest (confer ownership of property upon a person) or fail to vest
3. There must be a measuring life – A person who must necessarily vest or take possession of the interest when the prior interest ends. The measuring life must be in being when the perpetuities period starts to run.
   i. Generally, the perpetuities period begins when the instrument takes effect.
      a. If an interest is created by will, the measuring life or lives must be in being at the testator’s death.
      b. If the interest is created by deed or irrevocable trust, the measuring life or lives must be persons in being when the deed or trust takes effect.
      c. If the interest is created by an inter-vivos trust revocable by the settlor alone, the measuring life or lives must be persons in being when the power to revoke terminates. If the power to revoke terminates at the settlor’s death the measuring life must be persons alive.

4. The interest must vest w/in the perpetuity period. This time is the lives in being plus 21 years, plus period of gestation.

ii. No Possibility of Remote Vesting
   a. Fertile Octogenarian – The legal fiction, assumed under the rule against perpetuities, that a woman can become pregnant as long as she is alive.
   b. The Unborn Widow
   c. The Slothful Executor

iii. Application of Class Gifts
   A. The first question to ask is: When will the class close?
      1. If the class will surely close physiologically within the perpetuities period (i.e. lives in being plus 21 years), then you proceed immediately to question #2 below.
         i. How do you determine whether a class will surely close physiologically?
            a. A class will surely close physiologically at the death(s) of the parent(s) of the class. So, the relevant question is whether those death(s) will necessarily happen during the perpetuities period. Keep in mind the possibility that additional parents could be born after the instrument goes into effect.

   • Note that the class need not be physiologically closed at the time the instrument goes into effect. It just needs to surely close physiologically within the perpetuities period (i.e. lives in being plus 21 years).

   a. If the class will NOT surely close physiologically within the perpetuities period (i.e. lives in being plus 21 years), then you ask whether the class will close under the rule of convenience within the perpetuities period (i.e. lives in being plus 21 years).
1. How do you determine whether a class will close under the rule of convenience?
   i. A class will close under the rule of convenience if, at the time the instrument goes into effect, any member will necessarily become entitled to a vested interest during the perpetuities period (i.e. lives in being plus 21 years).
   a. Note that if you close the class under this method, only those members who, at the time the instrument goes into effect, will necessarily become entitled to a vested interest during the perpetuities period are part of the class. No person born thereafter can share in the property.
      1. If the class will close under the rule of convenience, move to question #2 below.
   c. If, under either method A or B, the class will NOT close within the perpetuities period (i.e. lives in being plus 21 years), then the class gift fails for violation of the RAP. Your inquiry stops.

B. If the class will close (either physiologically or under the rule of convenience) within the perpetuities period (i.e. lives in being plus 21 years), the second question to ask is: When will all contingencies be resolved.
   1. A. If all contingencies will be resolved for all class members during the perpetuities period (i.e. lives in being plus 21 years), then the class gift is good.
   2. If a condition precedent for any member of the class will not be resolved within the perpetuities period (i.e. lives in being plus 21 years), then the whole class gift fails for violation of the RAP.