I. **Introduction** - this course deals with gifts of property through wills and trusts. One of the main principles and goals is *testator intent* – that the donor’s wishes should be respected. Initially, we will look at limits on when those wishes are enforced and how they are determined.

A. **Limitations on Inheritance** - while a person has great latitude on what may be done with his assets at death, there are some limits on the ability to make gifts, commonly this is an issue where the gift is made contingent on some action by the donee.

1. **“Right” to Inherit** - the ability to transfer property and death and the ability or entitlement to receive is governed differently by some states. This distinction is important what limits a state may place on inheritance.

   a) **Natural Right** - some jurisdictions find that the right to inherit is a natural one and therefore should not be subject to broad regulation.

   b) **Granted by State** - most jurisdictions view the right as one granted by the state and therefore is taken away or regulated.

2. **No Constitutional Limits** – Trust & estate law is primarily state based, there is no Constitutional provision governing inheritance. Additionally, the argument that court is a state actor and subject to the 14th amendment in enforcing provisions of a will has been rejected.

3. **Public Policy Limits** - a court may place public policy limits on what the court will enforce in the will of a testator. Specifically, if the restriction *affects a constitutional right*, the court may be reluctant to enforce the provision. (Shapira v. Union National Bank)

   a) **Marriage Provisions** - court have upheld some restrictions on marriage, however the court will not uphold a provision where it completely bars marriage in general to a specific person.

   b) **Divorce Provisions** - these provision that are contingent on or encourage a party to divorce in order to take under the will are considered void. However, if the motive is to support in case of divorce, the contention will be upheld.

   c) **Analyzing Intent** - a court may consider the intent of the testator in deciding if to honor a restriction on gifts.

1) **Doctrine of Probable Intent** - a minority of state will consider what the testator would do if alive today where a contingency is partially met or change in circumstance, etc.

2) **Gift-Over Provisions** - the court will be more likely to uphold a contingency where failure to fulfill the contingency result in a gift over to another, rather than forfeiture to the estate.
B. **Probate Process**- probate is the process of distributing property at death. Very few will go through the formal probate procedures.

1. **Goals of Probate**- the probate process is designed to protect the following three interests:
   a) *Evidence of Title Transfer* - show that owners gained proper title though a decree.
   b) *Protect creditors* - by requiring payment of debts.
   c) *Distribute Decedents Property* – by giving all the distant relatives a bunch of crap they don’t really want and will gladly sell.

2. **Probate & Non-Probate Assets** - not all assets are considered to be part of the probate estate, the following however are not considered part of the probate estate and don’t pass by will or intestacy:
   a) *Joint Tenancies*
   b) *Life Insurance Benefits*
   c) *Interests in Trusts*

3. **Administration of Probate** – the estate is probated whether testate (with a will) or intestate (without a valid will) in roughly the same.
   a) *Overseeing the Estate* - the responsibility of carrying out the will it placed in the hands of one person or organization.
      1) **Executor/Executrix** – a person named in the will to oversee it fulfillment.
      2) **Administrator**- a person appointed by the court to oversee the will, where no executor is name.
   b) *Notice Requirement* - most states allow probate proceeding to be *ex parte*, however, some states require notice to potentially interested parties.
   c) *Statute of Limitations*
      1) **Common Law = None**
      2) **UPC §3-108 - 3 year limit**
C. **Definitions of Status** - many statutes create mandatory shares in certain heirs based on their status. Also, status can be particularly important where the estate passes by intestacy.

1. **“Spouse”** - one is considered a spouse when they are *legally* married to the decedent at the time of death. However, there are a few sticky situations where the issue:

   a) **Common Law Spouses** - 11 states recognize the doctrine of common law marriage, therefore at the death of a the decedent, the “spouse” may be treated as such in the eyes of the law. Jurisdictions look at the following factors in determining the existence of a common law marriage:

      1) **Must be eligible to marry common law spouse** – both common law partners must be unmarried and must be of opposite sex.

      2) **Duration of Co-Habitation** – must generally meet a minimum period of years from 3 – 10.

      3) **Commonality of Resources**

      4) **Held out to be husband/wife**

   b) **Effect of Divorce Decree** - the effect of any such decree at common law was to terminate spousal status of potential heirs. (Biewald v. Jensen) However, the UPC §2-802 makes some exceptions:

      1) **Separation Decree Doesn’t = Termination** – a court order of separation does not eliminate standing a spouse

      2) **Subsequent Cohabitation may = Spousal Status** – the UPC provides that where the two continue to live together after a divorce or annulment that continue to “live together as husband and wife” may still be considered spouses.

   c) **Effect of Bigamy - Putative Spouse** - a putative spouse may be entitled to take in the estate. Only 12 states recognized the doctrine. This is an equitable doctrine that applies where a spouse believes they were married to the deceased, but the marriage was invalid on because of bigamy.

      1) **Traditional = No Recognition** – note that a minority of state recognize the doctrine – in most states there is no recognition of putative spouses.

      2) **Eligibility = Good faith belief marriage is valid** - In order to be eligible the following must exist- the spouse must be *innocent* – that is to say the must have a *good faith belief* that their marriage was valid. Knowledge of the invalidity of the marriage negates the ability of the spouse to take.

      3) **Effect on Estate** - if the spouse is recognized, there are three ways to divide the estate of the deceased:

         ⇒ **Quasi Marital Property** – putative spouse gets community property acquired during the “marriage”
⇒ **Partnership Theory** – treats the “marriage” as partnership, putative spouse rights parallel general partner’s at termination of agreement – likely to be similar disposition as above.

⇒ **Equity** – some jurisdictions just split possessions of decedent in half.

d) **Homosexual Relations Excluded**- homosexual relationships are excluded from the definition of “surviving spouse.” (In re Cooper) there are several ways in which person attempt to assure benefits for a ‘life partner’ including the following:

1) **Will bequest** – duh!!! – but this has the potential problem of undue influence, *infra*, may be claimed by the money-grubbing-pink-triangle-hating-relatives.

2) **Inter Vivos Transfer** – this works, but what if you break up?

3) **Establish Trust** – also challengable under the undue influence doctrine.

e) **“Reciprocal Benefits” Doctrine**- some states have doctrines that aid odd relationships to assure that a person is an eligible intestate heir. Hawaii has adopted a reciprocal benefits doctrine that may be used by same sex lovers other relationships such as mother/son (bet he lives at home) to be eligible the following must occur:

1) **Each party must be of age**

2) **Unable to legally marry each other**

3) **Consent to relationship through written declaration**

2. **Child**- ah lawyers, only we could have a problem defining what a child is. However, several problem situations which would make great Springer show topics! This is important since children are intestate heirs.

a) **Posthumous Children**- this is a child born after the death of the testator, however *is treated as ‘in being’ at death of the decedent and therefore eligible to inherit.* At common law, a child born more than 10 months after the death of the testator will have burden to prove there are the child of the testator. ???Hecht case – posthumous fertilization???

b) **Adoptive Children**- the general rule of most state is that an adopted child will be treated the *same as a biological child* in all intestate inheritance schemes. However, states disagree as to the effect on the adoptive child’s ability to *inherit from their natural parents*, there are 3 alternatives

1) **Cannot Inherit from Natural Parents** – **Majority** – most states hold that once your are adopted you are in effect no longer the child of your biological parents and therefore, no longer an heir. (Hall v. Vallandingham)

2) **Stepparent Exception** – **UPC** – some states, and the method preferred by scholars is a variation of the first rule where a person is *not* exclude from inheriting from their biological parents where the adopting person is *the spouse of a biological parent.*
3) No Effect – Can Inherit from Both – TX – some states hold that the adoption does not have any effect on an adoptive child’s ability to inherit from his biological parents. – there are effectively the children of both.

4) “Double Inheritance” Problem- states may have a double inheritance provision in their statutes that prevents a child from getting two shares under intestate succession – i.e. where child is adopted by aunt/uncle – only gets one share at death of grandparent and not share through father and uncle. Etc.

c) Virtual/Equitable Adoption- this doctrine allows a child to inherit as though an adopted child through foster parents in certain situations where no legal adoption was ever performed. Requirements to establish this relationship vary but focus very much like common law marriage. Note that unlike regular adoption, the foster parents here cannot inherit by/through the “adopted” child.

1) Contract Approach- allowed where the transferor of the child had a legal right to consent to an adoption.

2) Reform Approach- did child have a reasonable belief that he was entitled to legal right of a child based on relationship – (invalid attempt to adopted, held out as adopted, etc.)

3) Partial-Performance of Contract Approach- did the child perform the duties of a child within the family?

d) Adult Adoption- many states don’t draw distinctions in their adoption statutes between juvenile and adult adoptions. This is a popular means for “women in comfortable shoes” to provide for their life partners. However, such an adoption may still be challenged on undue influence grounds.

1) Lovers Exception- some statutes now make a lover exception that would prevent the use of this device to provide for use in a same sex couple situation.

2) May exclude by Will – additionally, will provisions that provide to only those adoptive children adopted as juveniles have been upheld and may be used.

e) Non-marital Children- aka “child w/o the benefit of clergy” aka BASTARDS- at common law these were the children of no one and may take from nobody. Modern rules now all allow inheritance from mother and from father where the child has been subsequently legitimated by either of the following:

1) Formal Legitimization- this can include a legal declaration or a subsequent marriage of the biological parents.

2) Equitable Legitimization- a child may also be legitimated where he is acknowledged by the father as his child. A presumption of legitimization will be created where taken into the father’s home or held out as child of the father.

f) Stepchildren- often colorfully referred to as “half-bloods” – are discussed infra II.D.

II. Intestate Succession- a large number of persons die without a will or with a that does not make a complete disposition of their estate. In that situation, the
law provides through statutes a *default scheme* of estate planning that distributes the
property. So ask yourself … *whose your intestate successor?!!*

A. **Overview**- each state has its own scheme to determine who is several general
principles can be distilled from these statutory schemes.

1. **Choice of Laws**- the law of the state where the decedent was *domiciled*
determines the disposition of *personal property*. The law of the *situs of real
property* governs its jurisdiction.

2. **Distributing Inheritance**- when distributing in an intestate scheme, the following
questions should be asked in order:

   a) *What is the Estate?* - remember that life insurance, joint tenancies, and trust interests
are excluded from the intestate estate, also all debts are to be settled first.

   b) *Who are the Heirs?* In order to be a valid heir, a person must meet all conditions set
out below in II.A.4

   c) *What is their Share?* This is determined by a specific statute, and may be affected by
other statutory rights, such as elective shares.

3. **Order of Inheritance**- the following hierarchy determines distributions:

   a) *Spouse* - entitled to a statutory “*elective share*” – which may be up to the entire
estate, this is discussed *infra* in II.B.

   b) *Children & Other Descendants* - once a spouse’s claim is satisfied, children and other
descendants take to the *exclusion of all others* where they exist.

   c) *Parents* - where no children or descendents exists, the estate may ascend to the
parents.

   d) *Siblings* - where the parents have deceased.

   e) *Relatives of Grandparents* - finally, the estate may be distributed to other collateral
relatives where no one closer is alive. They are often referred to as *laughing heirs*
because their distance often leaving them w/o remorse at the death of the decedent.

   f) *Eschete* - finally, if no heir can be found, the property will eschete to the state (ahh!
Becker property flashback!! NO TAX!). UPC §2-105.

4. **Requirements to Be Heir**- in order to be an eligible heir under the intestate
succession scheme a person must meet all of the following:

   a) *Must be Alive at Death* - in order to inherit you must be alive at the death of the
decedent.

   b) “*Top of the Line*” *Rule* - first descendent in a line takes the entire share, i.e. if your
dad is alive, he’ll get your grandpa’s stuff and you won’t get none!
c) Married Relatives Excluded- other than spouses, in-laws are not considered to be eligible heirs. However, they maybe considered eligible in order to prevent the estate from escheting to the state.

5. Simultaneous Death – at common law, a person could succeed property where they lived an instant longer than the decedent. However the Uniform Simultaneous Death act provides where the order of death is unable to determined, the beneficiary will be considered to have pre-deceased the decedent for purposes of inheritance. Additionally, some statutes impose a survival requirement of a period of time, such as 120 hours (5 days). For Joint Tenancies, property is split between the two heirs.

6. Negative Inheritance/Exclusion- at common law, you could not put a provision in your will specifically disinheriting anyone such as “I leave nothing to Chetema”, to preclude them from getting anything through intestate succession. However, under the UPC, §2-101, a person may “exclude or limit” the ability of a person to inherit through intestate succession.

B. Surviving Spouse- a surviving spouse is the only non-blood relative who is entitled to a share based on intestate distribution statutes, note – this is not the same thing as an elective share, discussed infra:

1. May Vary Based on Descendants- most statutes provide that a surviving spouse gets ½ the estate, if only 1 child (or issue thereof) survives, and a 1/3 share if there is more than one child or descend of a child alive.

2. UPC §2-102 Intestate Share of Spouse- the UPC make a more complicated division based on the number of other surviving heirs, note that in small estates, the spouse will still get the entire estate, regardless of below:

a) No Descendent or Parent = 100%- where no descent or parent survives, the wife

b) Descendents All Also Descends of Spouse = 100%- typically, this would be where the only children of the decedent are also the children of the surviving spouse, the idea here is that the law is not worried about the spouse providing for these heirs eventually.

c) Parent of the Decedent Survives, No Descendents = first 200K and ¾ of any balance.

d) Descendents All Also Descends of Spouse but Survivor has other descendents = first 150K and ½ of any balance – this situation is where the spouse has children from another marriage, etc., the notion is that the law is somewhat concerned with the possibility that the estate will not be used to benefit the children of the decedent.

e) Descendents are not all of descendents of Surviving Spouse = first 100K + ½ of any balance. The reasoning here parallels the above – spouse may not use estate to benefit heirs that aren’t hers.

C. Descendants- this term refers to any children or grandchildren, etc. of the decedent. Once a spouse has taken their statutory share, in intestate schemes descendents take to the exclusion of all other heirs.

1. Methods of Distribution- There are 3 different schemes that states utilize for distributing to relatives. See CHART 1 for examples of these schemes.
a) **Per Stirpes** - division begins at the generation with any living descendents. IL, FL. Typically this is the first level of descendents, shares pass to lower descendant through representation.

b) **Per Capita w/ Representation** - division begins a generation of first living descendents (remember: look for the warm body!!!). This is the *most popular* form of distribution that is accepted. Shares pass to lower descendants through representation. MO, Old UPC.

c) **Per Capita @ each generation** - New UPC uses this form. Division is made in accordance w/Per Cap w/representation, however if any of those descendents are dead – their share *does not pass by representation* but is then moves on and split equal among eligible alive/dead heirs at the next level, and the process is repeated until all is distributed.

**D. Ascendants and Collaterals** - in the absence of descendents and after the deduction of the spousal share (if any) other relatives will take from an intestate distribution. These distributions are set by statute and vary by state. The following are listed in order of preference:

1. **Parents** - most common and by the UPC, where there is no descendants, the estate of the decedent will pass to the parents, there are three ways that the share is determined this may occur:

   a) *Entire Estate to Parents* – (UPC)

   b) *Equal Share to Parents & Collateral* – (MO)

   c) *Double Share to Parents & Equal to Collateral* – (Rare – IL)

2. **Collaterals/Siblings** - sisters/brthers of the decedent are called collaterals, they take in the above schemes as described and the entire estate in every jurisdiction where both parents are deceased. *Decedents of collaterals take their share by representation*. They are referred to as *first line* collaterals.

3. **Remote Collaterals/Laughing Heirs** - in the event that there are no surviving first line collaterals, the estate passes to *second line* collaterals. *States disagree on limits on how far find a heir to inherit* – this limit is may be that the distant heir must be descendents of the decedent’s grandparents. (UPC §2-103) Some don’t (TX). There are 3 ways of distributing the estate adopted by states:

   a) *Parentelics* - estate passes to grandparents and their descendents, and if none, to the great grandparents and their descendents. (new UPC)

   b) *Degree of Relationship* - estate passes to the closest of kin counting the degree of kinship, who ever is closest takes. If they are the same degree, they spit the estate equally. (See table of consanguinity on page 86)

   c) *Degree of Relationship w/Parentelic Preference* - (MA) this combines the two above, the table of consanguinity is used, but the parentelic is used as a tie-breaker between distant relatives.
4. **Half-Bloods** - these are collateral relatives that share only one common ancestor (i.e. same mom, but different dads). Formerly at common law, half-bloods were so disfavored that they were entirely barred from inheriting by intestacy. States have adopted one of three modern schemes:

   a) *Treated same as whole Blood - Majority/UPC* - most jurisdictions now make no distinction between half and whole blooded relatives when taking by intestacy. (UPC - §2-107)

   b) *Whole Blood gets double share – Minority* - a minority of states follow the “Scottish rule” that half-bloods only get half shares or for easy math, whole bloods get double shares. (MS)

   c) *Take only where no whole blood* - a few states are close to the common law standard and allow a half-blood collateral to take only where there are no whole blooded relatives of the same degree.

**E. Advancements** - an advancement is an *inter vivos* gift, given to a persons who is likely to be an heir, by a person anticipating dying intestate. If the heir wants to share in the estate at death, the he must allow the advancement to be treated as though it is still a part of the estate at death or is brought into the hotchpot, and therefore is counted as part of that heir’s share a distribution.

1. **Common Law = Rebuttable Presumption** - at common law, a gift to a child was presumed to be an advancement on inheritance. The child had the burden of proving that the transfer was not intended as an advancement, but an absolute gift.

2. **Modern = No Presumption** - in most jurisdictions and under the UPC a gift to child is not considered to be an advancement unless there is evidence of expressed intent that the gift be considered an advancement. The UPC §2-109 requires a writing a proof of such intent.

3. **Value at time of Gift Used in Hotchpot** - note for purposes of determining value, the value of the gift at the time of the advancement is used and not the value of the gift at the time of death.

4. **Advancee Predeceases Advancer** - where the advancee predeceases the advancer, the value of the gift will not be counted against the share of any descendants of the advancee.

5. **Advancement Larger Than Intestate Share** – where this happens, the advancee is not required to put any money into the hotchpot, but will obviously not take any further from the estate.

6. **Generally only Apply to Children/Descendants** - note that the rules on advancement generally only apply to children or descendants, however, some jurisdictions also apply the hotchpot principle to gifts to collaterals.

7. **Partial Intestacy = Depending on State Goes in Hotchpot** - where a person makes some devises/gifts in a will, but fails to dispose completely of their estate in a will, states are split on whether the court will consider advancements in the hotchpot.
F. Management of Minor’s Property- frequently, a descendant may inherit property when they are a minor, in such situations, courts have adopted three different ways to manage the property until the child becomes of age, all of them establish an adult guardian to the property, however, the duties of that person vary with each:

1. Guardianship/Conservatorship- here the guardian must preserve the property left to the minor and deliver upon the achievement of age. Unless approved by the court, the guardian may not sell, lease, or mortgage the property. This is the default established by the court in intestacy cases.

2. Custodianship- the custodian is given the property to hold for the benefit of the minor. The custodian may sell/expend the property for the support of the child, and may reinvest the money. However, the custodian is subject to fiduciary liability for the mismanagement of the assets. This relationship must be established by will or inter vies.

3. Trusteeship- trusts are covered deeply infra. This relationship provides the most flexibility. Again, a trustee is subject to fiduciary liability for his management of the assets. The trust can be set up on any number of conditions or directions. This relationship must be established by will or inter vies.

G. Bars to Succession- in some situations an heir who would normally take under intestacy is prevented from doing so by a statute or may elect not to take.

1. Homicide/Slayer Statutes- most states have a statute that prevents a person from inheriting from a person they killed intentionally or with felonious intent. Therefore, these statute are not triggered by a conviction for involuntary manslaughter or other homicide w/o intent element.

   a) No change = Still Inherit- some states do not bar the killer from taking, on the basis they do not need to be punished twice.

   b) Bar Inheritance- Majority- most state do not let title pass to the killer on the basis that one should not profit for committing a crime. For purposes of intestacy, the killer is treated as if he predeceased the decedent.

   c) Form Constructive Trusts- some states allow legal title to pass, but force the creation of an involuntary trust. The trust will benefit the next person who would have taken.

   d) UPC Catch-All Provision- many statutes require that the potential heir be convicted of the crime of killing the decedent, however, the UPC provides that the person must only be found responsible with a preponderance of the evidence standard, thus a person acquitted under a criminal statute may be effectively “retried” to keep them from inheriting.

2. Unworthy Heirs- states also have a variety of statutes that preclude a persons from inheriting by intestacy. These situations typically involve some bad act on the part of the heir towards the decedent, such that it is likely that the decedent would certainly not want them to receive anything.

   a) Abandonment- where a spouse abandons the other, despite the fact they were never divorced, the spouse may be precluded from inheriting from the estate.
b) **Adulterer**- some states consider is a spouse commits adultery against the decedent, he may be precluded from subsequently inheriting.

c) **Failure to Support a Child**- where a parent fails to support a child, the parent may be precluded from inheriting from the child by intestacy.

3. **Worthy Heirs**- note that some states are also beginning to recognize “worthy heirs” this person is often someone who took care of the decedent at death, they may receive a *judicial gift* in thanks for their effort, again based on the likely intent of the decedent.

4. **Disclaimer**- at common law, a person had no choice but to take the property through intestate succession, however, modern statutes allow a person to disclaim interests in property. The primary reason not to take property is to allow it to pass to descendants w/o tax consequences.

   a) **Requirements of Disclaimer**- typically disclaimer must be done in writing, within a certain period after he becomes aware of the inheritance, such a disclaimer is *not revocable* once made. The disclaimer may be *partial* but cannot be conditional.

   b) **Effect** = *Treated as if pre-deceased Decedent* - the effect of disclaimer is that the first heir is treated as if predeceased decedent, note that in most schemes, this disclaimer *allows their descendants to take by representation*. (UPC §2-801).

   c) **Effect on Distribution of Property**- note that disclaimer may be used as a ploy to increase inheritance, as the mode of distribution may they favor the person’s family – see per capita w/representation for example.

**III. Execution of Wills**- persons that don’t wish to have the state determine how their property distributed are free to make wills with their own distribution. However, in order to be a validly executed will, several legal and procedural test must be met, this section discusses those requirements.

A. **Intent Requirements**- in order to make a valid will, a person must be of *sound mind and intend to make a final disposition*. The following discuss how a determination is made that the testator had a sound mind when making his will.

1. **Legal Capacity – Age** – a person must be of the minimum age set by statute before a valid will can be executed. In most states and under the UPC the age is 18, however, some states have exceptions for person under the age required who are married or in military service.

2. **Testamentary Capacity Requirement**- a determination that the testator is of *sound mind* must be made, this inquiry is obviously more subjective than the age requirement.

   a) **Why Required**- several valid reasons exist for requiring a demonstration of mental capacity:

      1) Will should only be respected where represents “true” desires of testator

      2) Mentally incompetent person in not a legal “person”
3) Protect decedents family

4) Assure person who later become incapacitated that early wishes will be respected.

b) Testing for Mental Capacity- the test has be put into 4 different parts that the testator must understand in order to have the requisite capacity. He must know:

1) Nature and Extent of Estate Property

2) Be Aware of all persons who are “natural objects of decedent’s bounty- such as children, spouses, etc.)

3) Effect of action being taken and its effect – must know consequences of making will.

4) How the elements relate to assure orderly plan of disposition.

c) Eccentrics- testamentary capacity cannot be destroyed by demonstrating a few isolated act, idiosyncrasies, irregularities or departure from normal unless they bear upon the four elements of the test. (Estate of Wright)

d) Temporal Nature of Capacity- Lucid Intervals- the fact that a person is declared incompetent or put under conservatorship does not preclude valid dispositions – the person is only required to fulfill the above factor at the time of execution and not any interval before or after.

e) Degree of Capacity for Will = <Contract, >Marriage- the required capacity to make a will is subjective, but it has been held to be less than what is required to make a valid contract, but more than required to get married.

f) Drafting Tips – Assuring Mental Capacity- a lawyer has a professional duty not to draft a will for an incompetent person. Where capacity may be questionable the lawyer should take several steps to assure the will is valid – by examining the estate for himself, finding out all family member, additionally, disinherited family members should appear in will with no gift to show knowledge.

3. Insane Delusions- a person may have sufficient capacity to execute a will, but may be suffer from an insane delusion so as to cause a particular provision in or the entire will to fail for lack of testamentary capacity if the devise is caused by the delusion.

a) Insane Delusion = False Conception of Reality- which the testator adheres to against all evidence and reason to the contrary. Two viewpoints exist for determining if a believe qualifies:

1) Majority = Rational Person- even if there is some factual basis, the delusion will be considered to be insane unless a rational person in the testator’s situation would reach the conclusion.

2) Minority = Any Factual Basis – a minority of jurisdictions will not find an insane delusion where there is any factual basis at all for the delusion.
b) **Challenged Gift must be product of delusion**- Causation must be shown in order to claim delusion as a reason to invalidate a will. In order to claim an insane delusion, that challenger must show that the devise that is challenged is the product of the delusion.

c) **Proving Insane Delusion**- essentially a will or provision may be found invalid where the following steps are met

1) **False Concept or Belief**- the testator adheres to a belief which is against all reason and evidence to the contrary.

2) **Cannot Correct** – the belief is not susceptible to correction by presenting evidence indicating the falsity of the belief.

3) **Reasonable Person Test**- a rational person would not act as such or hold the beliefs of the testator.

4) **Direct Impact**- the belief had a direct impact on the will- it must impair testamentary capacity in order to void the will or provision. If the person’s craziness didn’t affect the will = no remedy.

4. **Undue Influence**- A will may also be found invalid in its entirety or in part where undue influence is demonstrate. Undue influence should be found where it can proved the substitution of another’s will for the testator. This does not include general influencing or sucking up to grandparents, etc., but is typically is defined as some form of coercion.

a) **Proving Undue Influence**- the following elements must be demonstrated by a challenger in order to invalidate a provision or entire will:

1) **Opportunity to Influence**- the person must have contact with testator and must be a person w/an opportunity to influence – if it is a confidential relationship – a presumption of undue influence may be created.

2) **Did Attempt to Influence**- the person must have actually attempted to influence the disposition of the will of the testator.

3) **Susceptible Testator**- the testator must have been susceptible to influence. It should be show the testator was weak willed.

4) **Effect on will**- causation is required, that is the influence must actually affect the disposition of the will.

b) **Persons w/"opportunity to influence"**- Confidential Relationship- the court has found undue influence in a number of relationships. Note that where the court finds a confidential relationship a presumption of undue influence may be created. This will shift the burden to the will’s proponent to show that there was not undue influence. The following relationships have all been found to have the possibility of undue influence:

1) **Managing Business Affairs of Testator**
2) Attorney/Client Relationship

3) Older Lover/Younger Lover

4) Extramarital Affair

5) Parent/Child

c) Circumstantial Evidence of Undue Influence- direct evidence of undue influence is often rare, so the court will listen to circumstantial evidence of the existence of such influence:

1) Motive – the person exerting the influence does not necessarily have to personally benefit from the will. But such a disposition can help. Particularly, if it can be show the beneficiary would have received a smaller disposition in a prior instrument.

2) Untraditional Disposition – where the will make an untraditional disposition, particularly where the person accused of undue influence receives a share that is larger than their intestate share, may be used as evidence of undue influence. Also if the will benefit others at the expense of traditional heirs. Again, especially if the instrument replaced one of a more traditional disposition.

3) Opportunity and Access- the closer the relationship, particularly in terms of physical proximity, the more likely a finding of undue influence.

4) Relationship w/Testator- as discussed above the more “confidential” the relationship between the alleged influencer and testator, greater the chances.

5) Susceptibility of Testator- the court will look at the reputation of the testator as an easily malleable individual (aka Alex Lee), or is he is stubborn jack-ass.

6) Connection w/Will- the court will look at if the influencer suggested the drafting, modification, or abrogation of the will. Including, presence at drafting or execution, etc.

d) Attorney Bequests- attorneys relationship often involves advising or drafting of a will, as such, this is a confidential relationship that establishes a presumption of undue influence, which must be refuted by clear and convincing evidence of a lack of undue influence where the attorney benefits in the will.

1) Precluded by Ethics Code – note except for below, the code of ethics precludes attorneys from drafting wills where they will be a beneficiary.

2) OK when related to Testator – the law and ethics code makes an exception to the rule where the attorney is related to the testator, and allows such instruments without a presumption of undue influence.

3) Outside Counsel = Must be More than Scribner – using outside counsel will only prevent charges of undue influence against an attorney where the lawyer is used as a independent consultant, and not as a mere scribner of the instrument. (In re Moses)
e) **Avoiding Challenges for Undue Influence** - several alternative may be used in order to defend against charges of undue influence:

1) **“Good Child Defense”** - where closeness normally used to show undue influence child in some jurisdictions can claim, they were the only one who cared for the testator, etc.

2) **No Contest Clauses** - courts have upheld no contest clauses as valid in most situations.

⇒ Some Court Will Not Honor – some courts will not honor such clauses where there is a good faith challenge – or where certain things are challenged – such as validity of execution, etc.

⇒ Must bait clause – in order to be effective, the testator must give the potentially challenger a gift under the will that is sufficient that he may be reluctant to risk losing it in a challenge.

3) **Explanation of Disinherited** - where the testator explains why certain likely heirs receive nothing, it is more likely to be upheld – however such an explanation may be used as evidence of undue influence, and also must be careful to avoid testamentary libel.

5. **Testamentary Intent** - another requirement is that the testator actually intends the will as a final disposition. Often referred to as *animus testandi*, such intent is required in order for a will to be valid. This issue of intent arises in several circumstances:

   a) **Conditional Wills** - where a will contains a conditional event as in “should I be mauled by wild dogs during my trip…” the disposition will be considered to be a valid will.

   1) **Court will examine if actually intended condition** - This is based on a belief that the testator is actually expressing his inducement to make the will rather than an intended condition. However, if the court determines that it is actually intended as condition, probate may be denied.

   2) **Extrinsic Evidence of Intent** – some court allow extrinsic evidence that the will was not intended to take some effect, if the will is properly executed, it is doubtful that the court will admit such evidence.

   b) **Sham Will** - this is a document that appears to be a will, but was actually executed by the testator for another purpose, therefore, it lacks the required testamentary intent. (Flemming v. Morrison – executes will to get woman to sleep with him).

   1) **Where valid will = must have conclusive evidence of sham nature** - if the document bears the appearance of a regular testamentary act, there must be conclusive evidence that in fact the document was executed as a sham.

   2) **Extrinsic Evidence of Intent** - some court allow extrinsic evidence that the will was not intended to take some effect, if the will is properly executed, it is doubtful that the court will admit such evidence.
6. **Fraud**- a claim of fraud may be made to defeat the existence of testamentary intent and *invalidate* the *entire will or separable provisions* thereof, or the court may impose a *constructive trust*. This occurs when the testator is deceived by a misrepresentation and would not have made the same disposition had he been aware of the misrepresentation.

   a) **Required Elements**- the basic required elements are identical to contract and tort requirements:

   1) **False Representation**- made to testator

   2) **Known to be False/Intent to deceive** – by the person making the representation.

   3) **Reasonably Relied on**- the statement must be reasonably relied on by the testator.

   4) **Causation**- the false representation *must* cause the testator to execute a will the testator would not have signed by for the misrepresentation.
b) *Fraud in the Inducement* - this occurs when a misrepresentation of facts, cause the testator to execute a will to include particular provisions (in favor of the defrauder) that he otherwise would not have agreed to. Note that again, it must be shown that absent the misrepresentation, the testator would not have made the gift.

c) *Fraud in the Execution* - this occurs when a person misrepresents the contents or character of the instrument signed by the testator. The document must be one that the testator would not have signed if he was aware of the misrepresentation.

d) *Alternative Recovery – Tortious Interference w/Expectancy* - a person may recover where he can show actions of torfeasor prevent him from receiving a gift from testator. This is a tort remedy – therefore there is no equitable recovery of specific items in the will, and it will not trigger no contest provisions.

B. **Statutory Requirements** - in addition to mental requirements, a will must met several statutory requirement to be considered validly executed. The following section deals with those requirements.

1. **Attested Wills** - most will that are executed are required to be attested. This means that they must be *in writing, signed by the testator, and witnessed*. The following details what is necessary to met these requirements:

   a) *Rational For Requirement* - in addition to being traditional, the formal attestation requirement give the testator awareness of the importance of his action, provides evidence for later contests and provides safeguards against fraud.

   b) *Writing Requirement* - currently wills must be in writing, there is not a specific requirement what they must be written on and with what. However, obviously the permanency of the writing aids it in any contests. Note that under current law – videotape and similar media cannot be used to make a valid will.

   c) *Signature Requirement* - the will must be signed by the testator or if he cannot sign it, in his presence and at his direction.

      1) **Majority = Anywhere on Document** - Some jurisdictions may require that the will be signed at the bottom or foot thereof, however, many modern statutory schemes have eliminated that requirement. (UPC – requires initial or abbreviated signature at bottom) This was to avoid unauthorized additions.

      2) **Any Symbol w/animus signandi** - there is no requirement that the signature be the full name or etc. of the person. Modern laws would allow initials, first names, nicknames, statement of family relationship, so long as the intent to sign was present.

   d) *Witness Requirement* - still in most states today, in order to be validly executed a will must be signed by witnesses as well as the testator.

      1) **Number Required Varies by State** – most states and the UPC require 2 witnesses. Some require as many as 3, and some do not require any.

      2) **Must be competent & disinterested** – to be a competent witness a person must be able to testify in court as to the witnessing (i.e. at common law - criminal
conviction may preclude) Some states have a minimum age. The witness must not directly benefit from the will to be considered a disinterested witness.

⇒ Spouse of Testator – still considered interested under most states laws

⇒ Member of Benefiting Organization- where a witness is a member of an organization that benefits from the will, he will not be considered interested under most witness statutes.

3) **Presence at Signature** - the statutes typically require the testator *sign the will in the presence of the witnesses or acknowledge his signature* on the document in front of them. Note that a witness may not necessarily be present at the time of signature of *the testator or other witnesses* and the will can still be valid.

⇒ Reasonable Time After- UPC – requires only that

⇒ Delayed Attestation- some statutes are very lenient with how long witnesses have to attest after signature, some may even allow after death.

4) **Tests for Presence** - what does it mean to be present at the signature- the following tests are used:

⇒ Line of Sight Test- this requirement is only satisfied if the witness can see the testator sign, doesn’t have to look, but must be able to.

⇒ Conscious Presence Test- witness is only required be to in the same room and be aware of the act of the signature.

e) **Execution Requirements** - note that the requirements for execution vary with each state, and given the general principles of conflict of laws that apply to wills, it is important that a will comport with all jurisdictions, if the following steps are followed, the will should be considered validly executed in any jurisdiction:

1) **Fasten all Pages Together**- additionally it is wise to list the total number of pages within the will itself.

2) **Ensure that the Testator reads & understand the entire document**

3) **All should be in one room, one ceremony**- the lawyer, testator, witnesses and a notary should all be in one room to the exclusion of all others, none should leave until the will has been executed completely.

4) **Ask questions of testator**- the lawyer should verify with the testator that it is his will, he has read it, is he aware of what it does, and acknowledge the witnesses.

5) **Sign in Margin of Each Page** – in addition to signing at the end, the testator should sign each page of the will in the margin.

6) **Witnesses Must See Signature**- witness should be able to see the actual signature
7) **Witness should read attestation clause aloud** and then sign after expressing intent to act as a witness.

8) **Witness should write addresses** - in addition to signatures, witnesses should provide their addresses next to their signatures.
f) **Self-Proving Affidavits** - in addition a typed clause at the end of the will may be included, swearing before a notary public that the will was duly executed. May be done at or subsequent to execution.

g) **Safeguarding will** - generally it is not wise to have the testator keep the executed copy – since when it is needed, he won’t be there to tell you where it is. Additionally, if the lawyer hangs on to it there may be issues of solicitation. Some states provide for pre-death filing with the court.

2. **Problem - Interested Witnesses** - an interested witness is one that stands to benefit if the testator’s will is valid. Most commonly this is being a beneficiary in the instrument. *Subsequent disclaimer by the witness does not cure this problem*. Several statutory schemes are adopted by states that affect this situation:

a) **Will Voided** - some jurisdictions may void the entire will on the basis that the witness is completely incompetent to testify and therefore the instrument fails for lack of required number of witnesses.

b) **Total Purge** - the gift to the witness may be voided. Therefore is considered to be disinterested and the instrument is otherwise valid.

c) **Supernumerary Exception** - some states will allow a witness to keep his share where the will was witnessed by more than the required number of witnesses and therefore if that witness is disqualified, the instrument was still witnessed by enough people.

d) **Supernumerary or lesser of 2** - a variation, this allows the above, in addition, if the witness is still necessary, he will get the lesser between, the current will, any prior will, or intestate share.

e) **No Purge, but presumption of Undue Influence** - some states will not purge the gift per se, but will instead create a rebuttable presumption of undue influence regarding the gift to the witness.

f) **No Purge (UPC)** - other statutes have no effect on the gifts or the validity of the will.

3. **Mistakes in Execution - Curing Defects** - where the required elements for valid execution are not met, in some situations a court may allow the defect to be cured by later action.

a) **Strict Compliance – Four Corner Rule** - some jurisdiction do not allow cures to the an error in execution, and will not allow extrinsic evidence to cure defects- this is strict adherence to the four-corner rule. (In re Pavlinko)

b) **Falsa Demonstratio Non Nocet** - the will does not fail for mistaken or false description, the language will be treated as if it was crossed out from the rest of the will.

c) **Reformation of Will** - essentially the dispensing power below, a court may in limited situations reform the language of the will to correct mistake.
d) *Constructive Trust*- this remedy may be used and fraud and has been extended to a mistake context.

e) “*Substantial Compliance*”- some jurisdictions allow a defect to be cured where the *parities made an effort to comply with the requirements*, the will may be found valid. (In re Ranney).

f) *Dispensing Power- UPC(§2-503)* – the broadest curative party is the general dispensing power of the UPC that allows a court to hold will as valid where *clear and convincing evidence* is presented that the will/document represents the testators intent.

4. **Liability for Defect- Malpractice against Drafter**- in some states, about ½, a beneficiary may have standing to sue drafter where the will fails to be validly executed. This is often limited to persons named in the will and does not grant standing to those omitted from the will. This is an exception to the normal privity rule that the other ½ of jurisdictions enforce to deny standing.

a) *Statute of limitations- Runs from Death*- note that the statute of limitations for this action runs from the death of the testator and not from the execution date of the will.

b) *Tort Remedy, Not Equity* - this is only a tort remedy which is good for money, but the court cannot order the re-distribution of the testators property (real or personal) because of malpractice, therefore, if the object is of sentimental value, this will not provide remedy.

5. **Nuncupative/Oral Wills**- these will are only allowed in emergency situation and are only allowed to bequest *personal property* of limited value. The bequests must be witnessed and the witness should reduce it to writing.

6. **Holographic Wills**- these are wills *handwritten by the testator* and are only recognized in only about *one half of states*. These wills, where allowed, *are exempted from any attestation requirements*. Occasionally, this will have limitations in jurisdictions that allow them, such as a cap on property to be disposed, or only permitted in special circumstances (foreign military service).

a) *Strict Holograph Requirements*- in jurisdictions that follow a strict requirement for holographs, the following conditions must be met:

1) **Entirely Hand Written**- the entire will must be written in the handwriting of the testator.

2) **Signed by Testator**- generally in addition to have to sign the will the signature may be required to be at the foot of the document.

3) **Dated**- the will must be dated, preferably with month, day and year, or the will could fail.
b) **Allowing of Typed Portions**- modern statute constructions allow some typing in most holographic wills. However, the *Material Provisions Must be Handwritten*—as long as the actual gifts and other material provisions of the will are handwritten other portions may be typed. (UPC)

c) **Use of Fill-in-the-blank form wills**- these may be found valid holographs in some jurisdiction, however, new UPC requires that a substantial portion of the will and all material provision be handwritten, so such a form may not necessarily be a valid holograph.

### IV. Revocation & Revival of Wills

Once validly executed, a will stays in effect and will be admitted to probate until it is revoked by the testator. This revocation may be in part or in the entirety. Once a will is revoked, it will generally be considered a dead instrument, however, in limited circumstances the entire will or provisions will be revived and become enforceable again.

#### A. Revocation in the Entirety

This is the easiest form of revocation, that is that the entire first instrument is rendered invalid. This may be done in three ways. Note that first two are accomplished by an act that is inconsistent with the will being the final disposition of the testator. The third is the result of an event in the life of the testator that will almost certainly change his intent to distribute. *Note some of these methods can be used for partial revocation of a will.*

1. **By Subsequent Instrument**- a person can only have one valid will, therefore, one way that an old will is revoked is the *valid execution* of a new will. In order to successfully revoke the old will the new one must me all execution requirements. (UPC §2-507)

   a) **Expressly**- this is the preferred method of revocation, ideally the new will contains a provision that expressly revokes all prior wills.

   b) **By Inconstancy or Implication** – this method is not preferred by the court because it requires the court to interpret the intent of the testator in the second will. If the first will is not inconsistent with the second will, the second will be treated as a codicil. *This creates a question of if a gift is intended cumulatively or a substitute.*

   1) **Complete Disposition = Revocation**- if the 2nd document makes a complete distribution of the testator’s property, then the prior will is presumed to be revoked.

   2) **Incomplete Disposition = May be read together**- if there is a specific gift in the other will, etc. and that gift is not contradicted then the 2nd will is treated as a codicil and is read together with the first will.

   c) **Inconsistency in the same Instrument**- this may occur in two main situations, the resulting presumptions will be created and may be rebutted-

      1) **Gift of Same Item to Different People**- this will probably create a joint tenancy in the item.

      2) **Multiple Gifts to Same Person**- if the gifts are *different* they will be viewed as cumulative. If the gifts are *identical* they will be viewed as substitutes.
2. **By Physical Act** - a will may also be validly revoked by destroying or performing some other act on the will that makes it clear it is no longer a valid expression of the testator’s intent. Among the officially sanctioned acts are burning, tearing, canceling, obliteration or destroying the will (regardless of if words are rendered illegible). Note that canceling by writing “void” etc. must affect the word on the page. (Thompson v. Royall)

   a) **Requirements (UPC §2-507)** - the following requirements must be met for a valid revocation by physical act to be recognized:

   1) **Must be performed by Testator** – or in their conscious presence at their direction

   2) **Must perform act with intent to revoke** - testator must have *valid testamentary capacity and intent* to effectively revoke.

   3) **Must be an accepted revocatory act** – such as burning tearing etc. *Crumpling into a ball does not count!*

   b) **Burden of Proof on Proponent of Will** - where a revocatory act is performed on the will, the burden of proof is on the proponent of the will to establish the revocation was not valid under (a) above.

   c) **Also voids Codicils** - note that a physical act voiding the will also voids any codicils to the will, even though no physical act was performed on them.

   d) **Duplicates** - physical acts of revocation can only be performed on the original. Thus if the original is revoked by physical act, all the copies are also revoked, but the destruction of a copy does not validly revoke the will.

   e) **Lost Wills – Presumption of Revocation** - if a will cannot be found among a testators important papers at death, the absence of the original creates a presumption that the will was revoked and destroyed by the testator.

      1) **Lost After Death = Still Enforceable** - if the will is lost after the death of the testator, then no presumption of revocation is created and the will is enforceable if the contents can be proven as listed below.

      2) **Proving Contents of Lost Will** - if the will is proven not to be validly revoked and the original cannot be found, its contents can be proved by *any clear and convincing evidence* – including a copy in possession of the drafter, testimony of typist, etc.

3. **By Operation of Law** - where an event greatly changes the circumstances of the testator, provisions on an existing will may be made void by operation of law in order to protect his likely intent until a new instrument can be drafted:

   a) **Divorce** - in most jurisdictions (UPC §2-804) a valid divorce voids all gifts to a spouse. The new UPC includes non-probate assets.

      1) **Treat as if predeceased Spouse** - the effect of the cancellation is that the spouse is treated as if she pre-deceased the testator.
2) **Provisions for Relatives of Spouse** – jurisdictions vary on the effect of divorce upon gifts to the relatives of the spouse that are not relatives of the testator. The UPC also disinherits the relatives of the divorced spouse.
b) *Marriage-* where a testator subsequently marries, an old will is revoked to provide the new wife with her intestate share. Unless, the omission in the current will can be proved to be intentional.

c) *Birth of Child-* a child born *after the execution* of a will is considered a *pretermitted child* and is entitled to a share in the parent’s will. Note that where a person is married and has a child after the will is executed a minority of jurisdictions hold the entire will is voided.

**B. Partial Revocation By Physical Act** different problems may exist where a testator attempts to revoke only part of the instrument through a physical act, this if often accomplished by physically crossing out persons in the will.

1. **Overview**- when dealing with partial revocation by physical act the following questions need to be answered:

   a) *Is it possible to revoke in part by the technique used?* – note that as common law such modification was never given recognition, and today partial revocation by physical act is only recognized in about half the states.

   b) *Has the revocation in part actually occurred?* Sometimes where the deletion is made part of an attempt to change the gift it will be ignored under DRR. Also, where a new gift is created as part of the deletion, it may be ignored.

   c) *What effect does the partial revocation have on the remaining parts of the will?* Often the deletion will affect the residuary clause of the will.

2. **Statutory Constructions**- partial revocation is far from universally accepted and a variety of statutory schemes exist in the states:

   a) *½ States Have Statute Allowing (UPC §2-507)*- about half the states have statutes allowing partial revocation by physical act.

   b) *Not Allowed - Require Subsequent Instrument* - many states may only allow partial revocation by a subsequent instrument, such as a codicil, etc.

   c) *Silent Statute = Assume Not Okay* - where such revocation is not specifically allowed by a statute, and no statute controls, the default is that such modifications will not be made valid.

   d) *Holograph = Okay* – note that holographic will where executed and allowed, subsequent revisions would be permissible.

3. **Cannot Create New Disposition**- states that allow partial revocation will *not* allow it where it *creates a new gift or increases the value of any gift*, other than to the residuary clause.

   a) *Example:* I LEAVE 10 MILLION IN EQUAL SHARES TO LARRY, MOE AND CURLY. This modification *would not* be honored since it has the effect of increasing the shares to Moe & Curly.

   b) *May only Increase Share to Residuary* - however, obviously any deletion increases the residual share, this is okay. Additionally the deletion of one person from the
residual clause (REMAINDER TO JIMMY, RONALD & GEORGE) will also be considered valid.

c) ***Holographs = Okay***- note that holographs are often considered continually revisable documents and therefore again where allowed, this modification would be effective.

4. **Problem: The Obliterated Name**— what if you are in a jurisdiction that does not recognize partial revocation by physical act, but the testator has completely obliterated the name so the original cannot be read?

a) *Give to Non-Obliterated = effectively allowing*- some jurisdiction do nothing and honor the will, this effectively allows the partial revocation.

b) *Give Gift to Named, Obliterated pass by Intestate Succession*- some will honor the rest of the will and will take the obliterated gift and distribute it by intestate succession.

c) *Void Entire Will/Clause*- some jurisdictions will void the entire clause or will based on the invalid obliteration of the name.

5. **Dependant Relative Revocation (DRR)**— this is a doctrine is misnamed to the extent it has nothing to do with dependant relatives. The doctrine allows the court to invalidate a revocation of a will or part of a will where the revocation was made based upon a mistaken assumption of law or fact, such that the court believes the testator would not have revoked if he had known of the falsity of the assumption.

a) *Situations where DRR applies*- there are two:

1) Alternative Disposition that fails— specifically, the testator attempted to give a different gift to the beneficiary that was found invalid

2) Mistake in the terms of the Revoking Instrument— where the gift in the new instrument fails for validity or other reasons, leaving the former beneficiary without anything.

b) *Questions to ask in application of DRR*- before applying DRR, a court must answer the following questions:

1) **Is there a valid revocation by physical act?**— Look to earlier discussed requirements to determine if the actions of the testator actually resulted in a revocation.

2) **Should DRR be applied?**— the court may only award the original gift or nothing under the doctrine, when deciding to apply the doctrine the court considers extrinsic evidence of testator’s intent and should award which ever outcome is closer to this intent.

c) *Interlineation/Cross Out*- this situation occurs where the testator, in a none holograph, crosses out a gift and writes in a new one, such as the following: “To Bill my blue dress [cigar].” The new gift is not valid. If the revocation is valid, the court may decide between giving Bill nothing or the blue dress under DRR. *Note that*
DRR will not honor the new gift. This also applies where the names of beneficiaries are changed.

d) Revocation/Mistake of Law – Validity of New Will - this occurs where the testator voids an old will and invalidly executes a new will that fails. The court may use DRR and enforce the old will or allow the estate to pass by intestacy. Note a court may not choose to honor the new will under DRR.

e) Revocation/Mistake of Law- Validity of Old Will - this is where the testator revokes a new will under the mistaken assumption that the old will is revived. Assuming the old will cannot be revived (see below), the court may, under DRR, either enforce the new will or let the estate pass by intestacy, whichever is likely to be closer to the testators intent. Note again that the court may not choose to enforce the old will.

f) Revocation/Mistake of Fact - this occurs where the testator revokes a will or portion thereof on the mistaken belief that circumstances surrounding the disposition have changed. Such as a mistaken belief that a beneficiary is dead. The use of DRR in this situation is more complicated because of a requirement to prove this mistaken belief is the cause of the revocation. The following will be accepted as proof:

1) Will States Mistaken Fact – “NOW THAT HILLARY IS DEAD, I GIVE MY STUFF TO MONICA”

2) Extrinsic Evidence of Testators mistake

3) Not allowed where Mistake was in testators control – if subsequent revocation says “I HEREBY REVOKE GIFT OF 10K TO JACK JR., BECAUSE I ALREADY GAVE HIM THE MONEY.”, but the testator never actually gave him the money, DRR is not applied since clearly the testator was aware of the mistake.

C. Revival of Wills - revival refers to the reinstatement of a will that the testator has already revoked by one of the manners listed above. A testator could trigger revival by simply re-executing the old will, however that would be far to easy. The following statutory schemes are used by states in determining if a will is successfully revived by other actions:

1. Common Law = Automatic Revival (Rare) – at common law a will remained valid until revoked by the testator, if a subsequent will was made and they revoked, the first will would again govern unless it was revoked by some method other than the subsequent instrument.

2. Revival Pursuant to Testator’s Intent (UPC §2-509 Majority)- a majority of jurisdictions will only recognize revival of a prior will if the testator intends it to be. This intent may be manifested in an express provision of the revocation of the second will, or through extrinsic evidence of testator’s intent.

3. No Revival Allowed – so states don’t allow revival, the execution of the second will completely invalidates the first will, unless it is validly re-executed. However, these states may allow the doctrine of DRR, discussed supra, which essentially would allow revival of the will in certain circumstances.

V. Will Components - this section deals with what actually is considered to be the will of the testator. Specifically, issues arises where the testator executes an original
will and then may create subsequent documents. This may create confusion as to which
documents are actually considered to be part of the will.

A. Integration of Wills - the doctrine of integration states that all papers present at
the time of execution intended to be a part of the will are considered to be part of the
will. This is referred to as internal integration. External integration is the reading of
more than one will together. Problems may arise if they are not attached together at
the time, to be certain they are considered integrated as testator may want to initial
each page. The following requirements must be met:

1. Papers must be present at the time of Execution- if the paper is not present at
the time of the will it is not consider internally integrated, and thus never properly
executed

2. Papers must be intended to be part of the Will- obviously there must be intent
that the paper be considered part of the will, typically evidenced by a staple, etc.
or initially, described above.

B. Republication by Codicil - this doctrine has the effect of changing the date of
execution of a will from its original date to the date of the executed codicil. The
following requirements must be met:

1. Codicil must be Validly Executed- like the will, a codicil must meet all the
execution requirements of the jurisdiction that a new will would (such as
witnesses, etc.).

2. Prior Validly Executed Instrument in Existence- the codicil must be added to
an existing will – a validly executed codicil will not subsequently validate an
invalid will.

3. Updating must not be Contrary to Testator’s Intent

4. Effects of Republication- This may be important for determining issues such as
pretermitted children and omitted spouses. They will lose their status after the
execution of the codicil. Additionally, a subsequent codicil to a revoked will may
re-execute and revive it. (Will 2, written to replace Will 1, but subsequent codicil
written to Will 1, would republish Will 1 and revoke Will 2 by subsequent
instrument.)

C. Incorporation by Reference - this allows a testator to incorporate a
memorandum or other document that may contain more specific instructions, etc.
regarding the disposition of property. (UPC §2-510) Essentially, a legal fiction is
created that the external document exists in the will in exact duplication. The
following requirements must be met:

1. Prerequisites- for any incorporation to be successful the following must exist:

   a) Validly Executed Will- the document must be incorporated into a validly executed
      will in order to have any effect.

   b) Writing- the document must be written in form, otherwise, it also has no effect.

2. Requirements- in order to be successfully integrated the document must meet
the following tests:
a) Will must refer to an extrinsic document- the will must actually refer to the
document, not just imply its existence. This is evidence of the testator’s intent.

b) Document must exist at execution of will- most importantly, the memo must exist at
the execution of the will, it cannot be subsequently written or modified after the
execution. NOTE: there is no requirement that document be “executed” like a will
or be present at execution.

c) Will must describe writing sufficient to Identify- the reference in the will must make
clear what document is being referred to, otherwise the reference will fail.

d) Writing Must Conform to Description- the document, even if it is the one intended,
must conform to the description of the document in the will.

3. Exception – Lists of Personal Property – note that some states allow an
exception that allow lists to dispose of personal property not included in the will to
be considered part of a will. Even when drafted after the will, so long as it is
signed, the list itself does not need to be holographic.

D. Acts of Independent Significance- this doctrine allows wills to designate
beneficiaries or property to pass under the will which are identified by acts or event
that have lifetime motives (i.e. independent significance) apart from the will, that is
the acts are not for the sole purpose of completing the will. The following are
example of such acts/events of independent significance. (UPC §2-512).

1. Specific Gifts of General Nature- these are gifts that imply a specific gift, but
the nature of the gift may change after the execution. They are still valid. Eg: “I
LEAVE MY CAR AND MY BOTTLE OF SCOTCH TO LEONARD LITTLE” Even if the testator
sell his current car and gets a new one after execution of the will, Leonard still
gets it.

2. Identity of Beneficiaries- these are gifts made to people that will be identifiable
at the time of death, but whose composition may change after execution of the
will. These are also valid. Eg: “I LEAVE 20K TO EVERYONE WORKING FOR ME AT MY
DEATH” – again the composition of this group is likely to change after execution,
but the gift is still valid.

3. “Contents of” Gifts – these are gifts that are similar to those described in (1),
such as “the contents of my safety deposit box” or “the contents of my gym
locker”; obviously the contents of these items may change, but the gifts are still
valid.

VI. Will Construction- Problems can often arise from attempting to determine
what is intended by the testator in the will. In certain situations, some courts may look
to extrinsic evidence to determine this intent, others will look at the will strictly following
the four-corners doctrine. Unfortunately, testators don’t die right at the time the will is
executed, therefore, often there can be changes in the nature of the beneficiaries or the
estate of the testator that also create confusion as to what is intended by the will. The
following section deal with resolving these problems of construction.

A. Admission of Extrinsic Evidence- in general, as in contracts, courts are
reluctant to allow extrinsic evidence of the intent of the testator, the will is to stand on
its own. This is referred to as the four corners rule or the plain meaning rule. The
below sections delineate what action a court will take towards extrinsic evidence in
situations where intent is unclear:
1. **Mistake**- in general courts are not very forgiving of mistake in the drafting of wills, extrinsic evidence will not be allowed in most situations to eliminate mistake:

   a) **In Execution**- see supra, but mistakes in execution will result in an **invalid will**, such invalidity cannot be cured through extrinsic evidence.

   b) **In Revocation**- see supra discussion of DRR, DRR does allow extrinsic for proving testator’s intent when the court is attempting to decide to apply the doctrine.

   c) **In the Inducement**- in general there is no recourse for inducement to give a gift that is caused by a mistake through extrinsic evidence. However, if the mistake is **recited in the instrument**, then the gift may be void. Additionally, if the gift is a product of fraud, there may also be recourse, discussed supra.

   d) **In Drafting**- there is no exception for extrinsic evidence where there is an error in drafting, unless fraud is alleged, again, sorry Charlie, be more careful, and read what you sign. (CT Junior Republic v. Sharon Hosp.)

2. **Misdescription**- if the will contains a mere misdescription, but the gift and the beneficiary are evident, courts will generally strike the misdescriptive language and honor the gift.

3. **Patent Ambiguity** – this type of ambiguity is **clear on the face of the will**. Eg. “I give 100k to Washington University, commonly known as SLU.”

   a) **Common Law = Strict = No Extrinsic Evidence Allowed**- in a traditional approach no extrinsic evidence would be allowed and the gift would likely fail.

   b) **Modern = Evidence of Circumstances Admissible**- the modern constructions may allow evidence of facts and circumstances surrounding the will, however, statements of the testator are **not admissible**.

   c) **Personal Usage Exception**- where a person may use a nickname etc. to describe a person or object rather than a traditional or legal name, extrinsic evidence of the intent of the testator may be admitted.

4. **Latent Ambiguity** – this type of ambiguity is only revealed when **attempting to apply the will**. This is where no one can be found who meets the description of the will.

   a) **Equivocation** – this is a type of latent ambiguity where **more than one person fits the description** of the will.

   b) **Extrinsic Evidence Allowed** – the court will look at extrinsic evidence to determine what was intended by the testator.

   c) **Statement of Testator to Drafter Admitted**- unlike patent ambiguity, statements of the testator may be admitted when made to the attorney or drafter of the will.
5. **Invalidity of Will** – a court will also accept extrinsic evidence that a will is not a valid because of testamentary intent or capacity. Including that the will is a sham will or the presence of undue influence, etc.

**B. Change in Status of Beneficiaries** – another problem is found in the fact that beneficiary can vary from the time a will is executed until the death of the testator. If the beneficiary dies before the testator, the problem of lapses or void gifts must be addressed. Additionally, where a gift is made to a class of individuals, the gift may be complicated by determining who is a member of the class and when the class closes.

1. **Lapses** - a lapse occurs if the beneficiary of the will dies after the execution of the will, but before the testator. This may also occur where the beneficiary is treated a legally deceased a function of law, but is still alive at the death of the testator.

   a) *Common Law Approach* - this approach was primarily that lapses would drop in the residual clause:

   1) **Specific & General Devises = Drop to Residual Clause** - if the beneficiary pre-deceased the testator, his gift went into the residual clause.

   2) **Portion/All of Residual Lapses = Intestacy** – if the residual gift fails because one or all of residual beneficiaries also lapse, then their portion or the entire residual pass by intestacy.

   3) **Class Gift = Surviving Members Only** – if a member of a class dies before the death of the testator, then he is treated as tough he never existed and his share is split among the other members.

   4) **Void Devise = void gift** – where beneficiary is dead at the time the testator executes the will, this gift is void, property would pass to the residual clause.

b) *Anti-Lapse Statutes* - these statutes prevent lapses by creating substitute beneficiaries. They operate on a presumption that if the testator had know that beneficiary had passed away, he would give the gift to the beneficiary’s descendants. (UPC §2-603)

   1) **Breadth of Statute Varies by State** - each state varies who such statutes apply to based on the relationship of the beneficiary to the testator, as a proxy for if the gift would have been made to the descendants. Some are vary narrow – applying only to 1st degree relatives, others are very broad and apply to any beneficiary.

   2) **Pass to Beneficiary’s descendants who survive the Testator by Intestacy** – where a beneficiary fits within the statute, the gift will pass to his heirs, typically by intestacy statutes (may be restricted to descendants), however, some states may do it based on the will of the beneficiary if he died testate. If no person meet relation restriction, then the gift drops to the testator’s residuary clause.

   3) **Application to Class Gifts** – some states apply their lapse statutes to class gifts as well, there the descendants of a pre-deceased class member may be able to take his share.
contrary intent clause to prevent lapse – in some situations the testator may plan in advance and create an anti-lapse gift, such as “my cigar to hillary, if hillary does not survive me, then to monica.” this trumps any anti-lapse statute that are discussed above. if this gift-over also lapses, most state have the gift drop to the residual clause.

d) modern – attempt to avoid partial intestacy – note that some states in order to prevent partial intestacy will give the entire residual to the remaining living residual beneficiaries, rather than passing lapse shares by intestacy.

2. class gifts – is a gift to a body of persons who may be uncertain in number at the time of the gift; each persons share depends on the total number of persons in the class.

a) general rule = predecease testator = forfeit share – the general rule is that if a member of a class predeceases the testator, his share is forfeited and split among the remaining class members.

b) anti-lapse applied to class gifts – the modern trend is to apply anti-lapse provisions to class gifts as well, therefore, descendants of class members may be entitled to the predeceased’s share.

c) fractional/named gifts – rebutting presumption of class gift – if the testator species names, or fractions of gifts, then a rebuttable presumption is created that the gift is to individuals, and not to a class. however, this presumption may be thwarted with evidence of class language and intent.

d) gift to named person + class = treated as class gift – where a class gift is made and includes and individual, such as “to albert and my children” – the gift is considered to be a class gift with albert added to the class. therefore, if albert predeceases the testator, his share does not pass to the residual under a common law scheme.

e) determining closing of class – for purposes of wills, classes close when they naturally close, or when it is convenient based on the ability of the members to demand distribution, thus typically with the death of the testator.

3. void gifts – this is where a gift is made to a beneficiary who dies before the will is executed. if no statute exists, void gifts pass into the residual clause of the estate. however, the modern trend has been to amend anti-lapse statutes so that they apply to void gifts as well.

C. change in property – once again, things often change between when a will is executed and the death of the testator. one problem is that property that was owned by the testator at the time of execution may not be in the possession of the testator at death or has significantly changed in form.

1. types of gifts – changes in the property can have a varied effect based on what type of gift is given by the testator.

a) specific – this is a gift of a specific item such as my property at 1600 pennsylvania, my cat, my pearl necklace, money is a specific accounts, etc.
b) **General**- this is a property that is not specifically identified by the testator—such quantities of money, 10 acres of land in Texas, etc., 500 shares of K-Mart stock.

c) **Demonstrative**- this is a general devise made from a specific source, such as “30k from the sale of my Beanie Baby collection.”

d) **Residual**- this is a gift of left-overs. It really cannot be adempted.

2. **Ademption by Extinction** – this is where the property which the will devised is no longer in the possession at the time of death.

a) **In Specie Ademption** – (majority approach) – if the item is not present in specie (i.e. exactly in the kind specified) the bequest fails regardless of the intent of the testator.

1) **Applies only to Specific Devises**- note that this type of ademption can only occur with specific devises.

2) **General & Demonstrative Devises = No Ademption** – if a person is given a general gift or demonstrative gift and there is not assets in the estate to satisfy the bequest, or the item of the demonstrative is not in the estate, other assets may be sold to satisfy the gift.

3) **Total Failure, Nothing Conveyed**- under this view if the gift is adempted by extinction, it fails completely and there is no substitute gift conveyed.

4) **Change in form, but not Substance is Okay**- where stock in a company changes into stock in another company through a merger, or where a bank changes names in a merger, it is unlike the court would considered the gift adempted.

5) **Court’s ways to Avoid harsh ademptions**- courts may do several things to avoid the potentially harsh results of ademption by extinction:

   ⇒ Characterization – view gift as general rather than specific

   ⇒ Classify the change in property as change in form instead of substance- give proceeds of change.

   ⇒ Find that ademption was not voluntary – give value where a finding was that testator didn’t mean to get rid of gift, or gift was disposed of by guardian or conservator.
b) **Intent Doctrine** – (minority approach, UPC §2-606) – this doctrine looks at whether testator intended the gift to ademption. The UPC uses this theory to create a mild presumption against ademption. This may allow the beneficiary to receive the value of the gift or other alternated gifts.

c) **Partial Ademption - Pro Tanto Ademption** - some time the gift may be only partially admepted (i.e. left 100 acres a of property to A, but at death, only owned 75 acres because of sale, etc.). In this situation, the beneficiary is to receive only what is left, even in intent jurisdictions.

3. **Ademption by Satisfaction** – this is the failure of a testamentary gift because the testator has already transferred the property to the beneficiary between the time of the will’s execution and the time of death. This is essentially parallels the intestate succession concept of advancement. Any gift in the will would be reduced by the amount given before death.

   a) **Applies only to General & Demonstrative Gifts** - this is because the doctrine of ademption by extinction would effect these gifts.

   b) **Creates a rebuttable presumption of Ademption** - transfer to children during life that is similar to property devised by the will should create a presumption that the gift has been satisfied.

4. **Accession/Accretion** - property in the will may increase or decrease in value. The question may be asked to what is the beneficiary entitled at the death of the testator and was is placed in the residual clause – as a general rule – the beneficiary will take profits as a result of a change in form, but not substance.

   a) **Stock Splits** - a possible problem exists where a stock splits between the time the will is drafted and distribution of the estate at the death of the testator. This problem has two possible resolutions:

      1) **Specific Gifts** - if the court finds that the will intended to make a specific gift, such as “I LEAVE MY SHARES OF DEATH ROW RECORDS TO TIPPER”, then the court is likely to give the beneficiary ALL SHARES.

      2) **General Gifts** - if the bequest is a general one “I LEAVE 100 SHARES OF BEACHCRAFT TO JOHN JOHN” then the court will probably only award the number specified by the will, the split shares would move to the residual clause.
b) **Dividends**—these earnings distributions from stocks, etc. Additionally, offspring of pets are also considered dividends. Dividends distributed after execution, but before the death of the testator are the property of the testator and would pass to the residual. Dividends earned after the death but before distribution would belong to the beneficiary.

5. **Abatement**—the issue of abatement must be addressed when an estate has *insufficient assets to fulfill all the bequests of the will*. This can often happen because there is a priority of paying off all debts and creditors (such as student loans) before paying out the rest of the estate. (UPC §3-902)

   a) **Order of Abatement**—when other gifts must be abated to fulfill the bequests of the will, they are cancelled in the following order:

   1) **Intestate Property**—if the testator died partially intestate, this property is first to be eliminated.

   2) **Residuary Gifts**

   3) **General Gifts**—reduced on a pro-rata basis, and if necessary completely eliminated.

   4) **Specific Gifts**—also first reduced pro-rata - some states provide that specific real estate gifts are to be favored over personal property. Some states also give direction as to favoring certain relatives over others.

   b) **Calculating Pro Rata Shares**—note that reductions are made on a pro rata basis *by category* (therefore all general gifts are eliminated before any specific gifts are reduced pro rata). This is done by:

   1) **Total all category gifts**

   2) **Calculate fractions for each beneficiary**

   3) **Multiply by amount available to all individuals**.

6. **Exoneration**—this issues arises when the property bequeathed by the testator (either real or personal) is encumbered by a mortgage, lien or other security interest.

   a) **Common Law = Passes Free & Clear**—exoneration was presumed at common law, and the residual of the estate was used or other gifts were abated through the process listed above in order to allow the property to pass free and clear.

   b) **Modern Law = Passes w/Mortgage (UPC §2-607)**—because of the imposition that exonerating property often puts on estates, requiring the abatement of gifts and presumable frustrating the testator’s intent, modern statutes allow the property to pass with the lien, unless specific language exists in the will directing it be exonerated.

VII. **Restrictions on Testation – Family Protections**—historically, some protections have existed to assure that members of a testator’s family
are provided for, even where the testator has attempted directly or inadvertently disinherited them. These protections exist for spouses and children of the testator.

A. **Elective Share**— in non-community property jurisdictions, historically, all wages and property bought with them were the property of the owner. Historically, the spouses were protected with the rights of homestead and dower (curtesy) Modern laws also provide in order to protect a spouse who did not earn money, a spouse may claim a forced or elective share from the estate of the testator. This share is taken instead of any gift in the will of the testator.

1. **Typically = 1/3 of the Estate**— in most states, if the spouse is not provided more in the will, she may claim a 1/3 share, however in some states, this may be only a life estate interest. It may also include a minimum dollar value.

2. **UPC §2-202 = Sliding Scale**— spouse receives a percentage of estate based on how long married to testator before death. 3% after the first in increasing at 3% per year until ten years, then increasing at 4% a year until 50% is reached at 15 years of marriage.

3. **Property Subject to Elective Share = Augmented Estate**— an elective share in many states is determined based on looking at more than the normal probate estate to determine the value, the following may be considered part of this augmented estate and will be counted in determining the proper elective share:

   a) **Joint Tenancies w/Spouse as Survivor**— properties held w/the testator as a joint tenancy with a right of survivorship will be counted in the augmented estate.

   b) **Life Insurance Not Payable to Spouse**— life insurance benefits paid on the death of the testator to someone other than the spouse.

   c) **Inter Vivos Gifts**— in general will not be counted as property in the augmented estate or against any elective share figure. However, the Old UPC and some states treat such gifts like advancements and will count it in the estate and against the amount owed the spouse under the forced share.

4. **Avoiding Elective Shares- Inter Vivos Trusts**— where a husband is really determined to screw his wife. He may create an inter vivos trust, such a trust is likely to have the testator as both a trustee and beneficiary. This scheme removes the assets from the probate estate, but still gives the testator control over the assets during his life. A variety of schemes are in place to limit this ability to hide assets from the forced share by recapturing the assets of the trust at death.

   a) **Illusory Purpose Test**— some jurisdictions will find that the trust was formed for an illusory purpose – mainly the improper purpose of keeping them out of the estate and away from spouse. The court may recapture the assets to the estate for purposes of determining and satisfying the elective share where the testator had substantial control over the trust, specifically-

   1) **Testator = Trustee or Power of Appointment**— the testator is the settlor and the trustee or has the ability to appoint/remove the trustee.

   2) **Revocable Trust**— if the testator reserves the right to revoke the trust.
3) **Testator is Beneficiary**- Testator is also a beneficiary.

   b) *Intent to Defraud/Deprive* - states that use this standard look at subjective intent, sometimes under a factor test, such as control retained, time between settling and death, revocation power, etc.

   c) *Statute Regulation* - some states have codified these tests in statutes.

   d) *No Statute/No Test* - (minority) some states have no tests or statutes and effectively let the spouse hide assets from the other through this sort of trust.

5. **Satisfying the Elective Share- Who Contributes?**- obviously a forced share is not calculated in the estate, therefore it must come at the expense of other persons' gifts, there are two ways that states, first, the value of the property disclaimed by the spouse by electing to take a forced share is used to satisfy her share, the rest comes from:

   a) *Ordinary Rules of Abatement* - a minority of states apply the normal rules of abatement discussed supra VI.C.5.

   b) *Pro Rata Contribution* - a majority of states will instead take the share pro rata – essentially 1/3 of everybody's share.

6. **Waiver of Elective Share**- states (UPC §2-213) allow for a spouse to waive the right to an elective share (in prenuptial agreements, etc.) however, there is a strong presumption in favor of the forced share and any such waiver to be valid must be made after fair disclosure. Specifically, the following factors are considered:

   a) *Legal Ramifications of Waiver*

   b) *Opportunity Consultation of an Independent Council*

   c) *Experience/Intelligence of Waiving Spouse* (the dumb blonde exception)

   d) *Economic Condition of Waiving Spouse*

   e) *Knowledge of assets in estate of testator*

**B. Community Property**- in a community property situation, all earnings, acquisitions from them and property bought by both spouses during the marriage (w/some exceptions) are considered to be community property. These states law stems from Spanish/French civil codes: CA, AZ, ID, LA, NV, NM, TX, WA & WI (Uniform Marital Property Act).

1. **Modifies Common Law System**- note that at common law, a husband & wife owned separately all the property each acquired. Unless specifically acquired by joint ownership.

2. **Pre-Marital Property Excluded**- if the property is acquired before the marriage, or the result of a gift or inheritance of one spouse it is not part of the community
property. Such property may become all or in part community because of maintenance payments from the community property or decision of the spouses.

3. **Only Own \( \frac{1}{2} \) Interest** – where property is community a spouse only \( \frac{1}{2} \) of the property, therefore will bequests only convey the half of the property owned by the deceased spouse.

4. **No elective share**- communities do not have elective share statutes.

C. **Migrating Couples**- another problem is that married couple don’t always stay in the state they are married and can own property in a number of states, this creates issues of what law applies to marital assets.

1. **Conflict of Laws Problem** – property faces determination of rights that we are concerned in this situations at two points- when the property was acquired which is a problem of characterization as separate or marital, and secondly at the death of the testator when marital rights are applied to the property

   a) **Real Property = Situs Law Controls** – traditionally there has always been strong deference to the laws of the location of real property, therefore, the law of the situs controls both the characterization of the property as marital or separate and the application of marital rights.

   b) **Personal Property** – the problem of personal property is more complex, there are two important times for determining the effect of marital rights on property, this is an issue where the matrimonial domicile is moved between acquisition and death:

      1) **Acquisition = Characterization** – whether property can be considered marital or community property is determined at the time of the property was acquired by the laws of the state of the matrimonial domicile at the time of acquisition.

      2) **Death of Testator = Marital Rights** – the law of the matrimonial domicile at the death of the testator determines if there are marital rights in the property

2. **Resolving Problems of Migrating Couples**- solving the problems where the matrimonial domicile has moved from community property to an non-community property jurisdiction or vice-versa between acquisition are to be solved in the following steps:

   a) **Determine Characterization**- was the property separate or community at acquisition?

   b) **Apply Marital based on Domicile at Death**- for community property now in an elective share state there is no change, but separate property now in a community property state will now likely be considered “quasi community”

   c) **Be Aware of cumulative rights**- note that a spouse is entitled to half of all community property, which is considered to be hers and may have a forced share (usually 1/3) of all the property of the spouse where there has been a move in jurisdictions (move from community to separate) – this is cumulative (so she really has 2/3 of community property under elective share)

3. **Moving From Separate to Community Property States**- where property would have been considered community, but was acquired in a separate property
jurisdiction and the matrimonial domicile is moved to a community property state at the death of the testator, may be considered quasi community property, however not all community property states recognize quasi-community property, this has the following effect:

a) \textit{Acquiring Spouse Dies First}- property is treated as community and the other spouse receives one half, the testator may dispose of the other half (however, spouse may be subject to elective share).

b) \textit{Non-Acquiring Spouse Dies First}- property is treated as separate – entire interest remains with the acquiring spouse.

4. \textbf{Moving From Community Property to Separate States}- unless converted by the spouses, property that was acquired in a community property state remain community property even after moving to a separate property jurisdiction.

\textbf{D. Omitted Spouses}- an omitted spouse is one that is married by the testator after the execution of the testator’s will that is effective at death, and is not included in that will. The idea here is that the disinheritance of the spouse is accidental and not intentional on the part of the testator.

1. \textbf{Effect of Marriage on Pre-Marital Will}- the effect of the marriage itself may effectively invalidate the entire will as an operation of law, however, modern statutes don’t tend to follow this common law rule. Both tend to have the same result of allowing the spouse to take an \textit{intestate share}.

a) \textit{Common Law = Revocation by Operation of Law}- at common law the will was considered completely revoked as an operation of law after marriage, therefore, the \textit{entire estate would pass by intestate succession}, and an omitted spouse would take an \textit{intestate share}.

b) \textit{Modern Law = Partial Revocation-} the modern trend is to treat the will as partially revoked to the extent of the share of the omitted spouse, the spouse may take pursuant to her \textit{elective share or omitted spouse share} (which is typically the \textit{intestate share}, larger than the elective share), if it is established by statute. \textit{UPC = omitted share = intestate share} (§2-301).

2. \textbf{No mention of Will = Rebuttable Presumption that Spouse is Omitted} – if the spouse is not mentioned in the will of the testator at all, then there is a presumption that the spouse was not omitted intentionally and may take an omitted share. However, if the spouse does appear in the will, there will be a presumption that the will was made in contemplation of marriage.

3. \textbf{Exceptions to Omitted Spouse Provisions}- several exceptions may prevent the spouse from claiming to be omitted. (UPC §2-301) A spouse may not be considered to be omitted where:

a) \textit{Will executed in contemplation of marriage} – if it is evident that despite of the date of the will, it was contemplated in the marriage of the spouse. Extrinsic evidence???

b) \textit{Expressed intent of will to remain in effect despite marriage}- if the will expresses that it should remain in effect even if the testator marries.
c) **Spouse provided for outside of will** - if the spouse is provided for by other transfers outside the will, such as life insurance beneficiary, etc.

4. **Satisfying the Omitted Share - who contributes?** - unlike elective shares, a majority of states fulfill the omitted share by normal rules of abatement, however, a minority use a pro rata contribution. Note that under the UPC, an omitted spouse has no claim against the property left to a child of the testator, who is not related to the spouse.

5. **Elective Share v. Omitted Share** - an omitted share can be contrasted with an elective share in several ways:

   a) **Omitted Usually Larger** - an elective/forced share is typically 1/3 of the estate, while an omitted share is typically equivalent to the intestate share, therefore, is often around ½ the estate.

   b) **Elective Share Uses Augmented Estate** - an elective share is calculated by using non-probate assets in the equation (see supra), based an augmented estate, an omitted share is calculated only by using the probate estate.

   c) **Elective Share Not Defeated by Intent** - a spouse may be unable to take an omitted share where intent that she be omitted from the will can be demonstrated, however, the right to an elective share cannot be defeated with the all the evidence in the world that the spouse wished the other were dead.

   d) **Elective = Pro Rata – Omitted = Abatement** - a majority of states use a pro rata contribution to gather assets for the elective share, but they use regular abatement to gather shares for an omitted share.

   e) **Heirs of Survivor may claim Omitted Share** - if the spouse survives the testator, but dies before the distribution of assets, there is no right for her heirs to claim an elective share, however, these heir would have a right to claim the omitted share. (Estate of Shannon).

E. **Pretermitted Children** - there are no statutes requiring parents to leave parts of their estate to their children, except for Louisiana. A presumption may be created that the disinheritance was inadvertent and the child may be guaranteed a share of the estate. This is a pretermitted child and are often protected by statute.

1. **Pretermitted Child = born/adopted after execution** - most state protect only children who were born or adopted after the will of the testator was adopted.

2. **Effect of Pretermitted Child = What Share?** - remember at common law, this determination would have the effect of revoking the will as an operation of law. Thus allowing the child to take by intestate succession. Modern statutes are not so extreme, such statute often look to gifts to the other children of the testator and will give the child the lesser of the intestate share or gifts to other children.

3. **Other Children Considered Pretermitted (MINORITY)** - a number of variations of these statutes exist, some states have statutes that also protect the following persons as pretermitted children.
a) *Must Specifically Disinherit Children* – some statutes will also protect children *born/adopted before the execution of the will* where the child is not specifically disinherited by the will.

b) *Child Mistakenly Though Dead* – other jurisdictions also have statutes that cover children of the testator that were mistakenly believed dead at the time of the drafting of the will.

c) *Heirs of Pretermitted Children* – some statutes also allow the heirs of pretermitted children to claim the share of the child, if the child predeceases the testator and they are not otherwise provided for in the will.

4. **Children NOT Considered Pretermitted** – the following are situations where a child that may otherwise be considered pretermitted, will not be treated as such:

a) *Will Indicates Intent to Disinherit (Missouri Type)* – where the face of the will indicates an intent of the testator to disinherit the child. Extrinsic evidence of intent is not considered.

b) *Extrinsic Evidence = Intent to Disinherit (Mass. Type)* – both the will and extrinsic evidence may be used under these statutes to show that the omission of the child in the will was intentional.

c) *Eligible under Class Gift* – if the child is not named in the will, but is eligible to take under a class gift in the will (“to my children…”), then they will also not be considered pretermitted.

d) *Non-Probate Transfer* – where the child was the beneficiary of a non-probate transfer, such as a life insurance policy or POD account.

e) *Entire Estate to other parent of child* – some statutes also do not treat children as pretermitted where the entire estate of the parent is left to the other parent of the child.

5. **Effect of Re-publication** – a will is considered to be republished as of the date of execution of a valid codicil, therefore, if this date is after the birth of a child, that child is *no longer considered pretermitted*. This would presumably also apply to omitted spouses. (*Azcunce v. Estate of Azcunze*)

6. **Malpractice Against Drafter – Privity Requirement** – beneficiary’s generally lack privity to sue the drafter under malpractice protection. However, exceptions are granted in some states for persons named in the will. With pretermitted children, this is *not possible* because by definition, they are not in the will.

**VIII. Trusts** – this is a popular device that is used to avoid probate, to assure effective management of assets, protect the future interest of property, avoid probate and minimize taxes. The agreement creates legal title in a fiduciary (the Trustee) and an equitable interest in the beneficiary.

A. **Types of Trusts** – trusts are not just created by wills, but may be created in a number of situations, however all must meet the requirements established below in VIII.B.
1. **Inter Vivos** - this is a trust created while the settlor is still alive, often the settlor reserves the income of the trust to himself as beneficiary until death. This trust is often used as an *alternative to a will*. It is created by a declaration of trust or deed of trust.

2. **Testamentary Trust** - this type of trust is created by the will of the settlor at his death. In addition to meeting the trust requirements, such a trust must *meet execution requirements of a will*.

3. **Express Trust** - this is trust that is made at the wish of the settlor through a writing or orally, contrast with a constructive trust.

4. **Operation of Law** - a trust is created by operation of law is created w/o any express intent. Such trusts are created when:
   
   a) *An Express Trust Fails* – through an invalid instrument, etc.
   
   b) *A Trust is Implied* - the settlor doesn’t explicitly establish, but intent is inferred.
   
   c) *Constructive Trusts* - imposed by court by a statutory duty, such as a slayer statute (discussed *supra*), generally because it would be *unjust to allow the trustee to benefit from the assets*.
   
   d) *Trust of convenience* - created where court see trust as necessary to protect legal interest against waste. (not common)

5. **Declared Trusts** - these are trusts in which the settlor is the *sole trustee*. These may be private (for benefiting individuals) or charitable.

6. **Irrevocable Trusts** - if no language in the trust says otherwise, *an irrevocable arrangement is presumed*. The settlor cannot revoke the trust assets. Also called a vested trust.

7. **Revocable Trusts** - contrasted with above, this is a trust where the settlor retains the power to revoke the trust assets.

**B. Required Elements of a Trust** - in order to create a valid and enforceable trust agreement, the following elements must all be present:

1. **Valid Purpose** - a trust may be created for any purpose so long as the purpose is not *illegal*. Additionally, the trust by its terms must *not* require the trustee to commit an act that is *criminal, tortious or contrary to public policy*.

   a) *Defrauding/Evading Creditors = Improper Purpose* - trusts that are created for the sole purpose of keeping the settlor’s money out of the hand of creditors (both tort and financial), or other person’s who would have a right to the property (spouse’s forced share) is an improper purpose

   b) *Inducing acts in others = Improper purpose* - additionally that would induce another person (like a beneficiary) to commit an act that is criminal, tortious or contrary to public policy (like divorcing a spouse) through its conditions is also an invalid purpose
c) _Discrimination Doesn’t Necessarily = Improper Purpose-_ trusts that discriminate (such as a trust that creates scholarships for one-legged Filipinos) will not necessarily be considered to be an improper purpose if the serve the public good, the 14th amendment doesn’t apply to private individuals.

d) _Remedy for Improper Purpose_- there are several remedies to trusts enacted with improper purposes, for the most part, these remedies vary with the nature of the invalidity.

1) **Invalidate Trust, Undo Transfer**- the court may invalidate the trust and return the property to the estate of the settlor, where it would pass by residual or intestacy.

2) **Give to Trustee**- where the settlor is seen as having _unclean hands_, the court will be reluctant to return the assets to the settlor or his estate and will instead give legal title to the trustee w/o any restriction.

3) **Refuse to Enforce Condition**- where a trust is only made invalid by restrictions placed on the gifts to the beneficiary, (to Jim, so long as he divorces that bitch Heather) the court may enforce the trust w/o the restrictions if doing so does not violate the settlor’s overall intent.
2. **Settlor** - this is the person who creates the trust with assets, the settlor may also be a beneficiary and trustee, so long as at least one other person is a beneficiary or trustee.

3. **Trustee** - the trustee owns legal title to trust assets and holds property during the term of the trust, the trustee owes fiduciary duties to the beneficiary. A person is not bound to be a trustee, and may refuse to accept position.

   a) *May be person or corporation*

   b) *May be Beneficiary, Settlor or third party* - note that the settlor cannot be sole trustee or beneficiary, also fees may be paid to 3rd party in return for services of administering trust.

   c) *No Trustee = court appointment* - a trust will not fail for lack of a trustee, the court will appoint.

   d) *Merger Doctrine* - if the sole trustee is the sole beneficiary of the trust, ownership vests in the person and the trust is terminated.

4. **Beneficiary** - holds equitable title to trust assets, it entitled to benefits delineated by trust, has standing to hold trustee accountable as fiduciary. See infra VIII.D.

5. **Inter Vivos - Transfer/Present Declaration** - in order to create a trust, the settlor must make either a present declaration or a transfer of a deed of trust. The trust must be created at that time, i.e. the statement must actually create a trust and not just state intent to create one. A trust is validly created even if it only creates a future interest in beneficiaries.

   a) **Declaration of Trust** - this is a self-declaration by the settlor, by which he/she declares to be the trustee of a trust and transfers some equitable interest to one or more beneficiaries. The settlor retains legal title and is subject to self-imposed fiduciary duties.

   b) **Deed of Trust** – this is required for an inter vivos trust where the settlor is not the trustee. It transfers legal title to the trustee and imposes fiduciary duties on that person. The deed must also specify the beneficiaries (may include settlor.)

   c) **Delivery Requirement** - in order for a trust to be valid you need a transfer, in order for a transfer to be valid something must be passed to the trustee – either physical or symbolic deliver (such a piece of paper denoting intent or keys, etc.)

6. **Intent** – the settlor must show intent to create a trust, either by the means shown above for an inter vivos trust, a issue may exist in wills over the gift is outright or in the form of a trust.

   a) *No Particular Words Necessary* - there is no magic language that triggers a trust when used in a devise, however, people often use language such as “to Teddie to hold for the benefit and use of John John”
b) *Precatory Language Doesn’t Suffice as Intent*- mere expression of what the testator hopes the gift will be used for doesn’t necessarily create a trust such as “to Teddie with the hopes he won’t use it to buy more Chivas”

c) *Constructive Intent*- a court will find intent and create a trust in situations where the intent of the donor is clear, but the trust was not fully consummated before the death of the donee…(see infra IX.B.2)

1) **Donee knows or should have known trust was intended**- the court may also create a trust where evidence shows that the donee was aware or should have been aware that the donor intended.

2) **Dies Before Delivery** – if the owner dies before the trust property is delivered, *clear &convincing* is required to prove that a trust was actually intended.
C. **Requirement of Trust Property** - in order for a trust to be valid, it must 
contain some property interest, regardless of if it is in fee simple, contingent 
remainder, leasehold, life estate, etc.

1. **Property interest must be in existence** - the property must be in existence at 
the time of creation, a mere expectancy of receiving/creating property, regardless 
of the probability that the interest will be created.

2. **Need to Renew Intent** – if a trust is created and the property is not in existence 
at the time of creation, but comes into the possession of the settlor subsequently, 
in order to be valid the trust will need to be re-executed.

3. **Gift v. Trust** – note that gifts = requires intent + delivery = additionally, things not 
in existence may be gifted.

D. **Requirement for Beneficiaries** - the beneficiary holds equitable title in the 
trust and are owed a fiduciary duty by the trustee.

1. **Beneficiaries must be Ascertainable** - trusts must abide by the rule of 
perpetuities, they may be unborn at creation, but they must be certain to be 
ascertained, or the trust fails and returns to the residuary of the estate.

2. **Beneficiaries must be Capable of Delimitation** - if a gift is to a class of 
beneficiaries they must be able to be determined from the rest of the population 
by definition, feature, etc. E.g. devises such as “for my friends” would fail, while 
“for my relatives” would be okay.

3. **Pets as Beneficiaries** - because animals are not people they violate the rule 
against perpetuities. However, some jurisdictions may allow an animal to be the 
subject of an honorary trust, see below.

IX. **Special Types of Trusts** - in addition to trusts described above, several 
variations on the trusts exists.

A. **Honorary Trusts** - these are trusts that are for a specific non-charitable specific 
purpose, but lack ascertainable beneficiaries. (UPC §2-907). Such trust are not 
recognized by every jurisdiction. Those that do, often have special statutes.

1. **Not binding on Trustee** - these are called honorary trusts because the trustee is 
bound only by his honor and no fiduciary duty to carry out the wishes of the 
trusts.

2. **Purposes of Honorary Trusts** - in order to have a honorary trust, it must have a 
specific goal, but no ascertainable beneficiary. There are two common purposes:

   a) **Erection of Monuments** - a big statute of the settlor saying “I was a great person”

   b) **Care of Animals** - the care of specific animals

3. **Limits on Honorary Trusts** - jurisdictions that allow these trusts have specific 
statutes that place limits on the extent of the trust
b) **Time Limit - Rule Against Perpetuities** – the trust must not violate the rule against perpetuities, however, they violate the rule by their specific definition, as a result the statutes often place a specific time limit on the gift (21 years).

c) **Unduly Large Amount** – statutes limit the amount that can be placed in such a trust – you can only leave your pet so much money.

d) **Non-capricious Purposes** – statue require that the trust purpose be more than frivolous.

### B. Oral Trusts

there is no formal requirement that trusts must be in writing to be valid, however there are several situations where a writing may be required, however, there are exceptions to these rules allowing waiver of a writing requirement.

1. **Is a writing Required?** – a written trust is always advisable, however, a written instrument is only required for:

   a) **Testamentary Trust** – as discussed above, this type of trust is a part of a will and must meet with all the requirements of a will – one of which is a writing.

   b) **Inter Vivos Transfer of Real Estate** – transfers of real estate must comport with the statute of frauds.

2. **Equitable Trusts - Trustee Misconduct** – a trust will not fail for lack of writing where the conduct of the trustee induces the settlor to fail to met the writing requirement, this is a constructive trust imposed by the court:

   a) **Fraud or Duress Used by Tranferee**

   b) **Confidential Relationship between Transferor/ee**

   c) **Transferor made transfer in anticipation of death**

   d) **Court May Refuse Where “Unclean Hands”** – the court may refuse to create such a trust where the transferor conveyed the property for an improper purpose – such as tax evasion, avoid spousal share, etc.

3. **Common Situations for Oral Trusts** – there are several situations where oral trusts are more common than written instruments:

   a) **Disposition of Personal Property** – most jurisdictions allow an oral trust of personal property where there is a third party trustee and there is evidence that the settlor expressed trust intent either before or contemporaneously with the transfer.

   b) **Gift to Adulterous Lover** – where the transferor is otherwise married, drafting a written instrument is not always an option.

   c) **Inter Vivo Gift of Home to Child** – where a parent makes an inter vivos gift to child in return for a promise to allow the parent to live in the home, etc.

4. **Secret Trusts** – this is a situations where the property devised in a will is made without any indication the property is to be held in trust for another. Courts in this
situation will rely on extrinsic evidence that the gift was made as a trust in order to prevent unjust enrichment of the beneficiary. If convinced of the testator’s intent the court will impose a constructive trust.

5. **Semi-Secret Trusts** - these are trusts where the will makes clear that the trustee is not entitled to the gift, but fails to name beneficiaries. In such situations, most courts hold that the trust fails, and the gift returns to the residual of the settlor’s estate. Extrinsic evidence is not allowed to prove intent.

C. **Discretionary Trusts** - accurately predicting the needs of beneficiaries at the time of execution of a trust may be exceptionally difficult, therefore, a settlor may choose to create a trust that give the trustee general directions, but allows the trustee to use his judgment in distributing the funds either the income, corpus, or both. This compares to a mandatory trust where the trustee must distribute according to the trust.

1. **Spray/Sprinkle Trusts** - this is a discretionary trust where the trustee has the discretion of how much income to give to beneficiaries.

2. **Comfortable Support/Maintenance Trust** - ***NOTE: this is not the same as a SUPPORT TRUST- see infra, IX.F)*** sometimes the trust may specify a certain standard of support to be given by the trustee. The trustee has discretion to determine the appropriate level of disbursement. Note this will create a fiduciary duty to inquire into the needs of the beneficiary. Beneficiaries still may sue on alleged violations of fiduciary duty.

3. **Exculpatory Clauses = Disfavored** - these are provision which attempt to limit the liability of a trustee in case a breach of fiduciary duty is found. Court may allow this sort where liability is not completely eliminated, but the standard of care is lowered, also the court will look at the relationship between the trustee and the settlor out of concern of improper influence—

   a) Did Trustee have Fiduciary Relationship w/Settlor?

   b) Did Trustee Draft Instrument?

   c) Did Settlor have Independent Advice?

   d) Is the Provision Reasonable?

   e) Was there Undue Influence of other improper conduct?

D. **Spendthrift Trusts** - these are a variation of trusts where the beneficiary cannot alienate/devise the interest in the trust, this prevents creditors from reaching income or principal of the trust. The goal of such trusts is to protect beneficiaries who may be foolish. In some jurisdictions, this may be the default arrangement (NY), but most require specific language to trigger spendthrift status.

1. **May Limit Amount of Income Protected** - such statutes often contain limits to the spendthrift protection in terms of how much income may be received from the trust. This limit is often the amount needed for support at the current station in life and education of the beneficiary.
2. **Special Claimants against Spendthrifts** - the modern trend is to allow certain special classes of claimants to reach the beneficiary’s interest in a spendthrift trust on *public policy grounds*. Such rights may even extend to the corpus of the trust.

   a) *Suppliers of Necessary Services* – such as medical service providers, for services rendered to the beneficiary.

   b) *Persons Beneficiary is Bound to Support* – this includes payments of child support and alimony.

   c) *Tort Creditors*

   d) *Claims By State/Federal Gov’t* - most notably for payment of taxes.

3. **Self-Settled Spendthrifts Prohibited** - historically, self settled spendthrifts are prohibited because the purpose of protecting the beneficiary is obviously not present and it could be used to avoid creditors.

**E. Off-Shore Trusts** - a trust may be created in a foreign country. These trusts are often created because they are beyond the reach of US Courts.

   1. **Legality Turns On Intent** - The legality of these trusts turn on intent of these trusts, courts allow such trust made to protect assets from *unknown future lawsuits*, however, if the trust is created with the purpose of evading from *present or threatened* lawsuits, will *not* be valid and is considered fraudulent.

   2. **Sanctions for Invalid Intent** – while a US court will not be able to reach the assets themselves by invalidating the trust, they may *hold the settlor in contempt* if he fails to retrieve the assets. Additionally, an attorney who knowingly drafts an instrument may face ethical sanctions.

**F. Support Trusts** - these are trusts that *require* the trustee to make payments of income (or principal) to beneficiaries in an amount necessary for education or support. This is different than a comfortable support trust in that the expenditure of such trust is *limited to meet basis needs of beneficiary* (including education). These interests are also *not alienable*.

   1. **Protected from Creditors** - like a spendthrift such trusts are protected from general creditors, with some exceptions, such as the providers of necessary services. For this reason, self-settled support trust are also prohibited.

   2. **Partial Alienation Restriction** - the beneficiary is only restricted from alienating the benefits to the point necessary to support him, if the beneficiary is to receive additional funds under the trust, they are freely alienable.

   3. **State Supported Individuals and Support Trusts** - in some situations, beneficiaries may be eligible for state assistance, this situation creates two potential issues: (1) when determining eligibility for state benefits, to what extent in trust income considered?; (2) how can a trust be crafted as to augment but not superecede amounts to be received by beneficiaries from the state? The answers to these questions depend on the *nature of the trust income*: 
a) *Self-supported Trusts* - these are trusts where the person who wants to receive the state benefits also was settlor of the trust.

1) **Revocable** - if the trust is revocable, *both the corpus and income* are considered to be assets at the disposal of the settlor for determining eligibility for state benefits.

2) **Irrevocable** - if the trust is irrevocable, *corpus and income* that the settlor has a *legal right to receive* is considered to be assets at his disposal for eligibility calculations.

b) **3rd Party Trusts** - these are trusts that are settled by someone other than the beneficiary who is attempting to claim state benefits:

1) **Mandatory Trust** - where trust payments are mandatory (i.e. support trusts) *all income* to which the beneficiary is *legally entitled* is considered in determining eligibility.

2) **Discretionary Trust** - since a beneficiary is *not legally entitled* to the income of such trusts, this income is **not** counted in determining eligibility of benefits. These are often referred to as a *supplementary needs trust*. 
G. **Charitable Trusts** - because of a general desire to encourage charitable activities, some of the requirements that are required of private trusts are not required for charitable trusts. Specifically, while a trust must be created for a specific charitable purpose, it does not need to comport with requirement of a definite beneficiary. Additionally, if the purpose is frustrated, the court may reform the purpose to avoid failure of the trust.

1. **Must Have Valid Charitable Purpose** - in order to be a valid trust it must have a charitable purpose such that the trust’s actual beneficiary is the public. Just because a trust is benevolent doesn’t mean it is necessarily charitable. Specifically, except for the attempts to relieve poverty, the trust must not result in mere personal financial enrichment. The court has the power to determine if the purpose is charitable and will typically use a community consensus standard. Court will typically find a charitable purpose in the following non-exclusive list:

   a) Relief of Poverty
   b) Advancement of Education
   c) Advancement of Religion
   d) Promotion of Health
   e) Governmental or Municipal Purposes - Park & Museums, but not political parties.

2. **Indefinite Beneficiary Required** – a charitable trust is free of the requirement of known beneficiaries, this means that the rule against perpetuities doesn’t apply to charitable trusts.

   a) Must not be specifically named by trust- the trust should specify the charitable class in extremely broad terms.
   b) Must be sufficiently Broad to be “Charitable”- the class of beneficiaries must be the public, and not a particular person of small group. This can still be one person, so long as they are not identified by the trust (such a scholarship trusts).
   c) Mixed Trusts = Okay -

3. **Attorney General = Standing to enforce Fiduciary Duty** - because such trusts are for the benefit of the public, the attorney general of the relevant jurisdiction will have standing to enforce the fiduciary obligations of the trustees. Other statutes may provide beneficiaries w/limited standing to challenge trustee.

4. **Cy Pres – Reforming the Charitable Purpose** - because of the general desire to enable charity, the doctrine allows the reformation of the purpose of a charitable trust where its original purpose has become frustrated. In this situation, a private trust would terminate, without judicial interference. The doctrine is an attempt to approximate the wishes of the settlor.

   a) Must Have Valid Charitable Trust- first required element is a trust that meet the requirements listed supra.
b) **Particular Purpose Becomes Frustrated** – The original purpose of the trust must become **Impossible, Impracticable or Illegal** because of some sort of change in circumstances, etc.

1) **“Posthumous Surprise”** – this is a change in circumstances that the testator could not have foreseen, and if he had would have changed intent.

2) **Cannot change purpose for “better allocation”** – the purpose must be destroyed, a court should not apply cy pres to create a more efficient scheme that what was created by the settlor. (Buck)

3) **“Wastefulness” may be sufficient** - the new uniform trust act has a specific provision allowing for the application of cy pres where a gift if charitable but considered to be wasteful – may change outcome of Buck.

4) **Discrimination** – where trust as applied would constitute illegal discrimination, the court will apply the doctrine to remove the illegal restrictions.

c) **May conclude trust had general purpose w/suggestion** - court may apply cy pres to conclude that trust had a general intent and that specific goal of the trust was more of suggestion. (Neher – left money for construction of hospital, city didn’t need hospital – built health admin. building instead.)

d) **Benign Discrimination – Not Modified** – courts have held the benign discrimination (i.e. scholarships for the benefit of women, etc. ) is acceptable with such trusts. The court enforcement of such trusts does not = state action (perhaps concern w/gov’t official as trustee or public school).

**X. Modification and Termination of Trusts** - a trust is not written in stone forever, circumstance may arise where a trust is altered or eliminated. Such situations and the procedures to be used may be listed in the instrument creating the trust or in a statute.

**A. Modification of Trusts** - the terms and corpus of a trust may be modified any of the following methods below:

1. **Settlor Alive** - while the Settlor is alive a trust may be modified in the following manners below, note that unilateral action by the all beneficiaries **cannot** modify its terms:

   a) **By Settlor - Power Reserved to Settlor** - where the settlor has expressly reserved the power to revoke/reserve the trust, the terms may be modified, this is one of the purposes of a revocable instrument.

   b) **By Trustee - Reserves to Third Party (Trustee)** - the settlor may also have granted this power to a third party, typically this is the trustee.

   c) **By Settlor & Beneficiaries – Irrevocable Trust** – where the instrument creates an irrevocable trust, the terms can only be modified where the settlor and **all** beneficiaries agree to the modification.

   1) **Must Have Capacity to Consent** - in order for this consent to be valid there can be **no** beneficiaries who are incapable of consenting because they are unascertained, legally incapacitated, or minors.
2) **Exception – Virtual Representation**- a statute may allow the trust to be modified where some beneficiaries don’t meet the above condition by means of virtual representation. Where a party with the same interest may bind all unrepresented persons.

⇒ E.g. – Class Gifts – class may not be closed, but existing members may bind unascertained persons.

2. **Settlor Dead**- once a settlor has passed away, the circumstances where a trust can be modified are narrowed. Note that the trust cannot be modified solely by the agreement of the beneficiaries (need court action)

   a) **By Trustee - Reserves Power to Third Party**- the trust may explicitly reserve the right to modify it to a third person, typically the trustee.

   b) **By Court- Deviation**- the court may order changes to a trust in the circumstances listed below, these changes may include changing the trustee, permitting acts by the trustee prohibited by the trust or modifying other terms.

1) **Administration Deviation**- a trust will not fail for lack of a trustee, the court will appoint a person to serve as trustee.

2) **Change of Circumstances**- the court may also act to modify the trust where a change of circumstances threatens to defeat or substantially impair accomplishment of the trust purpose. Statute take two distinct approaches in determining if there is a change on circumstances:

⇒ Focus on Beneficiaries- some court will allow modification where one beneficiary needs more support, or where tax advantage given to beneficiaries.

⇒ Focus on Settlor’s Intent- others will only consider threats to the purpose intended by settlor and will not look at effects on beneficiaries.

3) **Consent of All Beneficiaries**- the trust may also be modified at the request of all beneficiaries by the court.

⇒ All Must Have Capacity to Consent- in order for this consent to be valid there can be no beneficiaries who are incapable of consenting because they are unascertained, legally incapacitated, or minors.

⇒ **Exception – Virtual Representation**- (if allowed by jurisdiction) Where a party with the same interest may bind all unrepresented persons.

⇒ Beneficiaries only includes trust beneficiaries, not residual takers – for purposes of consenting to the modification – residual takers of will (who would get assets after trust expires) are not considered beneficiaries (Hamerstrom v. Commerce Bank)

4) **Special Statute (MO)** – some states have special statutes allowing modifications in favor of disabled, minor or unascertained beneficiaries.
c)  *By Court – Cy Pres* – note that a court may also reform the beneficiary of charitable trust, discussed *supra* IX.G

**B. Termination of Trusts** - a trust will/may be terminated by the following means:

1. **Defective Execution** – if the trust does not comport with the execution requirements, it will be void and therefore fail. The trust will also fail if it lacks a required element (such as property or a beneficiary). Additionally, a trust may terminate where any execution is the result of *fraud, mistake, duress, undue influence*, etc.

2. **Merger Doctrine** – where the *sole* trustee and the *sole* beneficiary are the same person, the equitable and legal titles are merged into the same person and the trust terminates.

3. **Pursuant to Instrument** – the trust agreement itself can establish any number of ways for the trust to terminate -
   
   a)  *Power Reserved to Settlor or 3rd Party (Trustee)* – the power to terminate the trust may be expressly reserved to someone.

   b)  *Duration Expires* – the trust may have a set duration that is established by the instrument at which time the trust expires and the assets return to the settlor’s estate or are distributed as specified in the trust.

   c)  *Purpose Accomplished* – if the purpose recited in the trust is satisfied, the trust will terminate.

4. **Purpose Frustrated** – if the purpose of trust becomes unlawful, impossible or impracticable the trust will also terminate.

5. **Destruction/Exhaustion of Principal** – if the object of the trust is destroyed, obviously the trust is terminated. Additionally, if the corpus is exhausted or drops below a certain level (in some states) the trust will also terminate.

6. **Termination by Settlor** – under the following circumstance, a trust may be terminated by its creator -
   
   a)  *Revocable Trust* - hence the name

   b)  *Irrevocable Trust* - where the trust is irrevocable, the settlor will need the consent of all beneficiaries to terminate the trust:

      1)  **Consent of All Beneficiaries** – all beneficiaries must consent to the termination.

         ⇒  All Must Have Capacity to Consent - in order for this consent to be valid there can be *no* beneficiaries who are incapable of consenting because they are *unascertained, legally incapacitated, or minors*.

         ⇒  Exception – Virtual Representation - (if allowed by jurisdiction) Where a party with the same interest may bind all unrepresented persons.
2) Fraud/Duress/Undue Influence/Mistake- in the alternative the settlor may attempt to prove that the trust was not validly executed.

7. Termination by Beneficiaries (Settlor Dead)- in order for the trust to be terminated by the beneficiaries, all of the following conditions must be met:

a) Consent of All Beneficiaries- the trust may also be modified at the request of all beneficiaries by the court.

1) All Must Have Capacity to Consent- in order for this consent to be valid there can be no beneficiaries who are incapable of consenting because they are unascertained, legally incapacitated, or minors.

2) Exception – Virtual Representation- (if allowed by jurisdiction) Where a party with the same interest may bind all unrepresented persons.

b) No Material Purpose of the Settlor is Frustrated – Clafin Doctrine – just because all the beneficiaries decide they would like their money now, does not mean that they get it. Courts will not allow a trust to be terminated by the beneficiaries if a material purpose of the settlor remains to be accomplished.

1) Material Purposes – these purposes include spendthrift provisions, support provisions, discretionary provisions, age of maturity restrictions, etc.

2) Rare Exceptions – Statutes – some states (MO) have specific statutes that direct the court to allow special deviations and to look at the interest of the beneficiaries over settlor’s intent.
XI. **Fiduciary Administration** - the trustee is the fiduciary of the trust and owes duties to the beneficiaries of the trust. The trustee has power over the assets of the trust, so long as he acts in accordance with these duties, in return for acting as a trustee, he may receive some compensation. If the trustee violates his fiduciary duties, he may be removed and held accountable to the beneficiaries.

A. **Overview**

1. **Fiduciary Powers** - the trustee has the power to carry out the intent of the settlor. These powers are derived mainly from the trust instrument itself, but may be implied or necessary to carry out the trust objectives.

2. **Fiduciary Duties** - the trustee owes the following laundry list of duties to the beneficiaries, they are discussed in detail infra. These duties may arise from the instrument (either explicitly or by statutory incorporation), by the common law of agency, or by statute.

   a) **Duty of Inquiry**
   
   b) **Duty of Loyalty**
   
   c) **Duty to Follow Terms of Trust**
   
   d) **Duty to Collect, Protect and Preserve**
   
   e) **Duty to Earmark**
   
   f) **Duty to/not to Delegate**
   
   g) **Duty to Account**
   
   h) **Duty to Diversify**
   
   i) **Duty to Make Property Productive**
   
   j) **Duty of Impartiality**

3. **All Trustees Accountable for Breach** – where one trustee becomes aware of the breach on another, he must immediately take steps to remedy the breach, or else also be held liable for the breach as well.

4. **Reasonable Compensation** - the trustee is eligible to receive reasonable compensation for his work as trustee. Generally, whatever is established by the trust deed would be considered reasonable. However if the drafting attorney is also the trustee, then a closer look is taken to see if the trust fees are "reasonable."

5. **Remedies for Violation of Duty** - where a trustee violates a fiduciary duty, any number of remedies may be employed by the court, most often the remedy used is dependant on the nature and extent of the violation.
a) Removal of Trustee - the trustee may be removed and replaced by an alternative in the trust deed or appointment by court (trust will not fail for lack of trustee) this is permitted where:

1) Fiduciary Misconduct

2) Conflict of Interest

3) Ill-feelings – if no misconduct may still be allowed where evidence of ill feeling on part of trustee is grounds for removal.

b) Damages affect Trust Property - where the action of the trustee results in damages to the property of the trust, any of the following may be used as appropriate -

1) Surcharge - Appreciation Damages - if trustee wrongfully divested property, he may be liable for any subsequent increase in value of the property – this is an expectancy measure.

2) Surcharge - Date of Sale Damages - if trustee had power to sell, but failed to receive the proper value, he is liable for the difference between what should have been received and the amount actually received as of the date of sale. – this is an expectancy measure.

3) Recovery of Trust Property - if the trustee has title to the property, its restoration to the trust may be ordered. – the is a restitution measure.

4) Trust Pursuit Rule – Title to Ill-gotten Proceeds - if the trustee wrongfully disposed of trust assets but acquires new property – the new property is to be constructively placed in the trust. Additionally, if the property is held by someone who is not a good faith purchaser for value, title will be invalidated. – this is a restitution measure.

c) Wrongful Delegation - where the powers of the trustee were wrongfully delegated and resulted in damage to the trust -

1) Trust Pursuit Rule – see above

2) Surcharge Trustee – if the beneficiary can establish a causal link, the trustee may be held personally liable for damages. The court may award punitive damages.

d) Denial of Fees – any misconduct may be punished by the denial of the trustee’s fee.

B. Duty of Inquiry - the trustee has a duty to inquire into the needs of the beneficiary. This duty commonly arises in discretionary trusts where the trustee is obligated to supply the beneficiary with comfortable support. (Marsman)

C. Duty of Loyalty - the trustee also owes a duty of loyalty to the beneficiaries, specifically that he will prefer the interests of the trust to personal interests. The trustee is to manage the trust for the sole benefit of the beneficiaries.

1. Conflict of Interest – No Self-Dealing - trustee should not participate where he is considered to be on both sides of the transaction, either through directly or
indirectly. Such deals are only allowed where specifically granted by settlor of informed consent by beneficiaries.

2. Use Trust Property for Personal Gain - this also includes the use of trust assets for personal reason or gains.

3. Duty to Monitor Other Trustees - this duty loyalty includes making sure that other trustees are following their duties, if not they must be dealt with immediately or the non-violating trustee will also be held accountable. (only breaching fiduciary liable for appreciation damages.)

D. Duty to Follow Terms of Trust - the trustee has the duty to follow the trust agreement, specifically with respect to the distribution of income & principal. Note that the trustee will often error on the side of underpayment on the basis that it is easy to distribute undistributed money, but not easy to come up with money overpaid.

E. Duty to Collect, Protect and Preserve - the trustee is responsible for the assets of the trust specifically the trustee must take steps to:

1. Collect Trust Assets - must collect assets from estate administrator/executor or who ever is in control of asset without unnecessary delay

2. Inspect Trust Assets - must make sure that trust asset is what it is suppose to be, this may include an appraisal. It also the duty of the trustee to assure the asset was not diminished or used improperly by the administrator/executor.

3. Protect Asset - the trustee must take appropriate actions to safeguard the property (placing valuables in safe deposit box, etc.). Must do what ever a prudent manager would do to protect. Including make sure taxes are paid, register tile, insure property.

F. Duty to Earmark - the trustee has a duty to earmark trust property so that it can be traced – trustee cannot claim that trust assets were personal and vice versa. Exception – bonds for benefit of beneficiaries may be placed in trustee’s name.

1. Breach even if no Improper Use - note that this duty is breached even if there is no misappropriation of trust funds by the fiduciary.

2. Duty not to Comingle Assets - a corollary to the duty to earmark is the duty not to comingle trust assets with other personal assets. Again this is because of the difficulty in tracing trust assets for accounting purposes.

3. Common Law = Strictly Liable for any loss - under older statutory schemes, where these duties were violated, the trustee would be strictly liable for any resulting loss, regardless of if it would have occurred absent the violation.

4. Modern law = Liable for loss due to earmarking/commingling failure - the strict liability of common law has been softened – fiduciaries are now most often only liable for losses that result from the breach of the duty.

5. Earmarked, but Commingled – E.g. where money is kept in a separate envelope marked “Trust” and put in the trustee’s safe deposit box – they are earmarked, but are commingled.

G. Duty to/not to Delegate - the trustee is personally accountable for the assets, this means that the trustee should cannot delegate away responsibility, however,
there is a duty to delegate where a trustee is not qualified to manage the asset effectively. (Shriner’s Hospital)

1. **Duties Not to Delegate** - the trustee may not delegate responsibilities he can reasonably be expected to perform personally, except how as a prudent person might delegate those responsibilities.

2. **Duties to Delegate** - a trustee may have a duty to seek expert advice on matters that are beyond their expertise (such as financial investing), note that this delegation does not relieve the fiduciary of any duty to monitor & manage the trust.

   a) **Illegal act may be superceding intervening cause** - where the trustee properly delegated a duty, and the person the duty is delegated to performs an illegal act (such as embezzlement), personal liability of the trustee may be terminated.

**H. Duty of Impartiality** - the trustee has a duty not to prefer the interests of one beneficiary over another one. This can be specifically a concern where one group of individuals is entitled to the income of the trust and another group is entitled to the corpus. The fiduciary must be careful not increase income at the expense of the corpus, etc. (Dennis v. RI Hospital)

**I. Duty to Account** - the trustee has a duty to keep and render accounts of the trust. Specifically, the trustee must keep full, accurate and orderly records of all receipts and expenditures of the trust. Such information must be made available to the beneficiaries upon request.

   1. **Absence of Record = Construed Against Trustee** - if the trustee fails to keep such records, a presumption will be created that such funds were not expended for a valid trust purpose. (note that an exculpatory clause may reduce this duty)

   2. **Constructive Fraud- Failure to Account** – where a trustee made no efforts to ascertain info that is misrepresented in accounts, in such cases the court may re-open accounting. However the court will NOT reopen accounting if:

      a) **Fact is matter of Interpretation** – if the fact is not one of precise knowledge but a matter of trustee’s discretion or judgment, the court will not second guess the trustee. (Nat’l Acad. of Sciences- wife remarried, would have forfeited income, not detected by trustee = trustee liable)

      b) **Alleged Mistakes Were Plainly Visible** – if the alleged wrongful accounting was plainly visible form examination of the account or trust documents.

**J. Duty to Make Property Productive** - the trustee has a duty to invest the trust property and make I productive. This is governed by standards established by the settlor in the trust agreement, by statute (either directly or incorporated by settlor) or the standards which would govern a prudent man.

   1. **Duty to Diversify** – the trustee has an obligation to maintain a balanced portfolio, and may be held accountable is the investments are too conservative or too risky.

   2. **Will look to whole performance** – in line with this encouragement, when determining if the property is productive, the performance of the whole will be examined rather than individual investments.
3. **Higher Standard for Some Trustees** – when determining if the trust is making enough money, courts may hold professional manager to a higher standard than others who manage investments (note that there may be a duty to delegate to professional financial manager, see *supra*).

4. **Prudent Investor Standard** - the default standard for judging productivity is the prudent investor standard.

   a) **Old Standard = Prudent Man Manages Own Affairs** (Harvard College Rule)

   b) **Revised = Prudent Man Manages property of Another**

   c) **Modern = Harvard College w/Diversity requirement**

**XII. Lifetime Transfers w/Post-Death Consequences**

**A. Contracts to Devise** - most jurisdiction recognize a contract in which as consideration the testator guarantees to devise property to the other party at death.

   1. **Public Policy May Limit – Eg Spouses** – public policy may limit the enforceability of such contracts or even invalidate them, specifically, contracts to devise made with ones spouse will typically not be recognized.

   2. **Majority Require Writing** - most states require a writing in order for such contracts to be enforceable. The writing must be enforceable as a contract, but not as a valid will.

   3. **Specific Performance May be ordered** - the courts in such circumstances may order specific performance of the devise.

**B. Gifts Made Under Belief of Impending Death** - where a gift is made under belief of impending death, but the donor subsequently recovers, title in the donee may be voided by the donor.

   1. **Must Make Delivery – Actual/Symbolic/Constructive** - in order to be valid, the gift must be delivered, either actually or in some symbolic/constructive sense – e.g. keys to a car.