Trusts & Estates

I. Introduction
   a. Probate property
      i. Probate is default – unless listed below in I.b, all property will go through probate
         1. Intestacy is the default version of probate property
      ii. Property that passes through will or intestacy
      iii. Personal representatives’ duties
         1. Inventory assets
         2. Manager assets until distribution
         3. Clear title of assets
         4. Distribute remaining assets
   b. Nonprobate property
      i. Joint Tenancy – right of survivorship prevents distribution through probate
      ii. Life insurance – insurance company’s agreement to make payment at insured’s death does not qualify as probate
      iii. Legal life estate & remainders – result of original grantor’s division of property (not decedent’s division of property)
      iv. Interests in inter vivos trust – only trust property that avoids probate
   c. Terms
      i. Devise: real property given in a will
      ii. Bequest: personal property given in a will
      iii. Legacy: personal property given in a will
      iv. Executor: personal representative of decedent in testacy
      v. Administrator: personal representative of decedent in intestacy or in testate but no personal representative is named

II. INTESTATE SUCCESSION
   a. Introduction
      i. UPC § 2-102 - 105 on p. 60-61

Who Takes? | How Much?
--- | ---
Surviving Spouse | 100% if no descendants or parents
 | 100% if all descendants are also descendants of surviving spouse and no other descendants of surviving spouse
 | $200,000 plus 75% of remainder if no issue but a surviving parent (remainder 25% goes to surviving parent)
 | $150,000 plus 50% of remainder if all issue are issue of surviving spouse but surviving spouse has at least one other descendant not in common; remainder 50% is shared equally by issue
$100,000 plus 50% of remainder if one or more of the decedent’s descendants are not the issue of the surviving spouse; remainder 50% shared equally by descendants of decedent

**Issue**

- Shared equally among all

**Parents**

- Shared equally among all

**Issue of Parent**

- Shared equally among all

**Grandparents & issue**

- 50% to paternal grandparents side or their issue equally; 50% to maternal side or their issue equally
  
  If no surviving grandparents or their issue on one side, 100% to the other side

**State**

- 100% escheats to the state after that (to prevent laughing heirs)

b. **Surviving Spouse: STATUS v. FUNCTION**
   
i. **Share of Surviving Spouse**
   
ii. **Who Qualifies as “Surviving Spouse”**

   1. Bigamous couples – see case *Vargas*, where CA court allowed estate split in half, with half going to woman who had status and function as wife and the other half going to the other woman who had function and good faith belief in status as wife
      
      a. “putative spouse” – couple goes through ceremony of marriage and at least one spouse believes the marriage to be valid; typically putative spouses are treated as married for purposes of intestacy
   
   2. Same-sex couples – see case *Cooper*, where NY court held marriage is solely based on status, not function, and same sex couples cannot attain “status” of spouse
      
      a. MA allows same-sex marriage; HA, VT, & CA allow same-sex inheritance
   
   3. Unmarried cohabitants – if in a common law marriage (in a state that recognizes common law marriage), they have inheritance rights of married couple
   
   4. Married but separated – generally still qualify as spouses for intestacy
   
   5. Transsexuals – state-by-state interpretation; see *Gardiner* where KS decided that a transsexual is what s/he was at birth, thus invalidating an otherwise-valid marriage between a man and a woman (who was born a man)
      
      a. Shaky rationale that relies on considering “woman’s” inability to bear a child and lack of chromosomal change

c. **Descendants**
   
i. **Who Qualifies as a “Descendant”**
1. Marital children – taken for granted that child is of both spouses (“presumption of legitimacy”);
2. Nonmarital children – only presumed to be child of the mother, because court cannot assume the father even knows of the child’s existence
   a. However, if father is shown to have knowledge of or function as father, then child is “descendant”
3. Adopted Children
   a. In Hall, MD court held that children no longer have a right of inheritance from their natural parents after they are adopted.
   b. Dual inheritance from adoption – allowed to inherit from two sets of parents, if adopted parent is step parent; child may inherit from natural parents & adopted parents, but only adopted parents can inherit through the adopted child p. 86 UPC § 2-114(b)
   c. Adoption for the soul purpose of inheritance rights is not permitted under Kentucky court’s decision in Minary
   d. Equitable adoption – the natural parent(s) transfer custody of their child to a couple (or individual) who promise to adopt the child but who then fail to complete the proper paperwork to adopt the child legally; in O’Neal, GA disallowed the equitable adoption because the parties did not have contractual power to enter equitable adoption
   e. Adopted of same-sex couple – sometimes both parents are allowed to inherit from and through the child; see In Adoption of Tammy (MA) and In re Jacob (NY)
4. Posthumous children – conceived during natural father’s life but born after his death; also possibility of posthumously conceived child as in Woodward
   a. Woodward – allowed posthumously conceived child to inherit where surviving parent or child’s representative could show that father approved of conception of child and support for child (and, of course, that the child is actually genetically related to the decedent)
ii. Share of Descendants
   1. PER STIRPES
      a. Divide at the first generation
      b. Give one share to each of living descendants or descendants who are survived by someone else
c. Issue of predeceased descendants take and split among their bloodline if necessary

2. **PER CAPITA WITH REPRESENTATION**
   
a. Divide at first generation with living descendants  
b. Assign one share to each living descendant and predeceased descendant who is survived by another 
c. Issue of predeceased descendants take and split equally among their bloodline (just like how per stirpes ends)

3. **PER CAPITA AT EACH GENERATION**
   
a. Divide at first generation with living descendant 
b. Assign one share to each living descendant and each predeceased descendant who is survived 
c. Divide remainder among next generation by “pooling” the takers at the next generation (excluding any whose parents already took) 
d. Continue as necessary 

d. **Ascendants & Collaterals**
   
i. **Share of Ascendants & Collaterals**
      
1. Parentelic approach – start with closer lines and move to more remote lines 
   a. Relatives of a closer parentelic line take to the exclusion of further lines  
2. Degree of relationship approach – see chart on p. 79; count direct ancestors and then move “down” the ancestor’s direct lines to come up with a number; the lower the number, the higher the claim for heirship 
   a. Relatives of a closer degree take to the exclusion of a more remote degree  
3. Degree of relationship with parentelic tiebreaker – do the degree of relationship approach first; any “tie” for lowest number is broken, if possible, by the parentelic approach…divided equally from there

    ii. **Special Issues Regarding “Half Bloods”**
        
1. Common law: can’t inherit 
2. UPC § 2-107: half-blood consider whole-blood for purposes of inheritance

de. **Advancements** – no class notes 

d. **Bars to Succession**
   
i. **Homicide Doctrine** – equitable principle that one cannot profit from one’s own wrongdoing; courts either:
        
1. Allow property to pass to killer (since legislature could change the law if they wanted to)  
2. Bar passing to killer based on equity
3. Create constructive trust such that property formally passes to killer, but killer is compelled to forfeit interest in property
   a. *Mahoney* – slayer not allowed to take, formed constructive trust, but drew the line between voluntary and involuntary manslaughter
ii. Disclaimer – donee’s way of expressing intent to decline to accept a testamentary gift
   1. Generally treated as predeceased

III. EXECUTING A WILL
   a. Testamentary Capacity
      i. Mental Capacity
         1. Requirements: 18 years old & ability to know
            a. Nature & extent of property
            b. Natural object of testator’s bounty
            c. Disposition of testamentary choices
            d. Relating the above to one another
         2. Legal presumption of capacity
         3. *In re Estate of Wright* – Daughter attacked will, claiming a lack of testamentary capacity, but the court noted the high burden of proving lack of capacity. The court upheld the will and dismissed the incidents showing otherwise as isolated and unusual incidents, but nothing more. According to the court, the testator understood the requirements for mental capacity.
      ii. Insane Delusion
         1. False sense of reality to which the testator adheres despite all evidence to the contrary and that false sense of reality affects a testamentary disposition
            a. Not just a mistake, but a false perception of reality
            b. Courts apply (1) rational person analysis (could a rational person have reached the same conclusion?) and minority of courts apply (2) “any factual basis” test (is there any factual basis to support the testator’s belief?)
               i. Not that different, in practice
         2. Causation – insane delusion must have CAUSED the property to be distributed in a way the testator probably would not have wanted
            a. Most courts use “but for” causation.
            b. Honigman uses “might have affected” causation.
         3. *In re Honigman* – Man believed his wife of 40 years suddenly indulged in a life of gratuitous sex with every
man she met. The court held that under the rational person test (the majority approach), despite “evidence” to the contrary, it was reasonable for the jury to decide that he suffered from insane delusion when he wrote his wife out of his will.

iii. Undue Influence
   1. Requirements: (a) testator was **susceptible** to undue influence, (b) influence had the disposition or **motive** to exercise undue influence, (c) influencer had the **opportunity** to do so, and (d) disposition is the **result** of that influence
   2. **Lipper** – Testator wrote grandchildren out of will, upset that they didn’t pay attention to her in her later years. The grandchildren attacked the will for undue influence, claiming that the son forced the grandchildren out of the will. The court held that while (a)-(c) existed, there was no evidence that the son caused the disinheritance.

iv. Undue Influence for Attorneys
   1. Presumption of undue influence when attorneys draft an instrument that substantially benefits them (unless they are a relative or married to the client)
   2. Practical Tips:
      a. Use no contest clause – token amount given to disinherited person and if contested s/he loses that token amount
      b. Make a statement in a separate affidavit such that it explains why disinheritance occurred, but doesn’t hurt the disinherited person’s reputation unless they challenge their disinheritance.
   3. **In re Will of Moses** – Older woman has a sexual relationship with a younger attorney. An independent attorney drafted the will, but didn’t explain how undue influence may come to effect the will, if at all. Court said the woman’s will invalid for undue influence.
      a. Widely criticized for its focus on non-traditional sexual relationship

v. Undue Influence & Sexual Relationships
   1. **In re Kaufmann’s Will** – After several wills with increasingly higher percentages going to his gay lover, the testator executed a will that gave his lover his entire inheritance. The court mysteriously confirmed that there was “undue influence” because the beneficiary was the dominant and the testator was the submissive.

vi. Fraud
   1. Occurs when the testator is deceived by an intentional misrepresentation aimed at influencing the testamentary
scheme and the testator would not have otherwise done the testamentary act had the misrepresentation not occurred
   a. Intent to deceive
   b. Intent to influence testamentary decision
   c. But for causation
2. Fraud in the inducement – purpose of inducing the testator to execute a will with certain provisions
   a. *Puckett* – Elderly woman gave attending nurses power of attorney and all of her estate after nurses played on her fears that her family abandoned her. Court held that it was fraud to say that family abandoned her, so will was invalid.
   b. *Carson* – Man “marries” woman but he is already married, though he tells her he is not. She dies and her will gives everything to him. Turns out that he was already married. Court left the issue to the jury to decide if the fraud satisfied “but for” causation.
3. Fraud in the execution – person misrepresents to testator a document that the testator is signing
4. Remedies
   a. For fraudulent provisions: Revoke as much of the will as was affected by the fraud
   b. For fraudulent failure to execute or revoke: Constructive trust – give effect to a will the testator did not execute in order to prevent unjust enrichment

vii. Duress
1. Extreme version of undue influence that is overtly coercive, where a wrongdoer performs, threatens to perform, a wrongful act that convinces the donor into making a testamentary decision s/he would not have otherwise made
2. *Father Divine* – Woman left her entire estate to Father Divine’s cult. According to her cousins, she wanted to change the will to benefit them. The “cult” organized an operation on the woman that killed her, robbing her of, among other things, the ability to revoke her previous will. The court created a constructive trust giving the property to the cousins.
   a. *May also be a case of undue influence (if lesser than duress) or fraud (if she didn’t need the surgery)*

viii. Tortious Interference
1. Definition: civil claim against third party who commits misconduct in testamentary process
2. Advantages of civil suit
   a. Longer statute of limitations than probate
b. Punitive Damages awarded in tort not probate

c. No risk of losing inheritance if no contest clause exists

3. *Marshall v. Marshall* - Issue: whether J. Howard’s son E. Pierce tortiously interfered with J. Howard’s inter vivos gift to Vickie Lynn when he restricted access to J. Howard’s money. CD of CA decided it was tortuous interference.

b. Statutory Requirements for an Attested Will

i. The Function of Formalities

1. Evidentiary – ensures reliability of document’s reflection of testator testamentary intent

2. Protective – ensures that it’s more difficult to bring a fraudulent claim & ensures adherence to express testator intent in the will

3. Ritualistic – impresses upon the testator the finality and importance of the testamentary action

4. Channeling – encourage individuals to consult an attorney to draft a will, thus facilitating the probating of the will

ii. The Requirements

1. Writing

2. Signature of the testator

3. Two witnesses who simultaneously saw the signing or simultaneously heard the testator say that he signed the will

   a. *In re Groffman* – Testator’s will invalid because testator did not simultaneously acknowledge his signature to the witness, but did it consecutively. This exemplifies the common law approach of strict adherence to the formalistic requirements.

   b. *Stevens v. Casdorph* – Testator driven to bank by legatee to have will signed. The witness did not actually see the signature nor were they told by the testator of the signature, so the will was invalid.

iii. Curing Mistakes

1. Swapping wills

   a. *Pavlinko’s Estate* – Husband and wife have wills drafted and mistakenly sign the other one’s will. Court refused to probate the will, because the testator didn’t sign the document (his wife did).

   b. *In re Snide* – Similar facts to Pavlinko, but the court noted the mistake did not rob the probate court from the ability to determine the underlying testator intent, so it admitted the swapped will to probate.

2. Substantial Compliance – modern trend; purpose of formalistic requirements are met, because testator came pretty close to meeting the requirements → intent over formalism
a. *In re Will of Ranney* – Witnesses signed the self-proving affidavit rather than the will. The court held that the will was not properly executed, but applied the substantial compliance test, requiring (1) clear & convincing evidence that will manifests testator intent and (2) clear & convincing evidence that will substantial complies with statute’s formalities.

3. Harmless Error/Dispensing Power – need only show testator intent (substantial compliance without the second prong)

a. *In re Estate of Hall* – MT court held that though testator signed “draft” version of the will, he and his wife believed it to be a final version and destroyed their previous will. Applying the harmless error doctrine, it was clear that the “draft” will expressed the testator’s intent, so it was admitted to probate.

c. Statutory Requirements for an Unattested Will (“Holographic Will”)

i. Where Permitted

1. Only allowed in about ½ the states; see fn on p. 236
2. Allowed under UPC § 2-502
3. Only “function” served in a holographic will is evidentiary (because document is a reflection of testator intent)

ii. The Requirements

1. Writing
2. Signed – only signed by the testator
3. Dated – required by some states, but not all & not the UPC
4. Handwritten – to offset lack of witnesses, the holographic will must be in handwriting; most holographic states & the UPC require that **material provisions** be in handwriting, but some require the entire will to be handwritten

a. *Kimmel’s Estate* – Nearly illiterate man wrote a note to his sons explaining how he would like his property distributed if “emmy thing happens” the day he died. Court allowed probate on the holographic will, because – despite difficult to read – it was handwritten & manifested intent.

b. *Estate of Johnson* – Man printed form will and filled in blanks, then signed his own will. The court held that only the handwritten portions were allowed to be examined, so the form was nonsensical and the will was not admissible.

i. UPC Approach: determine testamentary intent from handwritten portion, non-handwritten portion, and other reliable extrinsic evidence
ii. Under UPC, Johnson will would have been admitted

c. *In re Estate of Kuralt* – CBS anchor executed valid holographic will in 1989, giving MT property to long-time lover. In 1994, executed a will that left all property to his wife (thus reneging the 89 will). In 1997, he began transferring the MT property to long-time lover, left a note for her stating his intent that she “inherit” the property, and he died shortly thereafter. Court emphasized testator intent and testamentary nature of the note, so it considered the note a holographic codicil to the 94 will.

d. **ASK THESE QUESTIONS:**

i. *Is there a handwriting? (If yes, move on.)*

ii. *Is the handwriting testamentary in nature?* 
   
   → most states require “material provisions” are testamentary in nature

iii. *Is there a signature?*

d. **Will Components**

i. **Integration of Wills** – all pieces physically present at the time of execution that testator intends to be part of the will constitute the pages of the will

ii. **Republication by Codicil** – executing a codicil to a will “reexecutes” and “republishes” the entire underlying will

   1. Testator can only republish a properly executed will

   2. Where it goes against the grain of the testator’s intent, ignore republication date in some jurisdictions

iii. **Incorporation by Reference** – valid will can incorporate by reference a document not properly executed if (1) the valid will references the non-valid extrinsic document, (2) the extrinsic document was in existence at the time the valid will was executed, (3) the extrinsic document conforms to the descriptions in the will and (4) there is an intent to incorporate the extrinsic document

   1. *Clark v. Greenhalge* – Testator executed will that referenced an extrinsic memorandum. She then created the memorandum and a notebook. Court held that the notebook was described by the will. MISTAKE: Court did not analyze the “in existence” requirement.

   2. *Johnson v. Johnson* – Testator typed three paragraphs distributing testamentary property. He didn’t sign that, but he wrote a sentence underneath the typed paragraphs giving $10 to his brother and he signed that, noting that the will shall be complete. Court held (mistakenly) that it was republication by codicil, but it was probably incorporation by reference.
iv. Acts of Independent Significance – may dispose of property by reference to acts outside the will as long as referenced act has significance independent of its effect on testator probate estate.
   1. Ex: “I devise to A whatever car I own at my death.”
   2. Ex: “I give $1,000 to every employee of mine at my death.”

IV. CONSTRUING A WILL
a. Dealing With Mistakes
   i. Traditional Approach (Plain Meaning Rule)
      1. Words should be given their plain meaning; No extrinsic evidence unless offered to explain away ambiguity in wording (or to show lack of testamentary capacity)
      2. Still the majority approach
      3. Mahoney v. Grainger – Testator wanted estate to be split among her cousins, so will specifically benefits “heirs at law,” but her nearest heir was her aunt. Court said it’s unambiguous language – estate goes to aunt.
      4. Arnheiter v. Arnheiter – Testator puts the wrong address on her will, but court excludes “clearly erroneous” term such that then reads “my house on Harrison” with no address.
   ii. Modern Trend (Reformation)
      1. Eliminates Plain Meaning Rule, admitting extrinsic evidence to determine testator’s intent
      2. Eliminates distinction between patent & latent ambiguities, admitting extrinsic evidence for all of it
      3. Extrinsic evidence admissible to cure scrivener’s error
         a. Erickson v. Erickson – Testator executed a will two days before marriage, but state statute revokes a will by operation of law at marriage. Court held that extrinsic evidence should be admitted to show scrivener’s error, which must prove by clear & convincing evidence that (1) scrivener erred and (2) the error affected testamentary intent.
4. Doctrine of Presumed Intent – unforeseen change in circumstances after a will’s execution that frustrates testator’s intent requires admission of extrinsic evidence to determine what testator would have wanted
   a. *Flannery v. McNamara* – Testator gave property to his wife, who deceased. Her sisters cared for testator. He probably thought they would inherit her property at his death since they were close relatives. Only other relatives were laughing heirs.

b. Changes in Condition or Status of Beneficiaries
   i. Lapses – beneficiary predeceases testator
      1. Gift is revoked, because heirs of beneficiaries were not intended beneficiaries by testator
      2. Void gift – different, because beneficiary was dead when will was executed; was never valid, but treated the same was as a lapses gift (revoked)
      3. *Estate of Russell* – Testator gave gift to “Roxy Russell & Chester Quinn.” Quinn was to take care of Roxy, a dog, as shown by extrinsic evidence. Court held that gift was void, because dogs can’t be beneficiaries, so that half of the gift went to intestacy.

   ii. Anti-lapse Statutes – where there is a lapse, and the predeceased beneficiary is closely related to the testator, the beneficiary’s issue who survives the testator should receive the gift unless expressly stated otherwise by testator
      1. *Allen v. Talley* – Testator leaves will that bequeaths property to “my living brothers and sisters.” Issues of deceased brothers & sisters want to take by representation, but court refuses since the plain language clearly expresses intent that only the living brothers and sisters should take.
      2. Antilapse does not apply to spouses; see *Jackson v. Schultz* – L marries B and gives estate to B “and her heirs and assigns forever.” Court believes testator intent to give property to B’s heirs if B is dead, so construes language to read “B or her heirs” rather than the B and her heirs, which is meaningless boilerplate lawyer language that basically just means “B.”
   
   iii. Class Gifts – gift to more than one individual that automatically has a right of survivorship associated with it
      1. Better to not name individuals if goal is to create a class gift
         a. *Dawson v. Yukes* – Testator wanted only two nephews to receive her portion of a farm. One of the nephews predeceased her, and the other nephews claimed her gift was a class gift. The court held that because she specifically named the
two nephews and excluded all others, this wasn’t a class gift.

2. Describe the gift in the aggregate rather than in separate shares

3. Beneficiaries should share a common trait that distinguishes them from everyone else

4. Overall scheme is to apply the right of survivorship based on the words of the will
   a. *In re Moss* – Testator gave property to wife with a residual in his nieces, one of whom was particularly named, but that niece predeceased wife. Court construed nieces to be a class gift, despite individual named.

iv. Lapses Revisited
   TRADITIONAL RULE
   1. If specific or general devise lapses, it goes to residue
   2. If residuary devise lapses, it goes to intestacy
   3. If a class gift lapses, it goes to surviving members
   
   UPC RULE
   1. If specific or general devise lapses, it goes to residue
   2. If residuary devise lapses, it goes to other residuaries
   3. If a class gift lapses, it goes to residuaries
   
   ANTI-LAPSE RULE
   1. If specific or general devise lapses, to issue of testator if beneficiary qualifies under statute
   2. If residuary devise lapses, to issue of testator if beneficiary qualifies under statute
   3. If a class gift lapses, it goes to issue of testator if beneficiary qualifies under statute

  c. Changes in Property
     i. Ademption
     1. Lt. “to take away;”
     2. Occurs when property devised by testator no longer exists at testator’s death
     3. Types of gifts (as defined in Restatement § 5.1)
        a. Specific – testamentary disposition of specifically identified asset
           i. Only property that can “adeem” and then only under the identity approach
        b. General – testamentary disposition of an amount to be paid out of the estate’s assets
        c. Demonstrative – testamentary disposition of a specific amount to be paid out of a specified account but that may use the general assets of the estate to fund the remainder if not sufficient
d. Residuary – testamentary disposition of net probate estate

4. Approaches
   a. Identity approach – rely on the identity of the property by the testator such that any specific gifts that no longer exist are adeemed; the ones that can be “found” are given to the devisee
      i. Wasserman – Settlor gave Wasserman apartment buildings in trust, but sold the buildings for cash. Wasserman took nothing, because the court applied the identity theory, and the gift was specific (so it failed and adeemed).
   b. Intent approach – ascertain the testator’s goal in devising property and give the value of the now-adeemed property to shafted party

5. UPC Approach (p. 410)
   a. Adopts a bit of a hybrid between identity & intent theories – requiring specific funds that replaced property to go to devisee; if not possible, the general assets are used to the extent that it would honor the testator’s intent to do so
      ii. Abatement – when debts of estate are greater than the total assets of the estate
         1. Honor specific gifts first
            a. But if not all specific gifts can be honored, sell the gifts and divided them proportionally among specific devisees gifts
            b. After distributing total to specific devisees, divide proportionally the general assets of the estate to the general devisees.
         2. Residuaries are the first to go! If there’s not enough to cover the specific and general devisees, the residuaries get nothing

d. Revocation of a will
   i. Revocation in Entirety
      1. Subsequent Instrument
         a. An attested will or valid codicil can revoke a prior will by express language or implicitly by inconsistency between the two documents
            i. Revoking a codicil doesn’t revoke the underlying will
         b. Writing alone may suffice if it is independently sufficient to show the testator’s intent to revoke the document its entirety (e.g. writing void across the first page of a will)
c. *Thompson* – Testator attempted to revoke her will and codicil by writing on the back “this will is null and void.” Because no one else signed it as witnesses, the court held that it was not a valid will and thus couldn’t be used to revoke the will.
   
i. Under a modern approach, it would perhaps qualify as a revocation by physical act.

2. Physical Act
   a. Under UPC § 2-507(a)(2) – destructive act revokes the will if the act shows testator intent
   b. Majority: destructive act must affect some part of the written portion of the will
      i. *Harrison* – Atty rips up the will in an effort to effect testator intent to revoke the will. Though the will was not properly revoked (since it was not done by the testator), the court prohibited the document from entering probate, thus giving effect to the revocation.

3. Operation of Law
   a. Ex: divorce typically ends all gifts to the former spouse or the former spouse’s relatives (specific to state statute)

ii. Partial Revocation
   1. Revocation by Subsequent Instrument
      a. A codicil is used to amend a will – thus it can partially revoke a will
         i. Revoking codicil doesn’t revoke the underlying will
      b. Holographic codicils to attested wills are valid
      c. Writing alone may suffice if it is independently sufficient to show the testator’s intent to revoke the document in part (e.g. writing “void” over a clause)
   2. Physical Act
      a. Not all states allow a partial revocation by physical act; when they don’t it’s out of concern for preventing fraud
   3. Operation of Law

iii. Dependant Relative Revocation
   1. Elements
      a. Valid revocation
      b. Revocation based on a mistake of fact or law
      c. The testator would not have revoked had she known the truth of the fact or law
   2. Analysis Steps
      a. Is there a valid revocation based on state law? (For exam, what about UPC?)
i. May often have to consider validity of partial revocation by physical act (crossing out a dollar amount)

b. Would DRR give effect to testator intent?
   i. Often a tough call if choosing between a change from $1000 to $500 – which is better $1000 or $0?

3. Typical situations
   a. Revocation by act
      i. Was revocation proper? (usually yes)
      ii. Was attempt at codicil proper? (usually no – mistake of law, because the holographic will doesn’t meet statutory requirements)
      iii. Would the testator prefer to not have revoked the will knowing that the beneficiary would get nothing?
      iv. *LaCroix v. Senecal* – Testator executed an improper codicil (not witnessed) in order to use her nephew’s proper name rather than nickname. Court applied DRR to give effect to the validly revoked prior will.
   b. Revocation by writing
      i. Was revocation proper? (usually yes)
      ii. Was attempt at codicil proper (usually no – though legally accurate, mistake of fact)
      iii. Testator intent

iv. Revival
   1. Giving effect to a previous will when a testator attempts to revoke a valid will or codicil that had a revoking effect in an effort to “un-revoke” the previous will
   2. Majority approach & UPC 509 – must show intent to use revival
   3. *Alburn* – Testator executed “Milwaukee will,” then moved and revoked that will with the “Kankakee will.” In an effort to give effect to the Milwaukee will, the testator revoked the Kankakee will, but the court followed the minority approach and did not allow the Milwaukee will to probate, because the strict guidelines of the Will Statute were not met.

e. Restrictions on the Power of Disposition (When a Will Can Be Trumped)
   i. Protection of the Spouse
      1. Marital Property Systems
         a. Separate property: husband and wife own separately all property each acquires except as otherwise agreed upon
i. Elective share – enforceable against all property owned by the decedent at death (certain percentage of property)
   1. All but GA has an elective share, but even in GA you can’t fully disinherit your spouse
   2. UPC – elective share is a sliding scale that increases with the length of marriage

b. Community property: husband and wife own jointly all acquisitions from earnings during marriage in equal undivided shares
   i. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin & Alaska – by choice

c. A comparison: death v. divorce in SP & CP

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<th>Upon divorce</th>
<th>Upon death</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community Property</td>
<td>½ of property accumulated from wages during the marriage</td>
<td>Same as divorce</td>
</tr>
<tr>
<td>Separate Property</td>
<td>Try to be equitable – not always ½ but close</td>
<td>Traditionally, 1/3 (so less than if you just get divorced)</td>
</tr>
</tbody>
</table>

d. UPC 1990 – Give spouse a sliding scale percentage of the elective share based on the duration of the marriage (3% after one year, growing to 50% after 15 years)
   i. Tends to undervalue intangible contributions

e. Innovative solution: use sliding scale for separate property and community property for real property

2. Rights of Surviving Spouse to Support – make sure the spouse isn’t out on the street
   a. Social Security benefits to surviving spouse
      i. Can’t transfer benefits
   b. ERISA (Employee Retirement Income Security Act of 1974) pension plans
      i. May occasionally be waived
      ii. Spouse must have survivorship rights
   c. Homestead exemption – varies by state; generally right to occupy the family home for lifetime to ensure that the spouse has somewhere to live
   d. Personal property setaside – like homestead but for personal property
e. Family allowance – for maintenance & support of surviving spouse & minor children during the probate process

3. Rights of Surviving Spouse to Elective Share (RIGHT TO PROPERTY)
   a. Rationale
      i. Partnership theory – the surviving spouse helped amass the wealth, so should have a right to the property
         1. Should be about half (plus whatever decedent gives)
      ii. Support theory – provide the surviving spouse adequate support
         1. Typically 1/3 at common law
   b. Property Subject
      i. Traditionally a share of the probate estate
      ii. Judicial responses – ILLUSORY TRANSFER TEST – most widely accepted; whether the transfer was truly inter vivos or whether the decedent retained a share during life such that it is more like a testamentary transfer
      iii. INTENT TO DEFRAUD SURVIVING SPOUSE – whether the deceased intended to defraud his/her surviving spouse by creating nonprobate property
         1. Some use subjective (did he actually defraud her) test and some use objective (was the effect that she was defrauded) test
      iv. PRESENT DONATIVE INTENT TEST: whether the deceased spouse really had a present donative intent when the nonprobate transfer was made

*Sullivan v. Burkin* – Husband & wife separated, but during marriage husband created inter vivos trust distributing the majority of his property. None of it went to the wife. His will disposed of 15% of his property, also none to the wife. The court held that the nonprobate trust would not be included, but that in the future it would be if the deceased spouse retained revocation rights. EX: of PRESENT DONATIVE INTENT

*Bongaards v. Miller* – Wife’s mother established a trust for her, giving the wife the power of appointment over her remainder. She wrote a will disinheriting her husband and gave the remainder to her daughter. The court distinguished this from Sullivan, where the property was earned during marriage and the nonprobate transfer allowed escaping the elective share. This trust remainder was not part of the elective share, not earned during the marriage, and including it would ruin its purpose.
c. Waiver
   i. Will cannot waive surviving spouse’s right
      1. No need to have spouse’s approval in creating a will
   ii. Prenuptial or antenuptial agreements may waive right
      1. Must be agreed upon
      2. Must be full disclosure of assets

Garbade – Wife signed a pre-nupt on her hectic wedding day. Husband dies 2.5 years later, and court enforces agreement (as any other contract).
Grieff – Same facts, but the hubby also provided the lawyer. This time the court was worried about “particularized inequality” between the parties.

4. Rights to Community Property
   a. All property acquired during marriage as a result of time, energy, or labor of either spouse
      i. Gifts during marriage do not count
      ii. Pre-marriage inheritance does not count
   b. Commingled property – separate property with community property
   c. Transmutation – spouses can agree to have separate property
   d. Stepped-up basis -

5. Multi-state Couples
   a. SP → CP
      i. Property gathered in SP state for couple that moves to CP state is “quasi-CP.” The deceased spouse’s SP is considered CP and half-interest goes to the surviving spouse.
         1. Property of the surviving spouse may not be devised by the deceased.
         2. California does this; AZ doesn’t
   b. CP → SP
      i. Personal property that is CP remains CP at death. Additionally, surviving spouse has the option of doing an elective share to receive 1/3 of the remaining half!
         1. Legislatures: most say CP brought into the state remains CP and is not SP
         2. Spouses should keep property as CP not change it to SP, because of the double-stepped-up basis for tax purposes

6. Omitted Spouses
a. Traditional: testator executes a will and marries shortly thereafter. Issue: whether testator intended to disinherit or to revise will but never got around to it.

b. Presumption: testator meant to include but didn’t; this may be rebutted
   i. Testator’s intent for disinherance in the will
   ii. Extrinsic evidence of intent to disinherit
   iii. Valid prenuptial agreement

c. Shannon – Widower left a will with everything to his daughter. He remarried and died shortly thereafter. Though he provided for this wife other ways, she claimed pretermitted spouse under the will. Court could not rebut presumption, so allowed for her to take.

d. UPC: intent to omit must be shown by the will, by extrinsic evidence, or by evidence in the will that it is effective notwithstanding a subsequent marriage

ii. Protection of Children
   1. Intentionally Disinherited
      a. Lambeff – Australian case in which testator had a daughter, divorced her mother and broke connections with the daughter. He then remarried, had two sons and left his entire inheritance to them. She petitioned the court for part of the estate and though he ignored her and she was better off than the sons, the court allowed her to receive 10% of the estate.
      b. That shit wouldn’t happen in America, where we can disinherit our children. America: fuck yeah!

   2. Pretermitted Child Statutes – executes a will, has a child, and never includes child in the will
      a. If the child receives a gift after will’s execution, the child is not omitted.
      b. If the child is alive at the time of execution and not mentioned, the child is omitted.
      c. PRESUMPTION: child born after the execution of a will when the testator dies without revoking or revising was unintentionally omitted
      d. Azcunce – Testator had three children and executed a will that included all three. He then had a fourth child. He went to revise his will, but only did a republication by codicil; of course, he died unexpectedly. Court held that the republication by
c codicil meant the fourth child was alive at the execution of the will and thus not pretermitted.

3. Overlooked Child: some states extend pretermitted presumption to overlooked children who are omitted because (1) testator doesn’t know of them and (2) testator mistakenly believed the child to be dead.

4. UPC Approach – pretermitted children are presumed to be accidentally forgotten, but that may be rebutted ONLY from the will.

5. Omitted issue of the deceased child –
   a. *Estate of Laura* – Testator left his estate entirely to his daughter and specifically disinherited his son and his two grandchildren. One of his grandchild’s issue (after grandchild’s death) attempted to claim the testator’s will. Court held the omitted issue of an omitted deceased child is not pretermitted.
   b. *Estate of Treloar* – Testator named his son-in-law, but not his daughter, in his will. The daughter was dead and her children claimed a share of the estate. The court held because the daughter was unnamed, she was not intentionally disinherited. Thus, the children had a right to the estate.

V. TRUSTS
   a. Definition: devise whereby the trustee manages property of the settlor for one or more beneficiaries
   b. Inter vivos/testamentary
      i. Inter vivos – settlor provides property & creates the trust during life
      ii. Testamentary – settlor provides property & trust created once the settlor dies
   c. Irrevocable/revocable
      i. Irrevocable – settlor gives up her right to change her mind
         1. Testamentary can only be irrevocable
      ii. Revocable – settlor retains the right to revoke the trust
         1. Must be inter vivos
   d. Deed of Trust/Declaration of Trust
      i. Deed of Trust: settlor is not the trustee; requires a deed that declare the intent & delivery of property
      ii. Declaration of Trust: settlor is the trustee; need not be in writing unless Statute of Frauds (property)
   e. REQUIREMENTS: (1) settlor intends to create a trust; (2) ascertainable beneficiaries; (3) a trustee exists (though it will not fail for want of a trustee); (4) the trust is funded by res; (5) perhaps a writing is necessary
      i. SETTLOR INTENDS TO CREATE A TRUST
         1. Anytime one party transfers property to another party with the intent to benefit a third party
2. Use of “trust” words creates presumption of intent
3. *Lux v. Lux* – Grandmother leaves the residue of her estate to her grandchildren with statements that the estate “shall be maintained” and “shall not be sold.” The court held that that was enough to show “intent” to create a trust.
4. *Jimenez v. Lee* – Daughter sued father claiming he used money intended as gifts to the father for the benefit of the daughter’s education. The court held that because the grantors intended the daughter to have the beneficial interest of the property, it was a proper trust.
5. **Failed Gifts:** deceased intended to make an inter vivos gift, but it failed for want of delivery; typically donee says there was an intent to create a trust
   a. Restatement & leading authorities reject this method, because it’s merely recharacterizing the deceased’s intent
   b. *Hebrew University v. Nye* – Deceased manifested intent to transfer rare book collection to Hebrew U, but there was no evidence of delivery. The court refused the fiction that would convert the deceased from a donee to a settlor, because there was no intent to create a trust.

ii. **Trustee**
   1. A trust does not fail for want of a trustee
   2. Trustee has fiduciary duties to beneficiary
      a. These are discussed below

iii. **Property/Res**
   1. Settlor must be the source of some property
   2. Trust must be funded to exist
   3. If third party trustee, must be transferred to trustee
   4. If settlor is trustee, “delivery is not required,” so the res should be separate, identifiable, and in existence
      a. *Unthank* – Deceased wrote a letter to Rippstein, telling her that he would give her $200/month as long as he lived. He then crossed out “as long as I live,” and wrote that he bound his estate to make the payment. He died three days later. Rippstein tried to probate the letter as a holographic codicil (probably should have been, but it was rejected). Then, she argued that it was a declaration of trust, but that argument failed, because the alleged declaration of trust did not specify which part of the res was to be set aside for Rippstein.
      b. *Brainard v. Commissioner* – Brainard told his mother and wife that he was creating a trust for them based on profits of his 1928 stock trading. He
would assume any losses and would take a reasonable fee. The profits, if there were any, would be his. Court disallowed, because the res was not in existence and only speculatively would become in existence. (Holding otherwise would allow someone to escape paying capital gains or income taxes.)

c. Speelman v Pascal – Pascal promised his secretary 2% of stage profits of Pygmalion and 5% of movie profits of My Fair Lady. Court allowed this transfer, considering the future profits “res,” because (1) there was a possibility of profits and (2) the profits did in fact materialize.

d. Contradiction? Probably so. The case may be distinguished by (1) Brainard’s potential for tax fraud, (2) Speelman’s writing, or (3) Speelman’s actual ownership of the thing that was to be profitable. Instead, the courts tend to apply the rule that future interests are not res, but if it was used as res and interest is now ripe, it will count as res.

iv. Beneficiaries
1. We must be certain who the beneficiary is
   a. Applies to private trusts, not charitable trusts
   b. Settlor’s unborn children tend to be exempted from this rule
2. The beneficiary must have legal standing to enforce fiduciary duties
3. Classes of beneficiaries – must be capable of delineation
4. Clark v. Campbell – Deceased gave his property to his trustees to distribute “to my friends” as his trustees shall select. The court held that while there was intent to create a trust, the class of “friends” was not sufficiently ascertainable.
   a. Friend is not an ascertainable class, because it cannot be delineated.
5. Searight’s Estate – Testator left Trixie the Dogg to Florence and deposited $1000 in the bank for the care of Trixie. Though the money was really intended for Trixie, not Florence, and though Trixie cannot enforce fiduciary duties (the reason we need ascertainable beneficiaries), the trust can continue as an honorary trust.
   a. Honorary Trust: trust that should fail for want of ascertainable beneficiaries, but may continue because the purpose is specific and honorable and not illegal or capricious
   i. Ex: trust for pets, trust for care of grave
v. Possibly a Writing Requirement
   1. Not required for trust, but required by Wills Act (for testamentary distributions) and Statute of Frauds (for real property)
   2. REQUIRED: inter vivos trust in land; testamentary trust; inter vivos deed of trust
   3. NOT REQUIRED: inter vivos trust not for land; trusts as operation of law (constructive, resulting)
   4. Hieble v. Hieble – Mother dying of cancer transfers her real property by deed to son and daughter. They orally agree that children will transfer property back if mother recovers. When she recovers, son refuses to transfer property, relying on the Statute of Frauds and saying it is unenforceable. Court held that because he stood in a confidential relationship with his mother, because there was lack of consideration for the property, and because the conduct of the parties indicated a trust, the son had to show that no trust existed. Because he couldn’t, the court imposed a CONSTRUCTIVE TRUST to reconvey the property.
   5. Oliffe v. Wells – Testator devised her residuary to Rev. Wells to distribute as he thought best to carry out the testator’s wishes. The court imposed a resulting trust on the Rev. Wells, because it was clear he was not to be the beneficiary.
      a. SEMISECRET TRUST
         i. Clear that the named beneficiary is not to be the final beneficiary, but there is no indication who the beneficiary is
            1. Fails for lack of ascertainable beneficiary
         ii. No Extrinsic evidence allowed
         iii. Resulting Trust sends the res back to the residuary or through intestacy
      b. SECRET TRUST
         i. There is no intrinsic evidence of intent to create a trust
         ii. Extrinsic evidence shows that there was an intent to create a trust
         iii. Court imposes a resulting trust to ensure res is properly distributed
            1. Goal: prevent unjust enrichment
    f. Types of Private Trusts
       i. Discretionary
          1. In a pure sense, beneficiary has no right to income/principal, but it is only at the discretion of the trustee
a. Still, beneficiary has more than a mere expectancy interest in the trust

2. Duties
a. Duty to inquire
   i. Before trustee can exercise discretion, must inquire into beneficiary’s status and needs
   ii. If initial steps are unsuccessful, there arises a duty to follow-up
b. Duty to decide
   i. Trustee often has sole discretion over when to distribute, but it must be pursuant to the terms of the trust
c. Duty to stay inside scope of discretion
   i. The default is that the trustee must act reasonably (objective standard) and in good faith (subjective standard)
   ii. That duty may be modified by the terms of the trust (e.g.: trustee decides in sole & absolute discretion)
d. Duty to consider settlor’s purpose, if applicable
   i. If the trust provides a purpose or standard, the trustee must consider that in making distribution decisions (e.g. if for “comfortable support and maintenance” – typically means keep at current standard of living)
e. *Marsman* – Settlor created a testamentary trust for her husband, Cappy. Cappy became unemployed and his standard of living plummeted. He asked the trustee for a distribution from the trust, and the trustee gave him the minimum distribution; then required that future requests be in writing. The court held that the trustee breached his duty to inquire, his duty to consider the settlor’s purpose (thereby breaching his duty to stay within the scope of his discretion).

ii. Mandatory
   1. Trust in which trustee must distribute the beneficiary’s interest in the income (typically at specific intervals)

iii. Spray Trust
   1. Trustee must distribute (thus mandatory) res in trust to a group of individuals, but trustee has discretion over to whom and how much each is to receive.

iv. Spendthrift Trust
   1. Trusts that include a clause that the beneficiary may not transfer her interest voluntarily or involuntarily
2. Exceptions
   a. Ex-spouses entitled to alimony
   b. Children entitled to child support
   c. State/federal government for tax claims
   d. Creditors who provide basic necessities (at common law)
      i. Under UPC, first three and creditors who have provided services for the protection of the beneficiary’s interest in the trust
3. Scheffel v. Krueger – Mother of sexually abused child sues father, the abuser, and is awarded tort damages on behalf of the child. Court found against father in excess of $500,000. Father is beneficiary of trust with mandatory payments for interest and discretionary payments for principal. Court held that spendthrift trust prevents reach from tort offenders.
4. Shelley v. Shelley – Beneficiary of spendthrift trust with mandatory interest in the income and discretionary interest in the corpus owed child support and alimony payments. The court ruled that the tort claims were allowed to reach the mandatory interest, but were not allowed to reach the corpus as creditors. However, since the children were beneficiaries in emergency circumstances, the trustee’s failure to distribute the corpus to the children was an abuse of discretion. We didn’t talk about this in class.
5. No self-settled spendthrift trusts
   a. FTC v. Affordable Media – Scam artists defrauded consumers and put millions of dollars in offshore accounts. The trust stated that a court order constituted “duress” and would sever the scam artists as trustees. The court held them in contempt. They claimed they couldn’t access the trust to pay defrauded consumers. The court thought they were lying since (1) they remained protectors of the trust and (2) they were able to access upwards of $1M at the drop of a hat.
6. Creditors’ Rights
   a. Can reach mandatory, discretionary or spendthrift trusts if settlor is beneficiary
   b. If settlor is not beneficiary, creditor can only reach mandatory trusts (not discretionary/support or spendthrift unless an exception applies)
   v. Support trust – amount necessary for the support or education
      1. Can’t just be for care & maintenance; must be NECESSARY
   g. Modification
i. Requires:
   1. Must further the settlor’s intent – case-by-case determination
   2. Unforeseen change – modern trend is that this is a low threshold (e.g. increase in inflation rate, high medical costs)
   3. Substantially impairs settlor’s intent – case-by-case and fact sensitive determination
   4. Beneficiaries consent
      a. Guardian ad litem must take into consideration noneconomic factors
      b. Virtual representation: some courts allow a minor or unborn child to be represented by someone else with the exact same rights/claims
      c. UTC authorizes court to order modification without requiring consent of all beneficiaries

5. Trust of Stuchell – Settlor’s trust provided for distribution of the trust principal to the settlor’s grandchildren, one of whom was mentally retarded and on public benefits based on his low income. The beneficiaries petitioned for a modification to perpetuate the trust for the mentally retarded beneficiary. The court rejected this because there was no unforeseen change and it would only make the trust more beneficial to the beneficiary.

h. Trust Termination – when all the beneficiaries want to end the trust but the trustee objects
   i. Conflict: honoring settlor’s intent v. giving too much weight to a trustee (who benefits from continuing the trust)
      1. Test: is there an unfulfilled material purpose?
      2. Certain trusts are not subject able to be prematurely terminated
         a. Discretionary trusts
         b. Spendthrift trusts
         c. Support trusts
         d. Trusts in which the beneficiary is to reach a certain age

3. Estate of Brown – Testamentary trust for trustee to use income & principal for education for the decedent’s nephew’s children. After that, the trust was to be used for the care & maintenance of the nephew and his wife for the rest of their lives. Upon completion of the education, the beneficiaries petitioned to have the trust terminated. The court declined, because the trust had a purpose to provide support throughout the nephew’s life.

i. Trustee Removal – traditionally not allowed even if all beneficiaries are in agreement
i. UTC: allows trustee removal if (1) material breach of trust; (2) infighting among co-trustees; (3) underperforming trust; or (4) changed circumstances

j. Charitable Trusts

i. Benefits

1. No RAP
2. No requirement for ascertainable beneficiaries
3. Tax advantages

ii. Charitable Purposes – must be a remedy for a social harm or advancing a good cause like education, music, the arts, science, health, law, etc.; not merely benevolent (performing kind acts)

1. Typically limited to
   a. Relieving poverty
   b. Advancing education
   c. Advancing religion
   d. Promote health
   e. Governmental purposes
   f. Other purposes that would benefit the community (see above)

2. Shenandoah Valley – Deceased created a charitable trust (so he thought) for 1st-3d graders to give money before Christmas and Easter. The court held that the timing of the gifts was indication that it was benevolent, not charitable, in purpose.

3. Rosser – Proposed trust to publish Wasserman’s book after her death. English professor & a publisher both read and determine that it is of no benefit to society as a whole. Still, the book might benefit someone out there, so it should be considered charitable.

iii. Modification (CY PRES DOCTRINE)

1. Where a trust has a general charitable purpose but the specific purpose becomes impossible, impractical, or illegal to carry out, the courts may modify the trust to serve another purpose within the general charitable purpose rather than imposing a resulting trust.

2. In re Neher – Woman donates property and money via a charitable trust for the construction of a hospital in a small town. The small town petitions for a modification, because it lacks the resources to run a hospital and a neighboring town just built a hospital. The court allowed cy pres, such that the city was able to build an administrative building.

3. Buck Trust – Woman created a trust for the needy in Marin County. Because there are no needy in Marin County, the Foundation wants to support the entire five-county SF area, because the purpose is to serve the needy in that area. Court requires the benefits to accrue in Marin County, since
that was the specific requirement. The court then appoints a different trustee.

4. **Barnes Trust** – Eccentric art collector wanted to preserve his billions of dollars in art in a certain way (location, certain order, not charging the public, keeping high society out of the gallery, etc.). In an effort to make the gallery sustainable, the court allowed modification (first a world tour, then charging some fees, now perhaps moving the entire gallery to the city from the burbs).

5. **Discriminatory Trusts** – invalid, because trusts must have a valid purpose. Determine whether class is suspect. Demarcations based on suspect classes are subject to the highest level of scrutiny (e.g. race). Gender subject to an intermediate level of scrutiny. Religion subject to the establishment clause as well when the state is attempting to enforce a trust that discriminates on the basis of religion.

VI. **Fiduciary Duties**

   a. **Trustee’s Powers**
      i. Some states made a laundry list of trustee powers that to which the trust instrument must reference
      ii. Recently, some states have “default” rules for powers the trustee is presumed to have

   b. **Duties of the Trustee**
      i. Duty of Inquiry into Beneficiary’s Needs
      ii. Duty of Loyalty – everything must be done with the beneficiaries in mind; duty to act reasonably & in good faith
         1. Prohibits Self-dealing – direct benefits to the trustee
            a. No further inquiry required by the court: trustee has breached duty of loyalty
            b. *Hartman v. Hartle* – Testator had five children and appointed two of her sons-in-law as executors of her estate. They sold the property at a public auction to one of her sons, on behalf of one of her daughters and the wife of an executor. The court held that the executor was self-dealing, even though it only involved his wife, not him directly. Because the purchaser of the land was a bona fide purchaser for value and without notice, the sale could not be rescinded. However, the benefiting sister had to share with the complaining sibling.
            c. Remedy: trust pursuit rule – give property back unless it was sold to a bona fide purchaser for value without notice
         2. Prohibits Unfair Conflicts of Interest
a. If a conflict of interest exists, the court must
determine whether the transaction was fair. If it
was, there is not a breach of fiduciary duties.
b. Rothko – Testator’s will gave 800 paintings in trust
to benefit others. The three trustees chose to sell
100 of the paintings to a gallery. One of the trustees
was the gallery’s director. Another trustee was a
struggling artist trying to find favor with the gallery
(by agreeing to sell the paintings). The court held
that both situations were a conflict of interest and
the sale was not reasonable based on its price. The
third trustee was liable for the other trustees’
breaches.
   i. If the third trustee wanted to avoid liability,
      he could have gotten an injunctive relief
      from the courts before the sale occurred.

iii. Duties Related to Property
   1. Duty of Prudence – trustee must act with reasonable
      prudence when making investment decisions
      a. Used to be “safe” investments
      b. Safe investing is now diversification
      c. Estate of Janes – Trustee kept high portion of the
         estate (over 70%) in Kodak stock, which deflated in
         value from $140/share to $40/share over a five year
         period. The court held that maintaining the high
         percentage of Kodak stock violated the trustee’s
         duty of prudence, which required more
         diversification. Damages are limited to lost capital
         from the would-have-been sale of the res at an
         appropriate time.
   2. Duty to Collect & Protect – obtaining possession of the
      trust assets without undue delay (non-stock property)
   3. Duty Not to Mingle Trust Funds With Trustee’s Funds – to
      ensure that trustee’s creditor cannot reach the trust’s funds
   4. Duty to Earmark Property – make clear what is trust
      property and what is the trustee’s personal property
      a. Remedy: trustee liable to the extent she failed to
         earmark

iv. Duties to Beneficiaries (other than loyalty)
   1. Duty of Impartiality – strike the delicate balance between
      the potential conflict from income beneficiaries (who want
      risky investments) and remainder beneficiaries (who want
      safe investments)
      a. Income beneficiaries are entitled to share of
         property proceeds that were not sold in a timely
         manner.
b. Remaindermen are entitled to share of income if an overperforming property is not sold in a timely manner

c. *Dennis v. Rhode Island Hospital Trust Co* – Settlor created a trust with three downtown Providence buildings. The income beneficiaries wanted to maintain the property to keep their funds coming in. The remaindermen sued saying that the properties had decreased so much that it was mismanaged by not selling the property.

2. Duty to Inform and Account – must give the beneficiaries some information about the trust res and status such that the beneficiaries may determine whether a breach occurred

   a. *Fletcher v. Fletcher* – Settlor created several trusts. The trustees claimed that the settlor wanted the beneficiaries kept in the dark about the trust itself. The court ordered the trustees to disclose information about the trust to the beneficiaries to ensure that they could preserve their rights and check the fiduciary duties of the trustee.

3. Duty to Inquire – duty to inquire into the needs of the beneficiaries (see *Marsman*)