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Trusts and Estates Outline  

Introduction  

I. The “Right” to Inheritance  
A. Questions to ask yourself in every problem  
   1. Who benefits?  
   2. Why do they benefit?  
   3. What should you do if client doesn’t fit into class of benefited people?  
B. Right to give  
   * Hodel v. Irving*—statute allowed Indians to leave land through inter vivos trust or irrevocable trust only—if neither of these arrangements, then land went to tribe at large  
   - Statute not enforced by court, so there is a right to pass on property at death  
   - Compare with *Irvin Trust Co. v. Day*—state has right to completely do away with right to pass on property at death by statute  
C. Right to receive  
   - Since 1960s, courts less likely to enforce conditions imposed upon gifts  
   - Why? when alive you have to deal with consequences but when you’re dead you push consequences off on others, so public policy comes into play  
   * Shapira v. Union National Bank*—decedent’s will imposed condition that son marry Jewish girl with Jewish parents  
   - Will upheld by court because request not unreasonable  
   - No right to receive—son has no right to land and will is only an extension of what father could have done while living  
   * Maddox v. Maddox*—marrying a Society of Friends member was unreasonable because there were only 6 in the area  

II. The Probate Process  
A. PURPOSE: get property cleared and distributed  
B. PROCESS  
   1. Appointment of representative—administer if intestate, must post bond  
   2. File original of will—becomes property of state, representative decides if probate is needed  
   3. Give notice to potential beneficiaries and creditors  
   4. Letters issued—executor/administrator has authority to fulfill duties  
C. Duties of representative  
   1. Collect and inventory assets  
   2. Manage assets  
   3. Receive and pay claims or creditors  
   4. Distribute the remainder  
D. Ways to avoid probate: trust, insurance, joint tenancy, POD contracts and maybe small estate  
E. Duty to client  
   * Simpson v. Calivas*—duty to client extends to beneficiary when harm to heir is foreseeable  
   * Hotz v. Minyard*—attorney had relationship with decedent and beneficiary; bad idea because atty must deal with beneficiary in a fair way, so can’t follow testator’s wish that he not inform beneficiary of second will that affects her inheritance  

III. Who May Inherit  
A. Surviving Spouse
- State must legalize the relationship in order for person to be defined as a spouse for the purpose of inheritance laws.

_**Peffley-Warner v. Bowen**_*—life partner is not a spouse according to state law and cannot collect statutory share of decedent’s estate, but gets equitable share.

- Must look to state law where partners reside—partner must be able to take under intestacy statute of state, which means must be defined as a spouse by the state.

_**In re Gardiner**_*—post operative female is not a spouse because person is actually male and must be opposite sex to married; gender is an issue of law determined at birth.

- Other view: gender is an issue of fact determined at time marriage occurred.

_**In re Estate of Cooper**_*—surviving spouse is clearly defined as husband or wife, so survivor of homosexual relationship is not entitled to a right of election under decedent’s will; partner gets what is given to him in the will but can’t get elective share, which would have been more.

- Court takes status approach rather than functional approach—state defines who is and is not a spouse.

- _**Brashey**_* case takes functional approach—those who function as family members are entitled to benefits of family members.

- If state accepts common law marriage: equal protection argument; similarly situated male and female don’t have same rights if in long term relationship with a male who dies.

**B. Descendants**

- More sympathy for function approach as applied to children:
  
  1. **Natural children**

    _**General rule for marital children**_*—if child born 280-300 days (depending on state) after father’s death, child is presumed to natural child of decedent.

    _**Uniform parentage act**_*—presumes child born to a woman within 300 days after the death of her husband is a child of that husband.

    _**General rule for non-marital children**_*—need formal adjudication of paternity, UPC established paternity or father can openly acknowledge.

    _**Woodward v. Commissioner of Social Security**_*—child conceived and born after death of father retains inheritance rights of natural children under MA state law if: genetic relationship established, decedent consented to posthumous conception and support of child, suit brought within time limitation for paternity.

    - Court looking for consent of father here—not an issue in non-assisted reproduction because intercourse is consent.

    - In LA, successor has to exist at the time of death.

  2. **Adopted children**

    _**General rule for adopted children**_*—all rights of natural child, but not more.

    - Adults will adopt same-sex lovers to avoid will contest, but NY courts do not permit adult adoption of adult romantic partners because sexual relationship is not an appropriate basis for adoption.

    _**Hall v. Vallandingham**_*—adopted children do not have right to inheritance from natural family.

    _**O’Neal v. Wilkes**_*—no adoption because aunt had no authority to enter contract; dissent says equitable adoption allows for full performance by the child to overcome an objection to contract.

**REVIEW PROBLEMS:** pg. 46, Sept. 11 hypothetical.
Intestate Succession

I. Introduction
   A. The Basic Scheme
      ◦ The law of state where person dies governs disposition of personal property
      ◦ The of state where real property is located governs disposition of real property
      Uniform Probate Code—pg. 72 in book and handout from class
      ◦ EXAM QUESTION: What a resolutions to irrationality in the UPC?
   B. Share of Surviving Spouse
      Common law—surviving spouse gets ½ share if only child or issue of one child survives and a 1/3 share if more than one child or issue of one child survive; if no descendant, spouse shares with decedent’s parents or other kind
      UPC rule—if all decedent’s descendants are also descendants of the surviving spouse and the surviving spouse has no other descendant, surviving spouse takes entire estate; if no descendants, then spouse shares with parents only
      Uniform Simultaneous Death Act—beneficiary is deemed to have predeceased the benefactor; for join tenancy, ½ of property is dealt with as if A died first, and ½ as if B died first
      Janus v. Tarasewicz—life insurance should be paid to primary beneficiary rather than secondary beneficiary when insured and pb were in accident together, and insured died immediately and pb was on life support for two days before dying; court uses total brain death standard
      ◦ Other option: common law standard of heart and breathing
   B. Share of Descendants
      General rule—after spouse’s share set aside, children and issue of deceased take remainder to exclusion of everyone else
      ◦ To disinherit someone, entire estate must devised to other persons
      ◦ Three ways to take by representation
         1. Strict per stirpes—divide property into as many shares as are living children and deceased children who have living descendants
         2. Per capital with representation—bring surviving descendants of a deceased to a level where descendant is still alive
         3. Per capita at generation—initial division at level where one descendant living; left over treated as one pot and distributed equally among next generation
      ◦ Adopted children in family tree
         -MD: treated as natural child if valid adoption so inherit from adoptive parents but not natural parents
         -TX: dual inheritance from adoptive parents and natural parents
         -UPC: adoptive and natural parent have to be married for dual inheritance to occur and adoptive parent must spouse of natural parent (go back to definitions of spouse—lesbians adopt kid in NY, kid can’t collect from biological mom, only adoptive mom)
   C. Advancements—MOOT POINT IN MOST STATES DUE TO UPC
      Common law—gift given to children by living parents was pre-payment on child’s intestate share; exceptions—pay for education through college
      UPC—presumes gift is not an advancement unless there is a contemporaneous writing; changes common law if recipient does not survive decedent so advancement is not taken into account when computing the division of decedent’s intestate estate
      Hotchpot—value of gift brought into total calculation of estate, but don’t bring in if gift exceeds intestate share
Expectancy—descendants of living people are heirs apparent and only have expectancy interest in estate, which they can’t transfer but may be able to enforce in contract

D. Special Issues Regarding Transfers to Minors

Guardian—responsible for minor child’s custody and care, but no authority to deal with property
- Three options for management of child’s property
  1. Guardianship/Conservatorship—common law idea; traditionally many restrictions but now given title in trust and has same rights as trustee
  2. Custodianship—gets property to hold for benefit of minor under state Uniform Transfers to Minors Act; can spend for minor’s benefit with ampley discretion and no court approval; fiduciary is subject to standard of care observed by a prudent person dealing with the property of another
  3. Trust—most flexible

E. Share of Ascendants and Collaterals

Collateral kindred—all persons related to decedent by blood but not descendants or ancestors

General rule—if decedent is not survived by a spouse, descendant or parent, intestate property passes to siblings, whose descendants take by representation

UPC—no inheritance beyond grand parents and their descendants
- 2 rules for distribution if no first line collateral
  - Parentelic system—go to grandparents and their descendants, great-grant-parents and their descendants and so on until an heir is found
  - Degree of relationship system—pass to closest of kin, counting degrees of kinship: count up steps from decedent to nearest common ancestor of decedent and claimant, and then count down steps to claimant from the common ancestor; total number = degree
- If no heirs, property escheats to the state

F. Special Issues Regarding “Half Bloods”

Old rule—wholly excluded relatives of half-blood inheriting land through intestate succession

General rule—relative of the half-blood is treated the same as a relative of the whole-blood

Virginia rule—half blood gets half share

Mississippi rule—half blood takes only when there are no whole blood relatives of same degree

Oklahoma—half blood excluded when there are whole blood kindred in same degree and inheritance came to the decedent by an ancestor of which the half blood is not a descendant

G. Bars to Succession

Involuntary—state won’t give you money because against public policy

EX: Homicide

In re Estate of Mahoney—if killing is intentional, constructive trust is set up for heirs of decedent because slayer shouldn’t be able to profit from crime; here, convicted of manslaughter, but state doesn’t differentiate between voluntary and involuntary manslaughter so need adjudication from lower court about intent
- Most statutes have statute to deal with the issue
- Generally slayer treated as pre-deceasing the victim

UPC Views: §2-803 bars slayer from succession to probate and non-probate property; killer treated as if disclaimed
- In both general and UPC, conviction is conclusive but acquittal can be overcome by a preponderance of the evidence

Voluntary—disclaimer to avoid tax consequences, maintain welfare benefits, emotional reasons, property isn’t valuable, avoid creditors except federal tax lien
EX:  *Troy v. Hart*—Medicaid recipient can’t disclaim interests; against public policy one should be able to choose not to regain ability to support himself

**Wills**
- To be a will, document must do one of 3 things: distribute property, name an executor or personal representative or revoke a prior will

I. Executing Wills
   A. Testamentary Capacity—remember to think about these topics from an affirmative point of view to make sure client’s intent and objective is ultimately achieved
      1. Mental Capacity
         - To make a will, person must be 18 and of sound mind
         - Two questions to ask: Is testator insane? Did insanity cause the gift?
         *In re Strittmater*—hatred for men interpreted as insane delusions and showed no interest in NWP, so will leaving estate to National Women’s Party was product of decedent’s insanity; judge presumes that hatred of men is per se insanity, probably should go to jury
         - Reasons mental capacity is required (first 3 are most popular)
           - Will should be given effect only if it represents the testator’s true desires
           - Mentally incompetent man/woman is not a person
           - Mental capacity required to protect family
           - Legitimacy of system cannot exist unless testator decisions are reasoned
           - Sane desires can be carried out even though another will is made when person is insane
           - Protect society at large from irrational acts; courts can strike down anti-social dispositions as against public policy
           - Protect senile or incompetent testator from exploitation—see undue influence
         - Requirements to establish mental capacity
           - Know nature and extent of property
           - Know persons who are natural objects of testator’s bounty—see status v. function
           - Know disposition being made
           - Know how elements relate so to form an orderly plan for disposition of property—what is orderly?
         *Estate v. Wright*—disregard isolated acts unless they bear upon and have influenced the testamentary act; if family isn’t concerned, no one else should be
         - Less competency needed to make a will than to bequest a gift, make a contract or get married
         - Breach of professional ethics to draft a will for mental incompetent
      2. Insane Delusion
         - Definitions:
           - Delusion—false conception of reality
           - Insane delusion—delusion to which testator adheres against all evidence to the contrary
           *Majority rule*—delusion is insane even if some factual basis if a rational person in testator’s situation could not have drawn the conclusion reached by the testator
           *Minority rule*—delusion is not insane if any factual basis at all
         - Only part of will caused by insane delusion fails
In re Honigman—court looks to proof offered by both parties and decides that jury could have found that testator’s belief that wife was unfaithful was an insane delusion; dissent says evidence only shows that testator’s belief was unfair rather than insane

◦ Majority focuses on fact that couple were business partners and had been married for 40 years, which could speak to definition of marital property

Mistake—different from insane delusion because could be corrected if testator told the truth

Living probate—some states declare validity of will and establish testamentary capacity and freedom from undue influence before death

◦ Outcomes appear to be based on fairness and societal norms rather than insanity, so make sure client is sane that there enough evidence to prove sanity in court

3. Undue Influence

◦ Hard to define, but coercion must exist; occurs when person wouldn’t have made decision without influence

Less than helpful test—testator was susceptible to undue influence, influencer had the disposition and opportunity to exercise undue influence, and disposition is the result of undue influence; still no definition of undue influence

More often applied test—confidential relationship, receive bulk of testator’s property, testator is of weakened intellect, burden shifts to accused to prove no undue influence

Lipper v. Weslow—even though attorney preparing will was son and had grudge against those disinherited, got more than he would have under intestate statute, testatrix was of sound mind so no undue influence

No-contest clause—beneficiary who contests will take nothing or a token amount

◦ Atty can accept gift from client if transaction meet general standards of fairness

In re Will of Moses—sexual relationship existing between attorney and decedent when will was drafted raises presumption of undue influence and fact that independent counsel who offered no advice actually wrote will according to couples’ instructions doesn’t override the presumption; dissent—testator of sound mind just like Lipper

◦ Different than Lipper because court doesn’t approve of relationship and natural bounty not receiving estate

In re Kaufman’s will—homosexual partner found to exert undue influence where relationship was similar to spousal relationship—one painted one ran affairs; family contested due to relationship

4. Fraud

◦ Occurs when testator is deceived by misrepresentation and does something he or she would not have done in absence of the misrepresentation

Elements: intent to deceive, purpose of influencing testamentary disposition, but-for causation

◦ Provision produced by fraud is invalid

◦ Three types

Fraud in inducement—person misrepresents facts causing testator to execute a will to include provision in the wrongdoer’s favor to refrain from revoking a will or to not execute a will
Fraud in the execution—person misrepresents the character or contents of the instrument being signed

Tortuous interference with an expectancy—prove that interference involved was tortuous in itself, such as fraud, duress or undue influence and sue for tort damages—fraud must be practiced on the testator, no cause of action for fraud practiced on the beneficiary

Estate of Carson—couldn’t establish but for causation when decedent left entire estate to husband, but marriage was bigamous; could have been thankful to be deceived into many years of happiness

Latham v. Fr. Divine—murder kept decedent from effectuating new will; court set up constructive trust assuming testator would not have benefited $\$s$ in new will

- Same result through tortuous interference case

In re Vickie Marshall—suit for tortuous interference with inter vivos gift; must show expectancy, tortuous interference (draining of assets by son so wife couldn’t get them), that $\Delta$’s conduct was independently tortuous in nature (forging and shredding docs), and but for causation (but for fraud, expectancy would have occurred)

- MA doesn’t recognize tortuous interference

5. Sham Wills
- Invalidate a will if the testator didn’t really mean it

Fleming v. Morrison—will not enforceable because purpose was to get a woman to sleep with him and he told people he didn’t mean it; parol evidence admitted

B. Statutory requirements

UPC—writing, witnesses (interested okay), testator signs/acknowledges

Wills Act—writing, may be purging statute if witness is interested, testator signs at foot

General rule—will is valid if meets formalities required by state testator was domiciled in at death, state where will was executed, state where testator was domiciled when will was executed

- Steps to follow to make a will valid in every state
  1. Fasten and number pages
  2. Testator reads and understands—no undue influence, fraud or insane delusion
  3. Lawyer, testator, two disinterested witnesses and notary are in same room, but no one else is also in the room
  4. Lawyer asks if 2 disinterested people should be witnesses
  5. Witnesses watch testator sign every page at foot—someone can help if testator asks
  6. One witness reads attestation clause aloud
  7. Each witness signs and addresses
  8. Self proving affidavit attached

- Formal requirements serve following purposes: ritualistic function, evidentiary function, protective function, and assurance to testator that will is carried out

Attested wills—UPC requirements are writing, signature of testator and two witnesses

In re Goffman—will not valid because witnesses didn’t watch testator sign

- Two tests
  - Line of sight—testator must be able to see witnesses were he to look
  - Conscious presence test—witness is in presence of testator if testator comprehends that witnesses are in the act of signing

Estate of Parsons—witness could not disclaim gift under will because disclaimer has no bearing on interest of witness at time of disclaimer because purpose of having disinterested witnesses is to
make sure there is no undue influence or fraud—estate given to those receiving valid gifts under the will

Holographic wills—according to UPC material portions (part that manifests intent) must be in handwriting; can use extrinsic evidence to establish intent

In re Estate of Johnson—form will with handwritten parts is not sufficient because no testamentary intent rely solely on handwritten portions; may be worried about people using coercion to get form wills signed
  ◦ Holographic wills that don’t strictly comply may still be admitted to probate if no one contests

II. Will Components
A. Integration of Wills
  ◦ All papers present at time of execution, intended to be a part of the will are integrated into the will
  ◦ Avoid problems by fastening pages together
B. Republication by Codicil
Codicil—an addendum, modification or amendment of the first will
  ◦ A properly executed first will is treated as re-executed as of the date of the codicil

Johnson v. Johnson—validly executed codicil can republish an invalid will, but document not attested so can’t be probated; courts blurring the lines—on one page document, codicil is handwritten portion which republishes typewritten portion, but court says handwritten part is valid holographic will and typewritten part incorporated by reference and all fails because without typewritten part no intent; court constructively severs for purpose of getting into probate, then allows incorporation by reference
  ◦ No state allows codicil to republish will not executed in compliance with statutory requirements
C. Incorporation by Reference
  ◦ Extraneous documents become part of the will if sufficiently identified in the will
  ◦ Docs must be in existence at the time of executed, but do not have to be attested

Clark v. Greenhalge—although no evidence as to when information written in notebook, court allows incorporation by reference probably because think people should be able to alter gifts if they want to; court is relaxing the doctrine to effect testator intent
D. Acts of Independent Significance
  ◦ Gift is affected by outside events
  ◦ EX: you get what is in safe deposit box according to will and testator changes what is in the safe deposit box

III. Will Construction
A. Admission of Extrinsic Evidence
Plain meaning rule—a plain meaning in a will cannot be disturbed by the introduction of extrinsic evidence that another meaning was intended
  ◦ Rule is criticized: there can never be one true/real meaning, only that which writer gives it
Personal usage exception—if extrinsic evidence shows that testator always referred to a person in an idiosyncratic manner, evidence is admissible to show that testator meant someone other than the person with the legal name of the legatee
  ◦ Two types of ambiguity: latent (do appear on face, but when terms are applied to property or beneficiaries) and patent (appears on face of will)

Mahoney v. Grainger—term heirs at law is not ambiguous and its application to the facts at hand were clear so no extrinsic evidence to show that draftsman made a mistake is admitted

Estate of Russell—court rejects plain meaning rule, then applies it so that gift to person and dog is awarded to person, but dog’s gift is redistributed to other beneficiaries; perhaps judge had bias toward niece who is a natural heir
UPC §12.1—change mistakes if clear and convincing evidence shows that mistake affected specific terms of document and donor’s intent

B. Changes in Condition or Status of Beneficiaries

- Devisee must survive the testator for gift made by will to be valid
  - If specific or general devise lapses, then devise falls into residue
  - If residue lapses, the heirs take by intestacy
  - If class gift lapses for one person, gift is shared by surviving members of the class

Void devise—devisee is dead that time the will is made

Antilapse statute—substitute other beneficiary for dead beneficiary if certain requirements are met

UPC §2-605—issue of deceased devisee who survived the testator by 120 hours take in place of deceased devisee

- If there is a lapse, gift will go to residuary beneficiary unless: anti-lapse statute applies, will provides for substitutes or gift can be construed as a class gift
  1. Anti-lapse statute
     Allen v. Talley—“living brothers and sisters” prohibits application of the anti-lapse statute
  2. Will provides for substitutes
     Jackson v. Schultz—court looks at phrase “to his heirs and assigns forever” and interprets “and” to mean “or”—gift is to his wife or, if she doesn’t survive me, to her assigns; court probably fails on side of testamentary intent or maybe saying doesn’t want anti-lapse statutes to apply to spouses
  3. Class gifts
     Dawson v. Yucus—no class gift because no generic class description, made class gifts in other parts of will with correct language and some members of class are named

American Law of Property §22.6—if reasonably minded person would intend the consequences of a class gift, it should be presumed that the testator has made a gift to the class

C. Changes in Property

Common law—determine if property is specific, general or demonstrative; if specific then ademption by extinction applies

Wasserman v. Cohen—court focuses on identify of property rather than testator intent, holding that apartment that was sold before death is specific so it is not bequeathed; this is the rule because this is the rule rationale

- Other rationale: if testator wants to give you a thing and it no longer exists, then testator must have intended that gift be extinguished
- Opposite rule: focus on intent and do case-by-case analysis of testator intent

UPC approach—presumption against ademption and in favor of fact that testator intended to give something; if you rebut presumption, exceptions come into play—very few states follow this

IV. Revoking Wills

A. Revocation in Entirety

- All states allow at least two ways to revoke: executed writing and physical act
- For revocation by inconsistency, testator must say “I revoke” or make a complete disposition
- Harrison v. Bird—presumption that revocation occurred created because letter sent with pieces by lawyer who tore up will was found in possession of testator

- Generally, testator must perform the act himself, UPC allows another to do it if in conscious presence of testator
If you can’t find a will, it is presumed to be revoked—will that is lost, destroyed without consent of testator or destroyed without compliance with statute can be admitted to probate if contents are proved; some states say no admittance unless in existence at testators death or fraudulently destroyed

*Thompson v. Royall*—writing across will is not enough, still must be attested or words of will must be physically affected

B. **Effect of Divorce Upon a Will**

*General rule*—divorce revokes a gift to a spouse that is in the will

*Minority rule*—only revoke gift if there is a property settlement

C. **Partial Revocation**

- In some states, partial revocation can only occur by subsequent writing because new gift can only be made if attested and in writing; also protecting against fraud

D. **Dependant relative Revocation**

*General rule*—if testator mistakenly revokes a portion of the will, revocation is ineffective if you can show the testator would not have revoked had he known the truth

- Two step process: Is there a valid revocation? What stands?

- Two types of mistakes that DRR applies to: alternative plan of disposition than fails or mistake is recited in the terms of the revoking instrument or established by clear and convincing evidence

*Carter v. First United Methodist Church of Albany*—revocation occurred when testator marked through all property dispositions and testator believed 1978 document (wrapped around valid will) would be valid so first will isn’t revoked because second will is invalid; better argument to say that marks on valid first will were only tentative acts because 2nd will was a draft

*Estate of Auburn*—testator drafted two wills, revoked the 2nd one by tearing believing first would be revived; first was not revived due to operation of state law; DRR applies to revocation never occurred and 2nd will is valid; goes against testator intent, but is next best thing and only thing to do in accordance with state statutes

E. **Revival**

*UPC rule*—if wholly revoked, remains revoked unless revived; If partially revoked, then previous will is revived

V. **Restrictions on the Power of Disposition: Family Protection**

A. **Protection of the Spouse**

*Community property*—shared earnings: survivor takes ½, decedent can devise ½ without spousal interference

*Separate property*—no sharing, but entitled to share at death (except in GA)

1. **Share of what?**

   - *Sullivan test*—treat as part of the estate of the deceased assets of an inter vivos trust created during the marriage by the deceased spouse over which he/she alone had a general power of appointment, exercisable by deed of will; do not consider motive or intent of spouse creating the trust

   - *Illusory transfer test*—focus is on control; concerned with preventing fraud

   - *1969 UPC approach*—provides for 1/3 of an augmented estate; focus on property in possession or control of spouse

   - *1990 UPC approach*—includes in augmented estate: life insurance benefiting someone other than spouse,; transfers made before X; transfers made after marriage where decedent retained substantial control of property; property of both spouses split according to % based on length of marriage; using partnership theory of marriage; focused on length of marriage rather than decedent’s control over property
2. **Migrating Couples**
   - Law of situs controls problems related to land, unless provision for application of law of state of marital domicile
   - Law of marital domicile at time personal property is acquired controls the characterization of the property
   - Law of marital domicile at the death of one spouse controls the survivors marital rites
   
   *Quasi community property*—remedy for injustice caused when couple moves from separate property to community property state

3. **Waiver**
   - *Pre-nuptial agreement*—presumed valid unless spouse can prove fraud, etc.
   - *In re Estate of Garbade*—couldn’t establish fraud, so pre-nup applied and wife couldn’t get elective share; unilateral pre-nup is OK if no fraud
   - *In re Grief*—wife can waive a pre-nup in a separate property state if can show a particularized inequality; here inequality in access to atty and difference in power between husband and wife
   - Pre-nup waiving all rights to community property will not be enforced
   - *Widow’s election*—support only through a life estate, waives community property ½

4. **Omitted Spouses**
   - ???

B. **Protection of Children**
   - Can omit a child from your will
     1. **Accidentally disinheriting a child**
        - *Azcunce v. Estate of Azcunce*—4th child born after execution of will and codicil executed after 4th child born didn’t mention her; codicil republishes valid will, so 4th child is no longer pretermitted; court not allowing flexibility in doctrine
        - *Espinosa v. Sharber et al*—atty and testator disagreed about inclusion of 4th child from above; atty didn’t tell testator that execution of codicil would leave 4th child with no money; 4th child has no privity so no standing to sue
        - *Simpson v. Calveas*—focus on foreseeability of injury to beneficiary to determine if beneficiary has standing to sue atty
     2. **Intentionally disinheriting a child**
        - Silence can disinherit already born children
        - If in state that covers after born or not named children, then name with intent to disinherit
        - Hard to get around after born statute, because if you don’t know about a child, you can’t intend to disinherit them—can transfer your assets because statute only reaches things in probate

**Trusts**

I. **Testamentary v. Inter Vivos Trusts**
   - *Declaration of trust*—transfers interest or title to the trustee, who is the settlor
   - *Deed of trust*—transfers interest of title to the trustee, who is a 3rd party
   - *William v. Farkus*—court holds beneficiaries interest is in a trust rather than a will even though hard to determine what beneficiaries rights were, and trustee had total control over the property; document at issue easily could be just an unexecuted will rather than a trust

II. **Trust Requirements**
   - *General elements*: trustee, manage for (implication of purpose), property, device beneficiary
   - **Valid purpose**—any lawful purpose is the standard in all states
Unlawful purposes that would invalidate a trust

- Trust is set up to promote an illegal activity
- Defraud spouse—hiding assets that would otherwise go toward statutory share
- Try to evade rule against perpetuities
- Encouraging discrimination
- Discouraging marriage
- Defraud current creditors

B. Settlor and Transfer or Present Declaration

Settlor—person who creates the trust

Inter vivos trust—created during settlor’s life

Testamentary trust—created by will

Declaration of trust—settlor declares he holds property in trust; recognized in most states, but must be careful that can’t be challenged as an unexecuted will

- Requirements: settlor is trustee, no delivery nor a deed of trust; donor must manifest an intention to hold property in trust; statute of Frauds requires written instrument if property is real

Deed of Trust—necessary if settlor is not trustee of inter vivos trust

- Deed of trust or trust property must be delivered to bring trust into being

C. Trustee

Generally—for a person to be a trustee, there must be some duties and person must accept the role

Who can be a trustee? Can be one or several, individual or corporation, settlor, 3rd party or beneficiary as long there is a co-beneficiary

- Trust will not fail for want of a trustee

Duties: administer trust solely in interest of beneficiary; self dealing is highly limited; preserve property; make property productive; pay income to beneficiaries; duty of fairness to income beneficiaries and remainder men; keep separate from trustee’s own property; keep accurate accounts; invest prudently; not delegate trust powers

- To be a trustee, person must be old enough, competent, accept the role and have duties

D. Intent

- Did grantor manifest an intention to create a trust relationship?

Jimenez v. Lee—atty used word trust in a letter and presumed to know what the word means; father is trustee and must spend in accordance with purpose of trust (education) rather than spend for good of minor as a custodian would

- Default rule is trustee when trying to figure out if person is a trustee or custodian; if you want a custodianship you must specifically say so

C. Property

- Trust cannot exist without trust property, but any interest in property may be transferred

- Would the particular claim be called property by a court?

Requirements: source (settlor—need intent plus delivery if not trustee) and type (known, identifiable and in existence)

Unthank v. Rippstein—marginal notation is not a declaration of trust because no known amount for payment of $200/month to be paid from; court dismisses idea that writing could be a holographic will; court thwarts testator intent—testator only made a promise to make a gift which is unenforceable

Brainard v. Commissioner—an expectancy can’t be held in trust, so no trust created because testator didn’t know if stock would produce profits when he created the trust to distribute the profits
D. Beneficiary
- Holds equitable interest and may bring personal claims against the trust and has other remedies relating to the property itself
  Requirements: definite, identifiable, legal standing
Clark v. Campbell—“friends as much trustees may select” can’t be beneficiaries because no statutory or other legal limitations and no precise meaning; not definite or identifiable; testator had intent to leave to friends, but policy is only to allow family to be unnamed to avoid mess of determining who are friends
In re Searight’s Estate—trust to a dog must fail because dog doesn’t have legal standing, but court imposes honorary trust because supporting the dog is a worthy purpose and person designated to care for dog is willing
Percatory trust—moral obligation only
Honorary trust—legal obligation enforceable by court
E. Writing? Some exceptions
- Usually legal device means a written or oral agreement
  - Oral if inter vivos transfer of real property made through declaration of trust
  - If deed of trust, you need a delivery which is generally in writing but can be physical
  - For real property, statute of frauds requires writing
  - Testamentary trust must meet statutory requirements for a valid will
Hieble v. Hieble—even though transfer of property to son should have been in writing, court ignores statute of frauds and imposes a constructive trust because son would be unjustly enriched if he got to keep land
Constructive trust—flexible remedy imposed in a wide variety of situations to prevent unjust enrichment; usually requires:
  - Confidential/fiduciary relationship
  - Promise by transferee
  - Transfer of property in reliance of the promise
  - Unjust enrichment of the transferee
  - Can’t collect if you have unclean hands
Resulting trust—arises by operation of law when: a) an express trust fails because it makes an incomplete disposition or b) one person pays purchase price for property and causes title to be taken in the name of another person who is not a natural object of the bounty of the purchaser
Olliffe v. Wells—trust calls for residue of trust to go to Wells, who has discretion to distribute in accordance with settlers wishes, which were known to Wells; trust fails for no definite beneficiaries and constructive trust not imposed because no unjust enrichment if Wells doesn’t get the money
- If beneficiaries aren’t named, courts assume the worst

III. Special Types of Private Express Trusts
A. Mandatory and Discretionary Trusts
Marsman v. Nasca—trustee had duty to inquire into financial resources of beneficiary where trustee had discretion to pay out principle for support and maintenance of beneficiary but was mandated to pay out income
Trust pursuit rule—beneficiary is allowed to pursue property even if it takes on a different form and get it back; exception—bona fide purchaser
B. Spendthrift Trust
- Beneficiaries cannot voluntarily alienate their interests nor can their creditors reach the interests
- Mandatory/discretionary trust can also be a spendthrift trust if clause included
- Can’t be set up for the settlor’s own benefit—may be use self-settled trust
Support trust—requires trustee to make payments of income to beneficiary in an amount necessary for support or education of beneficiary in accordance with an ascertainable standard—beneficiary can’t alienate interest and creditors can’t reach interest
- Blurs lines between discretionary and mandatory
- Trustee has to pay money, but has discretion in determining what manner and style already accustomed
- Similar to spendthrift except limit to what trustee can give beneficiary

Shelley v. Shelley—trust is partially discretionary: income distribution is mandatory and principle distribution is discretionary; includes emergency clause for benefit of son and his children; includes spendthrift clause; kids and wife can get to income because public policy overrules testator intent; kids can get to principle because abandonment is an emergency

United States v. O'Shaughnessy—beneficiary does not have property right in undistributed assets of a discretionary trust, but interest is a mere expectancy; IRS can’t get to money, but trustee can’t help beneficiary evade the IRS either

Support Trusts and Medicaid—
- If self-settled and revocable, corpus of trust and all income are considered assets for Medicaid
- If self-settled and irrevocable, maximum amount that could be given to settlor is asset of settlor for Medicaid

IV. Modification and Termination of Trusts
- Settlor’s intent cannot be set aside after death
- Trust may always be modified or terminated if settlor and beneficiaries agree

In re Estate of Stuchell—even though settlor is dead and two beneficiaries agree, court does not allow trust to be modified because change will only make it more advantageous for one beneficiary; shouldn’t be able to change trust to get around Medicaid resource rules

Claflin doctrine—a trust cannot be terminated prior to time fixed for termination even though all beneficiaries consent if termination would be contrary to a material purpose of the settlor

Uniform Trust Act §411—court can modify terms of trust if because of circumstances unknown to settlor modification will substantially further purpose of creating the trust; usually applied in situations where widow isn’t getting enough money
- Courts more likely to allow trustees to deviate from administrative provisions rather than distributive provisions due to changed circumstances

In re Estate of Brown—trust for education of couple’s children and life long support of couple; trust can’t be terminated because material purpose is to assure life long income; giving lump sum won’t ensure life long income—couple could have assigned interest to children, who could have terminated when education was complete

V. Powers of Appointment
- Settlor gives power to individual which may be used to benefit donee or a 3rd party
- Two types: testamentary and inter vivos

Irwin Bank & Trust Co. v. Long—husband has unexercised general power of appointment, but wife can’t get to property in fulfillment of divorce decree until husband exercises his power
- Public policy mandates supporting children, but formalism of doctrine is inconsistent with this purpose
- Exception to rule: if donee of general power is also donor, then creditor’s can reach
- Author of book thinks donee of general power of appointment should be treated as owner
Siedel v. Werner—separation agreement gives away husband’s power of appointment; court agrees with CL rule not allowing donees to contract away power of appointment; if wanted it to be a release, then should have called it a release

New rule—contract isn’t enforceable but can be construed as a release if party to contract is same as who would take under default

VI. Charitable trust

Requirements—1) charitable purpose that is public in nature and 2) advances interest of a group (indefinite number of persons)

A. Charitable Purposes

Shenandoah Valley National Bank v. Taylor—need more than just benevolence or kindness; here, children could use money for anything and no guarantee that all children were needy

B. Modification: cy pres

Doctrine of cy pres: If purpose originally set forth in trust is no longer practical or possible you can apply money of trust to another purpose

In re Neher—trust calls for memorial hospital for husband to be built with funds; court holds that memorial was general charitable purpose and more important purpose, so funds could be used to build administrative building as memorial for husband because hospital was not a feasible option

The Buck Trust—trust funds to be used for needy people in Marin Co, but not many needy people; trust amount increased dramatically and foundation wanted to help more needy people; change not allowed because geographic restriction was an important part of testator’s intent; trustee should be changed even though testator also chose the trustee

Uniform Trust Act—allow cy pres if charitable purpose becomes unlawful, impractical or impossible to fulfill or wasteful

- Modification of charitable trust differs from modification of express trust because:
  - General rule for express trust: everyone agrees and compliance wouldn’t defeat material purpose; can’t deviate from terms just because beneficiaries will be enriched
  - UTA for private express trusts: modify if because of something unknown to settlor modification will enforce material purpose of settlor
  - Settlor’s intent not given such primacy in context of charitable trusts—interest is to the beneficiaries

C. Supervision

Herzog Foundation, Inc. v. University of Bridgeport—only AG, at his own discretion, has standing to bring suit when restriction in a charitable trust is not being followed unless trust specifically calls for reversion

- Uniform Trust Act gives donors standing to enforce a restriction

VII. The Rule Against Perpetuities

A. Introduction

Purpose—keep property marketable and limit dead hand control

Definition—limits the time at which property can be subject to contingent interests; property must vest of fail to vest within life in being plus 21 years

Life in being—someone who can affect whether or not the contingency will vest or fall

- ONLY look to specific contingent interests to apply rule

B. No possibility of remote vesting

- Is there the possibility of someone being born after the instrument takes effect?

Fertile octogenarian problem: presume everyone is fertile—always the possibility to reproduce no matter how young or old you are
Unborn widow problem: if trust to widow, it is possible person will have a different wife who isn’t born yet

C. Application to class gifts

Two requirements: both must be met for gift to be valid
- Class must close either physiologically or by rule of convenience (any member of class entitled to immediate possession)
- All conditions must be met

Ward v. Van der Loeff—will and subsequent codicil make gifts to nieces and nephews; codicil revoked the will only to extent will was valid, so gift to nieces and nephews in codicil is invalid but gift in will is valid because closed under rule of convenience, but don’t actually get possession until widow’s remarriage

D. Application to Charitable Trusts—rule doesn’t apply

Fiduciary Administration of Trusts

I. Powers of Trustee

Uniform Trustees Power Act—3rd party has no duty to inquire, but if had actual knowledge of trust then can’t keep what he purchased

Common law—3rd party has duty to inquire
- If multiple trustees of a private trust, one can’t act alone, but multiple executors can act alone
- Co-trustees are liable for each other’s acts: negligence, inactivity or wrongful delegation

II. Duties of Trustee

A. Duty of Loyalty
- If self-dealing exists, then no further inquiry and trustee is liable
- If conflict of interests exists, then further inquiry into unfairness

Hartman v. Hartle—defines self dealing as trustee purchasing an asset at sale of trust property

In re Rothko—all 3 trustees liable because conflict of interest—1T owned gallery, 2T was a struggling artist and T3 didn’t stop other trustees from acting
- Silence won’t save a trustee
- Under UTPA—trustee who doesn’t join in exercising a power is not liable to beneficiaries or to others for the consequences of the exercise; probably have to do more than just write a letter

B. Duty to Care for Trust Property

3 Duties: Duty to Collect and Protect, Duty to Earmark, Duty not to Mingle

Common law—strict liability for any loss because didn’t earmark

Restatement—if neglected to earmark/mingle in good faith, then only liable for loss due to failure to earmark
- Modern trend is to make it easier on trustee, especially when no loss occurs due to failure to earmark or avoid mingling of funds

C. Duty Not to Delegate

Shriners Hospital—trustee can get advice from a professional, but must make the final decision herself
- RST and Uniform Prudent Investors Act allows trustee to seek professional advice as long as she defines investment objectives and is in charge of strategy

D. Duty of Impartiality

- Trustee must deal with remainder men and income beneficiaries equally

Dennis—trustee should have sold buildings sooner because waiting led to decrease in property left for remainder men; trustee is personally liable

E. Duty to Inform and Account
Trustee must be aware of status and present info at least to beneficiaries, preferably to court. *Fletcher*—beneficiary can see trust instrument because no explicit confidentiality clause in trust and because beneficiary needs to know what docs say to hold trustee to duties.

- Courts haven't ruled on whether trustee must allow beneficiary to see trust instrument
  - CA courts say beneficiaries and heirs have right to see terms of an irrevocable trust
  - Interest of natural heirs should be protected
  - Children are morally owed an accounting of their parent’s property at death

**F. Duty To Make Prudent Investments**

- Manage risk: diversification helps manage risk because huge loss may only be taken in one place

  *Estate of Collins*—Took big chunk of trust property and made junior mortgage as only investment; clearly breached duty to diversify—put it all in one venture; court says don’t have to diversify, but didn’t investigate the company borrowing the money or the supposed collateral; violated every applicable rule because whole transaction based on trust.

**Planning for Incapacity**

*Revocable trust*—settlor wants to maintain some control, but also wants to provide for possibility that settlor could become incapacity

- In instrument name a successor trustee in event of incapacity
- Co-trustees: settlor is one and chooses another and either can act alone on behalf of the trust and upon settlor’s incapacity co-trustee becomes sole trustee

*Durable power of attorney*—while ordinary power of attorney terminates at incapacitation of person, durable power continues through life of incapacitated person (aka principal)

  *Franzen v. Norwest Bank Colorado*—common law rule is that power of attorney documents gave all powers to person, so infer that power to revoke trust was included—word revoke was in the document and under common law that is enough

- Wills Act says person with power of attorney can’t revoke will
- Doesn’t make sense that can change revocable inter vivos trust but can’t change a will—more checks with a trust than with a will?