TRUSTS AND ESTATES OUTLINE 2

What kind of property is it?
- Probate
  - Will
  - Intestacy
- Nonprobate
  - Trust
  - POD
  - Life ins
  - JT

WILLS

- 1. Did testator have testamentary capacity?
  - Did T know
    - Nature and extent of property?
    - Persons who are natural objects of his bounty?
    - Disposition he is making?
    - How these relate in an orderly plan for the disposition of his prop?
    - NO → Will invalid
      - Isolated acts not enough
      - Feminists crazy
    - YES →
      - Insane delusion?
        - A false perception of reality against all reason and evidence to the contrary
        - Ct 1: even if delusion has factual basis, invalid if rational person could not reach same conclusion under the circs
        - Ct. 2: no delusion if ANY factual basis
      - Undue influence (coercion)?
        - 1. T susceptible
        - 2. ∆ had opportunity
        - 3. ∆ had motive
        - 4. Causation
        - Rebuttable presumption if:
          - Confidential/intimate relationship
          - Person receives most of T’s estate
          - T of weakened intellect
        - Maybe rebuttable presumption if:
          - No contest clause
          - Gift to attorney

- 2. Did testator have testamentary intent?
  - Fraud?
- Inducement: someone intentionally misrepresents facts
- Execution: someone intentionally misrepresents character/content of instrument
- Test
  - 1. Misrepresentation
  - 2. Intent to deceive T
  - 3. For purpose of influencing testamentary disposition
  - 4. Devise must be fruit of the fraud (But for)
- constructive trust on wrongdoer
- Tortious interference?
  - 1. Existence of expectancy
  - 2. reasonable certainty of realization of expectancy but for \( \Delta \)'s conduct
  - 3. \( \Delta \)'s conduct is intentional
  - 4. \( \Delta \)'s conduct is tortious
  - 5. But for causation
- Sham will?
  - 3. Are execution requirements met?
    - Who cares? 4 functions: evidentiary, protective, ritualistic, channeling
    - Attested?
      - (1) Is it in writing?
      - (2) Is it signed by T?
      - (3) Is it signed by witnesses?
        - In line of state or conscious presence of T
    - Holographic?
      - Does state recognize holographic wills?
        - If not, does state recognize partial revocation?
      - (1) Is it handwritten?
        - Does state require material portions or entire thing to be handwritten?
          - Does state require handwritten parts to show T intent?
      - (2) Is it signed by T?
      - Does state require date?
    - If requirements are not met,
      - Does state follow UPC substantial compliance rule?
        - Is there CCE that T intended this to be his will?
      - Does state require strict compliance?
  - 4. Does the will have more than one document?
    - Unstapled pages?
      - Integration: all pages present at execution are part of the will
    - Valid will + subsequent valid codicil?
      - Republication by Codicil: Did T intend codicil to republish original will?
        - Did T write handwriting on valid will? Holographic codicil
    - Valid will + 2\(^{nd}\) invalid document
- Incorporation by reference:
  - Does the will sufficiently describe the doc?
  - Does will show intent to incorporate the doc?
  - Did the doc exist when will was executed?
    - Dates
    - Keeping place
    - Writing & typing on one page: constructively sever
  - Valid will + separate list of personal property (not money), made before or after will
    - UPC separate writing:
      - Is list signed?
      - Does list describe items & devisees w/ reasonable certainty?
- 5. Acts of independent significance
- 6. Is there an ambiguity in the will language (2+ interpretations)?
  - EE allowed to show there is an ambiguity.
  - Is there an ambiguity on the face of the will (patent)?
    - Ct 1: Extrinsic evidence admissible
      - NOT of T’s intent
    - Ct 2: EE inadmissible
      - If can’t construe gift w/o EE, gift fails
  - Is there an ambiguity in application of will to T’s property (latent)?
    - EE admissible
    - Includes misdescriptions, nicknames
    - Equivocation (2+ possible gifts or beneficiaries)?
      - EE of T’s oral declarations of intent allowed
- 7. Is there an unforeseen change in circs after execution, but no ambiguity?
  - Probable intent doctrine
- 8. Is there a scrivener’s error?
  - Is there a BIG scrivener’s error?
    - Is there CCE that there is a scrivener’s mistake?
    - Is there CCE that T intended something else?
    - \( \rightarrow \) EE of T’s intent allowed
  - Is there a mere drafting mistake by scrivener?
    - Ct 1: No corrections unless misdescription
    - Ct 2: Ct will correct
- 9. LAPSE: Did beneficiary predecease T (a latent ambiguity), disclaim, or kill T?
  - Is there a lapse?
    - Specific and general devises \( \rightarrow \) residue \( \rightarrow \) intestacy
    - Residuary devise \( \rightarrow \) intestacy
      - No residue of a residue
    - Class gift \( \rightarrow \) surviving class members, or residue if none, or intestacy
  - Is an alternate beneficiary named? No \( \rightarrow \)
  - Does an antilapse statute fix the lapse?
    - Does beneficiary (NOT substitute beneficiary) qualify?
- Descendant, NOT spouse
- Degree of relationship
- Per stirpes/representation/etc
  ▪ YES → Goes to issue of beneficiary
    o Is it a class gift?
      ▪ Argue yes; maybe antilapse statute will apply
      ▪ No class if amount is specified, or # of beneficiaries is certain
    o Avoid: in will: if beneficiary predeceases, alternate beneficiary

- 10. Is beneficiary an animal?
  o Gift probably void for reasons of public policy

- 11. Is property gone?
  o State 1: identity approach
    ▪ Is property general?
      • Does not adeem
      • Construe gift at time of death to make it general
    ▪ Is property specific?
      • Adeems (gift revoked)
      • “My” makes it specific
  o State 2: intent approach
    ▪ Presumption against ademption

- 12. Is there not enough property?
  o Abate in this order:
    ▪ Residue
    ▪ General
    ▪ Specific and demonstrative: each person’s devise reduced by X%

- 13. Is will or codicil revoked?
  o By subsequent writing?
    ▪ (1) Does writing express intent to revoke?
    ▪ (2) Is writing properly executed?
  o By subsequent will?
    ▪ (1) Does 2nd will show T intent to replace, not supplement?
    ▪ (2) Does 2nd will make complete disposition of estate?
      • No → codicil that does not revoke
    ▪ Not necessary to expressly revoke. Revokes by inconsistency
  o Or is the new document only a draft?
  o By physical act?
    ▪ (1) Intent to revoke?
      • Presumed from act
    ▪ (2) physical act: burn, tear, cancel, obliterate, destroy
      • lines or marks:
        o State 1: must be on words of will
        o State 2, UPC: can be anywhere on will
      • Torn pieces found at death: presumption of revocation
      • Presumption of destruction if can’t find will at death
    ▪ (3) act done by T or in T’s conscious presence, at T’s direction
  o Partially?
- Only some states recognize it.
- Strikeouts and handwritten changes can be seen as a holographic codicil IF signed.
  - By operation of law?
    - Divorce
    - Marriage after will
    - Birth of children

- 14. Is revoked will or codicil revived?
  - Dependent Relative Revocation
    - (1) Is gift revoked? Yes →
    - (2) Gift is cut out
    - (3) Is there another will that fails, or a mistake described in will2?
    - (4) Reinstall original gift IF
      - mistake inconsistent w/ T intent
      - mistake beyond control and knowledge of T
    - Is there a partial revocation (a cross-out and handwritten change?)
      - Reinstall crossed-out gift
  - Dependent Relative Revival
    - Did T revoke will2 under mistaken belief that he reinstated will1?
    - Wisconsin: NO revival
    - State 1: will2 revokes will1
      - StateA: will1 revived
      - StateB: will1 not revived unless reexecuted or republished
    - State 2: will1 not revoked unless will2 stays effective until T dies
    - State 3, UPC: will1 stays revoked unless it is revived
    - BLAH BLAH BLAH

- 15. Is will or codicil lost?
  - Probate if contents are proved

- 16. Did will leave out spouse?
  - Is this person a spouse?
    - Function approach: more likely
    - Status approach: probably not
  - Can spouse claim as pretermitted spouse?
    - Did spouse marry T after T executed will?
    - Rebuttable presumption that T accidentally disinherited spouse:
      - spouse gets intestate share UNLESS
        - T intentionally left out spouse
        - T provided for spouse outside of will
        - Spouse waived right to share
  - Is spouse in community property state?
    - Each spouse has control over ½ of prop after marriage
    - NO elective share
  - Is spouse in separate property state?
    - To each his own assets
    - Spouse can claim elective share (1/3 or ½)
      - Property included
Probate + nonprobate = augmented estate

Nonprobate included?
- Ct 1: yes if T retained power to revoke or appointment. Sullivan
- Ct 2: illusory transfer test
- Ct 2: intent to defraud test
- Ct 4: present donative intent test
- UPC: lists of included property

- NO elective share in Georgia
- Way around elective share: give all property to charity or someone else during lifetime

Did spouse waive elective share?
- Was waiver NOT unconscionable?
  - Did SS get fair and reasonable disclosure of decedent’s financial obligations?
  - Did SS voluntarily waive right to disclosure?
  - Did SS not or could not reasonably have had adequate knowledge of the financial obligations of decedent?

Postnups
- Fair when signed?
- Fair at time of divorce?

Is spouse’s testamentary gift smaller than elective share
- Ct 1: reduce other gifts pro rata
- Ct 2: take from residue

Did couple migrate?
- Is the issue relating to land?
  - Apply law of state where property is located
- Is the issue deciding if prop is comm or separate?
  - Apply law of where property acquired
- Is the issue the rights of the SS?
  - Apply law of domicile at death
- From separate to community?
  - SS loses elective share unless quasi-community system:
    - SS gets ½ if survives spouse
- From community to separate?
  - Old property is community; new property is separate

Does spouse have a right to support?
- Probate property
  - Homestead, personal property set-aside, family allowance, dower
- Nonprobate
  - Social security, private pension plans

- 17. Did will leave out a child?
  - Child is out of luck unless:
    - Child is owed child support or SS benefits
- Child is afterborn
  - Pretermitted child gets a share unless:
    o Omission intentional
    o Advancement

If the will is invalid, distribute property through intestacy:

**Intestacy**

- 1. Who takes via intestacy?
  - A. NO in-laws.
  - B. Couples w/ no legal status, but function as spouse:
    - Bigamous 2nd wife may be putative spouse
    - Unmarried cohabitants:
      - Some states give status
      - No status? Adopt, make K to share, make a will, turn property into nonprobate
    - Sex changes:
      - State 1: NO status
      - State 2: status if function
  - C. Adopted children
    - Is adoption valid?
      - Some cts honor equitable adoptions (oral agreements)
      - Ct 1: inherit from adoptive parents
      - Ct 2: inherit from both
  - D. Posthumous children
    - Presumption of paternity if born w/in 300 days of dad’s death
    - Conception after death:
      - Ct 1: inherit if (1) genetic relationship proved, (2) decedent consented to conception and support, and (3) notice is given to all interested parties
      - Ct 2: child does not inherit
  - E. Illegitimate children: inherit from father?
    - State 1: if father agrees or is adjudicated
    - State 2: if father is formally adjudicated
    - State 3: if father treats child as natural child or acknowledges paternity in writing
  - F. Half-bloods
    - State 1: same as whole-bloods
    - State 2: ½-share for ½-blood
    - State 3: whole and half of same degree: whole takes all
  - G. Collaterals
    - State 1: parentelic
      - Grandparents and their descendants, then Great-grandparents and their descendants, Etc.
- 2. How is property distributed?
  o Look at specific intestacy statute
  o UPC and 1/3 of states say:
    ▪ Spouse takes all if no parents or kids from another spouse
    ▪ Spouse takes all if neither spouse has decedents from another spouse
    ▪ Spouse takes $200k + 75% if parent but no descendants
    ▪ Spouse takes $150k + 50% if spouse has kids from another marriage but decedent does not
    ▪ Spouse takes $100k + 50% if only kids are not from decedent
  ▪ After spouse:
    • Decedent’s descendants
    • Decedent’s parents
    • Descendants of decedent’s parents
    • Decedent’s paternal grandparents or their descendants (1/2), and decedent’s maternal grandparents or their descendants (1/2)

- 3. Who gets what?
  o Per capita by representation
    ▪ Start w/ 1st gen where people are alive. Dead people get a share if they have living descendants. Split evenly.
    ▪ Next gen goes per stirpes. If someone in 1st gen was dead, their descendants split that dead person’s share.
  o Per stirpes
    ▪ Start w/ 1st gen, no matter what. One share per living child OR deceased child w/ living descendants.
    ▪ Next gen takes representative share: kids of one parent split evenly what dead person would have gotten
  o Per capita at each generation
    ▪ Start w/ 1st gen where people are alive. Dead people get a share if they have living descendants. Split evenly.
    ▪ Shares of deceased in 1st gen go into one pot and are divided equally among next gen: only children of deceased take from the pot. Children of people who took in the first round get 0.
    ▪ “Equally near, equally dear.”

- 4. Is someone’s gift reduced?
  o Advancements
    ▪ Did one child get an IV gift?
      • State 1: presumption of subtraction from intestate share
      • State 2: presumption against advancement
      • State 3: presumption against advancement unless declared in writing and signed
  o Did an heir disclaim his share?
- Heir treated as predeceased, and share goes by representation to next successor
- Cannot disclaim in order to keep government benefits
  o Did widow kill the testator?
    - Was there intent to kill?
      • No → slayer takes a share
      • Yes → slayer statute effective
        o State 1: slayer gets share
        o State 2: slayer gets 0
        o State 3: slayer holds constructive trust for decedent’s relatives

- Who takes care of an intestate property received by a minor?
  o Guardian appointed by court

**Trusts**

Is there a valid trust?
- 1. Is there an intent to create a trust relationship?
  o Not just an outright gift.
- 2. Is there a valid trust purpose?
  o Cannot violate public policy
    ▪ Cannot discourage marriage/encourage divorce
    ▪ Cannot encourage discrimination/limit relig freedom
    ▪ Cannot promote illegal activity
  o Cannot deprive spouse of statutory share
  o Cannot defraud creditors
- 3. Trustee
  o Is trustee 18+ and competent
  o Did trustee accept role as trustee?
    ▪ Words or conduct
- 4. Property
  o Is property identified?
    ▪ If this is unclear, is property separate from the rest of the estate?
  o Does property interest already exist?
    ▪ If not, trust might be created when property is later acquired.
- 5. Beneficiaries
  o Are beneficiaries ascertainable (identified by name)?
  o Are beneficiaries limited/definite (class)?
    ▪ Look at legal status, not function
  o Do beneficiaries have legal standing?
    ▪ State 1: if beneficiary is an animal, impose honorary trust
    ▪ State 2: if beneficiary is an animal, trust valid for 21 yrs or life of animal
- 6. Device
  o Is it a testamentary trust or a trust for real property?
    ▪ Must be in writing: deed of trust.
• Settlor must also deliver property or deed of trust to trustee
• If not in writing, is trust enforceable by operation of law?
  • Constructive trust
    o (1) Is there a confidential or fiduciary relationship?
    o (2) Is there a promise, express or implied, by the transferee?
    o (3) Is there a transfer of property in reliance on the promise?
    o (4) Is there unjust enrichment of the transferee?
    o No? Is there: fraud, mistake, murder, or a secret trust?
    o Yes: constructive trustee must convey property to rightful beneficiary
  • Resulting trust
    o Did an express trust fail (i.e. for lack of a legal beneficiary) or make an incomplete disposition?
    o Person holding property must reconvey to beneficiary
    o Semi-secret trusts FAIL, resulting trust for residue or intestacy.
      o Is it an IV trust?
        ▪ No writing required: use a declaration of trust, can be oral, settlor manifests intent to hold the property in trust.
    - 7. Does the trust survive the Rule Against Perpetuities?
      o Will all contingent interests certainly vest or fail within 21 years after the death of some life in being at the creation of the interest?
        ▪ Watch out for afterborn children
        ▪ Watch out for afterborn widows
        ▪ Is it a charitable gift based on a contingency? Can’t be valid unless the contingency is valid under RAP.
        ▪ Is it a class gift?
          • Will the class surely close during the perpetuities period:
            o Physiologically, by death of parent, or
            o By the rule of convenience (when any class member is entitled to possession), then
            o If all contingencies will be resolved w/in the perpetuities period, the class gift is valid.
              ▪ Is there a savings clause?
              ▪ Does the state apply cy pres?
              ▪ Does the state use wait-and-see for common law or 90 years?
              ▪ Has the state abolished RAP?
    - 8. Is it a support trust?
      o Did settlor specify amount?
      o Did settlor specify that amount is to be paid for support?
      o Yes: automatically spendthrift. Only creditors who provided support can access the trust assets.
- 9. Is it a spendthrift trust?
  o Is beneficiary restrained from alienating?
  o Is trust free from claims of creditors and others?
  o State 1: all trusts spendthrift unless settlor makes otherwise
  o State 2: no trusts spendthrift unless made so
  o Exceptions:
    - Self-settled trusts
    - Child support and alimony
    - Creditors who provided necessities
    - Federal taxes

- 10. Is it a charitable trust? (No RAP, no tax)
  o Is there a charitable purpose?
    - Yes: poverty, education, religion, health, government, beneficial to the community (art and music)
    - No: generosity/benevolence alone, political parties, particular people
  o Have trust terms become impracticable or impossible to carry out?
    - Is there general charitable intent?
      o Cy Pres: ct will redirect trust property to a charitable purpose that fits w/ charitable purpose of T
    - Is there specific charitable intent?
      o Charitable trust fails: resulting trust or reversion for settlor or his heirs
  o Does it benefit an indefinite amount of people?
  o Is it public, not private?
- If trust fails, assets go per will provisions for residue beneficiaries
  o UNLESS you can show it is a promise, enforceable by contract law.

If there is a valid trust,
- 11. Did trustee violate one of his duties?
  o A. Duties of loyalty to beneficiaries
    - i. No self-dealing
    - ii. No conflicts of interest
  o B. duty to care for trust property
    - i. Duty to earmark
    - ii. Duty not to commingle
    - iii. Duty not to delegate
    - iv. Duty of impartiality to beneficiaries AND remaindermen
    - v. Duty to make prudent investments
    - vi. Duty to inform and account.
  o C. Co-trustee duties
    - Charitable trusts: majority
    - Non-charitable: unanimity
  o Is it a discretionary trust?
    - Trustee must exercise discretion with sound judgment.
- Trustee has duty to inquire into financial resources of beneficiary to determine his needs

12. Is there a valid exculpatory clause vindicating trustee from liability?
   - State 1: valid if no abuse of fiduciary relationship b/tw settlor and trustee when trust relationship was created
     - Valid if negligence but not valid if bad faith, intentional, or reckless indifference to interest of beneficiary
   - State 2: never valid

13. Can the trust be modified?
   - Do settlor and all beneficiaries agree to modify? YES
   - If settlor is dead or does not consent,
     - Is there an unforeseen change in circs that substantially impairs settlor’s intent, that does NOT just make the trust more advantageous for beneficiaries?
     - Policy: cy pres would be better
   - Is it a charitable trust?
     - Is purpose general, but has become impracticable or illegal or wasteful? Cy pres applies.

14. Can the trust be terminated?
   - Do settlor and all beneficiaries agree to terminate? YES
   - Traditional rule: would termination NOT be contrary to material purpose of settlor? Termination allowed.
     - BUT no termination of spendthrift or support trusts ever
   - Some states: Is there good cause, changed circs that defeat purpose; does termination benefit disabled/minor/unborn/unascertained beneficiaries? Termination allowed.

Court logic:
- Effectuate testator’s intent
- Avoid intestacy
- Give to blood relatives
- Don’t like extramarital lovers or feminists or televangelists
- Be fair