I. The Right to Inheritance
   a. Marriage Restrictions:
      i. *Shapira* (24): will made gift to son contingent on his marrying a Jewish
girl w/Jewish parents w/in 7 yrs, w/gift to go to Israel if son does not
meet requirement. Ct upheld will b/c testator’s purpose was not merely a
negative one designed to punish his son, his plan was to encourage the
preservation of the Jewish faith and blood.
      ii. Restmt Property: restraint to induce a person to marry w/in a religious
faith is valid if and only if the restraint does not, under the
circumstances, unreasonably limit the transfeeree’s opportunity to marry.
   b. Waste: Can’t request property to be destroyed at death…
   c. Public Policy: Restmt Trusts invalidates trusts that are contrary to puclic policy.
   d. The Probate Process: function is to transfer title and make title clear. Other
   functions are to insure payment to creditors and distribute residue, but it is
   expensive (atty fees, commission, filing) and takes longer to distribute residue
   and creates uncertainty.
      i. Process
         1. File Original will, if there is one.
         2. Give notice to potential beneficiaries and creditors
         3. Letters issued from ct giving administrative/exec authority
      ii. Duties of Administrator/Executor
         1. Collect assets
         2. manage assets
         3. receive and pay creditor’s claims
         4. distribute residue
      iii. Probate
         1. Intestacy: Administrator designated by statute, must post bond
         2. Wills: Executor named in will may waive bond
      iv. Non-Probate (Avoiding Probate):
         1. Other instruments used to avoid probate include trusts, life
insurance, retirement/POD contracts, and joint tenancy property,
small estates (personal property and cash/accts below certain
monetary value).
   v. Atty Duties to Client: professional responsibility extends to intended
   beneficiaries

II. Who may inherit: distrib’n of award based on state definitions of family
   a. Surviving Spouses: W & J live together for 12 yrs in an interdependent
relationship. J dies, but W will only receive payment if they est’d a CL marriage
or J had a will.
      i. *Cooper* (492): homosexual relationship does not qualify as a “spousal
relationship” and survivor is not “surviving spouse”. Case relied heavily
on whether the partners could marry. An opposite sex marriage is the
more traditional, so potential is the key.
      1. In a state that allows CL/equitable marriages, there may be a
sexual discrimination argument (if I was a woman, I would be
treated differently…)
ii. **Legal Impediment:** if not legally married due to good faith mistake of law, but thought marriage was valid, treat would-be spouse as a surviving spouse.

b. **Functional Test:** *Braschi* case held same-sex partners living together as a family entitles the partner to same treatment afforded a relative. The case used the term “family member” while the elective share statute used “surviving spouse.”

c. **Status Test:** *Cooper* is a status-based approach rather than a functional one. One’s function as a spouse is unimportant when his/her status is not as a spouse.

d. **Status & Function – *Pefley-Warner* (HO):** ct gave would-be CL wife an equitable share of the property, but not the full amt an actual surviving spouse would be entitled to receive. State didn’t recognize CL marriage.

   i. “Cts must examine the relationship and property accumulations to make a just and equitable distribution.”

   ii. *Gardiner* (HO): transexual was deemed not a woman, and therefore the marriage was not valid under KS law which requires marriage btwn opposite sexes.

      1. “A male to female transexual is a transexual and remains a male for purposes of marriage.” Sex at birth is sex always!

      2. New Jersey would find valid marriage b/c they look at physiological aspects of individual to determine sex.

e. **Defense of Marriage Act:** fed law that states don’t have to give full faith and credit to other states’ marriages.

f. **Shares of Children:**

   i. Natural (Genetic) Children: marriage creates a legal presumption that a child is a child of the husband and wife. Posthumous children have a 280-300 day rebuttable presumption.

   ii. **Adopted Children:** even more status-based, it’s completely dependent on the legal relationship. Adopted children inherit from adopted parents only, not natural relatives.

      1. **Dual Inheritance – *Hall* (98):** father died, mother remarried, stepfather adopted children, father’s brother died – inherit? Since an adopted child has no right to inherit from the estate of a natural parent who dies intestate, the same child may not inherit through the natural parent by way of representation.

         a. **UPC:** adopted child inherits from adoptive relatives and also from natural relatives if the child is adopted by a step-parent.

   iii. **Posthumous Children:**

      1. **Woodward** (HO): H dies, W uses frozen sperm to have kids.

         a. “Where conception results from a 3rd party medical procedure, using a deceased person’s gametes, the burden is on the surviving parent to demonstrate the genetic relationship of the child to the decedent and that the intestate consented both to reproduce posthumously and to support any resulting child.”

         b. This is still a matter of statute and interpretation, not CL. There is no right to receive, it is merely a privilege conferred by statute.

iv. **Children born outside of marriage:** some states require judicial declaration of paternity.
1. UPA says: Parent/child relationship extends to every parent and child, regardless of parents’ marital status. A parental-child relationship is presumed to exist between a father and child if:
   a. (1) when the child is a minor, the father holds out a child as his own and receives that child into his home; or 
   b. (2) father acknowledges paternity judicially… (adopted in 1/3 of states)

III. **Intestate Succession: The Default**
   
   a. Intestacy and Spousal Share statutes involve status-based definitions (i.e. the couple must be married in the eyes of the state’s statute).
      i. See UPC *Intestate Estate* Sections on pg. 72-74.
   
   b. **Surviving Spouse:** single most common statutory provision is to give the surviving spouse ½ if only one child or issue of a child survives, and a 1/3 share if more than one child or one issue of deceased child survive.
      i. **UPC:** if all decedent’s descendants are also descendants of the surviving spouse, and surviving spouse has no other descendant, surviving spouse takes the entire estate.
      
      ii. **UPC & Majority:** if no descendant, spouse shares with decedent’s parents, if any survive. If parents are dead, spouse usu. takes all.
   
   c. **Shares of Descendants:** In all jurisdictions, after spouse’s share is set aside, children and issue of deceased children take the remainder. Sons/Daughters in Law are excluded in virtually all states.
      i. **Per Stirpes:** divide property into as many shares as there are living children of the designated person and deceased children who have descendants living.
      
      ii. **Per Capita w/Representation:** divide decedent’s estate into shares at the generational level nearest decedent where one or more descendants of the decedent are alive and provide for representation of any deceased descendant on that level by his or her descendants.
      
      iii. **Per Capita at Each Generation:** equally near and equally dear… Estate is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any.
   
   iv. **Advancements:** at CL, any gifts given to children while parents were alive are considered advancements of a bequest and are taken out of the inheritance. Child had burden of est’ing that the transfer was intended as an absolute gift, not to be counted against the child’s share of the estate. Statute has gotten rid of this practice.
      1. **UPC:** property given during decedent’s lifetime to an heir is an advancement only if decedent declared so in writing or if decedent’s writing indicates the gift is to be taken into account when calculating division/distribution of estate.
   
   v. **Managing a minor’s property:** if both parents die while child is a minor, and no guardian is designated by will, ct will appoint one from nearest relatives.
      1. **Guardianship/Conservatorship:** guardian has the duty of preserving the specific property left the minor and delivering it to the ward at age 18, unless the ct approves a sale, lease, or mortgage. Guardian can ordinarily use only the income from the
property to support the ward; guardian has no authority to go into the principal to support the ward unless ct approves.

2. Custodianship: custodian named in will is given property to hold for benefit of a minor. Custodian has the right to manage the property and to reinvest it, but custodian is a fiduciary and subject to prudent man std of care. Trust is usually preferable when a large amount of property is involved. Child receives property at age 21, but trust may postpone.

vi. Negative Disinheritance: testator cannot alter the statutory intestate distribution scheme w/out giving the property to others. Can’t just say “my son John gets nothing,” must devise entire estate to others.
   1. UPC changes this rule and authorizes a negative will. Barred heir is treated as if he predeceased the intestate.

vii. Half-Bloods: large majority and UPC treat half-sisters/bros as whole-bloods. In some states, half-blood takes half share; and takes only where there’s no whole-bloods of the same degree.

d. Consanguinity: when intestate is survived by descendant, intestate’s ancestors and collaterals do not take. When there is no spouse or descendant, intestate’s property goes to parents (us. & UPC). Siblings are first-line ancestors, and take if there is no surviving spouse, descendant, or parent. Siblings descendants take by representation like the intestate’s descendants would. States differ as to who takes if no first line relatives exist:
   i. Parentelic: intestate estate passes to grandparents and their descendants, and if none to great grandparents and their descendants, and if none to great greats, and so on.
   ii. Degree of Relationship: intestate estate passes to the closest of kin, counting degrees of kinship. Count generations up from decedent to the nearest common ancestor of the decedent and the claimant, then count down to claimant. See table of consanguinity pg. 90.

e. Bars to Succession:
   i. Homicide or fraud may prevent an heir from receiving. What Probate cts can and can’t do depends largely on intent – e.g. if manslaughter was voluntary or involuntary like in Mahoney (141): note determination of intent has lower std of preponderance of evid. in probate, which may result in finding of intent where criminal D pleads to involuntary (no res judicata effect b/c of different stds of proof).
      1. Slayer Statute: state may not have one, then…
      2. Intestacy Statute: follow them and ignore equitable rationale… or
      3. Equity: bars one who commits a crime b/c they shouldn’t profit from it (decision of the probate ct)
      4. Constructive trust: follows statute and equity, by allowing legal title to pass to the heir, but heir is constructive trustee of estate for next of kin.
      5. UPC: treats the killer as predeceasing the victim.
   ii. Other bars to succession include abandonment, adultery, failure to pay support, and abuse.
   iii. Disclaimer: may disclaim inheritance to avoid gift/estate taxes; for emotional reasons; to avoid creditors; to remain eligible for benefits
      1. Troy (151): Medicaid recipient may not disclaim and keep Medicaid benefits. D has a duty to pay hos own way by means
of an inheritance until the resources are exhausted, then to reapply and resume receipt of Medicaid benefits.

2. Att’y may be liable for malpractice for not advising clients of tax advantages of a disclaimer.

IV. Executing Wills & Testamentary Capacity
a. *Mental Capacity Test: Testator must have the ability to know:
   i. nature and extent of testator’s property;
   ii. persons who are natural (biological or status-based) objects of testator’s bounty;
   iii. the disposition testator is making; and
   iv. how these elements relate so as to form an orderly plan for the disposition of the testator’s property.
   v. *Testator must understand the significance of the act! Designated heirs are suspect if they aren’t the natural heirs of the testator.
      1. Testamentary capacity is not destroyed by showing a few isolated acts… unless they directly bear upon and have influenced the testamentary act.
   vi. The fact that a person has been declared incompetent and put under a conservator doesn’t necessarily mean the person has no capacity to execute a will thereafter. However, to draft a will for an incompetent is a breach of professional ethics unless the att’y determines competence, relying on her own determination of the client’s capacity.

b. Strittmater (159): (1) Was she insane; and (2) Did that insanity cause/bear upon and influence the act?
   i. Judge assumed there was no rational basis for her hatred of men, but fn is flawed b/c it assumes one must be insane if she thinks something that is outside of the norm…
   ii. Focus was wrong: rather than looking at hatred of men, ct should have focused on appreciation of designated beneficiary. Looked at wrong motivation…
   iii. This is per se insanity… Today, cts look at rational basis (even if you leave all your money to the cat).

c. Honigman (166): a will is bad when its dispository provisions were or might have been caused or affected by insane delusion.
   i. Ct looked at length of marriage, fact that their business was run successfully for many years, and that H stated he was sick in the head… (Fairness + Societal Norms = Foundation of findings)

d. Undue Influence: it must be proved that (1) the testator was susceptible to undue influence, (2) that the influencer had the disposition and the opportunity to exercise undue influence, and (3) that the disposition is the result of the influence.
   i. Burden of Proof: Where (1) a person in a confidential relationship (e.g. attorney or sexual) (2) receives the bulk of the testator’s property (3) from a testator of weakened intellect, the burden of proof shifts to the person occupying the confidential relation to prove affirmatively the absence of undue influence.
   ii. Sex:
      1. Moses (188): influence factors included sexual relationship, younger man of 15 yrs, man was att’y… Dissent said she was a businesswoman, voiced her intent, age was not so great, etc.
2. *Kaufmann* (193): undue influence was found b/c of history of dominance and subservience by gay lover. Had they been straight and married, survivor would have gotten his intestate share even if will was invalid. Should have gotten a current affidavit and set up an inter vivos trust…

iii. **Drafter of Will:** presumption of undue influence when an atty drafter receives a gift, rebuttable only by clear and convincing evidence, except where the atty is related to the testator.

e. **Sham Wills** – *Fleming* (414): testator didn’t really mean to leave the girl his money, he just wanted to get in her pants…

f. **Fraud:** in the inducement (213) and in the execution (215). Both forms contain intentional misrepresentations, with the purpose of influencing the testator, and but for the misrepresentations the testator would not have otherwise left the money to the misrepresenting party.

   i. Remedy for fraud in the inducement is to form a constructive trust
   
   ii. *Father Divine* (215): constructive trust will be erected whenever necessary to satisfy the demands of justice.

g. **Tortious interference w/expectancy:**

   i. **Anna Nicole Smith** – gross interference w/intent of testator by old man’s atty (intentional interference (draining assets), tortious conduct (falsifying/destroying doc’s, but for…).
   
   ii. *Cf. Fleming*: supposed devisee has action for malpractice against atty who drafted the sham will, not a tortious interference action. Difference is that a sham will doesn’t create an actual expectancy.

h. **Avoiding Will Contests:** to escape will contest problems that the will was not the actual intent of the testator:

   i. Have testator write a current affidavit in own words as to why will is designating beneficiaries as it is.
   
   ii. Put in a No-Contest clause: if done properly, they may prevent contest. One must receive something from the estate, clause will make them forfeit it if they contest.
   
   iii. As soon as you get more than your intestate share and you are drafting the will, suspicion is cast. Could give inter vivos gifts to prevent contests.

V. **Executing Wills & Statutory Requirements:**

a. **Attested Wills:** document may be a will if it distributes property, names an executor or personal representative, or revokes a prior will. (See 243 for proper method of execution)

   i. **Writing/Signature/Publication**

      1. **UPC:** (1) must be a writing; (2) two witnesses, who may be interested; (3) *testator must sign/acknowledge signature in witness’s presence on each page (anything in testator’s handwriting is valid if intended to be signature).

      2. **Wills Act/Other statutes:** (1) must be a writing; (2) two witnesses must be disinterested and sign in testator’s presence, (if witness is not disinterested, purging statutes operate to give person an intestate share only (or share from previous will)); (3) *testator must sign/acknowledge signature in witness’s presence at foot of document (anything in testator’s handwriting is valid if intended to be signature).
a. Line of Sight Test (testator must be able to see witnesses sign if he were to look) vs. Conscious Presence Test (witness is in the presence of the testator if testator comprehends that the witness is in the act of signing). UPC dispenses w/requirement that witnesses sign in testator’s presence at all.

b. Testator who is unable sign must ask for assistance or otherwise affirmatively allow help in signing

ii. Interested Witnesses: Purging statutes purge an interested witness only of the benefit the witness received that exceeds the benefit he would have received had the will not been executed (extra benefit).

iii. Harmless Error: (UPC) though doc may not be in compliance, it may be treated as if it was in compliance if the proponent proves by clear and convincing evidence that decedent intended the doc to be the will, revocation, addition, or revival of a will.

1. Cf. Pavlinko: H signed W’s will and vice versa. Does not meet statutory requirements and is invalid.

2. Substantial Compliance: clear and convincing evidence that document was in substantial compliance w/statutory requirements satisfies statute...

b. Unattested Wills:

i. Holographic Will: (UPC) may be valid whether or not witnessed, if the signature and material portions of the document are in testator’s handwriting.

1. Holographs may be written on a preprinted will form if the material portions of the document are handwritten.

ii. Extrinsic Evidence: Intent that the doc constitutes testator’s will may be established by extrinsic evidence, including, for holographic wills, portions of the doc that are not in testator’s handwriting.

c. Will Components:

i. Integration of Wills: all papers present at the time of execution and intended to be part of the will are integrated into the will. Atty should have papers fastened together and have testator sign/initial each page.

ii. Republication by Codicil: will is treated as reexecuted as of the date of the codicil. Applies only where updating the will carries out testator’s intent. Republication applies only to a prior validly executed will.

iii. Incorporation by Reference: any writing in existence when a will is executed may be incorporated by reference if the language of the will manifestst this intent and describes the writing sufficiently to permit its identification.

1. Most States: (1) Doc being inc’d must exist at time of execution ceremony; (2) will must indicate an intention to incorporate; (3) will must refer to doc sufficiently to allow identification; (4) will must say doc is in existence (not necessary under UPC).

2. Two step process for incorporating a typed doc to the written holographic will (if state allows holographs):

a. Look only at the handwriting to see if there is testamentary intent and other holographic will requirements. If they are met, then
b. Look to separate paper to see if it incorporates a typed or other handwritten doc or portion by reference. If it does, then it is included as a part of the will.

iv. Johnson (311): handwritten codicil republished an otherwise invalid typed will by incorporating the typed doc by reference, thus giving effect to the intent of the testator. A validly executed codicil operates as a republication of the will no matter what defects may have existed in the execution of the earlier doc, that the instruments are inc’d as one, and that a proper execution of the codicil extends also to the will.

1. In Johnson, to follow the doctrine, “constructively sever” the doc’s and incorporate by reference! Fraud is less likely w/one piece of paper than in the case of 2 or more papers…

v. Acts of Independent Significance: if beneficiary or property designations are identified by acts or events that have a lifetime motive and significance apart from their effect on the will, the gift will be upheld (e.g. will gives car to son, but car will change over time, so gift is not of specific car, but at testator’s death is upheld).

d. Will Construction:

i. Extrinsic Evidence (mistakes in drafting; ambiguity; correcting errors): the plain meaning in a will cannot be disturbed by the introduction of extrinsic evidence that another meaning was intended.

ii. Ambiguities: latent doesn’t appear on the face of the will but appears when the terms of the will are applied to the testator’s property or designated beneficiaries. Patent appears on the face of the will.

1. Equivocation: where a description fits two or more external objects equally as well, allow extrinsic evidence.

2. Misdescription: a mere false description does not make the instrument inoperative. A false description of property or of the intended recipient may be stricken.

3. Russell (417): ct ignored intent to give ½ estate to dog and gave the portion to testator’s niece. Held not to be a precatory trust for the dog after accepting extrinsic evidence to show intent of testator.

iii. Correcting Mistakes:

1. Erickson (427): will made two days before marriage, statute says subsequent marriage acts as revocation w/out provision for subsequent marriage. Held evid of drafter’s mistake should be admissible to est a written bequest should be admitted to probate b/c disposition provided by the will would have been in accord w/decedent’s intent.

2. Test: (1) clear and convincing evidence that drafter made error and (2) that testator wanted something else (gets around the mistake and changes remedy from malpractice). Cf Mahoney (410), where it was testator’s mistake; and Pavlinko, where error in execution meant will was invalid, as opposed to an error in drafting.

iv. Changes in condition or status (death) of beneficiaries: gifts are void/lapse if beneficiary predeceases testator unless (1) testator otherwise specifies; (2) anti-lapse statute applies; or (3) it can be construed as a class gift. CL puts specific devises to predeceased individuals in the
residue. If residue lapses, heirs take by intestacy (e.g. Russell at 417). If member of class dies, remaining class members divide the class gift.

1. No residue-of-a-residue Rule: if a share of the residue lapses (i.e. 1 of 2 residuary devisees predecease testator), the lapsed residue passes by intestacy to testator’s heirs, rather than remaining residuary shares.
   a. Argue it was a class gift for residuaries to keep it

2. Allen (441): “unto my living bros and sisters…” mean surviving at death or at time of execution? Means at death b/c of phrase “share and share alike.” Words of survivorship…

3. Jackson (446): whether substitute was provided in will providing for predeceased wife “and her heirs.” Ct made the ‘and’ an ‘or’, making wife’s children (from other man) the substitute. Note estate would have escheated otherwise.

4. Class Gifts – Dawson (449): substitute heir is someone who is specifically designated to take a gift if the first named beneficiary predeceases. This was not a class b/c (1) not all members were named; (2) testator knew how to make a class gift and didn’t; (3) testator gave specified shares to named beneficiaries; (4) didn’t call it a “class”

5. Moss (454): when testator gives property to A and a class (e.g. the children of B) in equal shares, he intends that the whole of the property shall pass if any one of B’s children survive him, even though A does not survive. Gift doesn’t have to be equally distributed among the class members.

v. Changes in property: what if devised property is no longer in testator’s possession at his death? To adeem is to take away…

1. Ademption by Extinction (CL): no gift b/c the specific gift can’t be devised, there’s no carryover or gift succession. Focus on actual existence of devised property, rather than intent of the testator. (Wasserman, 459).
   a. UPC allows for replacement assets (if BMW is bought to replace Ford after devising Ford, BMW can be devised as a replacement gift). Arguments arise when two replacements exist, argue replacement cost, type of use, etc.

2. General Gift (of specific cash value): must be satisfied (e.g. sell other property to get sufficient cash to complete the devise)

3. Demonstrative Legacies (hybrid, e.g. “$10k from XYZ stock”): if enough stock exists, sell it, otherwise, sell other assets to gain the cash and complete the gift.

4. Beneficiary isn’t entitled to specifically devised property or value of such property if testator gave the property away before dying. Beneficiary is entitled if she sold it, it was stolen, or it was destroyed.

5. UPC – Give Specific Devisee:
   a. Any remaining balance on the purchase price of the specific property sold;
   b. Any unpaid amt of condemnation award for the property;

ADEMPTION
CL: presumption in favor of ademption.
Majority: CL + 5 exceptions
Minority: presumption against ademption + exceptions and replacement.
c. Any unpaid fire/casualty insurance proceeds after property has been destroyed;
d. Any property owned by the testator as a result of f'closing a mortgage devised to the specific devisee; and
e. The sale price of specifically devised property sold by a conservator.

e. Revoking Wills: (1) execute a 2nd will and execute it properly, use language revoking previous will; and/or (2) testator may destroy will. Intent to revoke is always necessary!
   i. Revocation by Entirety
      1. By subsequent instrument: a subsequent will that does not expressly revoke the prior will but makes a complete disposition of the testator’s estate is presumed to replace the prior will and revoke it by inconsistency. If the subsequent will does not make a complete disposition of the testator’s estate, it is not presumed to revoke the prior will but is viewed as a codicil.
      2. Revocation by Inconsistency: subsequent will that doesn’t expressly revoke the prior will but makes a complete disposition of the estate is presumed to replace the prior will and revoke it by inconsistency. It is viewed as a codicil if it doesn’t make complete disposition of the estate.
      3. By physical act: burning, tearing, cancelling (CL – “alter words”; UPC – anywhere on will)
         a. Harrison (277): atty tore up will, gave it to testator, and could not be found upon his death. Ct said rebuttable presumption of revocation (intent to revoke) existed.
         b. Majority: will that is lost/destroyed w/out testator’s consent or w/testator’s consent but not in compliance w/revocation statute, can be probated if its contents are proved by clear and convincing evidence.
         c. Minority: a lost/destroyed will cannot be probated unless it was in existence at testator’s death and destroyed thereafter or was fraudulently destroyed during testator’s life.
      4. By operation of law: divorce revokes a gift (only if there’s a property settlement in some states)
   ii. Partial Revocation by Physical Act: UPC – “a will or any part thereof is revoked by performing a revocatory act on the will”. Several states only allow revocation by act of revocation, i.e. it can be revoked in part only by a subsequent instrument.
   iii. Dependent Relative Revocation: If testator purports to revoke his will upon a mistaken assumption of law/fact, revocation is ineffective if testator wouldn’t have revoked his will had he known the truth.
      1. Carter (286): 2 wills, one older and attested, but with every property disposition marked through; the other newer and wrapped together and unattested. Presumed revoked and new will validated b/c testator assumed it would be valid if found wrapped w/the old will. Note that named beneficiaries in both wills wouldn’t take under intestacy.
a. Ct should have found it to be a nonfinal draft and reached the same conclusion w/out going through major assumptions and DRR…

iv. **Revival:** Testator executes will 1 and subsequently executes will 2, which revokes will 1 by express clause or inconsistency. Testator later recokes will 2. Is will 1 revived?
   1. Few cts: will 1 is not recoked unless will 2 remains in effect until testator’s death.
   2. Majority: will 2 legally revokes will 1 at the time will 2 is executed.
      a. Majority: upon recovation of will 2, will 1 is revived if testator so intends. Testator’s intent may be shown from circumstances of will 2 revocation or from oral declarations that will 1 is to take effect.
      b. Minority: a revoked will cannot be revived unless reexecuted w/testamentary formalities or republished by reference in later executed testamentary writing.

VI. **Family Protection: restrictions on power of disposition**

a. **Protecting the Spouse:** intent is not always dispositive, public policy demands that certain people be entitled to certain portions of certain people’s property. Even if you wanted to, you could not completely disinherit your spouse.

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i. Rights of surviving spouse to support:
   1. Soc. Security cannot be contracted around. Govt policy demands who recipient will be.
   2. Pensions are like soc security, but there is some leeway. Divorce doesn’t change it, but remarriage does.
   3. The Homestead gives the spouse a right to the home free of creditors. This also cannot be contracted around…
   4. Certain Pers. Prop. Such as furniture under a certain value limit is free from creditors claims.
   5. Family Allowance allows for maintenance and support of the surviving spouse for a certain §’ory time period.
   6. Dower/Curtesy allows widows to automatically get a life estate in 1/3 of the husband’s property. Dower issue is essentially dead b/c the elective share in each state is going to be the better option except for in only a freak situation.

ii. **Elective Share:** surviving spouse can choose to take under decedent’s will or can renounce the will and take a fractional share of decedent’s estate. Share varies widely, UPC bases the amt on a sliding-scale percentage dependent on duration of marriage. No elective share exists in community property state or in GA.
1. **Sullivan** (500): Bright Line Rule: property that should be treated as part of the estate of the deceased, includes assets of an inter vivos trust created during the marriage by the deceased spouse over which he or she alone had a general power of appointment, exercisable by deed or by will. It’s an issue of control! ↓

2. **Illusory Transfer Test**: an illusory revocable trust ($$ put in trust in attempt to keep it from spouse) is not totally invalid, but merely counts as part of the decedent’s assets subject to the elective share; trustee may have to contribute some of the trust assets to make up the elective share.

iii. **Waiver (Pre-Nup)**: spouses can waive their right to spousal share. It is presumed valid in the absence of fraud. Party attacking waiver has burden of showing fraud, duress, misrepresentation.

1. What if, in a SP state, a couple enters into a pre-nuptial agreement? **Garbade** (518): Wife waives elective share in pre-nup, but she wants to void the pre-nup and take the elective share, which would be bigger… Presumption of legality, W has burden of est’ing fraud, duress, misrepresentation, etc., but she couldn’t do it here.

iv. **Grieff**: “the contestant of a prenup must establish a fact-based, particularized inequality before a proponent of a prenup agreement suffers a shift in the burden to disprove fraud or overreaching.”

1. Particularized inequality: lack of access to an atty; sophistication of H vs. W; etc. **Garbade** et recognizes that there is an inequality, but absent fraud, it’s okay. It’s hard to find a prenup that is not characterized by inequalities btw the two parties. **Grieff** est’s a lower burden…

2. Sort of makes the wealthy party take fin’l responsibility for the marriage, instead of screwing over the poor girl or boytoy… It idealizes what marriage should be – a sharing of assets.

v. **Community Property**: (8 states) all property and earnings obtained during the period of marriage is the property of H & W equally, except for inheritance and gifts given to one spouse. Each spouse owns an undivided ½ share in all the property while they are alive. Deceased spouse can will his/her ½ as they wish, otherwise, the surviving spouse will not only keep his/her ½ share, but will take his/her intestate share of the deceased spouse’s ½ share.

1. **Widow’s Election**: involves a will executed by H devising all community property in trust to pay income to his wife for life, w/remainder to others on wife’s death, and requiring the wife to elect btwn surrendering her half of the community property and taking under H’s will. It is now common for H & W to transfer all the CP to a revocable trust, paying income to them both for their joint lives and for the life of the survivor w/remainder to their children or others. The revocable trust becomes irrevocable upon death of one of the spouses.

vi. **Separate Property**: Separate Property unless jointly acquired/held, the property remains separate. So surviving spouse can choose an elective share instead of what he/she would get under the will. Most states provide for an elective share of 1/3 of everything, not just the property acquired during marriage. GA is the only state that allows disinheriting
of spouse. No sharing of earnings; but entitled to share… but a share of what?

1. 1969 UPC: “augmented estate” – broadens the definition of property that is subject to the spousal share, but makes deductions in amounts given inter vivos and in life ins.
2. 1990 UPC: “augmented estate,” still includes transfers during marriage where transferor maintained control, but also includes such transfers before marriage. Also, rather than deducting life ins proceeds from the Est, it augments the Est by the amts of life ins given to persons other than the surviving spouse. Further prevention of disinheritance!

b. Multi-State Couples: The case where people move from community property state to a separate Property state, and vice versa.
   i. Three choices of law to be considered:
      1. Law of the situs of the land controls problems related to the land.
      2. Law of where the couple is domiciled at the time the personal property is acquired controls the characterization of the property.
      3. The law of the couple’s domicile at the death of one spouse controls survivorship rights.
   ii. Separate Prop → Community Prop: If all property was acquired in SP state, then it remains SP. If wife was unemployed, she is only entitled to her statutory share while in the SP state. When they move to CP state and suppose H ceases to earn, she neither has an elective share nor does she get her CP ½. To cure that prob., several states have the principle of quasi-CP, which gives her ½.
   iii. Community Prop → Separate Prop: Each spouse generally retains the preexisting property rights, i.e., CP continues to be CP.

c. Pre-marital wills: (UPC) omitted spouse gets intestate share as to the portion of the estate that is neither devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor devised to a descendant of such child. Unless will was made in contemplation of the marriage; the will is intended to be effective notwithstanding any subsequent marriage; testator provided for spouse in lieu of testamentary provision.
   i. Shannon (530): “Exclusionary clauses in wills which fail to indicate the testator contemplated the possibility of future marriage are insufficient to avoid the statutory presumption.”
      1. Omitted spouse shall receive a share in the estate consisting of ½ community property share; ½ quasi-community property share; intestate share of the separate property. Spouse does not receive if testator’s failure to provide in the will was intentional…

d. Protecting Children: LA is the only state that prohibits a parent from disinheriting certain children.
   i. Accidental Omissions: children are generally protected only where the omission was accidental. Statutes protect:
      1. Children born after execution of the will (UPC); or
      2. Children born after or before execution and not named (some states); or
      3. Children mistakenly believed to be deceased (UPC).
   ii. Azcunce (537): Will est’d trust for W and 3 then-living kids, no provision for after-born kids. Codicil was created after 4th child was born and still
no mention of that child. Probate ct appointed guardian ad litem to
protect the interests of the named children and challenged 4th child’s
interest.

1. “Presumably if the testator had wished to provide for the 4th
child, he would have done so in the codicil as the child had been
born by then. B/c he did not, the child was, in effect,
disinherited, which the testator clearly had the pwr to do.”

iii. Espinosa [Azunce cont’d] (540): The 4th child brought malpractice action
against the draftsman of the codicil b/c her father was not informed that
she would be excluded from inheritance. Father drafted a new will
providing for the 4th child, but never signed it due to a dispute w/his wife
about available assets.

1. “The doctrine of republication by codicil is not applied
automatically, but only where updating the will carries out the
testator’s intent.” (302). However, the ct held the 4th child had
no standing to sue the draftsman for omitting her from the
codicil b/c her name is not mentioned in the codicil! “If there
ever was a case where a person was wronged, but allowed to fall
through a crack in the legal system, this is the case.” Patricia has
no remedy.

2. Cf. McAbee (544): the difference here is that the daughter was
named in the will and, thus, had standing to sue for malpractice.

iv. Intentionally Omitted Children: How do you intentionally disinherit
children (assume no after-born children)? Omit them from the will
(silence) if the statute only protects after-born children. Otherwise, you
have to name them w/intent to disinherit. If you want to disinherit all
after-born children as well, to overcome the presumption that such a
child is included, you can transfer your assets b/c the statutes only apply
to probate assets.

v. Pretermitted Child Statutes:

1. MO-Type: benefits children not named or provided for in the
will. It must appear from the will itself that omission of the child
or other heir was intentional. Extrinsic evidence is inadmissible.

2. MASS-Type: child takes unless it appears that such omission
was intentional and not occasioned by any mistake. Extrinsic
evidence is admitted to show both the presence or absence of
intent to disinherit.

VII. Will Substitutes: Nonprobate Transfers

a. Contracts w/POD’s

i. Wilhoit (331): The traditional rule (still followed in some states) is that
POD designations in contracts other than life insurance contracts are
invalid. Case struck down a POD designation in a contract of deposit b/c
it is a testamentary act not executed w/the formalities required by the
Wills Act.

ii. UPC: authorized POD designations in all contracts, and >½ states
followed. “A provision for a nonprobate transfer on death in a (contract)
is non testamentary.”

b. Multiple party bank accts: include joint and survivor acct, POD acct, agency acct,
and a savings acct trust. If an agency acct is intended, survivor is not entitled to
the proceeds of the acct, they belong to the depositor’s estate.
c. **Joint tenancies** (or tenancy by the entirety): upon death of one joint tenant or tenant by entirety, survivor owns the property absolutely. Joint tenancies cannot be revoked by the transferor (only transferor’s ½ may be given), while POD designations and (under UPC) joint bank accts can be changed/revoked.

**VIII. Trusts:**

a. Device where a trustee manages property for one or more beneficiaries.

b. **Trust Requirements**

   i. **Valid & Lawful Purpose:** There must be a purpose for the trust. Managing property for the purpose of benefitting someone else. Can be any lawful purpose. Can’t hide assets from spouse, avoid rule against perpetuities, encourage discrimination, discourage marriage, etc.

   ii. **Settlor & Transfer/Present Declaration** (557): trust may be created in settlor’s life (inter vivos by declaration or deed of trust) or by will at death

   iii. **Trustee:** must accept and have duties; ct may appoint if one is not named, but settlor intended to create a trust.

   iv. **Intent:** grantor must merely intend to create a trust relationship (i.e. intend for property to be conveyed to one for the use and benefit of another).

   v. **Property:**

      1. **Source:** Settlor… need intent plus delivery if not trustee

      2. **Type:** known & identifiable; in existence. Can be anything, any interest in property.

         a. **Brainard:** (586) “No trust arises when the interest comes into existence in the absence of a manifestation of intention to make the trust come into existence at that time.” Silence will not suffice for such manifestation. Thus, here the trust did not attach until appellant credited the profits to the beneficiaries on his books of acct.

         i. **Tax issue:** if the trust arose after the profits came into existence, then the profits are taxable to him… The key is that the property must be in existence at the time the trust is made for it to be valid! If settlor gives intent & delivery, but property is not in existence, but it does come in to existence later, the trust is then valid.

   vi. **Beneficiaries:** must be definite, identifiable, & have legal standing

   vii. **Device:** can be

      1. **Oral** (if inter vivos transfer of personal property and if it was a declaration – not a deed – of trust) or

      2. **Written** (if real property, have to take into acct the § of Frauds; if it’s testamentary, has to meet state Wills Act) agreement

   c. **Types of Private Express Trusts:**

      i. **Discretionary Trusts:** in a mandatory trust, trustee must distribute all the income. In a discretionary trust, trustee has discretion over payments of either the income or the principal or both.

         1. **Creditors:** Although a creditor cannot by judicial order compel the trustee of a discretionary trust to pay him, a creditor may, in some states, be entitled to an order directing trustee to pay creditor before paying beneficiary. Trustee need not pay any
part of the trust to beneficiary, but if trustee does, creditors stand in the beneficiary’s shoes.

ii. Spendthrift Trusts: beneficiaries cannot voluntarily alienate their interests nor can their creditors reach their interests.

d. Purpose & Trustee Requirements:
   i. Declaration of Trust: Settlor declares that he holds certain property in trust:
      1. Settlor is trustee
      2. no written instrument is necessary, can do it orally if personal property
      3. real property requires a written trust.
   ii. Deed of Trust: settlor transfers property to another person as trustee
      1. Needed if trustee and settlor are different people.
      2. Deed of trust must be delivered to trustee
      3. One cannot be a sole trustee and sole beneficiary…
      4. If settlor intends to create a trust, but fails to name a trustee, ct will appoint one. Intent is the key, language doesn’t matter.

e. Revocable Trusts:
   i. Deed of Trust: trust settlor transfers legal title to property to another person as trustee pursuant to a writing in which settlor retains the power to revoke, alter, or amend the trust and the right to trust income during his lifetime. Upon settlor’s death, assets are distributed or held in further trust for beneficiaries.
   ii. Declaration of Trust: settlor declares himself trustee for benefit of himself during lifetime, w/remainder to pass to others at his death.
   iii. Farkas (352): Is this really a trust or is it a will? Farkas had four stock certificates issued in his name as trustee for Wms, and he executed four separate declarations of trust in which he declared he was holding said stock in trust w/Wms as the beneficiary.
      1. Declaration of Trust: interest goes to a beneficiary and trustee manages the funds. Trustee is the settlor of the trust, so it looks like a will. Here, Farkas = trustee = had fiduciary duties to beneficiary… of course, if Wms (beneficiary) had gone to Farkas and said you are violating your fiduciary duty, Farkas would have simply revoked it.
      2. Upon execution of the trust instruments, did Wms presently acquire an interest in the subject matter of the intended trusts? Any interest, no matter how infinitesimal!
      3. Did Farkas retain such control over the subject matter of the trust as to render said trust instruments attempted testamentary dispositions? The rights to receive cash dividends, to change beneficiary or revoke, to retain proceeds of sale/redemption of trust property… Is this not complete control!?
      4. Ct found the declarations were valid inter vivos trusts and were not attempted testamentary dispositions… they have a “testamentary look.”

f. Resulting Trust: Where an express trust makes an incomplete disposition, or where one person pays the purchase price for property and causes title to the property to be taken in the name of another person who is not a natural object of the bounty of the purchaser, this is called a “purchase money resulting trust.”
[E.g. O owns property, sells it to A who puts the deed in B’s name. Not assumed to be a gift, so B holds title in resulting trust for A.]

i. Clark: (598) Settlor left property in trust to his “friends” that the trustee would select. Problem is that the word “friend” has no identifiable limit. The beneficiaries are not definite, have no statutory meaning, and there’s no case law definition.
   1. Where a gift is impressed w/a trust ineffectively declared and incapable of taking effect b/c of the indefiniteness of the trust, the donee holds the property in trust for the next taker under the will, or for the next of kin by way of a resulting trust. Trustees therefore hold title to the property to be disposed of as part of the residue. (Clark should have named names…)

g. Honorary Trust: beneficiary can’t force trustee to uphold his duties, but we rely on the trustee’s good will to carry out the testator’s wishes. The ct will uphold the validity of a gift for the purpose designated, where the person to whom the power is given is willing to carry out the testator’s wishes… it puts moral trust in the Trustee.
   i. Searight’s: Beneficiary of trust is a dog… dog can’t come to court and enforce her rights, so she doesn’t really have legal standing, even though she’s definite and identifiable…
      1. The trustee knew of her designation and duties and willingly accepted them in Searight’s.
   ii. Honorary Trust is different from a Precatory Trust b/c an Honorary is legally enforceable while a Precatory is solely a moral obligation. Honorary Trusts are not widely recognized in the US, and are generally held valid in three circumstances:
      1. Taking care of tombstones/grave sites
      2. Maintenance of specific animals
      3. Religious funerary masses to honor the deceased testator

h. Oral Intervivos Trusts of Land: usually statute of frauds prevents, but ruling of constructive trust
   i. Hieble: (609) dying mother transferred property to son & daughter in joint tenancy contingent on them giving their shares back if she survived the cancer; then mother recovered and wanted her 100% ownership back. Daughter gave her share back, but son refused. This is an oral promise regarding land…
      1. Issue is whether equity should impose a constructive trust where a donee who by deed has rec’d really under an oral promise to hold and reconvey to the grantor has refused to perform his promise.
      2. Even though the Statute of Frauds is not satisfied, the ct held it was a constructive trust. Even absent fraud, when property is acquired and retained, thus constituting unjust enrichment, a constructive trust is merited.
      3. Unclean Hands? In Pappas (613), donee conveyed the land to his son in light of an impending divorce to avoid his wife getting to it. Ct held no constructive trust b/c unclean hands due to misrepresentation. No evidence of such misrepresentation in the Hieble case.
   ii. Olliffe (614): another way to prevent unjust enrichment is to simply invalidate the trust. Couldn’t be done in Hieble b/c that was a secret
trust, while *Olliffe* was semi-secret. Though there was no proof that the trustee Reverend would’ve been unjustly enriched, the fact that the beneficiaries were not named was enough. The ct will assume the worst instead of doing a case-by-case analysis and looking at extrinsic evidence. This distinction btwn secret & semi-secret trusts is no longer done in many jurisdictions and a constructive trust is often made.

i. **Support Trust:** A trust designed to support the beneficiary. It is Mandatory in that the trustee must make payment to beneficiary, but Discretionary in that trustee determines how payments are made. However, the beneficiary must be allowed to live in a manner in which the beneficiary is already accustomed, so the trustee doesn’t have absolute discretion. It’s like a Spendthrift in that beneficiary can’t alienate the interest and creditors can’t come in and take the money. However, there’s no limit to what the trustee can give the beneficiary in a spendthrift. In a Spendthrift, a beneficiary can live a life of luxury, while in a Support, they cannot (unless that’s the life they are already accustomed to).

   i. Support Trusts and Medicaid (648-50): Self-Settled Trusts: taking your own money, and put it in trust for your own benefit. The proceeds from such a trust can be accessed by Medicaid. Spendthrift clauses are inapplicable to Self-Settled Trusts. Even if it’s a Discretionary Self-Settled Trust, and trustee has to determine the money distributed, then Medicaid can still access the funds b/c the if it’s revocable, the settlor has complete control over the corpus of the trust and all the income. If irrevocable and Discretionary, Medicaid is viewed as a necessity, so the max amt that could be attributed…

   ii. 3rd-Party Est’d Trusts: beneficiary has no control over $…

j. **Modification & Termination of Trusts:**

   i. A trust may be terminated if (1) all of the beneficiaries agree; (2) none of the beneficiaries is under a legal disability; and (3) the trust’s purposes would not be frustrated by doing so (focus on settlor’s intent).

   ii. Ct will not permit trustee to deviate from the terms of the trust merely b/c such deviation would be more advantageous to the beneficiaries than compliance w/such direction… Modification would be outside Settlor’s intent. The only purpose here is to make the trust more advantageous to the beneficiaries… so no modification allowed.

      1. Rebuttal argument would be that Settlor wanted to provide whatever is best for his successors – not that per stirpes was the only way for his successors to get the money. That’s what his intent was!

   iii. *Stuchell* (652): 2 beneficiaries agreed to modify the trust b/c one of their sons was disabled and eligible for Medicaid. She didn’t want the funds of the trust to be applicable to him. She wanted to set up a Discretionary Supplemental Needs Trust w/a spendthrift trust b/c it was going to just give him a ¼ interest in fee simple, which would make him ineligible for Medicaid.

   iv. *Brown* (657): Trust provides for the education of the children and for life-long income for the beneficiaries through mgmt and discretion of the trustee. It is not a support trust b/c the trustee must pay all of the trust income to the beneficiaries, not just paying amt necessary for support. The trust provides for the “care and maintenance and welfare of the lifetime beneficiaries so that they may live in a style and manner to which they are accustomed, for and during the remainder of their natural
lives” after their education has been provided for. Since trustee must, at the very least, pay all trust income to beneficiaries, trust is not a support trust. [If it’s a small trust, the trustee is the one who benefits b/c he’s going to continue getting fees.]

1. Settlers could still achieve their objectives, despite the court’s holding, by assigning it to their children.

v. Removal of Trustee: UTA (663) – ct may remove trustee if (1) he has committed material breach of trust; (2) lack of cooperation among cotrustees impairs administration; (3) poor investment decisions; (4) if removal would be in best interests of beneficiaries.

IX. **Powers of Appointment:**

a. allowing flexibility in trust administration.
   
i. **General Power:** one in which a donee can give the property to himself, his creditors, his estate, or creditors of his estate.
   
   ii. **Special Power:** one in which the donee is limited to a particular class of objects. Power is not beneficial to the donee and cannot be reached by his creditors.
   
b. **Stuchell:** To avoid the Medicaid resource problem created by the trust remainderman’s incapacity, even if the settlor had no way of knowing that he would be mentally retarded, he could have given grandmother a specific power of appointment so she could determine how her grandchildren would get the gift. General power is not warranted here, b/c she could exercise the power to give herself the money, rather than the children. Moreover, her creditors could access it if she did exercise such power.
   
c. **Irwin Union Bank** (668): beneficiary has no control over trust corpus until he exercises his power of appointment and gives notice to trustee that he wishes to receive his portion of the corpus. Until such exercise is made, trustee has absolute control and benefit of the corpus w/in the terms of the instrument. *(Cf. O’Shaughnessy)* What would justify similar treatment of the property interests at issue in the two cases? What would justify different treatment?
   
i. General power of appointment, so he could just take the money. Creditors are entitled to the money if he exercises such power. He has no control over the trust corpus until he exercises his power of appointment and gives notice to the trustee that he wishes to receive his % of the corpus. Until such exercise is made, trustee has absolute control and benefit of the corpus w/in the terms of the instrument.
   
   ii. What arguments can be made in support of the holding, apart from common law dogma (b/c it’s a mere expectancy, the property no longer exists until power is exercised)?
      
      1. It’s in accord w/trustee’s wishes; if we let wife & creditors get money now, the slippery slope would begin, and where would it all end; estate and gift tax issues.
   
d. **Seidel & Werner** (683): What would Anna and Frank take under the separation agreement? What would they take as takers in default of appointment? How would your analysis change if they died before they reached the age of 21? If they died during Steven Werner’s lifetime? Why is the separation agreement not a release of Steven Werner’s general testamentary power of appointment? As Anna and Frank’s lawyer, what could you have done to insure that the agreement would be treated as a release?
      
i. They were greedy, so ct ruled against them…
X. **Charitable Trusts:**

a. Charitable Trust must have a

   i. Charitable public purpose (e.g.,
      1. Relief of poverty
      2. Advancement of education
      3. Promotion of health
      4. Gov’t or municipal purpose; and
      5. Purposes beneficial to the community); and

   ii. Advance/benefit interests of an indefinite group.

b. *Shenandoah* (859): By plain language of doc, testator intended it to be a charitable trust to provide for education of every student in a school. But ct thought surrounding circumstances didn’t make it one…

   i. “If a large sum of money is given in trust to apply the income to every inhabitant of a city, whether rich or poor, the trust is not charitable, since although each inhabitant may receive a benefit, the social interest of the community as such is not thereby promoted.”

   ii. Gifts which are mere exhibitions of liberality and generosity, w/out regard to their effect on the donees (i.e. w/out consideration of donees’ need), are not charitable.

c. **Cy Pres – Modification of Charitable Trusts:** when the purpose set forth in the trust is no longer practical or possible, beneficiaries can use the proceeds for another charitable purpose.

   i. Uniform Trust Act: “a ct may apply cy pres if a particular charitable purpose becomes unlawful, impracticable, impossible to fulfill, or wasteful.” Such application requires balancing of the needs of society against an assessment of settlor’s probable intent.

   ii. *Neher* (870): Gave a house in trust to community w/direction for said property to be used as a hospital. Ct can reform the charitable trust b/c the gift was made to the community, not the hospital. Testator had two wishes: to make a memorial to her husband and to make a hospital. Community said hospital was not feasible.

      1. The hospital provision lacked particular instructions, ct held the paramount intention was to give the property for any charitable purpose, rather than a particular charitable purpose (almost as if “for a hospital” was just a suggestion).

      2. A grafted direction after an intent to give may be ignored if the direction was impracticable.

   iii. *The Buck Trust* (872): Money was left to Marin County – the wealthiest suburb of San Francisco – to be used only in that county for the needy, religious, educational purposes. Trust grew from $9m to $300m and fdn wanted to expand its use to help out people in the surrounding area. Fdn said trust’s growth was a posthumous surprise, and testator would’ve wanted the money to be distributed more broadly. Ct ordered creation of a new fdn and designated research institutes, schools, and drug treatment programs as beneficiaries. Commentary argued judge violated basic principles of private philanthropy b/c there was no evidence of intent to help the specific beneficiaries he chose…

d. *Barnes Fdn* (879 & handouts): Fdn wants to move art collection 10 miles to Philly and to build a new bldg w/the help of pvt donors, and they also wanted to increase the number of trustees so the pvt donors could gain some control. Fdn wants to insure that the collection continues, but they are out of money, so it is
the only way to achieve that. However, the fundamental purpose of the trust was argued to be for education of the common people and the settlor disdained Philly’s high society – it was argued that the art shouldn’t be moved, b/c it was currently in a poor black community.

i. Balance Settlor’s intent with charitable purpose. Atty gen brought suit b/c it had to be open more than one day per week to retain its charitable status (atty gen was only party who had standing to sue). Ct was faced w/deciding to Respect Intent vs. uphold Public Purpose.

e. **Supervision of Charitable Trusts - UMIFA + Herzog** (883): at CL, a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift/trust unless he had expressly reserved the right to do so. The general rule is that charitable trusts or gifts to charitable corp’s for stated purposes are enforceable at the instance of the A.G. CUMIFA doesn’t change that law.

   i. Special Interests: a beneficiary w/special interests can enforce a charitable trust if he shows that he is entitled to receive a benefit under the trust that is not available to the public at large or to an average beneficiary (e.g., elderly indigent widow living in charitable home for elderly has standing to sue trustees to bar relocation of residents; parishoners can sue to enforce trust for benefit of church; taxpayer can sue to prevent transfer of a library held in trust that is proposed to move (893)).

f. RAP: in general, a charitable trust is exempt from RAP and may endure forever.

**XI. Rule Against Perpetuities:**

a. RAP limits the time during which property can be made subject to contingent interests to lives in being plus 21 yrs.

   i. Relevant Lives: The only lives relevant are those who can affect vesting of the contingent interest. May include the preceding life tenant; the beneficiary; ancestor of the beneficiary; any person who can affect a condition precedent attached to the gift; or, in case of a class gift, any person who can affect size of a class member’s share.

   ii. Lives in Being: if an interest is created by will, the validating life/lives must be in being at testator’s death. If the interest is created by deed or irrevocable trust, validating lives must be in being when the deed/trust takes effect.

b. **No Possibility of Remote Vesting:**

   i. Fertile Octagenarian

   ii. Unborn Widow – *Dickerson* (801): trust is not to terminate until deaths of C, M, and M’s widow, but the identity of M’s widow can’t be determined until M’s death. M could marry an 18 yr old twenty yrs after settlor’s death, have additional children by her, then die. C might also die. M’s young widow, however, could live another 50 yrs, after which the interest would vest…

   iii. Note: “A gift payable at a designated age indicates survival to the time of possession is not required. If the beneficiary dies under that age, the principal will be paid at the beneficiary’s death to the beneficiary’s estate, unless someone would be harmed by such payment.” (741).

c. **Class Gifts**

   i. The All or nothing rule:

      1. Class must close
a. ‘physiologically’ or 
b. by “rule of convenience” (i.e. class will close when any member of the class is entitled to immediate possession and enjoyment) and 

2. All conditions precedent for every member of the class must be satisfied, if at all, w/in the perpetuities period.

i. Every member of the class may be ascertained, but every member may not have satisfied some condition precedent, and this too is required.

ii. Ward (809): Ct held rule of convenience saved the gift in the will. Why? There were no conditions precedent, so the only question was “will the class close w/in the perpetuities period?”

1. Fertile Octogenarian: if T dies in 1916, and his parents have another sibling of his in 1917, and everybody but the new kid dies in 1918, and widow dies in 1919, and the new kid has a child in ‘44, who doesn’t reach age 21 until ‘65 – which is in violation of the RAP. The class won’t close!

d. RAP Process:
   i. The first question to ask is, “When will the class close?”
      1. A. If the class will surely close physiologically within the perpetuities period (i.e. lives in being plus 21 years), then you proceed immediately to question C. below.
      2. How do you determine whether a class will surely close physiologically?
         a. A class will surely close physiologically at the death(s) of the parent(s) of the class. So, the relevant question is whether those death(s) will necessarily happen during the perpetuities period. Keep in mind the possibility that additional parents could be born after the instrument goes into effect.
      3. Note that the class need not be physiologically closed at the time the instrument goes into effect. It just needs to surely close physiologically within the perpetuities period (i.e. lives in being plus 21 years).
   ii. B. If the class will NOT surely close physiologically within the perpetuities period (i.e. lives in being plus 21 years), then you ask whether the class will close under the rule of convenience within the perpetuities period (i.e. lives in being plus 21 years).
      1. How do you determine whether a class will close under the rule of convenience? A class will close under the rule of convenience if, at the time the instrument goes into effect, any member will necessarily become entitled to a vested interest during the perpetuities period (i.e. lives in being plus 21 years).
      2. Note that if you close the class under this method, only those members who, at the time the instrument goes into effect, will necessarily become entitled to a vested interest during the perpetuities period are part of the class. No person born thereafter can share in the property.
      3. If the class will close under the rule of convenience, move to question iii. below.
iii. If, under either method A or B, the class will NOT close within the perpetuities period (i.e. lives in being plus 21 years), then the class gift fails for violation of the RAP. Your inquiry stops.

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

XII. Fiduciary Administration of Trusts

a. Duties of Trustee
   i. Duty of Inquiry into Beneficiary Needs
   ii. Duty of Loyalty
      1. No self-dealing
      2. No conflicts of interest
   iii. Duty to collect, protect & preserve trust property
   iv. Duty to earmark (must designate/put assets in name of trust)
   v. Duty not to commingle (mixing personal and trust assets)
   vi. Duty not to delegate
   vii. Duty of Impartiality
   viii. Duty to inform himself and account to beneficiaries (e.g. appraisals, trends, assessments)
   ix. Duty to make Trust Property Productive

b. Duties of Trustee: If there is more than one trustee, the trustees of a private noncharitable trust must act as a group and w/unanimity, unless the trust instrument provides the contrary. Note the UTA rejects unanimity requirements.
   i. One co-trustee may delegate to another co-trustee ministerial functions that do not require the exercise of discretion. A co-trustee may not delegate to another co-trustee discretionary powers which can be exercised only by the co-trustees together.
   ii. Discretionary Powers include the purchase or sale of trust assets, investment of trust funds, allocation of receipts and disbursements btwn principal and income, and discretionary payments of income or principal to trust beneficiaries.
   iii. In a charitable trust, unanimity of action is not required of the trustees, a majority decision makes actions valid.

c. Duty of Loyalty – Hartman (903): self dealing is a trustee purchasing from himself at his own sale; an explicit exchange of value from the trust to the trustee, and to the trustee’s benefit.
   i. Rothko (906): This is a testamentary trust, going into effect at testator’s death. Reis: not self-dealing b/c he’s not owner of gallery, but conflict of interest b/c he will definitely benefit from the transaction. Stamos: will also benefit b/c he’s an artist. Levine: stood by and did nothing while he was aware of the co-trustee’s actions. Failure to act can result in liability! As soon as these guys accepted the duties of trustee, they would have to continue performing those duties until a ct relieved them
of those duties. But they should probably want to get in front of a judge to notify the ct of their conflict and seek to resign… Levine could also seek an injunction to bar the sales, thus getting into ct another way…

d. Duty to Care for Trust Property (919-920)
   i. Duty to collect and protect
   ii. Duty to earmark (must designate/put assets in name of trust)
      1. Liability variation from older view (strict liability) to modern view (liable for only losses directly resulting from failure to earmark, not gen econ conditions)
   iii. Duty not to commingle (mixing personal and trust assets)
      1. Liability varies same way as earmarking

e. Duty not to delegate – Shriners Hospital (922): Trustee has duty to observe the std in dealing w/the trust assets that would be observed by a prudent man dealing w/the property of another. If trustee breaches that responsibility, he is personally liable for any resulting loss to the assets. A trustee breaches the prudent man std when he delegates responsibilities that he reasonably can be expected to personally perform.
   i. Trustee delegated duties to stockbroker, who embezzled $$.
      “A trustee is not personally liable for losses not resulting from a breach of trust.”
      Lack of causal connection…

f. Duty of Impartiality – While a trustee is administering the trust, he must refrain from placing himself in pos’n where his personal interest does or may conflict w/interest of beneficiaries.

g. Duty to inform and account to beneficiaries (938) – Trustee has duty to appraise property periodically, keep proper records, do accounting, inform himself of the values and trends of the assets, etc. Dennis (929).
   i. Trustee has a duty to the beneficiary who is ultimately entitled to the principal not to retain property which is certain or likely to depreciate in value, although the property yields a large income, unless he makes adequate provision for amortizing the depreciation. Dennis (934).
   ii. Fletcher (938): trustee is under a duty to the beneficiary to give him upon his request complete and accurate information as to the nature and amt of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accts and vouchers and other documents relating to the trust.
   iii. Where a trust is created for several beneficiaries, each of them is entitled to info as to the trust. Beneficiary is always entitled to such info as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.

h. Duty to make Prudent Investments: Again with Dennis (929): trustee violated duty of impartiality and the duty to inform and account as well. One more duty the trustee might have violated (but wasn’t mentioned in the case) was the duty to make prudent investments.
   i. Restmt: “trustees must make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amt and regularity of the income to be derived.”
   ii. Diversification:
   iii. Collins (957): trustees violated every applicable rule… First, they failed to diversify the investments; second, they invested in a junior mortgage on unimproved real property and left an inadequate margin of security;
third, the backup security obtained was no security at all (That it is generally unwise to invest in second mortgages is problematic enough, but they never obtained possession of the security!). Perhaps most importantly, the trustees didn’t do any investigation whatsoever…

1. Trustees argue that the trust documents gave them “absolute discretion,” ct held they did not. Ct does not go so far as to say that an explicit grant of absolute discretion could not authorize trustees to make improper investments, but argument is there. Of course, the first requirement of being a trustee is having a fiduciary duty, so it seems that a ct would never uphold a trust that designated trustees, but allowed them to escape their duties as fiduciaries.

XIII. **Lifetime Planning – Planning for Incapacity:**

   a. (396) using a trust to deal w/incapacity of a settlor
   b. Revocable Trust: establish settlor as trustee who may act alone and provide a co-trustee who may act alone upon settlor/trustee being declared incompetent.
   c. Durable Power of Atty: an instrument by which a principal confers express authority on an agent to perform certain acts or kinds of acts on the principal’s behalf.
      i. *Franzen* (397): power of atty authorized agent to manage and deal in settlor’s name and for her benefit in the creation and/or revocation of trusts or other investments…
      ii. An agent may not revoke or amend a trust that is revocable or amendable by the principal w/out specific authority and specific reference to the trust in the agency instrument.
      iii. Doesn’t have to specifically name the trust, this provision is good enough…