Basic terminology:
- Inter vivos gift = gift given during life
- Inter vivos trust = trust established during life
- Testamentary trust = trust established by a will
- Will = document signed by a testator, becomes effective upon death, disposes of assets

Constructive trust:
- Have title but not use of the property; compelled to pass it on to someone else.

Probate exception to federal jurisdiction, *Marshall* (Anna Nicole)
- State retains jurisdiction over the matter
- 2 prongs:
  - Is the matter purely probate in nature?
  - Is the matter probate related; e.g., by exercising jurisdiction, would the ct:
    - Interfere w/ probate proceedings
    - Assume general jurisdiction over probate
    - Assume control over property in custody of state court

Probate & nonprobate
- Probate = property that passes under decedent’s will or by intestacy
- Nonprobate = passes under instrument other than will (for most of these, a death certificate will suffice as proof)
  - Joint tenancy (real and personal property)
  - Life insurance
  - Contracts with payable-on-death provisions
  - Interests in trust
  - Trustee holds property for benefit of named beneficiaries
  - If decedent has a testamentary power of appointment over assets in the trust, then the decedent’s will must be admitted to probate, but trust assets do not go through probate

Terminology
- Executor: when the decedent dies testate & will names the person who will execute will & administer probate estate
- Administrator: same, but person not named in the will
- Person appointed as administrator must give bond
  - Will often waives bond requirement; one of the reasons for writing a will
- All different courts that handle these matters are collectively referred to as “probate courts”
- A person dying testate *devises* real property to *devisees* and *bequeaths* personal property to *legatees*
  - But, “I give” is sufficient to effectively transfer any property
- Real property *descends to heirs*, personal property is *distributed to next of kin*
- Today, in almost all states, a single *statute of descent and distribution* governs
Probate jurisdiction:
- Primary or domiciliary: exists in state where decedent was domiciled @ time of death
- Ancillary administration: necessary if real property is located elsewhere
- Law of state of domicile determines disposition of personal property; law of state where real property is located determines disposition of real property

Probate types & procedures: informal vs. formal / “solemn form”:
- Notes pp. 5-6, Casebook pp. 30-39
- When looking at whether to draft a will & go through probate, look at the size of the estate to determine whether it’s economically desireable, or would deplete the estate too much
  o Also look at whether you want probate for other reasons (dysfunctional family, unknown creditors)

Intestacy
- Default rule
- A will that makes an incomplete disposition of the estate results in partial intestacy
- Look first to surviving spouse, then to descendants, and then to ascendants and collaterals
- UPC on intestacy:
  o Share of spouse, p. 61
    ▪ Spouse gets everything, or less if:
      • Parent survives decedent
      • Spouse has children not from decedent
      • Decedent has children not from spouse
  o Share of heirs other than spouse, pp. 61-62
    ▪ First to decedent’s descendants, then to parents, then to descendants of parents, then grandparents & their descendants
    ▪ DOESN’T SEEM TO SAY WHETHER THIS IS PER STIRPES OR WHAT
  o Escheat to the state, p. 62
- Status and function of spouses
  o Normally, the status of spouse governs whether one counts as a spouse for intestacy purposes
  o Putative spouse = innocent participant who has duly solemnized matrimonial union, which union is void b/c of some legal infirmity – Vargas
    ▪ Really more about equity than anything else – rare instance where function trumps status; also, b/c of the innocent nature of the spouse
  o In states where homosexual couples cannot be spouses (which is most states), function won’t trump status on this issue – Cooper
    ▪ This means they don’t get right to elective share, for instance
Sex changes – Your biological gender, not what gender you identify as, determines your legal gender (and capacity to marry, therefore) – I THINK

HANDOUT ON BIGAMOUS MARRIAGES, UNMARRIED COHABITANTS, SEX CHANGES

Who Qualifies as a Decedent
- Marital children (children of decedent & spouse, born in wedlock)
- Nonmarital children (those born out of wedlock)
  - Can inherit from the mother
  - Problems with inheritance from the father – need proof of paternity
    - Varies by jurisdiction, examples:
      - Subsequent marriage of the parents
      - Paternity adjudged during father’s lifetime
      - Clear and convincing proof after death (DNA)
    - Uniform Parentage Act: paternity proved where:
      - Child is less than 2, father lives in same household child & holds out child as natural child
      - Father acknowledges paternity in writing, filed w/ appropriate agency (or court)
  - Posthumous children:
    - Typical example: conceived before & born after father’s death – in these cases, the child will be treated as in being from the time of conception (if born alive)
    - Children conceived after father’s death (in vitro):
      - Must obtain judgment of paternity
      - Prospective donor must clearly & unequivocally consent to posthumous reproduction & to support of any resulting child
- Adoptive children have the same status as biological children; count as descendants (except adults in some cases)
  - Status w/ regard to natural parents varies by state
  - Pretty much everywhere, if child is adopted by spouse of natural parent (remarriage), the child maintains relationship to that natural parent
  - In some, relationship to natural parents is terminated, and children cannot inherit from them by way of representation – Hall (adoption after father’s death, can’t inherit from uncle through original father)
  - UPC, p. 86
    - Person is child of natural parents, regardless of their marital status
    - Adoption – mostly the same as Hall, but when the spouse of one natural parent adopts, allows inheritance through the other natural parent
    - Precludes inheritance by parent from child, unless parent has treated the child as his/hers and not refused support
Virtual adoption: when the adoption contract is somehow incomplete, but a “parent” takes the child into his/her home under a promise to adopt, treats & holds the child out as his/her own, and the child performs all the duties growing out of the relationship, the child will be as a natural child to the parent’s estate at the parent’s death.

- This is a view in some states, may be minority view – so treat it accordingly

- Same-sex couples: if a same-sex couple adopts (or 1 of 2 lesbian partners is artificially inseminated), some courts will treat them both as the natural/adoptive parents of the child.

- Adoption of spouses/lovers may or may not be allowed

- Adoption of an adult does not bring a person under the terms of a pre-existing testamentary instrument, when he/she clearly was not intended to be so covered. Minority

- Courts are split on this rule

- Other inheritance:
  - Stranger-to-the-adoption rule: adopted child is presumably barred from taking under the will of a person other than the adoptive parent: “child” was construed as “blood child”
  - Today, adopted children are presumably included in gifts by T to “children,” “issue,” “descendants,” “heirs”
  - If laws are not retroactive, whether they take may depend on what the law was at time of testator’s death

Heirs: just children? Or children and spouses? Clear up terminology

Share of decedents:
- Children take parent’s share by representation of the parent, if the parent is dead
- A line with no descendants is treated as never having existed
- 3 methods:
  - Per stirpes: divide property into as many shares as there are 1) living children + 2) deceased children who have descendants living
  - Modern per stirpes / Per capita by representation (PCR):
    - If children survive descendent, distribution is same as per stirpes
    - If not, estate is divided equally at the first generation in which there are living takers
    - Treats each line, beginning at the closest living generation, equally
  - Per capita at each generation (PCG):
    - @ first generation w/ living descendants, estate is divided into as many shares as there are 1) surviving descendants, and 2) deceased descendants w/ children
    - Each of surviving descendants receives one share
    - @ next generation, remaining shares are combined & redivided, same way
    - Each taker at each generation treated equally w/ the other takers at that generation
- Just seeing the word “per stirpes” doesn’t guarantee that the system is in fact per stirpes. Also have to look at the generation where the system starts. But if it’s silent on generation and says “per stirpes,” then it is per stirpes.
- Usually doesn’t matter if the spouses of the lineal descendants are still alive; they lose out – true in most states.

**Ascendants and Collaterals**

- Anyone who’s above: parents, grandparents
- Collaterals: related by blood but not descendants or ascendants
  - First line collateral: descendants of decedent’s parents, other than decedent’s line (brothers, sisters, nieces, nephews)
  - Second line: descendants of decedent’s grandparents (aunts, uncles, cousins)
- Consanguinity chart, p. 79
- When no descendant, after taking spouse’s share, property goes to parents (most of the time)
- If decedent is not survived by a spouse, descendant, or parent, intestate property always passes to brothers, sisters, and their descendants
  - From there, go to the above systems at the level of surviving collateral
- If there are no first-line collaterals, states differ as to next in line
  - Parentelic system: to grandparents and their descendants, then to great-grandparents and their descendants, etc.
  - Degree-of-relationship system: estate passes to closest of kin, counting degrees of relationship (see consanguinity chart)
  - Lots of varieties of these systems (and some use parentelic to break ties in degree-of-relationship)
- Half-bloods:
  - Old rule: were excluded from intestate succession
  - Majority: relative of half-blood is treated as same as relative of whole blood
  - Few states: half-blood gets half share
  - A few others: half-blood takes only when there are no whole-bloods of same degree
- Advancements: only if acknowledged (see UPC, p. 115)
- Bars to succession:
  - (Convicted) killer is barred from taking from the victim – constructive trust on the property
    - Conviction is dispositive, but not necessary; if no conviction, use preponderance standard
  - UPC bars succession to probate as well as nonprobate property for slayer
  - These people are treated as having predeceased the victim
  - Most of the time this won’t bar the killer’s heirs from inheriting, but sometimes it will (especially if the killer could inherit from heirs) – see p. 130
  - Unworthy heirs – abandoning spouses, parents who fail to support – may also be barred
- **Disclaimer**
  - Disclaimant treated as predeceasing the decedent
  - But, only the disclaimed interest passes to descendants of the disclaimant (as opposed to a larger interest) – this is to prevent manipulation of the scheme to get more for disclaimant’s kids than should be given

**Executing Wills** – Testamentary capacity

- **Mental Capacity**
  - Restatement test, p. 141; Testator must be an adult and be capable of knowing and understanding in a general way:
    - The nature and extent of his / her property
    - The natural objects of his bounty
    - The disposition that he is making of the property
    - Must be capable of relating these elements to one another & forming an orderly devise regarding disposition of property
  - General craziness / weird behavior aren’t enough; you have to show some sort of mental incapacity that undermines the above. *In re Estate of Wright*
  - Presumption of sanity, esp. after attestation; look very skeptically on attesting witnesses who later testify the guy was insane
  - Declaration of incompetence & being placed under a conservator doesn’t mean, *prima facie*, that you lack requisite mental capacity
  - Remedy: will fails

- **Insane Delusion**: a false conception of reality to which person adheres against all evidence to the contrary (legal, not medical, view)
  - Majority view: insane delusion can have some factual basis, so long as no rational person in T’s situation could have drawn T’s conclusion
  - Minority view: insane delusions must have no factual basis
  - Only the part of the will caused by the insane delusion fails (or, if all so caused, then the whole thing fails)
  - Feminism and man-hating as insane delusion. *Strittmater*
    - Social views may affect understanding of what is an “insane delusion”
  - Paranoia about wife’s infidelity, based on trifles, and w/ acknowledgement of illness, as insane delusion. *Honigman*
  - Remedy: partial intestacy

  - **ONE CATCH – TO BE DISCUSSED LATER**
    - Not the same as a mistake (which will not invalidate a will) – mistake is susceptible to correction if T is told the truth

- **Undue Influence**
  - Test: whether such control was exercised over T’s mind as to overcome his free agency & free will, & to substitute the will of another; so as to cause T to do what he otherwise would not have done but for control
  - 1) Testator must be susceptible to influence, 2) influencer must have disposition & motive to exercise the influence, 3) influencer must have
opportunity to exercise influence, 4) disposition must be the result of the influence.

- See p. 160 for the restatement test; also lists suspicious circumstances
  - Confidential relationship + suspicious circumstances raises a presumption of undue influence

- Confidential relationship, motive, and opportunity are all important factors; but when other evidence suggests that T is of sound mind, and told others (besides devisees) about her plans, those things may not be enough. *Lipper v. Westlow*

- Presumption of undue influence arises in bequest to attorney, except when attorney is related to T. Presumption can only be rebutted by clear and convincing evidence.

- Remedy: partial intestacy

- No contest clauses: beneficiary who contests a will shall take nothing, or a token amount, in lieu of the provisions made under will.
  - Majority: enforce such clauses, unless probable cause for the contest
  - Minority: enforce such clauses unless contestant alleges forgery or subsequent revocation (by will or codicil), or beneficiary is contesting a provision that benefits the will drafter or a witness to the will

- Undue Influence & Sexual Relationships
  - Typically, one of the lovers will be categorized as easily-taken advantage of, weak-willed, reliant on the other’s dominance
  - Unmarried lovers, esp. older-woman, younger-man cases, may give rise to a confidential relationship that leads to undue influence. And if the lover is an attorney, finding another attorney to draft the will may not be enough. *Moses*
  - Homosexual lovers can also apply to that. *Kaufmann*
  - Might be able to get around a finding of undue influence by drafting a document explaining the disposition (but not one that sounds too much like a therapy session)
  - Also, get around wills entirely – inter vivos trust (and it’s a lot harder to argue undue influence if the trust has been in place for 7 years); joint tenancy; anti-mortem probate

- Fraud: Testator deceived by a misrepresentation & does what T would not have done, had the misrepresentation not be made
  - Must be made w/ intent to deceive testator & the purpose of influencing the testamentary disposition
  - Fraud in inducement: person misrepresents facts, causing T to execute will, include particular provisions in wrongdoer’s favor, or refrain from executing or revoking a will
  - Fraud in the execution: person misrepresents the character or contents of the instrument signed by T, which does not in fact carry out T’s intent (a blind person signing)
  - Or, R’s way of distinguishing them:
    - Inducement:
      - Attempt to change the testator’s intent re gifts
• Testator attempts to give everything to niece; Carol says niece is dead
• Testator changes intent about who should get her property based on a misrepresentation (lie)

- Execution:
  • Instead of being about gifts or specific beneficiaries, this goes to intent w/re the document
    - Can be difficult to determine whether a legacy is the fruit of fraud (is someone devising because of status or function?). Ex: a married man “marries” a woman; she later dies. Is her bequest b/c he’s her husband, or b/c she loves him & has lived with him for years? *Carson*
    - Nurses who persuaded a sick woman that her other relatives were wasting her money and wanted to put her in a home. *Puckett v. Frida*
    - Remedy: partial intestacy (invalidate the provision based on fraud) unless the fraud goes to entire will – or constructive trust
      - *Notes said constructive trust; I think book might have said partial intestacy*

- Duress
  • Wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that wouldn’t otherwise have been made.
  • Transfers compelled by duress are invalidated
  • Woman wanted to re-execute a will; she was prevented from doing so (and possibly killed) by a cult. *Latham v. Father Divine*
    - Can read this case as about fraud too – misrepresenting a need for surgery, that prevented re-execution
    - Can impose constructive trust on a beneficiary under a will produced by duress, in favor of defrauded party; this is true even when this would result in distribution of property in accord w/ a completely unexecuted will. *Fr. Devine*.
    - Only way to get the draft will in is constructive trust – requires fraud or duress (as opposed to undue influence)

- Tortious Interference – tort action: one person’s actions testator, which in turn affects a 3rd party who expects to take under will
  • Cause of action brought by 3rd party beneficiary; not a will contest
  • Might pursue this b/c of punitive damages (+ economic damages?) vs. intestate share
  • Elements of tortious interference with an expectancy
    - Existence of an expectancy
    - Reasonable certainty that expectancy would have been realized but for the interference (but-for causation)
    - Intentional interference with that expectancy
    - That interference must be tortious conduct (fraud / duress / undue influence)
    - Must have some sort of damages
If you lose in the probate context, you’re barred from bringing your claim; and you must pursue probate remedies first; failure to do so may bar suit.

- Thus most states won’t let you proceed w/ tortious interference claim until you’ve succeeded in probate (even if you don’t stand to get an intestate share)

Marshall v. Marshall

Executing Wills – Statutory requirements

- The function of formalities
  - **Ritual Function**: be sure that the statement was deliberately intended to effectuate a transfer; Impress transferor w/ significance of his statements
  - **Evidentiary Function**: Increases reliability to proof; testator can’t testify
  - **Protective Function**: Safeguard testator against undue influence or other forms of imposition; Difficult to justify under modern conditions
  - **Channeling Function**: easier to determine person’s wishes @ time of death if the will is standardized; different from ritual function b/c that’s about making sure that testator understands

- The Requirements
  - P. 203, UPC requirements for attested wills
    (a) Except as in (b) below, 2-506, and 2-513, a will must be:
      1. in writing;
      2. signed by testator, or in testator’s name by some other individual in testator’s conscious presence & by testator’s direction
      3. Signed by at least 2 other individuals. Each individual must sign in reasonable time after witnessing either: signing of will as in (2), or after testator’s acknowledgement of the signature or the will
    (b) A will not complying with (a) is valid as holographic will, whether or not witnessed, if the signature & material portions of document are in testator’s handwriting
    (c) Intent that document constitute testator’s will can be established by extrinsic evidence. For holographic wills, that can include portions of doc not in testator’s handwriting
      - Example of formalism: old English law required T to sign in the presence of both witnesses simultaneously. Signing in presence of 2 witnesses, individually and sequentially, would not do. *In re Groffman*
        - Focus on presence is – in the presence of testator. Not really important that they see each other
        - UPC invalidates this; “present at the same time” is no longer required
      - Technical requirements must be followed exactly, or the will is invalid: here, there were 2 witnesses, but will was neither signed, nor the signature nor will acknowledged, in their presence. *Stevens v. Casdorph*
        - Under this statute, witnesses must sign in presence of testator and of each other
        - Two tests for witnessing: “line of sight” vs. “presence”
        - Court seems to like “line of sight”
- But again, neither required under UPC
  - More formalism: under CA law, gifts to subscribing witnesses were invalid unless there were 2 other & disinterested witnesses to the will. *Estate of Parsons*
    - Disclaimer of interest, after T’s death, does not make you “disinterested.”
    - Function of a subscribing witness is performed when will is executed – must have been disinterested at time of execution.
  - **Purging statutes:** Under UPC, an interested witness does not forfeit a devise, but CA adopted a version of this that creates a presumption of “duress, menace, fraud, or undue influence.”
    - The UPC version purging statute exists in less than 1/3 of cases
    - Prior CA statute: purge the witness of only the “extra benefit” (amount that witness benefited from having will executed vs. from not having will executed).
    - Other such statutes (like MA) voids a devise to an attesting witness (unless there are two other disinterested witnesses) – doesn’t seem to invalidate their act of witnessing.
    - May also apply if a husband or wife of beneficiary is the witness (*LaCroix v. Senecal*)
  - Recommended Method of Execution, p. 215-20 (see pages for method, or “Statutory requirements” file for an abridged version)

- **P. 202 n. 2 – a minority of states permit “oral wills” in limited circumstances (last sickness, or in military service) – respected in limited circumstances**

- **Curing Mistakes**
  - Can’t correct mistake where husband signs wife’s will and wife signs husband’s will, and they both had their will drafted together to have a common testatory scheme – this would start us on the road to anarchy! *In re Pavlinko’s Estate*
  - A spouse’s will, bearing decedent’s signature, mistakenly signed by the decedent as if it were his own, may be admitted to probate as his will. *In re Snide*
    - Rejects Pavlinko
    - Also important: the wills were identical, except for names
    - Also: this is a case of a Guardian at Litem and a “manufactured will contest” – if there’s a GAL on the test, talk about narrow “economic” interests of child vs. broader “familial” interests of the child
  - **Dispensing power, UPC p. 226 –** Gets rid of a formal requirement if proponent can prove, by clear and convincing evidence, that the decedent intended the document to constitute a will (or some other document)
    - Or, as R articulated it: that the document reflects the testator’s intent
    - How is this different from substantial compliance?
      - It’s broader – can absolutely get rid of a requirement
Dispensing power relies on testator’s intent; substantial compliance on approximation of the legal requirements

And, if you’re dispensing with a requirement, there need not be any substantial compliance with that requirement at all

- R: Ranney is actually an example of the dispensing power, under the guise of substantial requirements
- And Snide may have been applying

  - Substantial compliance doctrine: When formal defects in a will occur, proponents of the will may still probate the will by proving by clear and convincing evidence that the will substantially complies with the statutory requirements (or, as in the book, that the purposes of the formalities were served). In re Will of Ranney
    - Meant to curb effects of “harsh formalism,” compliance with formalities is important b/c of the purpose of formalities, not as an end in itself
    - This one about witnesses who signed a self-proving affidavit that was separate from the attestation clause & made references to the attestation clause, but there were no attestation clauses
    - Another example of substantial compliance: Hall went to draft a new will; asked if the draft could serve as an interim will; attorney said yes (and was wrong). Hall then tore up his original. “Interim draft” will was admitted to probate. In re Estate of Hall
    - If you’re looking at substantial compliance narrowly, Hall probably wouldn’t fall in there. Witnesses are so essential that you cannot “substantially comply” if you have none

- Conditional will: language of condition doesn’t mean that the will is to be probated only upon condition; will can be probated on death from any cause (p. 239) – relates to holographs, mostly

Unattested wills
- Holographic wills:
  - Requirements, UPC p. 203
    - Material portions in testator’s handwriting
      - Early generations: whole thing had to be in own hand
      - In some states (but not under UPC), testamentary nature must be gleaned solely by handwriting
    - Signed by testator
      - May be signed anywhere; but if not at end, may be doubt about whether T intended name to be sig.
    - No witnesses; no attestation clause required
    - Date may be important, but not a requirement
      - Allowed in slightly more than half states (mostly south) – FN 21 on p. 236 lists them
      - Might be able to get similar affects if we’re in a jurisdiction that has adopted the dispensing power, but doesn’t allow holograph
o Mostly serves evidentiary function; doesn’t serve channeling, ritual, or protective
o Whether something is testamentary in nature is a question of fact
o Letter saying “if anything should happen” and instruction to “keep this document because it may be important” contemplates death and reflects testamentary intent. *Kimmel’s Estate*
o Preprinted language may be ignored – even if legally necessary – if it’s not the part that disposes of property. *Estate of Mulkins*
o Printed words essential to establish testamentary intent are material provisions. *Estate of Johnson*
o Same type of thing as *Johnson*, but reverse – testator who uses a preprinted forms and fills in the blanks designating beneficiaries and apportioning estate between them, creates a valid holograph *Estate of Muder*
o Use of the word “inherit” and underlining it is strong evidence of testamentary intent. Also, can use extrinsic evidence to establish intent that the document constitute a valid holographic will or codicil. *In re Estate of Kuralt*

**IN RE ESTATE OF SKY DANCER**

**Will Components**

- **Integration of Wills:** all papers present at time of execution, intended to be part of will, are integrated into will
  - Litigated cases when: papers not attached, or there is evidence of tampering (staple holes, different fonts)

- **Republication by Codicil**
  - **NEED A DEFINITION OF WHAT IS A CODICIL, AND WHY THERE WOULD HAVE BEEN TROUBLE IN KURALT IF THE ORIGINAL WILL HAD MENTIONED MONTANA.**
    - Only applies to a prior, validly-executed will
    - Will is treated as re-executed (or republished) as of date of codicil
      - Can squeeze out a second will by republishing an earlier one
      - This also can cure problems (for ex: Will was subscribed to by 2 interested witnesses. If the codicil was subscribed to by 2 disinterested witnesses, everything’s fine)
        - This doesn’t make the will “not validly executed,” if there’s a purging statute – but does prevent the purging statute from applying

- **Incorporation by Reference**, rule p. 273
  - Any writing in existence @ time of execution may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.
    - UPC, p. 278, has exception: allows you to reference documents that are not yet in existence, but will be by death (applies only to tangible personal property)
  - Different from Republication by Codicil because inc. by reference can incorporate language that has never been validly executed
o If the document is not “in existence” at the time of the first will (say, a notebook with property dispositions that you update from time to time), but it is in existence at the time of a codicil, you’re good. *Clark v. Greenhalge*
  - And here, you’re saved by extrinsic evidence of the date of existence
- Blurring of “republication by codicil” and “incorporation by reference,” *Johnson v. Johnson*
  - Court’s reasoning on republication by codicil is wrong – republication can only work for a prior, validly-executed will
  - “Incorporation by reference” could work here if the typed and handwritten portions are two separate documents, and the handwritten portion was a complete holograph in itself. – Constructive severance
- Acts of Independent Significance
  - Dispose of property by referring to acts or life events that could be altered in the future
  - Ex: “All the stuff in this drawer to A,” “My car, to B”
  - The action must have motive apart from the desire to give gift at death (keep things in the drawer for safekeeping; want a nicer car)
  - Hard case – 2 labeled envelopes in a safe-deposit box

**Will Construction**

Two traditional rules:
- **Plain meaning / no extrinsic evidence rule:**
  - Extrinsic evidence may be admitted to resolve some ambiguities, but plain meaning of words cannot be disturbed by evidence that another meaning was intended
    - For example, no ambiguity in a legal phrase with a fixed meeting like “heirs at law”; improper plural doesn’t matter; term of will in conflict with verbal instructions doesn’t matter (that’s extrinsic evidence). *Mahoney v. Grainger*
  - Personal usage exception: if extrinsic evidence shows that testator always referred to a person in an idiosyncratic manner, evidence is admissible to show that the testator meant someone other than the person with the legal name of the legatee
  - Difference in ambiguities:
    - **Patent ambiguity** = appears on the face of the will (conflicting amounts of bequests, for ex.)
      - One approach: extrinsic not available to cure; will fails
        - Increasingly, extrinsic evidence is allowed
      - Construe language w/o aid of extrinsic evidence in a manner that saves the devise (change amounts, etc.)
    - **Latent ambiguities** = does not appear on face, but manifests itself when the terms are applied to property or beneficiaries; generally, two types:
• **Equivocation** = Will clearly describes person or thing, and 2 or more fit the exact description
  - Courts allow admission of extrinsic evidence to make the terms more specific
• No person or thing exactly fit the description, but 2 or more partially fit it (more common of two)
  - Courts also allow admission of extrinsic evidence here

- No reformation rule: court cannot correct a mistaken term to reflect what the testator intended to say
- Most jurisdictions purport to follow the **plain meaning rule** and the **no reformation rule**
  - *See Flannery v. McNamara*, upholding both the plain meaning rule and the no reformation rule.
    - Evidence of intention contradicting the intention expressed by the will is not really evidence of an ambiguity
    - **FLANNERY IN HANDOUT, GO BACK AND REREAD**
  - Increasing tendency toward allowing reformation and consideration of extrinsic evidence
  - Ex: an erroneous description doesn’t prevent a gift, can strike “unessential particulars” (strike street address #, and if the gift is still intelligible, it’s OK) – but this isn’t reformation. *Arnheiter v. Arnheiter*
  - Also, evidence innocent (non-fraudulent) **scriver’s error** is admissible to establish testator intent
    - Must establish that there was a scriver’s error, and that this error affected testator’s intent
    - “Scriver’s error” can include failure to account for a contingency – Erickson was led to believe that his will would be valid after marriage
    - A scriver’s error leading a testator to believe that a will would be valid, and we treat the will as valid. *Erickson v. Erickson*
    - This doesn’t correct all mistakes, and not all courts follow this; but R characterizes it as completing the move from a strict application of plain meaning to will reformation

- **Dependent relative revocation**: if a testator fails to provide for a living child solely b/c the testator mistakenly believes the child to be dead, under UPC 2-302, the child receives an intestate share in testator’s estate (see p. 155)
- **Revocation by**
  - A will must provide for the marriage (or subsequent event) in its terms to provide for the contingency – being made under circumstances that make the contingency painfully obvious isn’t enough. *See Erickson*

**Changes in condition / status of beneficiaries**
- **General vs. specific devise:**
  - Specific: names a thing (“my coin collection”)
  - General: a chunk of money, a block of stock.
- **Lapses:**
Beneficiary predeceases testator
  - Technically, creates an ambiguity (which would allow extrinsic evidence), but courts don’t always see it that way
If the gift (specific or general) lapses, it goes to the residue
If a residuary devise lapses, the heirs take by intestacy.
  - “No residue of a residue rule”: if a share of the residue lapses (one of 2 residuaries predecease T), lapsed residuary passes through intestacy rather than to remaining residuaries
  - In majority of states, this rule has been overturned, and is on its way out.
“Words of purchase” vs. “words of limitation” – typically, words of purchase indicate who gets the gift, and words of limitation indicate the type of gift
  - E.g. “to A, and her heirs and assigns” – “to A” are the words of purchase, rest is words of limitation (designate fee simple)
  - But, can be some play in this concept, especially to avoid intestacy. *Jackson v. Schultz*
Class gift: Devise is to a class of persons, and one member predeceases, the surviving class members divide the gift.
  - Typically needs to be “group label,” testator must be “group minded”
  - UPC rules, p. 399-400
    - Class gifts defined
    - Class gifts distinguished from gift to beneficiary
  - Words of survivorship create a class, and indicate that an antilapse statute (if one exists) does not apply
  - The word “living” (e.g., “living brothers and sisters”) in the context of words indicating participation in ownership of the estate (“share and share alike”) indicates survivorship, and thus a class gift. *Alvin v. Talley*
  - A gift to two specific people, w/ the expressed intent that the property go back to husband’s side of the house, was an individual (& not a class) gift, *Dawson v. Yucus*
    - T wasn’t closely connected to rest of husband’s family; could have named others as substitute takers; plus evidence that she knew how to create a class in other parts of will
    - Court allowed extrinsic evidence b/c lapse creates latent ambiguity
    - Extrinsic evidence important in class situation w/ respect to intent
  - *In re Moss*: treats a gift “to A and to B’s children” as a class gift, with A + B’s children as the class – T intends to give the gift to the surviving members
  - Antilapse statute can apply to gifts within class – p. 404 – seems to conflict with concept of words of survivorship
- **Void devise**: if a devisee is dead at the time of execution, or an ineligible taker (animal)
  - Residuary devise to “X and my dog”; not a devise to X “for the care of” the dog, terms of will are not susceptible to such meaning (so no extrinsic evidence allowed); half the residue goes by intestacy. *Estate of Russell*

- **Antilapse Statutes**: don’t prevent lapses, but substitute another beneficiary for the dead beneficiary if certain requirements are met
  - When we see a lapse, always ask if there is one of these
  - Usually, if (and only if) devisee is of specified relationship to T, and is survived by issue, the issue get the gift
  - Mostly these statutes apply to family members (at varying degrees of remove) but in some states, they apply to any beneficiary
    - Spouses are notoriously left out of antilapse statutes
  - Of course, is a default rule: can get around this in will
  - UPC rule on p. 393 – some interesting stuff on taking by representation

- **Ademption**:
  - If a person gets rid of a piece of property which is a specific devise under their will, the gift is “adeemed by extinction”
    - Intent of testator doesn’t govern here, just the presence of property
  - Does not apply to general, demonstrative, or residuary devises
    - General: intends to confer a general benefit, & not a particular asset
    - Demonstrative – hybrid of general & specific
      - General, paid from a specific source
      - If that source is around, use that to pay; if not, pay from elsewhere
    - Residuary – confers the leftover stuff
  - Identity theory of ademption – if the item is not in the estate, it’s extinguished
  - Intent theory: if specifically devised item not in the estate, the person may be entitled to cash value if they can show that this is what testator would have wanted
    - Attempt to make intent more important
  - The word “MY” can make a huge difference in distinguishing between general and specific (as in “100 shares” vs. “my 100 shares”)
  - Ways of avoiding ademption, pp. 409-10
    - Including, reading the terms of will to relate to property in existence as of time of death, not of execution
  - UPC Approach, exceptions to the identity theory, pp. 410-11
  - Absent a contrary showing of intent, a devisee of stock is entitled to additional shares received by T as a result of stock split
    - Some courts treat stock dividends differently, p. 413
  - Ademption by satisfaction: for general devises
- If T, after drafting will, transfers property of a similar kind, there’s a rebuttable presumption that the gift is in satisfaction (or partial satisfaction) of the general devise
- Does not apply to specific devises – those are “adeemed by extinction,” not by satisfaction
  
  - **Abatement**: if estate has insufficient assets to pay devisee:
    - Residuary reduced first, then general, then specific
      - Reduced in proportion (so if there’s only 80% left to pay general devisees, each general devisee takes 80% of the devise)
      - But, residuary beneficiary is often most important!
    - UPC provides that if abatement would defeat the testamentary plan, then may distribute shares as necessary to give affect to intent
    - Other answer is better drafting
    - Also, might have to worry about selling assets to cover debts

**Revocation of Wills**
- Revocation in entirety: permitted by subsequent writing (w/ testamentary formalities) or w/ physical act
  - Oral revocation, w/o more, is inoperable in all states
  - UPC, p. 252
  - Subsequent will that does not expressly revoke will but makes a complete disposition of estate is presumed to replace prior will & revoke by inconsistency
  - Subsequent will that does not make a complete disposition is viewed as codicil
  - *Harrison v. Bird*
    - Revocation by physical act means physical act performed by T, or at T’s direction
    - If T had possession of will b/f death but not found in personal effects, presumption that will was destroyed
    - Likewise, if a copy is destroyed, presumption of revocation even if duplicate exists
    - If she had duplicate in her possession still, presume no revocation
  - If a will is lost or destroyed without consent of T, or w/ T’s consent but not in compliance w/ revocation statute, it can be admitted to probate if its contents are proved (by copy or other clear & convincing evidence)
  - *Thompson v. Royal*: a note on the will saying that the will is cancelled will probably not be enough to cancel the will, absent other facts (like defacement)
    - Would work if the writing were validly executed
    - UPC would change this, p. 258
    - Act of cancellation requires touching words, doing violence to will
  - Writing “cancelled” and signing and dating each page of a will
    - Not revocation by physical act if that doesn’t touch the words of the will
    - Could be revocation by subsequent instrument, if this was holograph
Then, “cancelled” would have to be testamentary in nature
Intent that a document constitute a will can be established by extrinsic evidence (like the fact that this was written on the will)

- Partial revocation:
  o Could have partial revocation by codicil
  o Partial revocation by physical act may or may not be recognized, p. 258
    ▪ If recognized, would be by scratching out a gift
    ▪ But, may not be recognized b/c this is in essence a re-gift to residuary
    ▪ UPC recognizes partial revocation, p. 252
  o Doesn’t matter whether or not the will is holographic, revocation the same

- Dependent relative revocation
  o Testator revoked will b/c of mistaken assumption of law or fact
  o Revocation is ineffective if T would not have revoked had T known truth
  o Usual case: where T destroys will under belief that new will is valid, and it’s not
  o *LaCroix v. Senecal*
  o Tricky DRR case: $1000 gift lined out, “$1,500” written in its place and signed
    ▪ Might be holograph, but not if the number is insufficiently testamentary
    ▪ If not holograph, might be partial revocation
    ▪ Unless: DRR
    ▪ Then another question – what if he’s trying to give less, not more, money? Question of intent gets trickier

- Revival: T executes will #1, subsequently revokes will #1 by will #2, then revokes will #2. What of #1?
  Split into 3 views:
  o #1: #1 is not revoked unless #2 remains in effect until T’s death (minority)
  o #2: #2 legally revokes #1 @ time of execution, but #1 is revived if T so intends; intent may be shown from circumstances, oral declarations (large majority of states)
  o #3: Revoked will cannot be revived unless re-executed w/ testamentary formalities or republished
  o UPC, p. 268 – takes #2 approach
  o *Estate of Alburn*: state followed #3 approach, and applied DRR to probate #2 – T would not have destroyed #2 if she knew that #1 would not have been revived; DRR gets “next best result”

- Revocation by Operation of Law, UPC pp. 269-70 (divorce)

*Protection of Spouses*

- Have to ask:
  o What % is spouse entitled to?
  o And, of what property does spouse get that %?

- Community property (9 states, now w/ Wisconsin)
  o Whatever is earned during the marriage, each spouse gets ½ share
  o Exception: stuff given *to you* specifically by gift or inheritance
Marriage understood as unit working together for joint happiness maximization

- On divorce: each spouse entitled to 50% of what is earned during marriage
- Widow’s election in community property: pp. 457-458 (widow electing to take under the will to establish a trust of all the community property)
- Important to deal with “quasi-community property,” p. 459 fn 14
  - Treats property acquired outside of the CP state as community property, on death; property retains separate property nature until death
  - Meant to protect a surviving spouse who would lose right to elective share (see migrating couples)

Separate property (majority, 41 states)

- Titleholder holds property, not shared w/ spouse
- All but GA has elective share
- Traditional elective share: 1/3 of spouse’s entire probate estate (not just what was earned during marriage)
- UPC follows elective share approach, but not traditional
  - Get higher % as you’re married longer, up to 50% at 15+ yrs
- Right to support: surviving spouse gets use of property until death; after death, T’s will governs disposition; surviving spouse cannot use
  - Comes from probate & nonprobate property
- Right to property: title transfers to surviving spouse
- Distribution of estate on divorce became problematic w/ rise of “no-fault” divorce

- Every state will allow for a family allowance for about a year or so, out of probate property & despite the will
- *Sullivan*: “who is a spouse” for purpose of intestate succession & elective share
  - As above, legal status mostly governs, and here she still had the status of spouse, despite prolonged separation before death
  - Plus, she would have gotten 50% on divorce
  - Really grappling with the issue of the spouse’s ability to hide assets in the form of non-probate property
  - Has been read not to cover irrevocable trusts, some other will substitutes, and trusts created before marriage
  - Trying to equalize assets on divorce & death

- *Bongaards* – Spouse trying to use *Sullivan* to reach assets of a trust established by husband’s mother
  - Doesn’t get it – this makes sense in Community Property context b/c spouse not entitled to property that the other receives by gift or inheritance

1969 UPC, p. 447

- Augment probate estate to include certain nonprobate transfers
- Except for category 5: that’s to make sure a well-taken-care-of spouse doesn’t get more

1990 UPC, 448 – very complex & not reproduced

- Big change – Includes separate property incl. gifts & inheritance
- Uses a sliding scale to determine how much spouse takes
Assumes that after-acquired spouse is intentionally overlooked except if T is leaving all to his / her children? – I don’t know where I got this

- How would we correct the system?
  - Potential new method of distribution – community property as to wages accumulated (1/2) + sliding scale as to separate property
- Will cannot waive surviving spouse’s right to elective share, but surviving spouse can waive that in a prenup
  - UPC on p. 452, on waiver
  - Garbade: treats prenup like any other contract – OK even though signed right before the wedding, and “didn’t know what she was signing,” her waiver of the elective share was OK
    - No evidence of fraud
    - If she was that concerned about waiving her rights, she should have thought about it more or postponed the wedding or consulted a lawyer
  - Grief – opposite outcome
    - Burden changed: first, surviving spouse must show “particularized inequality” – ex: surviving spouse’s attorney was selected and paid for by deceased spouse
    - Once she shows that, other claimants must disprove fraud or overreaching
  - Both cases came from NY – Grief now controls

- Migrating spouses / multi-state couples
  - Law of the situs (location) controls ALL problems related to land
  - Law of marital domicile @ time that personal property is acquired controls characterization of the property (separate or community)
  - Law of marital domicile @ time of death governs surviving spouse’s marital rights (e.g. elective share or not)
  - Ex: painting acquired & building owned in state w/ separate property + elective share
    - Move to state w/ community property & no elective share
    - Painting is separate property (so don’t get ½), but b/c in CP state, can’t claim elective share
    - But, can claim an elective share in the building

- Pretermitted spouses: get married after the execution of a will
  - Shannon (in CA, a community property state): if T doesn’t provide for a surviving spouse in a will made before marriage, then:
    - Spouse gets her ½ of community property
    - Plus ½ of CP belonging to T (so, all of CP)
    - The ½ of “quasi-community property” belonging to T
    - A share of separate property of T equal to what spouse would have got if T died intestate, but no more than ½ of the separate prop.
  - Pretermitted spouse statute only applies when it’s consistent w/ T’s intent, & only with marriage after will
  - If you want to make sure the statute doesn’t apply, re-execute your will
  - Could be justified under partnership or presumptive-intent theory
Court is going to be very demanding about demanding proof that T thought about and intentionally omitted after-married spouse (maybe to the point of naming her in the will)

UPC provision, p. 465

Protection of Children
- Except in Louisiana, Ts have the right to disinherit children, but … disinheritance invites will contest
- Other countries have family maintenance statutes that allow disinherited kids to claim share of estate. Lambeff v. Farmer’s Cooperative
- Pretermission statutes: protect against unintentional disinheri...
But, trustee’s rejection is probably not enough to prevent finding of trust
- In the absence of a provision to the contrary, an executor becomes trustee
  - Property: comes from settlor, title given to 3rd party (trustee) w/ intent to benefit the beneficiary
    - Trust needs trust property (called the res)
      - Distinguishes trust from debt
      - Must be separate, identifiable, and in existence
    - Need not be money or real estate; can be any transferable interest in property
- Beneficiaries
  - Need to have someone to whom the trustee has fiduciary duty
  - Exception: charitable trust
- A purpose (for)
  - Purpose must be valid – generally invalid to set up trust to promote racial or gender discrimination, violate criminal code, infringe on right to marry, to divorce, religious freedom
  - Must intend to create the trust relationship – benefiting beneficiaries

Types of trusts
- Revocable: trustee reserves right to terminate trust, take possession of property that’s the trust corpus – or to alter or amend the trust & right to trust income
  - Settlor may also reserve income interest & power of appointment
  - Now recognized as valid will substitute, although initially there was problem w/ lack of compliance w/ wills act
  - On settlor’s death, the assets are distributed or held in trust for other beneficiaries
- Irrevocable: settlor gives up right to change mind (some exceptions)
- Inter vivos trust may be either revocable or irrevocable
- Testamentary trust: takes effect only on death; irrevocable
- Reasons for revocable trusts in estate planning (in life & death), pp. 316-22

Ways to establish trust (inter vivos)
- Declaration of trust (settlor declares self trustee):
  - Intention to declare self trustee
  - No writing requirement (unless statute of frauds problem (land)); no requirement of delivery
- Deed of trust (settlor is not trustee):
  - Usually, settlor will name who she wants, but a trust will not fail for lack of trustee
  - Writing that declares intention
  - Delivery – of instrument, of property, or of access to property (key)

- Lux: no specific words are required to create trust; instead ask whether trustee intended to create trust relationship
- Jimenez: Intent to create trust vs. to create a custodial relationship
  - Trustees have more extensive duties than custodian
Default is trust relationship; not a custodian unless you say so, and you can’t go back and change it after the fact.

The fact that you’re a lawyer and recognize that you hold something in trust is very damning.

Remedy for use of trust corpus to purchase new stuff: constructive trust in new stuff

Trustee liable for the amount that there would have been, had there been no breach.

Trust vs. inter vivos gift, Hebrew University v. Nye

Case from bottom up – trying to establish trust in absence of a writing

Wanted books to go to university, but not a whole lot of evidence that she considered herself trustee.

Since possibility of trust is ruled out, have “constructive” (really symbolic) delivery:

- Constructive delivery: do everything you can to deliver it (such as by delivering access)
- Symbolic delivery: manifestation of intent to give a gift (i.e., by itemized list)

Either way, it’s OK – but blurs the line btw trust and inter vivos gift.

Unthank v. Rippstein – how to treat a marginal note about wanting to bind estate to pay $200 a month for life?

A document that’s insufficiently testamentary & can’t be admitted to probate, can’t create a testamentary trust.

Looking for either technical words, or some reference to death, which aren’t present.

Couldn’t be deed of trust; no delivery.

@ best, is a declaration of trust – but no indication that he ever assumed the duties of trustee for himself, or intended to.

Also, you need separate, identifiable property to constitute trust (for res) – can’t just say “from some part of my estate”

“My estate” could be identified chunk (my land) or “everything I have”

Decision furthers the policy of not accidentally putting property into trust.

R thinks this is a valid holograph in light of Kuralt.

Resulting Trust

Equitable reversionary interest

Express trust fails or makes an incomplete disposition.

Where one person pays purchase price for property, causes title to be taken in name of another who is not a natural object of bounty of the purchaser.

Transferee is not entitled to the benefit, so title reverts to transferor or his estate.

Brainard v. Commissioner: When there is no res at the time of declaration of trust, but the res is to exist at such future time, the settlor retains title in himself to the future, possibly-existing res. When the res comes into existence, the settlor must again manifest his intent to create a trust.

Trying to declare a trust to get around tax consequences.
- **Speelman v. Pascal**: person can assign future earnings from existing contracts as *res* – if this is assigned, the *res* is considered then-existing
  - Taking about royalties to My Fair Lady here
  - Have constructive / symbolic delivery here
  - Difference between this and *Brainard* involve policy concerns more than whether you can assign future problems, perhaps
  - But have to take the holdings seriously even apart from policy concerns

- **Clark v. Campbell**: a provision that said “trustees, you know my friends – distribute my property among them” was invalid
  - Substitution of trustee’s will for settlor / testator
  - Beneficiaries may be established by class, but class must be capable of definition
    - This group is not ascertainable, no limits, selection criteria
    - “Families / relatives” might have been
  - Trust beneficiary must have legal standing to challenge trustee’s actions
  - A clause like this can’t be an absolute gift to trustee or to establish a power
  - Has been a gradual opening up of the law to consider function more since this case was decided (1930s)

- **Searight’s Estate**: an honorary trust is valid, so long as the trustee is willing to carry it out
  - Honorary trust: established for the benefit of a beneficiary who can’t enforce it (an animal)
  - Keeps property so long as willing to carry out duties; if not willing or stops, trust arises in residuary / next of kin
  - Would be charitable trust if established for care of dogs generally
  - See UPC, p. 527

**Power of Appointment**
- When there is transfer in trust for members of an indefinite class, no enforceable trust is created, but transferee has discretionary power to convey property to members of class that he may select
- Valid power of appointment may have definite class of beneficiaries
  - Test for validity: if class of beneficiaries is so described that some person might reasonably be said to answer the description
  - Appointment is invalid if it can’t be determined whether appointee answers the description
- Today, beneficiaries often given powers of appointment
  - For ex: beneficiaries may choose from among a class to appoint as people to receive the trust assets
  - It’s a nonfiduciary power – if not exercised, trust corpus passes to settlor’s heirs
- Can’t treat the will as creating a power of appointment in Clark because you can’t give that power to trustees. They hold property in fiduciary capacity

**Oral Inter Vivos Trust of Land**
- Ordinarily, the statute of fraud prohibits this; courts will enforce in some circumstances
- If O conveys land to X upon oral trust, X as trustee, can X keep the land?
  o Some courts: X keeps the land, b/c Statute of Frauds forbids oral trust
  o Others: constructive trust imposed on X for benefit of trust beneficiary, to prevent unjust enrichment
- Most judgments: X gets to keep the land – but the law is tending away from that
- Constructive trust for beneficiaries will always be imposed where:
  o Transfer wrongly obtained by fraud / duress
  o Where transferee (X) was in confidential relationship w/ transferor (O)
  o Or where transfer was made in anticipation of transferor’s death
- More common than transfer to X for benefit of 3rd party: oral trust for benefit of transferor
- *Hieble v. Hieble*: For the purpose of constructive trust in oral inter vivos trust in land, a confidential relationship may exist btw parent and child.
  o Not per se fiduciary, but tends to confidentiality – and with added facts like parent’s weakness…

**Secret Trusts & Semi-Secret Trusts**
- *Olliffe v. Wells*: A trust not sufficiently declared on the face of the will cannot be set up by extrinsic evidence to defeat the rights of the heirs at law or next of kin.
- **Secret trust:**
  o Testator gives sth to a person under a will; devise is absolute on its face
  o A promise by Wells to use the devise for a specific purpose would be enforceable by constructive trust on Wells
  o Secret b/c will indicates no trust
  o Courts admit evidence of promise to prevent devisee from unjustly enriching self, constructive trust to remedy inequity
- **Semi-secret trust:**
  o If Will indicates that Wells hold the legacy in trust, but does not identify the beneficiary, a “semi-secret” trust is created
  o Not necessary to admit evidence of promise to prevent unjust enrichment – the legacy just fails
- Restatement takes the view that constructive trust should be imposed in the circumstance of a semi-secret trust, as with a secret trust, and evidence of the promise should be admitted. But most jurisdictions follow the distinction above distinction, not Restatement
- When the trust fails:
  o Goes back to residuary (if the devise creating the trust isn’t itself residuary)
  o Back to heirs by resulting trust
- **Trusts for Lovers – How to keep it secret?**
  o Wills are public
  o Executors must reveal & pay taxes on trust @ death
  o Inter vivos, revocable trust wouldn’t work – transfer would become effective on death, and bank couldn’t release assets w/o making sure that taxes had been paid
    ▪ If irrevocable, again, executor would have to list all taxable gifts on return
Plus, community property risk of defrauding spouse
Life insurance also listed on estate tax return
Suggestion: class gift w/ secret trust designating lover – keeps it separate from trust under wills, but still have estate tax problem
Leaving stuff to nonmarital children can be even trickier

Discretionary vs. Mandatory trusts
- Mandatory: no discretion over who will receive income, amount distributed
- Discretionary: discretion over payment of income, or beneficiary to whom income is paid, or both
  - Spray trust: distribute income to members of a group as trustee determines (possible means of providing for a lover)
  - Support trust: trustee’s discretion limited by support standard (beneficiary’s standard of living)
  - Discretionary support trust: combines explicit statement of discretion w/ stated support standard
- Primary way of policing trustee is fiduciary obligation
- Marsman v. Nasca: distribution from principal is discretionary to support Cappy
  - When you have a discretionary trust set up for support set to a standard of living, have a duty to inquire as to beneficiary’s needs and a duty to distribute from the principal if necessary
  - Bona fide purchasers w/o notice:
    - Supported by consideration & unaware of trustee’s breach
  - Exculpatory clauses are not looked on favorably and are strictly construed
    - Two approaches to testator’s silence: uphold such clause in absence of evidence of fraud
    - Or, will have to show by written evidence, that Testator knew of the clause and approved it
  - Extended discretion, exculpatory clauses, mandatory arbitration clause – in notes after the case

Creditors’ Rights
- Discretionary trust w/ no support standard: creditor can’t reach the trust – can’t force distribution
  - If distribution is made, can come in and grab money before it gets to beneficiary
- Discretionary trust w/ support standard: also can’t reach this, exceptions for alimony & child support
  - See UTC p. 546
  - Traditionally, Beneficiary can’t use trust as promise for future payment, and Creditor can’t reach it
  - Trust distinctions have been blurred over time
- Spendthrift trust:
  - Beneficiary cannot alienate interest
  - Creditors cannot reach the money; doesn’t matter whether clause is mandatory or discretionary – even through trustee has to make payments, creditors can’t come in and claim the payments
  - This includes protection from tort creditors
Only two exceptions to not allowing creditors to reach it:
  - Fraudulent transfer to set up trust
  - Self-settled trust

Spendthrift UTC provision, p. 553 – sets up another exception, for providing for spouse or child (claims of children and former wives)
  - And another exception for those who have furnished necessary service or support

- *Scheffel v. Krueger*: really horrific facts, yet upheld spendthrift trust provision
- *Shelly v. Shelly*: claims of children and wives could reach spendthrift trusts
- Self-settled asset protection trusts
  - Cannot shield claims against yourself by putting your own assets in trust for your own benefit
  - Why protect inherited wealth but not earned wealth in this way?
  - A number of jurisdictions – (6) state and offshore – now allow this
    - P. 559 for the states
  - But, will courts bar recovery? *FTC v. Affordable Media*. Not resolving issue of whether self settled asset-protection trust can be a defense against civil contempt; actions here did not establish impossibility.
    - Impossibility of compliance is a defense to contempt.
    - Trust protectors, see p. 565 n. 29 – as trust protectors, could determine events of duress and remove the other trustee (I think)

**Modification and Termination of Trusts**

- If settlor and all beneficiaries consent, irrevocable trust may be modified or terminated
- If settlor is dead: American courts hold that a trust cannot be terminated or modified prior to the time fixed for termination, if termination / modification would be contrary to material purpose of settlor.

- *In re Trust of Stuchell*:
  - Case law: can modify when 1) all of beneficiaries agree, 2) none of the beneficiaries is under a legal disability, 3) trusts purposes would not be frustrated by doing so
  - Restatement on termination, want applied to modification: Can “modify” trust when: compliance would defeat or substantially impair the accomplishment of purpose of trust
  - Can’t modify the trust just to get more advantageous terms to beneficiary
  - Might be concerned about defrauding state, or maybe harming retarded son

- UTC on modification / termination, pp. 577-578
  - Can modify or terminate if that will further purposes of trust, & to the extent practicable, modification must be in accord w/ settlor’s probable intent
  - May modify terms if continuation would be impracticable, wasteful, impair trust’s administration
  - Upon termination, trustee distributes trust property consistently w/ trust purposes
- **Troy v. Hart:** when a person disclaims inheritance to avoid paying for own support (Medicaid), there is a constructive trust imposed in favor of the state, in the amount the person would have owed the state
  - No trust here: intestacy issue
  - People can’t voluntarily impoverish themselves to get benefits
  - Problems on p. 572 – be very careful of who is “settlor” – Medicaid rules make distinction between self-settled trusts and others
  - Pp. 569 – 572 – trusts for the state-supported

- **Termination**
  - Even if all beneficiaries consent, cannot terminate if contrary to purpose of settlor
    - Provisions deemed to state a material purpose, such that termination is contrary to settlor’s purpose: spendthrift trust, discretionary trust, trust for beneficiary’s support, enjoyment postponed (beneficiary gets benefits @ certain age)
  - **In re Estate of Brown:** governance by trustee may be a material purpose, so even if the beneficiary would get the whole trust corpus, may not be terminable
    - But then, wouldn’t early termination of any trust violate the intent of the trustee?
    - Language that trustee is to use income & part of principal may be said to indicate intent of trustee governance
    - Maintain dead hand control; control rate of $$ to beneficiaries

- **Trustee removal**
  - Remedy for breach, not a modification of trust terms
  - Can’t remove trustee for disagreement or a non-serious breach
  - Sort of a “thumb on the scale” for trustees chosen by settlor
  - UTC provision, pp. 586-87 – generally in line with this

**Charitable trust**
- Exempt from RAP, can go on forever.
- Need not have ascertainable beneficiary, but must have charitable purpose
  - Ways to see if sth is charitable rather than benevolent:
    - Charitable purpose
    - Public (as opposed to private)
    - Indefinite # of persons (as opposed to one, or even specifically identifiable, beneficiaries)
  - Valid Charitable purposes (remedying social harm or advancing good cause):
    - Relief of poverty
    - Advancement of education
    - Advancement of religion
    - Promotion of health
    - Government or municipal purposes
    - Other purpose the accomplishment of which is beneficial to the community
  - Trusts to benefit a political party = noncharitable (against public policy)
But to achieve certain political goals is fine, even if one party aligns with those goals
- The words “benevolent” and “philanthropic” should be avoided – not a big deal anymore, but used to be considered wider than “charitable”
- *Shenandoah Valley Nat’l Bank v. Taylor*: mere benevolence, liberality, generosity cannot be upheld as charities.
  - This was the $5 before Christmas & Easter case
  - No indication that the money is actually used for education, no power to restrict use (and the time of year is least conducive to actual use)
  - “Merely benevolent” is like social gift-giving
- *Rosser v. Prem* – Charitable trust to publish a book
  - Lower court – not charitable, no way anyone could benefit from this book
  - Appellate: could benefit someone, not court’s role to make that determination
  - Focus is on whether someone could benefit, and also that author is not doing this for money
  - Rule seems quite different from *Shenandoah*
- **Modification** – Cy Pres – doctrine that allows modification of a charitable trust
  - Applies when you have a charitable trust with a general charitable purpose
    - If it’s for a specific purpose, then it violates settlor’s intent to modify it
  - Direct trust to another charitable purpose that approximates settlor’s wishes
  - Only other option is that trust fails (termination), in which case the property passes by resulting trust to settlor’s heirs
- *In re Neher* – gift of house to Red Hook was a general gift, subject to *cy pres* when the gift was given to create a hospital
  - Deemed to have general charitable purpose of memorial, precatory purpose of hospital
- **Discriminatory trusts**
  - Courts may use *cy pres* to amend a trust that is discriminatory
  - Almost certain to do this when trustee is public body; when trustee is private, depends on the settlor’s probable intent (would settlor have preferred no racism, or preferred gift to pass?)
  - When the will creates an alternate choice (“if the racial restriction is valid, then property to X”) courts may not uphold that; would be giving effect to racism.
- The Buck Trust – a trust that was dedicated to serving the needy in Marin county (ridiculously wealthy) came into huge fortune
  - Adhere to the terms of the trust; trust won’t fail here if the money’s applied to Marin, will just be very inefficient
  - But, deviating from her intent at least in choice of trustee; trial court’s controlling role goes very far
- The Barnes Foundation – amending trust to care for art
- The amendments clearly violate testator intent, but he head intent to be “a little ridiculous”
- Plus, trust document seems to set itself up for failure

Fiduciary Administration of Trusts
- Trust pursuit rule: if trustee, wrongfully disposing of property, acquires other property, beneficiary can enforce constructive trust on property so acquired.
  - If trustee, in breach of duty, transfers to a 3rd party:
  - If 3rd party reasonably believes that the transfer is not of breach of trust, then 3rd party is not protected
  - Common law:
    - If you know that you’re dealing with trustee, have to exercise due diligence
    - UTC reduces the obligation slightly – must be good faith
  - If the 3rd party didn’t know about the trust:
    - Bona fide purchaser for value rule

- Powers of Trustee
  - Generally, none that are not in the document
  - Documents may generally incorporate all or some statutory enumerated powers
  - UTC: trustee can exercise all powers of unmarried, competent owner

- Duties of Trustee
  - Duty of Inquiry into Beneficiary Needs – Cappy case
  - Duty of Loyalty
    - Hartman v. Hartle: self-dealing: direct benefit, trading with trust assets (or w/ family)
      - Once the court finds self-dealing, no further inquiry
      - Only defenses: settlor authorized transaction, or all of beneficiaries consented after full disclosure
      - Some exceptions, given institutional trustees, pp. 781-82
    - In re Rothko: 2 trustees had conflicts of interest, intrinsically unfair deals. 3rd knew about conflicts, but sat by
      - Conflict of interest: trustee has some interest, but not a direct financial gain
        - Here, look at intrinsic fairness
      - Illustrates conflict of interest (this case) vs. self-dealing (Hartle)
      - 3rd trustee is in breach b/c he had a duty to investigate what was going on
      - Silence, refusal to sign does not absolve of liability, resigning wouldn’t do much
      - Appreciation damages should be allowed here, as they would be under breach of duty to retain
  - Contribution or indemnification from co-trustee, for co-trustee breach, p. 791
Duty of Prudence – what would a “reasonable investor” do with the trust property – diversification has become the key (rule in FN 16 explicitly makes that a duty)

- Can also apply to diversity in real estate holdings
- P. 797, Uniform Prudent Investor Act
- *In re Estate of Janes* – trustee held in breach by holding onto Kodak stock for too long until the price had plummeted
- Measure of damages is lost capital, not lost profits as in *Rothko*
- Difficulty with authorized and required retention, pp. 814-15

Duty of Impartiality – to strike a balance between various beneficiaries, including between income and remainder beneficiaries

- *Dennis v. Rhode Island Hosp. Trust Co.* – hanging onto real estate in RI in spite of value falling – will be good for income for a while
  - Income & remainder beneficiaries are the same
  - Just because they’re the same people, doesn’t mean that they’re not hurt as remainder beneficiaries
  - Can have to sell off property to maintain the balance between income & remainder beneficiaries, quite apart from the duty of prudence – if you know that the principal is not of much value to the beneficiaries
- Principal & Income Problem – designation of “principal” and “income” was fairly arbitrary, now the trustee has freedom to apportion between each.
  - “Unitrust, p. 829

Duties related to Trust Property

- Duty to “collect and protect” – about the same as duty of prudence as related to stocks; generally can’t ignore trust property
- Obtain the assets, make sure that the assets are what trustee ought to receive

Duty to Inform and Account – must inform beneficiaries of the status of the trust

- When you account and beneficiaries know & consent to your action, then you might be relieved of liability
- Or, if beneficiaries object & court rules that you’re good, absolved of liability through the date of the accounting
- *Fletcher v. Fletcher* – duty to provide complete and accurate information, beneficiary always entitled to information sufficient as to protect his rights
  - This is even so if trust document is silent on trustee’s power to provide information, and it seems that settlor’s intent is to keep provisions secret
  - Might have been decided differently if the terms of trust forbade brother from getting info
- UTC provisions, pp. 836-37

Duty not to commingle – keep the trust property separate from your own property – risk that personal creditors can reach commingled funds
• Prohibition against commingling has been partially abrogated – now OK to pool in common trust fund
  o Duty to earmark – make sure that the property is held in trust for the named beneficiary; has to be identified
    • Goes beyond commingling to specifically earmarking property as trust property
    • Distinguish property as trust property rather than trustee’s own