WILLS

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I. INTESTATE SUCCESSION

A. IN GENERAL

Intestate succession is the statutory method of distributing assets that are not disposed of by will. Property may pass by intestate succession where:

1. The decedent dies without having made a will;

2. The decedent's will is denied probate (e.g., due to improper execution or successful will contest); or

3. The decedent's will does not dispose of all of his property (resulting in "partial intestacy") either because a gift has failed or because the will contains no residuary clause.

B. INTESTATE SHARE OF SURVIVING SPOUSE

1. Descendants Also Survive

If the decedent is survived by a spouse and by descendants, in most states the surviving spouse takes ***one-third or one-half of the estate***. Some states give the surviving spouse a specific dollar amount plus the one-third or one-half of the estate. In some states (e.g., states adopting the Uniform Probate Code ("UPC")), however, the surviving spouse takes the entire estate if the decedent is survived by descendants all of whom are descendants of the surviving spouse and the surviving spouse has no other surviving descendant. [UPC §2-102]

a. "Descendants" and "Issue" Are Synonymous

In their intestacy laws and other statutes, some states employ the term "issue," whereas most states use the term "descendants." The terms are synonymous: A person's "issue" includes all of his descendants (children, grandchildren, etc.) and includes (in nearly all situations) adopted offspring. (*See* I.E.1., *infra*.)

2. No Descendants Survive

If the decedent is survived by a spouse but no descendants, in most states the surviving spouse takes the ***entire estate***. In UPC states, the spouse takes the entire estate only if the decedent is not survived by descendants ***or parents***. [UPC §2-102]

Example: W dies intestate, survived by her husband, H, and her parents, M and D. In most states, H would inherit the entire estate.

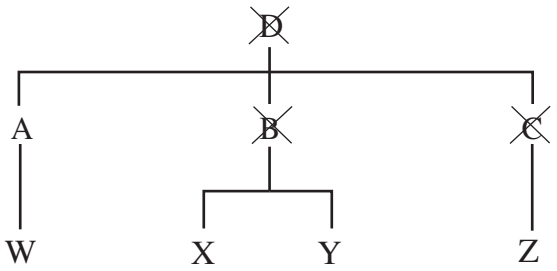
C. INTESTATE SHARE OF CHILDREN AND OTHER DESCENDANTS

The portion of the estate that does not pass to the surviving spouse, or the entire estate if there is no surviving spouse, passes to the decedent's children and descendants of deceased children. Parents and collateral kin never inherit if the decedent is survived by children or more remote descendants.

1. Majority Rule—Per Capita with Representation

In most states, the decedent's descendants take their shares per capita with representation. Under this pattern of distribution, the property is divided into equal shares at the first generational level at which there are living takers. Each living person at that level takes a share, and the share of each deceased person at that level passes to his issue by right of representation.

Examples: 1) D, a widow, dies intestate survived by: (i) child A, who has a son, W; (ii) X and Y, grandchildren by D's deceased child B; and (iii) grandchild Z, the daughter of D's deceased child C.



Because there is a living heir at the first generational level, D's estate is divided into three equal shares at that level. A takes one-third. The one-third that B would have inherited had he survived D passes by right of representation to his children, X and Y (one-sixth each). Similarly, Z takes a one-third share. W takes nothing even though he is D's descendant because his mother A is alive to inherit.

2) Same family tree as above, except that A also predeceased D. Because there are no living takers at the first generational level, the shares are determined at the second generational level. Each grandchild takes a one-fourth share.

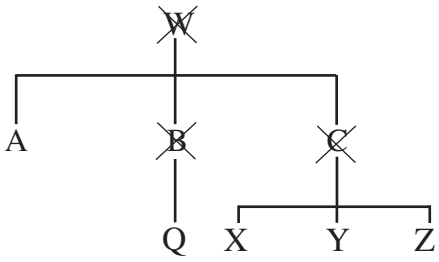
a. Compare—Classic Per Stirpes

Under the classic per stirpes distribution of the common law, one share passes to each child of the decedent. If a child is deceased, that child's share passes to her descendants by representation. The division is ***always made at the child level***, regardless of whether there are any living takers at that level. This method is also called "strict per stirpes," and continues to be used by a small minority of states.

2. Modern Trend—Per Capita at Each Generational Level

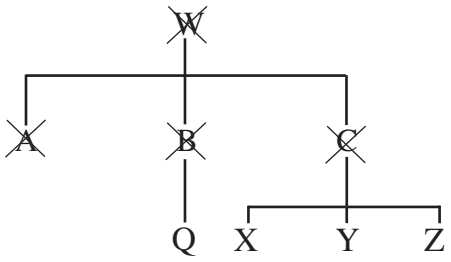
A growing number of states and the UPC replace the above scheme with a rule under which the distribution is per capita at each generation. Under this scheme, the initial division of shares is made at the first generational level at which there are living takers, but the shares of deceased persons at that level are combined and then divided equally among the takers at the next generational level. Thus, persons in the same degree of kinship to the decedent always take equal shares. [UPC §2-106(b)]

Examples: 1) W, a widow, dies intestate survived by: (i) her son A; (ii) grandchild Q (the child of her deceased son B); and (iii) grandchildren X, Y, and Z (the children of her deceased daughter C).



Under a ***per capita with representation distribution***, A would take one-third; Q would take one-third; and X, Y, and Z would take one-ninth each, taking by representation the share of their deceased parent. In effect, X, Y, and Z were penalized because they came from a larger family than their cousin Q. Under the ***per capita at each generational level*** scheme, A takes one-third (because there are three lines of issue). The other two one-third shares are combined into a single share (amounting to two-thirds of the estate) and distributed in equal shares at the next generational level. Q, X, Y, and Z take one-sixth each.

2) Same facts as above, except that A also predeceased W, leaving no descendants.



Here, the first generational level at which there are living takers is the grandchild level. The grandchildren take per capita, one-fourth each.

D. SHARES OF OTHER HEIRS

1. Parents

If the decedent is not survived by a spouse or descendants, in most jurisdictions the estate passes to the decedent's parents (one-half each) or surviving parent (who takes all).

2. Descendants of Parents

If the decedent is not survived by a spouse, descendants, or parents, the estate passes to the descendants of the decedent's parents, i.e., the decedent's brothers and sisters and the descendants of deceased brothers and sisters.

3. Grandparents

In most states, if the decedent left no spouse, descendants, parents, or descendants of parents, one-half of the estate passes to the decedent's maternal grandparents or their descendants and one-half passes to the paternal grandparents or their descendants.

4. Nearest Kin

If the decedent is not survived by any of the above, most states divide the estate into maternal and paternal shares. One-half goes to the nearest kin on each side of the family, no matter how remotely related to the decedent. Many states, however, have enacted "laughing heir" statutes, which cut off inheritance by persons so remotely related to the decedent that they suffer no sense of loss, only gain, at the news of the death. These statutes usually cut off inheritance rights of persons related to the decedent beyond the descendant-of-a-grandparent level.

5. Escheat

If the decedent does not leave any relative capable of taking the estate, the estate passes to the state. This is called escheat.

E. SPECIAL CASES

1. Adopted Children

a. As to Adopting Family—Adopted Child Treated Same as Natural Child

For purposes of intestate succession, an adopted person is treated the same as a natural child of his adopting parents. The adopted child can inherit from and through his adopting parents, and the adopting parents and their kin can inherit from and through the adopted child. A child adopted after the execution of a will is considered to be a pretermitted child within the meaning of a pretermitted child statute (*see* VIII.B., *infra*). Similarly, an adopted child is considered to be a lineal descendant within the meaning of an anti-lapse statute (*see* VII.A., *infra*).

b. As to Natural Parents—All Inheritance Rights Cut Off

Where a child is adopted by a new family, the adopted child and his kin have no inheritance rights from or through the adopted child's natural parents, and the natural parents and their kin have no inheritance rights from or through the natural child who has been put up for adoption.

1) Exception—Adoption by Spouse of Natural Parent

Adoption of a child by the spouse of a natural parent has no effect on inheritance rights between the child and that natural parent or his family. Inheritance rights concerning the other natural parent, however, are severed. Under the UPC, such an adoption has no effect on inheritance rights from or through ***either*** natural parent. [UPC §2-119(b)] Therefore, under the UPC, an adopted child may inherit from or through both natural parents as well as the adopting parent, whether the marriage of the natural parents was ended by divorce or death. *Note:* The other natural parent, however, may not inherit from or through the adopted child.

Example: Wanda and Harry have a child (Art). Wanda divorces Harry. Some years later, Wanda marries Sam; Sam adopts Art. For purposes of inheritance, Art is a child of his natural mother Wanda, and is a child of his adoptive father Sam, and any inheritance rights concerning Harry have been severed. Under the UPC, however, Art has three lines from which he can inherit: Wanda and her family, Sam and his family, and Harry and his family.

2) Exception—Death of Natural Parent

Adoption of a child by the spouse of a natural parent who married the natural parent after the death of the other natural parent has no effect on inheritance rights between the child and the family of the deceased natural parent. Also, adoption of a child by a close relative has no effect on the relationship between the child and the families of the deceased natural parents.

Example: Suppose, in the above example, Art's natural father (Harry) died, and Art's natural mother subsequently married Sam, who adopted

Art. This second exception simply means that Art continues to have inheritance rights through his deceased natural father (e.g., his natural grandparents—Harry's parents) notwithstanding his adoption by a new father.

2. Stepchildren and Foster Children

a. General Rule—No Inheritance Rights

Generally, stepchildren and foster children have no inheritance rights.

Example: W, a widow, has a daughter D. W marries H. Thereafter, the three live as a family unit, ***but*** H does not adopt D. There is no legal relationship between H and D. If D dies intestate, H is not a "parent" for inheritance purposes. If H dies intestate, D is not a "child" for inheritance purposes.

b. Exception—Adoption by Estoppel

However, under the right facts, in the above example D might be able to establish adoption by estoppel. This equity-type doctrine permits a stepchild or foster child to inherit from or through his stepparents or foster parents as though legally adopted. The doctrine is invoked where stepparents or foster parents gain custody of a child under an ***agreement with the natural parent*** that they will adopt the child. Just as the stepparent or foster parent would be estopped from denying the existence of a valid adoption, so also are those claiming under him on his intestate death.

3. Posthumous Children

Generally, one cannot claim as an heir of another person unless he was alive at the other person's death, but an exception is made for a posthumous child of the decedent. A child in gestation at the decedent's death inherits as if born during the decedent's lifetime.

Example: Sam and his brother Bill die in the crash of a private plane. Bill's wife is three months pregnant, and six months later Bill Jr. is born. For the purposes of distributing ***Bill's*** estate, Bill Jr. is an heir. However, for purposes of distributing ***Sam's*** estate, Bill Jr. is not an heir because he was not alive at his uncle's death and he was not Sam's descendant.

4. Nonmarital Children

At common law, a nonmarital child could not inherit from either parent, but only from his own descendants. Today, all states permit inheritance from the mother, and the modern trend permits inheritance from the father as well, provided paternity is established. [*See* UPC §§2-115(5), -117] In fact, as a result of constitutional litigation expanding rights of nonmarital children, in most states these children can inherit from the natural father if:

a. The father married the mother after the child's birth ("legitimated by marriage");

b. The man was adjudicated to be the father in a paternity suit; or

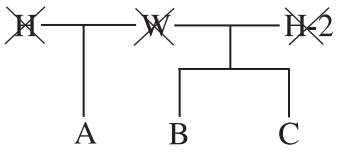
c. After the man's death, he is proved in the probate proceedings (usually by "clear and convincing evidence") to have been the father of the child.

5. No Distinction Between Half Bloods and Whole Bloods

Half bloods are brothers and sisters who have only one common parent. Most jurisdictions,

including those that have adopted the UPC, have abolished all distinctions between siblings of the half blood and those of the whole blood. [*See* UPC §2-107] Thus, they inherit equally.

Example: H and W have a daughter A. H dies; W marries H-2, and has two daughters (B and C) by that marriage. H-2 does not adopt A. Then H-2 and W die. A and C are sisters of the half blood: They have only one common parent. By contrast, B and C are siblings of the whole blood: They share two common parents.



Suppose C dies intestate, unmarried, and without descendants. Her nearest kin are her half sister A and her full sister B. A and B each would take one-half of C's estate.

F. DISINHERITANCE CLAUSE

1. Majority Rule—Disinheritance Clause Ineffective If Partial Intestacy

At common law and in most states, a will provision that expressly disinherits an heir is ineffective if the testator dies partially intestate. *Rationale*: If a testator did not make a complete disposition of her estate, the undisposed-of property passes by force of statute to the heirs, and a testator's intent is irrelevant as to any property passing under the intestacy statutes.

2. Minority Rule—Disinheritance Clause Given Full Effect

The UPC and statutes in several non-UPC states have overturned this formalistic and intent-defeating result. Under these statutes, a testator may exclude the right of an individual to succeed to property passing by intestate succession. If the person survives the decedent, the intestate share that would have passed to him passes as though he had disclaimed his intestate share. These are sometimes called "negative bequest" statutes, because they specify how property shall ***not*** be disposed of.

II. SUBSIDIARY PROBLEMS COMMON TO INTESTACY AND WILLS

A. SIMULTANEOUS DEATH

A person cannot take as an heir or will beneficiary unless he survives the decedent because property cannot pass to a dead person. (*See* discussion of lapse, VII.A., *infra*.) Because it is often difficult to determine whether a person survived the decedent (e.g., both are fatally injured in same car accident), all states except Louisiana have enacted statutes dealing with simultaneous deaths or deaths in quick succession. There is, however, no majority rule. About one-half of the states have enacted the traditional Uniform Simultaneous Death Act ("USDA"). The other one-half of the states have enacted the Revised Uniform Simultaneous Death Act, also known as the "120-hour rule."

1. Uniform Simultaneous Death Act—Property Passes as Though Owner Survived
Under the USDA, when the title to property or its devolution depends on priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person is disposed of as if he had survived. [USDA §1] In other words, the property passes as though the beneficiary or heir predeceased the other decedent.

The purpose of the USDA is to prevent the property of one person from passing to a second person (and then to the second person's beneficiaries), resulting in double administration and possibly double taxation of the same assets in quick succession, even though the second person did not survive long enough to enjoy ownership of the property.

a. USDA Applies to All Types of Transfers
The USDA applies to distributions of property ***by any means*** (intestacy, will, joint tenancy with right of survivorship, life insurance contract, etc.).

Examples: 1) Ann is the insured under a life insurance policy that names "Ben, if he survives the insured," as the primary beneficiary and Carol as the contingent beneficiary. Ann has a will that devises Blackacre to Ben and her residuary estate to the Red Cross. Ben has no will. Ann and Ben die simultaneously in a plane crash.

The life insurance proceeds are distributed as though Ann, the insured, survived Ben, the beneficiary. Thus, the proceeds are paid to Carol. For purposes of construing Ann's will, Ann, the testator, is deemed to have survived Ben, the beneficiary. Thus, the devise to Ben lapses and (assuming the anti-lapse statute does not apply) Blackacre passes under the residuary clause as undisposed-of property. For purposes of distributing Ben's intestate estate, Ben, the property owner, is deemed to have survived Ann.

2) H and W own real estate as tenants by the entirety. H and W die simultaneously in an automobile accident. "Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived." [USDA §3] Thus one-half passes through W's estate as though W survived H, and the other half passes through H's estate as though H survived W. (The point: There is no evidence to trigger the right of survivorship.)

b. Evidence of Simultaneous Death
The USDA applies only if there is "no sufficient evidence" of survival.

Example: Sue has a will that devises her entire estate "to my sister Mary if she survives me; otherwise to my brother Bill." Mary has a will that devises her estate to her husband, Horace. Sue and Mary are in a terrible automobile accident. Sue is pronounced dead at the scene of the accident. Mary, alive but unconscious, is taken to a local hospital where she dies two hours later. Here, there is sufficient evidence that Mary survived Sue. Thus, Sue's entire estate passes under her will to Mary, and then passes under Mary's will to Horace.

2. 120-Hour Rule

Because of dissatisfaction with the result under the USDA if the parties die within minutes or hours of each other, the Uniform Probate Code and about one-half of the states have enacted the 120-hour rule, under which an heir or beneficiary must survive the property owner by 120 hours in order to take. [UPC §2-104; USDA (1993) §§2-4] As with the USDA, the 120-hour rule applies to all transfers at death: wills, trusts, intestacy, life insurance, and other nonprobate transfers.

Examples: 1) Consider the same facts as in *Example 1), supra*, except that Ann dies instantly in the plane crash, whereas Ben dies at a local hospital three days later. If the USDA is the applicable law, Ben (and now Ben's estate) would take the life insurance proceeds and Blackacre under the will, because there is sufficient evidence that Ben survived Ann by a measurable period of time. If, however, the 120-hour rule applies, the result would be the same as in *Example 1), supra* (Carol would take the life insurance proceeds, and Blackacre would pass under the residuary clause of Ann's will), because Ben failed to survive Ann by 120 hours.

2) Consider the same facts as in *Example 2), supra*, except that W is pronounced dead at the scene of the automobile accident and H dies two hours later. If the USDA is the controlling law, H (and now H's estate) would succeed to the real estate by right of survivorship because there is sufficient evidence that H survived W. (Under the USDA, the outcome of the case could well depend upon who was driving the car and who was in the passenger seat!) If, however, the 120-hour rule applies, the result would be the same as in *Example 2), supra* (one-half of the property would pass through W's estate as though she survived H, and the other half would pass through H's estate as though he survived W), because H failed to survive W by 120 hours.

3. Statutes Apply Unless Governing Instrument Provides Otherwise

No one is compelled to have the USDA presumption or the 120-hour rule apply to her estate. Neither statute applies if the decedent's will or other instrument makes a different provision regarding survival. [USDA §6] In drafting wills, the technique most commonly used to cover the contingency of simultaneous deaths or deaths in quick succession is a time-of-survival clause, making bequests contingent on surviving the testator by, e.g., 60 days.

B. DISCLAIMERS

1. Disclaimed Interest Passes as Though Disclaimant Predeceased Decedent

No one can be compelled to accept a gift. A beneficiary or heir may disclaim any interest that otherwise would pass to the person from the decedent or the decedent's estate, with the consequence that the interest passes as though the disclaiming party predeceased the decedent. Disclaimers are made primarily for tax reasons.

Example: M, who is 75 years old, dies leaving a will that devises her entire estate to her descendants per stirpes. M is survived by her daughter D and her son S, each of whom has several children in college. D is a doctor and has a substantial estate and a substantial income in her own right. The effect of the inheritance will be to aggravate D's own income tax and estate planning problems. If D

accepts the inheritance and then makes gifts to her children, there will be gift tax consequences. *Solution:* D disclaims all or a part of her inheritance. (Partial disclaimers are valid under federal tax law.) The result is that the disclaimed interest passes from the decedent to D's children with no gift tax consequences.

In contrast, S is a law professor whose only outside source of income is from fees for giving bar review lectures. Under these economic circumstances, the idea of disclaiming his inheritance does not even cross his mind.

2. Must Be in Writing, Irrevocable, and Filed Within Nine Months

To be effective for federal estate and gift tax purposes, the disclaimer of a gift by will, an intestate share, or life insurance or death benefit proceeds must be (i) in writing, (ii) irrevocable, and (iii) filed within nine months of the decedent's death. [I.R.C. §2518(b)] Although some state disclaimer statutes impose additional procedural requirements, most state statutes have been drafted to conform to the federal statute.

a. Beneficiary Under Age Twenty-One

Under the federal statute, a beneficiary who is under age 21 has until nine months after her 21st birthday to make a disclaimer.

b. Joint Tenants

Under federal law and the UPC, the period in which a surviving joint tenant may disclaim the portion of the tenancy acquired by right of survivorship is nine months ***from the other joint tenant's death***. [26 C.F.R. §25.2518-2(c)(4); Estate of Dancy v. Commissioner of Internal Revenue, 872 F.2d 84 (4th Cir. 1989); UPC §2-1107]

c. Future Interests

While some states allow disclaimer of a future interest within nine months of its vesting in possession (i.e., after the life tenant's death), to avoid federal gift tax, the interest must be disclaimed within nine months of its ***creation***.

3. Disclaimer May Be Made on Behalf of Infant, Incompetent, or Decedent

A disclaimer may be made by a guardian or personal representative on behalf of an infant, incompetent, or decedent, but the court having jurisdiction of the estate of the incapacitated person or decedent must find that it is in the ***best interests*** of those interested in the estate of the beneficiary and is not detrimental to the best interests of the beneficiary.

4. Estoppel If Any Benefits Accepted

An interest cannot be disclaimed if the heir or beneficiary has accepted the property or any of its benefits. In other words, a person who, e.g., transfers or encumbers the property or enters into a contract for its sale is estopped from disclaiming the property.

5. Creditors' Claims

In most states, a disclaimer can be used to defeat creditors' claims. Because the effect of the disclaimer is that the property passes as though the disclaimant predeceased the decedent, the disclaimant has no interest that can be reached by creditors. However, a disclaimer cannot be used to defeat a federal tax lien. [Drye v. United States, 528 U.S. 49 (1999)]

6. Disclaimer of Life Estate Accelerates Remainder

Because the disclaimed interest passes as though the disclaimant predeceased the decedent, upon disclaimer of a life estate the remainder is accelerated.

Example: T's will devises property in trust: "Income to A for life, and on A's death, principal to her descendants then living, per stirpes." A makes a timely and valid disclaimer for tax reasons. The will is read as though the disclaimant predeceased the testator, and thus the remainder is accelerated. A's "descendants then living per stirpes" are determined at T's death (not at A's death), and the property is distributed outright to them.

C. DECEDENT'S DEATH CAUSED BY HEIR OR BENEFICIARY

In nearly all states, one who feloniously and intentionally brings about the death of a decedent forfeits any interest in the decedent's estate. The property passes as though the killer predeceased the victim. This result is usually accomplished either through the operation of a specific statute (called a "***slayer statute***") or by the imposition of a constructive trust.

1. Rule Applies to All Forms of Transfer and Benefits

The typical statute disqualifies the killer from taking under a will, by intestacy, or as beneficiary of a life insurance policy on the decedent's life. The killer is also disqualified from taking an elective share, a homestead life estate, an exempt personal property set-aside, a family allowance, or as a pretermitted spouse. [*See* UPC §2-803]

Example: Frank's will devises Blackacre "to my son Sam." Sam murders Frank. Frank is survived by Sam (now serving a life sentence in the penitentiary) and by Sam's son Gordon. Because the gift of Blackacre passes as though Sam predeceased Frank, Gordon takes Blackacre under most anti-lapse statutes (discussed in VII.A., *infra*).

2. Joint Ownership—Right of Survivorship Severed

If one joint owner in a joint tenancy, tenancy by the entirety, or joint bank account kills the other, the killer loses the benefits of the right of survivorship.

Example: H and W own Whiteacre as tenants by the entirety. W kills H. The right of survivorship is severed; in effect, the estate is treated as a tenancy in common. H's one-half interest passes under his will (or by intestacy) as though W predeceased him. W continues to own her undivided one-half interest in Whiteacre.

Note: W does not forfeit ***her*** interest in the property because of the killing. The purpose of the statute is to prevent W from benefiting from her wrongful act by taking H's interest by right of survivorship.

3. Proof of Killing—Evidentiary Standard

A final judgment of conviction of murder in any degree is conclusive for purposes of this type of statute. However, in the absence of a conviction of murder in any degree, the court may determine by a ***preponderance of the evidence*** whether the killing was unlawful or intentional.

Example: M dies under suspicious circumstances. Her daughter D is charged with murder in the first degree, but she is acquitted. Notwithstanding the acquittal, under the typical slayer statute the court could find that D unlawfully and intentionally brought about M's death, and that D forfeited all interests in M's

estate. This is because the evidentiary test would be the "preponderance of the evidence," not the "beyond a reasonable doubt" standard of the criminal action.

D. ADVANCEMENT OF INTESTATE SHARE

An advancement is a lifetime gift made to an heir with the intent that the gift be applied against any share the heir inherits from the donor's estate.

1. Common Law—Lifetime Gift to Child Presumptively an Advancement

At common law, it was presumed that an intestate would intend to treat all of his children equally. Consequently, when an intestate made a substantial gift to one child and not to others during his lifetime, the gift was held to be an "advancement" (i.e., an advance payment) of the child's intestate share upon the parent's death.

2. Modern Law—Common Law Presumption Reversed

Most states hold that the advancement doctrine can apply to any heir but reverse the presumption by providing that a lifetime gift is presumptively ***not*** an advancement unless shown to be intended as such. States that have adopted the UPC approach are even more stringent, requiring a writing to prove an advancement. In those states, no lifetime gift is considered an advancement unless it is: (i) declared as such in a contemporaneous writing by the donor, or (ii) acknowledged as such in writing by the donee. (The donee's writing need not be contemporaneous.) [*See* UPC §2-109]

3. Procedure If Advancement Found

Once it has been determined that an advancement was made, the amount advanced is computed with the net value of the estate for purposes of distribution. Thus, an heir who has received an advancement has his share reduced by the amount of the advancement. However, if the advancement is greater than the heir's intestate share, he is not responsible for returning the excess.

Examples: 1) In a state that applies the common law doctrine of advancements, Hortense, a widow, gives land worth $50,000 to her son Seth. Several years later, Hortense dies intestate survived by Seth and her daughter Debbie as her nearest kin. Hortense leaves an estate valued at $200,000. The land given to Seth is worth $80,000 at Hortense's death. The gift to Seth is treated as an advancement, i.e., a partial satisfaction of Seth's share of his mother's estate. If Seth wishes to take a share of the estate as heir, he must allow the ***date of gift value*** to be considered in distributing Hortense's estate:

$200,000	actual intestate estate
+ 50,000	date of gift value of advancement
$250,000	

Seth's share of the estate is $125,000, of which he is deemed already to have received $50,000. Thus, Seth takes $75,000 of Hortense's estate, and Debbie takes $125,000.

2) Same facts, except that the UPC applies. The gift is ***not treated as an advancement*** unless Hortense so indicated in a writing made at the time the

gift was made, or unless Seth made a written declaration that he understood that the gift was intended as an advancement. (The writing by the donor must be ***contemporaneous*** with the gift, but the writing by the donee can be made at any time after the gift.) If there is no such writing, the gift to Seth is ignored, and the $200,000 estate is divided equally between Seth and Debbie.

4. Advancee Predeceases Intestate

Generally, an advancement is binding upon those who succeed to the estate of the advancee in the event the advancee predeceases the intestate. In states following the UPC approach, however, an advancement is ***not binding*** on a predeceased heir's successors ***unless*** the required writing or acknowledgment specifically provides otherwise. [UPC §2-109(c)]

5. Advancement Valued at Time of Gift

The value of an advancement is determined as of the time the gift was made, and any fluctuations in the value of the advanced property will not affect the position of the next of kin.

E. SATISFACTION OF LEGACIES

The same rules apply to lifetime gifts to will beneficiaries as to intestate heirs. Under modern law, a testamentary gift may be satisfied in whole or in part by an inter vivos transfer from the testator to the beneficiary subsequent to the execution of the will, if the testator intends the transfer to have that effect. For obvious reasons, this doctrine does not apply to gifts made prior to execution of the will. In states following the UPC approach, the doctrine does not apply unless the testator provides for satisfaction in the will or a contemporaneous writing or the devisee acknowledges, in writing, the gift as one in satisfaction. [UPC §2-609]

Example: T's will bequeaths $10,000 to A. After executing the will, T transfers $10,000 to A along with a written statement that this is in satisfaction of the bequest in T's will. The bequest to A is satisfied; A takes nothing under T's will.

1. Value of Gifts in Satisfaction

Generally, if a gift is found to be in satisfaction of a testamentary provision, the value of the gift must be determined as of the time that gift was made. In states following the UPC approach, gifts in satisfaction are valued at the time the devisee comes into possession or enjoyment or at the death of the testator, whichever occurs first. [UPC §2-609(b)]

2. Gift of Specifically Bequeathed Property to the Beneficiary

There is one situation in which satisfaction of a bequest can occur even if not proved to have been so intended. If the testator gives the specifically described property to the beneficiary, there is both a satisfaction of the legacy and an ademption (*see* VII.B., *infra*).

III. EXECUTION OF WILLS

A. WHAT CONSTITUTES A WILL

A will is an instrument, executed with certain formalities, that usually directs the disposition of a person's property at death. A will is revocable during the lifetime of the testator and only operative at his death. Thus, an instrument that is operative during the testator's lifetime (as by presently transferring an interest in property) cannot be a will.

1. Codicil
A codicil is a ***supplement*** to a will that alters, amends, or modifies the will.

2. Instrument Need Not Dispose of Property to Be a Will
Although most wills dispose of property at death, the disposition of property is not a legal requisite of a will. The term "will" includes an instrument that merely appoints a personal representative or revokes or revises another will.

3. Will Has No Legal Effect Until Testator's Death
A will takes effect only upon the death of the testator. Until that time, the will may be revoked or amended, and the beneficiaries named in the will have only an ***expectancy*** (i.e., they acquire no property rights under the will). Because of the ambulatory nature of a will, it operates upon circumstances and properties as they exist at the time of the testator's death ("a will speaks at the moment of death"). In construing the will, however, the circumstances that existed at the moment the will was executed are considered to discern what the testator meant by the words he used.

B. TESTAMENTARY INTENT

For a will to be valid, the testator must intend that the particular instrument operate as his will. In the case of a well-drafted will, this issue is rarely in doubt. Testamentary intent is established by the document itself (e.g., "I, Hobie Gates, do hereby declare this instrument to be my Last Will"). The problem cases have involved instruments that contain no such recital and are ambiguous as to whether they were intended to be testamentary in effect. In these cases, testamentary intent can be established by extrinsic evidence but will be found only if it is shown that the testator: (i) intended to dispose of property; (ii) intended the disposition to occur only upon his death; and (iii) intended that the instrument in question accomplish the disposition.

1. Present Intent Required
The intention required is a present testamentary intent. A signed and witnessed statement of an intent to make a will in the future (e.g., "I am going to make a will leaving all my property to you") is not a will, for it shows that the instrument itself was not intended to be a will.

2. Sham Wills
An instrument containing a recital that "this is my Last Will" raises a presumption of testamentary intent, but the presumption is rebuttable. Evidence is admissible to show, e.g., that a person made a will naming his girlfriend as beneficiary to induce her to sleep with him [Fleming v. Morrison, 72 N.E. 499 (Mass. 1904)], or that the instrument was executed as part of a ceremonial initiation into a secret order [Shiels v. Shiels, 109 S.W.2d 1112 (Tex. 1937)].

3. Ineffective Deed Cannot Be a Will
If a deed fails as an inter vivos conveyance (e.g., for want of delivery), it cannot be probated as a will even though it was signed and attested by the required number of witnesses. If the grantor intended the deed to be operative during his lifetime, it cannot be a will.

4. Conditional Wills
A conditional will is one that expressly provides that it shall be operative only if some

condition stated in the will is satisfied. However, language that reads like a condition may be interpreted by the court as merely expressing the testator's ***motive or inducement*** for making the will.

a. Condition Must Be Expressed in Will
Parol evidence is not admissible to show that a will absolute on its face was intended to be conditional. Parol evidence may be admitted to show that the instrument was not meant to have any effect at all (e.g., a sham will) but not to show conditions.

b. Condition vs. Motive
Suppose Mary signs a duly attested instrument that reads, "I am going on a safari to Africa. If anything happens to me on the trip, here is how I want my property disposed of . . . ." Mary returns safely from the trip, but dies five years later. Should her will be admitted to probate? This question has no clear answer, and in your answer you should ***argue both ways***. Many courts have held that this language merely reflects that Mary was thinking generally about the possibility of death and the need for a will, which at that moment took the specific shape of not returning from Africa. [Eaton v. Brown, 193 U.S. 411 (1904)] However, on very similar facts, a number of cases have held the will to be conditional on not returning from the particular trip, and have denied probate. [*In re* Pascal's Estate, 152 N.Y.S.2d 185 (1956)] The following factors have been cited by the courts in favor of holding that the will was unconditional:

1) The fact that the testator executed a will is an indication that she ***did not intend to die intestate***.

2) The fact that the testator ***preserved the document*** after returning from the trip is another indication that the will's operation was not intended to be limited.

C. TESTAMENTARY CAPACITY—MUST BE EIGHTEEN AND OF SOUND MIND

In nearly all states, a person who has attained age 18 has the right and power to make a will. If a 16-year-old executes a will and dies 20 years later, the will is not valid because the testator did not have capacity at the time the will was executed. In addition, the testator must be of sound mind. The requirements for establishing testamentary capacity are discussed in IX., Will Contests, *infra*.

D. EXECUTION OF ATTESTED WILLS

For a will to be valid and admissible to probate, the testator must meet the formal requirements of due execution imposed by the statutes of the appropriate state. These statutes are often referred to as a state's Statute of Wills. If the statutory requirements are not met, the will is void (not merely voidable), and cannot be admitted to probate even if there is no objection. The formalities required for execution of a will vary from state to state. Most states require the following formalities:

(i) The will or codicil must be ***signed by the testator***, or by another person at the testator's direction and in her presence.

(ii) There must be ***two attesting witnesses***.

(iii) The testator must sign the will (or acknowledge her previous signature or acknowledge the will) ***in each of the witnesses' presence***.

(iv) The witnesses must sign in the ***testator's presence***.

Some states impose one or more of the following additional requirements:

(v) The testator must ***sign at the end*** of the will.

(vi) The testator must ***"publish" the will***, i.e., declare to the witnesses that the instrument is her will or otherwise communicate this fact so that the witnesses know they are witnessing a will rather than some other legal document.

(vii) The ***witnesses must sign in the presence of each other***.

1. Testator's Signature

a. What Constitutes a Signature

Any mark affixed by the testator, with the intent that the mark operate as the testator's signature, satisfies the signature requirement. "Betty," "Mom," "J.R.," the X of an illiterate person, and even the testator's fingerprint are all valid signatures. In addition, the testator's signature may be made by another person at the testator's direction and in the testator's presence. In fact, if that person writes the testator's name and then writes his own name, the person can be counted as one of the two needed attesting witnesses.

Example: Goldie, who is illiterate, has a will prepared. In the presence of Herb Miller, Goldie asks Ollie Pinkston to sign her name for her. The will has signature lines for the testator and for only one witness. On the signature line for the testator, Ollie writes "Goldie Lomineck, by Ollie Pinkston." Herb then signs on the witness line. "Ollie Pinkston" counts as the signature of an attesting witness, and the will has been validly executed.

b. Contemporaneous Transaction Doctrine—Order of Signing Not Critical

Suppose that one or more of the witnesses sign the will before the testator signs it (or that the testator and the witnesses sign on the wrong lines). The exact order of signing is not material, as long as all of the signings occurred as a part of a single, contemporaneous transaction.

c. Placement of Signature

In most states and under the UPC, a will is valid as long as the testator signs somewhere on the instrument (e.g., on the margin, or in the first clause). [*See* UPC §2-502(a)(2)] In a handful of states, however, a will must be ***subscribed*** (i.e., signed at the end). In states with this requirement, what happens if additional material (e.g., clause naming an executor) follows the testator's signature? In many states with this requirement, if anything other than the attestation clause follows the testator's signature, the entire will is void. However, by statute or case decision in several states, everything appearing above the testator's signature is given effect, but any matter following her signature is not considered a part of the will and is disregarded.

1) Compare—Words Added After Will Executed

Suppose that, after the will is signed and witnessed, T adds several clauses, making a new gift and naming an executor, underneath her signature. This case

does ***not*** involve the "signature at the end" requirement. Here, the added clauses are not given effect for another reason: They are ***unattested words***. Only the words present on the will at the time it was executed are part of the duly executed will.

2. "Presence" Requirement

Signing in someone's presence is required under many statutes, although the requirement takes various forms. In most states, each witness must sign in the testator's presence, but not necessarily in each other's presence. In other states, the witnesses must sign in the testator's presence and in the presence of each other. In most states, the testator must sign or acknowledge the will or signature in the presence of each witness, but not necessarily at the same time. Courts have applied various tests to determine when a person is in another's presence.

a. Majority View—"Conscious Presence" Test

A majority of courts apply the more liberal "conscious presence" test: The presence requirement is satisfied if each party was conscious of where the other parties were and what they were doing, and the act of signing took place nearby, within the ***general awareness and cognizance*** of the other parties.

Example: The will is signed in a hospital room. T, lying in bed behind a heavy screen, cannot see the witnesses (and vice versa) because they are standing in the doorway, 20 feet away. Nevertheless, the parties have signed in each other's conscious presence. [Nichols v. Rowan, 422 S.W.2d 21 (Tex. 1967)]

Compare: T and one witness sign the will in Attorney's office. Attorney then excuses himself and takes the will into the office two doors down the hall, where the second witness signs. Here the conscious presence test was ***not*** satisfied. Merely being in the same suite of offices does not constitute "presence." [Morris v. West's Estate, 643 S.W.2d 204 (Tex. 1982)]

b. Minority View—"Scope of Vision" Test

Some courts take the view that the parties must be in each other's scope of vision when they sign. Under this test, a person is present only if he could have seen the signing. (An exception is made for blind persons.) This does not mean that the signing must actually have been observed, but only that the person was in such close proximity that he ***could have seen the signing had he looked***.

3. Witnesses

Most states require that a will be attested by two competent witnesses. Under the UPC, however, a will is valid either if: (i) it is attested by two competent witnesses, or (ii) it is signed by a notary. [UPC §2-202(a)(3)]

a. Competency

All jurisdictions require that witnesses be competent. Competency for this purpose generally means that, at the time the will is executed, the witness is mature enough and of sufficient mental capacity to understand and appreciate the nature of the act she is witnessing and her attestation, so that she could testify in court on these matters if necessary. Most states do not impose a minimum age requirement for witnesses.

b. Interested Witnesses

At common law, an attesting witness who was also a beneficiary under the will was not a competent witness, and was barred from testifying as to the will's execution. If one of the two necessary attesting witnesses was a beneficiary, the will could not be probated. This harsh rule has been abolished in every state.

1) Majority Rule—Will Valid, But Bequest to Interested Witness Is Void

In most states, statutes solve the interested witness problem by eliminating the interest: The will is valid, but the gift to the witness-beneficiary is void. These are called ***"purging statutes"*** because they operate to purge the bequest to the witness.

a) Exception—Supernumerary Rule

An exception is made if the witness-beneficiary was a supernumerary witness, i.e., if there were three witnesses, two of whom were disinterested, and the will can be proved by the disinterested witnesses.

b) Exception—Witness-Beneficiary Would Take If Will Had Not Been Admitted to Probate

The statutes also carve out an exception if the interested witness would have taken if the will were not admitted to probate, i.e., if the beneficiary would have been an heir if there were no will, or if the beneficiary was also given a bequest in an earlier will that he did not witness. In such a case, the witness-beneficiary takes the lesser of: (i) the legacy, or (ii) his intestate share (or gift under earlier will).

2) Uniform Probate Code—Interested Witness Rule Abolished

Under the UPC, a will or codicil, or any part thereof, is ***not*** invalid because the will or codicil is signed by an interested witness. [UPC §2-505(b)]

Example: T's will bequeaths $25,000 to Harry, and devises his residuary estate to Sue. Harry signs the will as an attesting witness. In most states, the bequest to Harry would be purged unless: (i) Harry was one of three attesting witnesses, or (ii) Harry would be an heir (or legatee under an earlier will) if the will had not been executed. Under the UPC, Harry takes the $25,000 legacy in any case because the UPC has abolished the interested witness rule.

4. Attestation Clause

A well-drafted will invariably contains an attestation clause. This clause, which appears immediately below the signature line for the testator and above the witnesses' signature lines, recites the elements of due execution.

Example: "On the above date, the testator declared to us, the undersigned, that the foregoing instrument was her last will. She then signed the will in our presence, we being present at the same time. We then signed the will in the testator's presence and in the presence of each other, we and each of us believing the testator to be of sound mind on the date hereof."

An attestation clause is ***prima facie evidence*** of the facts recited therein. Unlike a self-proving affidavit (*see* 5., *infra*), however, an attestation clause does not constitute sworn

testimony and cannot serve as a substitute for the courtroom testimony of the attesting witnesses. Attestation clauses can be useful in two situations:

a. Witness with No Memory
Suppose witness A testifies that, although he recognizes his signature on the will, he has no recollection of signing it and thus does not recall whether he signed in the testator's presence. The courts have uniformly held that probate of a will does not turn upon the memory of the attesting witnesses. The void created by the witness's memory lapse is filled by the attestation clause, which is prima facie evidence that the facts as recited therein actually occurred.

b. Witness with Faulty Memory
Suppose witness B testifies that she remembers the execution ceremony very well even though it occurred 10 years before, and that the one thing she especially "remembers" is that the testator was not in the room when she signed the will. A number of cases have upheld probate of the will after a jury finding that the attestation clause, and not the witness on the witness stand, is telling the truth.

5. Self-Proving Affidavit
Many states and the UPC permit a will to be made self-proved at the time it is executed. The testator and the attesting witnesses sign the will, and then sign a sworn affidavit before a notary public reciting that the testator declared to the witnesses that the instrument was her will, and that the testator and the witnesses all signed in the presence of each other. [*See* UPC §2-504] (The affidavit can be executed at any time subsequent to the will's execution, but standard practice is to execute both the will and the self-proving affidavit in one ceremony.)

a. Substitutes for Court Testimony of Attesting Witnesses
The self-proving affidavit serves the same function as a deposition or interrogatory. It is a method by which the witnesses' sworn testimony can be secured at the time the will is executed, eliminating the need to track down the witnesses and arrange for their testimony in probate court after the testator's death. Self-proved wills may be admitted to probate without further proof.

b. Signatures on Affidavit Can Be Counted as Signatures Needed on Will
A few courts have ruled that the signatures on the affidavit cannot be counted as the signatures needed on the will itself because the affidavit, a procedural document designed to facilitate probate, was not executed with testamentary intent. The better and majority view, however, is that the will is validly executed. Because there is generally no requirement that the witnesses sign at any particular place on the will, the signatures on the affidavit are sufficient for the will's execution.

Example: T signs the will, and then T and the witnesses sign the self-proving affidavit (on a separate page stapled to the will) before a notary public. However, neither witness signs the will itself underneath the attestation clause. Under the majority view, the will has been validly executed because the signatures on the affidavit can be counted as the signatures needed on the will.

6. Uniform Probate Code—Court Can Ignore Harmless Errors

Even though a will is not executed in accordance with all of the required statutory formalities (e.g., there is only one witness), the UPC gives the court the authority to ignore harmless errors. The defectively executed will can be given effect if the will proponent establishes by ***clear and convincing evidence*** that the testator intended the document to be his will. [UPC §2-503]

Example: Mary types out her "Last Will and Testament" and asks her brother-in-law Bobby to help her execute it. Mary signs the document and then Bobby signs on the first signature line for witnesses—leaving the second signature line blank. In most states, the will would be denied probate because it is not signed by two witnesses. Under the UPC, however, a court may dispense with the requirement that there must be two witnesses, for there is clear and convincing evidence that Mary intended the document to be her will.

E. HOLOGRAPHIC WILLS

The UPC and a majority of the states recognize holographic wills and codicils. [*See* UPC §2-502] A holographic will is one that is ***entirely in the testator's handwriting and has no attesting witnesses***. Where recognized, a holographic will usually may be made by any testator with capacity, but a few states limit them to persons serving in the armed forces or mariners at sea.

1. Testator's Handwriting

Generally, to be valid, a holographic will must be ***entirely*** in the testator's handwriting. However, the UPC and most states that recognize holographic wills accept a will that contains some typewritten text as long as the portion not in the testator's handwriting is not ***material*** (i.e., the typewritten portion may be disregarded without violating the testator's intent). [*See* UPC §2-502(b)] Note that most states do not require that a holographic will be dated.

2. Testator's Signature

A holographic will must be signed by the testator, but there is no requirement that it be signed at the end of the will. The signature can even be found in the opening caption (e.g., "I, Jane Jones, do hereby declare . . ."). Courts also take a liberal view of what constitutes a signature; most will allow initials, a first name only, or a nickname.

3. Testamentary Intent

A question often arises with respect to documents offered as holographic wills as to whether the document was really intended to be a will. Often a letter or informal memorandum is offered for probate as a holographic will, and the court must make the determination of whether the document was so intended. ***The test is whether some future writing was contemplated.*** Extrinsic evidence is admissible to establish that an ambiguous document was intended to be a will.

Examples: 1) T's attorney received the following handwritten letter:

> Dear Attorney:
>
> I have decided to change my will as follows: I wish my daughter A to receive $10,000, rather than $20,000. My son B should receive $30,000, instead of the $20,000 as the will

presently reads. Also, the downtown condominium should pass one-half to A and one-half to B, instead of passing to C. Please make these changes, and I will sign the necessary papers next week.

/s/T

T died before signing the new will drafted by the attorney. B seeks to offer T's letter into probate as a holographic will because it is entirely in T's handwriting and is signed by T. The court will refuse to admit the letter as a holographic will because it clearly lacks testamentary intent. Obviously another writing was contemplated by T when she wrote the letter, and she did not intend the letter itself to be her will.

2) A hospital patient gives a nurse a note, saying, "Take care of this. It is my will." The note reads, "Everything I own should go to my sister Sharon. /s/ Testator." The nurse may testify as to what the testator said, and this, along with the circumstances of the writing, will probably be sufficient evidence of testamentary intent to admit the note as a holographic will.

4. Interlineations

Most states that recognize holographic wills give effect to handwritten changes, such as substituting beneficiaries, made by the testator after the holographic will is completed. By contrast, these types of interlineations are generally not given effect if made to an attested will (unless the changes themselves are sufficient to constitute a holographic codicil and the jurisdiction recognizes such codicils).

F. ORAL WILLS

Most states and the UPC do ***not*** recognize oral wills. [*See* UPC §2-502(a)(1)] The small number of states that allow oral wills do so only for the disposition of personal property and only if made by: (i) soldiers or sailors (only during a time of armed conflict in some states); or (ii) any person during his last sickness or in contemplation of immediate death. Generally, there must be at least two witnesses to such a will.

G. CONFLICT OF LAWS ISSUES

1. Real Property

To the extent that a will disposes of real property, its validity and effect are determined by the law of the state where the ***property is located***. [*See* Rest. 2d of Conflict of Laws §239]

2. Personal Property

With respect to dispositions of personal property, the law of the testator's ***domicile at the time of her death*** controls the validity and effect of the will.

3. Foreign Wills

Under the law of many states and the UPC, a will is admissible to probate in a jurisdiction if it has been executed in accordance with:

(i) The law of that jurisdiction;

(ii) The law of the state where the will was executed;

(iii) The law of the testator's domicile at the time the will was executed; ***or***

(iv) The law of the testator's domicile at death.

[*See* UPC §2-506]

H. ATTORNEY LIABILITY FOR NEGLIGENCE

Suppose that an attorney negligently prepares a will or negligently supervises the will's execution. Can the intended beneficiaries sue the attorney for the amount they would have received had the will been properly drafted and executed?

1. Common Law and Minority Rule—Privity of Contract Is a Defense

At common law and in a few states (e.g., Ohio, New York, Texas, Virginia), privity of contract is a defense to such an action. Under privity of contract, an attorney's duty runs only to the client who contracted for the attorney's services, and only the client can sue the attorney for negligence.

2. Majority Rule—Privity of Contract Rejected as Defense

Most states have rejected privity of contract as a defense. In these states, an attorney's duty also runs to the intended beneficiaries of the attorney's services, and they can sue the attorney for negligence. In such an action, the statute of limitations begins to run on the date of the decedent's death and not on the date the will was executed.

IV. COMPONENTS OF A WILL

A. INTEGRATION

A will often consists of more than one sheet of paper, yet the testator and the witnesses sign and attest on only one sheet: the last page of the will. The rarely litigated doctrine of "integration" concerns the following question: What sheets were present at the time of will execution and thus comprise the decedent's last will? If an integration question is raised, the will proponent must show that the pages were ***present when the will was executed*** and were ***intended*** by the testator to be a part of the will. The requirements of intent and presence are presumed when there is a physical connection of the pages (staple, paper clip, etc.), when there is an internal coherence by provisions running from one page to the next, or when the pages, read together, set out an orderly dispositional plan. These requirements also can be established by the testimony of witnesses or other extrinsic evidence.

Example: A will was prepared in haste for T, who was hospitalized. By oversight, page 4 (which named an executor) of the five-page will was left out when the will was stapled. Thus, only pages 1 through 3 and 5 (which contained the dispositive provisions) were part of the will that was signed and witnessed. On these facts, pages 1 through 3 and 5 should be admitted to probate. Page 4 cannot be admitted to probate because it was not part of the duly executed will. However, the other four pages should be admitted if they embrace the substance of T's dispositive plan. [Estate of Hall, 462 N.Y.S.2d 154 (1983)]

B. CODICIL

A codicil is a later testamentary instrument that amends, alters, or modifies a previously executed will. A codicil must be executed with the same testamentary formalities as a will. In some cases, it may be important to establish the date on which a will is deemed to have been executed. Under the doctrine of ***republication by codicil***, a will is treated as having been executed ("republished") on the date of the last validly executed codicil thereto.

Example: T executes a will that bequeaths one-half of her estate to her husband, H, and the other one-half to her child, C. Two years later, T has another child, D. T then executes a codicil that changes the executor named in the original will. T dies without having otherwise modified the original will. Under the doctrine of republication by codicil, the will is deemed to have been executed when the codicil was executed. Therefore, D is not an afterborn child and gets no protection from the pretermitted child statute. (*See* VIII.B., *infra*.)

C. INCORPORATION BY REFERENCE

In most states, an extrinsic document (not present at the time the will was executed) may be incorporated into the will by reference so that it is considered a part of the will. To incorporate a document by reference, three requirements must be met:

(i) The document must be ***in existence*** at the time the will is executed;

(ii) The language of the will must ***sufficiently describe*** the writing to permit its identification; and

(iii) The will must ***manifest an intent to incorporate*** the document.

1. Document Must Be in Existence at Time of Execution of Will

The requirement for incorporation most strictly adhered to by courts is that the document must be in existence at the time the will is executed. The courts are fearful that if this requirement is not adhered to, a testator could incorporate "a paper to be written which will be placed in my desk drawer," and could later name new beneficiaries by an unattested writing. Obviously, the safeguards of the Statute of Wills would be in serious danger if that were given effect.

Example: If the will executed and attested to on May 1 provides "$1,000 to each of the persons named in a letter that I have written and dated March 1 of this year, which will be found in my safe deposit box at the Acme Bank," and if the letter was in existence at the time the will was executed, the letter is incorporated by reference and the gifts are valid.

Compare: If the will provides "$1,000 to each of the persons named in a letter that will be found in my safe deposit box at the Acme Bank," but it can be shown that the letter was written ***after the will's execution***, the letter is ***not*** incorporated by reference and the intended gifts will fail.

a. Exception for List Disposing of Items of Tangible Personal Property

Sometimes clients seem more concerned about making gifts of personal items of sentimental value (e.g., crystal bowls, Winchester rifles, etc.) than about disposing of their intangible wealth or real estate holdings. Also, division of personal and household

effects among the surviving family members can lead to arguments unless the testator has given clear directions as to how these items are to be divided. To provide a convenient mechanism for making gifts of such items, many states and the UPC have enacted statutes carving out an exception to the rule that, to be incorporated by reference, the document must be in existence at the time the will is executed. In those states, a will may refer to a written statement or list to dispose of items of ***tangible personal property*** (not money, intangible property, or property used in a trade or business) not otherwise specifically disposed of by the will. The writing must be ***signed*** by the testator and must ***describe*** the items and the devisees with reasonable certainty. The writing may be referred to as one in existence at the time of the testator's death. It may be prepared before ***or after*** the execution of the will, and it ***may be altered*** by the testator after its initial preparation. [*See* UPC §2-513] Note that unless a state has a specific statute addressing this issue, such lists prepared after the execution of the will are invalid.

2. Identification of Extrinsic Document

The language of the will must refer to the extrinsic document in such a way as it may be reasonably identified, and the document must correspond to the description given in the will.

Example: M purchased a will form at a stationery store. In the space for naming the beneficiaries of his estate, M wrote: "Attached dated June 7, 2009." After M's death, the will (which was duly executed) was found in an envelope along with a handwritten and signed (but unwitnessed) memorandum dated June 7, 2009. The memo, which was paper-clipped to the will, designated the beneficiaries of M's estate. The will's reference to the date of the memo and its being "attached" were sufficient to incorporate the memo by reference.

D. ACTS OF INDEPENDENT SIGNIFICANCE

Under the "acts of independent significance" doctrine (sometimes called the doctrine of "nontestamentary acts"), a will may dispose of property by reference to acts and events that have significance apart from their effect on the dispositions made by the will. Even though the identification of a beneficiary or the amount of a bequest will be determined by some future unattested act, the bequest is nonetheless valid if the act has some lifetime significance other than providing for the testamentary gift.

1. Identification of Beneficiaries

The future act may relate to the identification of the beneficiaries.

Example: T's will provides "a legacy of $1,000 to each person who is in my employ at the time of my death." Thereafter, T hires three new employees and fires two longtime employees. Under this doctrine, it is assumed that T would not make employment decisions simply to make or unmake legacies in his will. The act of employment has independent significance apart from its effect on T's will. The gifts are valid.

2. Identification of Property

This doctrine also permits identification of the property that is to be the subject matter of a bequest.

Example: T's will bequeaths "my house and its contents to my sister Sarah." Thereafter, T buys new furniture and several valuable paintings, totally redecorating her house. The gift is valid and includes all items of furniture and furnishings

that are in T's house at her death, i.e., "those items of tangible personal property which convert an empty building into a habitable dwelling." The gift ***does not include intangible property*** that happened to be stored in the house (stock certificates worth $377,000; savings account passbook covering deposits of $124,000). [Souder v. Johnson, 501 So. 2d 745 (Fla. 1987)]

Compare: T's will bequeaths "the oil paintings in my den to the persons whose names I plan to write on the back of each painting." Thereafter, T writes various names on post-its and sticks them on the back of several paintings in his den. The gifts are ineffective because the tagging has no significance except as a testamentary act.

3. Acts of Third Persons

The doctrine of independent significance has been used with regard to acts of third persons as well as to acts of the testator. The usual situation is where a testator directs that his property be distributed in accordance with the will of another person. If the will is executed, and the other requirements of incorporation are met, the other person's will can be incorporated by reference. The more difficult case is where the testator provides that his property shall be disposed of as provided in the future will of another person.

Example: T executes his will devising the residue of his estate to any charitable trust established by the last will and testament of his brother, Barney Robles. Barney is alive and has no will. Subsequently, Barney executes a will devising all his property to the Robles Trust for Mental Health, a testamentary trust established by his will. Then Barney dies. Then T dies. It is generally held that the doctrine of independent significance applies, and the gift is valid.

E. POUR-OVER GIFT TO INTER VIVOS TRUST

The usual fact situation is like this: T established a revocable inter vivos trust. T then executed his will devising the residue of his estate to the trustees of the inter vivos trust to hold under the terms of the trust instrument as amended on the date of T's death. Subsequently, T amended the trust and then died. Can the residue be poured over into the trust as amended? The amendment cannot be incorporated by reference because it was not in existence when the will was executed. Some courts, however, held the amendment had independent significance if the inter vivos trust had a significant amount of property and was set up for lifetime motives. The problem was solved by legislation permitting this very useful estate planning device.

In most states, the Uniform Testamentary Additions to Trusts Act ("UTATA"), or its equivalent, has been enacted. A devise or bequest made to a trustee of an inter vivos trust is valid, notwithstanding the fact that the testator has reserved the power to amend or revoke the trust or has actually amended the trust after executing his will, and further notwithstanding the fact that the trust instrument or any amendment was not executed in accordance with the Statute of Wills. [UTATA §1; *see* UPC §2-511]

F. POWERS OF APPOINTMENT

A power of appointment is an authority granted to a person, enabling that person (the ***donee*** of the power) to designate, within the limits prescribed by the creator of the power, the persons who shall take the property and the manner in which they shall take it. Powers of appointment are widely used in drafting wills that create trusts. If a testator wants to establish a trust to pay

the income to her child for life, instead of deciding now (when the will is drafted) who will take the property on the child's death, the testator can give the child a power to designate the remaindermen by his will, enabling the child to take into account family circumstances as they develop during the child's lifetime. Also, if, for example, a parent holds a testamentary power of appointment exercisable in favor of her descendants, existence of the power over a substantial fund tends to insure filial devotion. "It doubtless occurred to the testator that by restraining a disposition of his property except by will, which is in its nature revocable, [his widow] would, to the end of her life, retain the influence over, and secure the respect of, the several objects of his bounty." [Hood v. Haden, 82 Va. 588 (1886)]

1. General vs. Special Power of Appointment

While the distinction between general and special powers of appointment derives from the common law, the only definition of importance today is the one set forth in section 2041 of the Internal Revenue Code, which applies the federal estate tax to property over which the decedent held a general power of appointment but not to property over which he held a special power of appointment. A ***general power of appointment*** is a power exercisable in favor of the donee himself, his estate, his creditors, ***or*** the creditors of his estate. A ***special power of appointment*** is a power exercisable in favor of a ***limited*** class of appointees, which class does not include the donee, his estate, his creditors, or the creditors of his estate.

Examples: 1) Wanda's will devises property in trust: "The trustee shall pay all trust income at least annually to my husband, Harold, for life. On Harold's death, the trustee shall distribute the trust principal, outright or in further trust, to such persons, ***including Harold's estate***, as he shall appoint by his will. If or to the extent that Harold does not exercise this power of appointment, on Harold's death the trustee shall distribute the trust principal to my then living descendants, per stirpes." Harold is the donee of a ***general testamentary power of appointment***, because he is not limited in the class of persons to whom he can appoint. Wanda's descendants are ***takers in default of appointment***, as they will take the property if Harold fails to exercise the power of appointment.

2) Teresa's will devises property in trust: "The trustee shall pay all trust income to my son, Seth, for life. On Seth's death, the trustee shall distribute the trust principal, outright or in further trust, to such of Seth's descendants as he shall appoint by his will. If or to the extent that Seth does not exercise this power of appointment, on Seth's death the trustee shall distribute the trust principal to his then living children." Seth is the donee of a ***special testamentary power of appointment***, as he is limited in the class of persons to whom he can appoint: He can appoint the property only to or among his descendants. Seth's children are takers in default of appointment.

2. Presently Exercisable vs. Testamentary Power

A presently exercisable power of appointment is one exercisable by the donee during her lifetime. A testamentary power is one that is exercisable only by the donee's will.

Examples: 1) T's will devises property "to A for life, and on A's death to such persons as A shall appoint by will; in default of appointment to B." T is the donor of the power of appointment. A is the donee of a ***general testamentary power***. It is a general power because the objects of the power ("such persons") include

A's estate or the creditors of A's estate. It is testamentary because it is exercisable only by will. B is the taker in default of appointment; B holds a vested remainder subject to total divestment. For purposes of classifying B's interest, the power of appointment is treated as a divesting condition subsequent because B takes ***unless*** A exercises the power of appointment.

2) T's will devises property "to A for life, and on A's death to such of A's issue as she shall appoint during her lifetime or by will; in default of appointment, to A's issue then living, per stirpes." A is the donee of a ***special power of appointment*** that is exercisable during A's lifetime or by will. It is a special power because A is limited to appointing among her issue. "A's issue then living" are the takers in default of appointment; there is a contingent remainder in A's issue.

In most states, a presently exercisable power of appointment is also exercisable by the donee's will unless the donor has expressly limited exercise of the power to the donee's lifetime.

3. Appointive Property Not Subject to Elective Share Statute
The basic theory of powers of appointment (whether general or special) is that the donee is the donor's agent in designating the beneficiaries of the appointive property; the donee is not the owner of the property. For this reason, a surviving spouse's elective share (VIII.A., *infra*) does not apply to property over which the deceased spouse held a power of appointment.

4. Generally Creditors Cannot Reach Appointive Assets
Under the theory that the donee does not own the appointive property, if the donee does not exercise her general power (whether presently exercisable or testamentary), her creditors cannot reach the property.

a. If Donee Exercises Power—Creditors Can Reach Those Assets
If the donee exercises the general power, the courts have abandoned the agency theory in favor of a fiction that enables the donee's creditors to reach the property. This is true whether the donee appoints to herself or to some other person. The theory is that the donee, in making the appointment, is exercising a dominion that is practically identical to that exercised by her over her own property, and so her creditors can reach the appointive property as though she were the owner. *Minority rule:* By statute in several states (e.g., California, Michigan), creditors of the donee of a general power can reach the appointive property regardless of whether the power is exercised.

b. If Donee Is Also Donor—Creditors Can Reach Appointive Assets
If the donee of a general power is also the donor, her creditors can reach the appointive assets whether or not she exercises the power. A general power of appointment cannot be used to squirrel away one's assets from her creditors. (This is analogous to the rule that a spendthrift clause in favor of the settlor of a trust is invalid.)

5. Exercise of Powers of Appointment

a. Residuary Clause Does Not, By Itself, Exercise Testamentary Power
In nearly every state, a residuary clause, by itself, does not exercise any power of appointment held by the testator.

Example: Father's will created a trust that gave his son Tom a life income interest and a general testamentary power of appointment, with a gift in default of appointment to Tom's descendants. Tom dies leaving a will that does not mention the power of appointment but contains a residuary clause that devises "all the rest, residue, and remainder of my property, of whatever kind and wherever located," to various persons. Tom's will does not exercise the power of appointment, and the appointive assets pass to Tom's descendants.

1) Minority Rule—General Power With No Gift in Default of Appointment
In states that have enacted the Revised Uniform Probate Code, a will's residuary clause exercises a ***general*** (but not a special) power of appointment ***unless***: (i) the donor's will called for its exercise by a specific reference to the power, or (ii) the donor's will provides for a gift in default of appointment. [Revised UPC §2-608(a)] Because a well-drafted will invariably makes a gift in default of appointment (as in the above example), the second exception usually applies.

b. "Blanket" Exercise of Power Permissible
If a person holding a testamentary power executes a will that devises "all the rest and residue of my property, ***including any property over which I may have a power of appointment***," this "blanket" exercise of any power of appointment will be given effect ***unless*** the creator of the power called for the power's exercise by an instrument that specifically referred to the power.

1) State Statute May Provide Otherwise
Several states have enacted statutes providing that a power of appointment may be exercised only by an instrument that makes specific reference to the power.

c. Exercise by Implication
The courts will find that a power of appointment (whether general or special) was exercised by implication when the donee purports to dispose of property subject to the power as though it were her own, meaning that the disposition can be given effect only if it is treated as an exercise of the power. An exercise by implication can be found ***unless*** the donor called for the power's exercise by a specific reference to the power.

Example: Teresa holds a general testamentary power of appointment over a group of assets that includes Blackacre. Teresa dies leaving a will that devises the fee simple title in Blackacre to her niece Nellie. Teresa's power of appointment is exercised with respect to Blackacre (but not as to the other appointive assets), as this is the only way the provision in Teresa's will can be given effect.

d. Interests That Can Be Created by Power's Exercise
Under the Uniform Probate Code and in nearly all states, the donee of a power of appointment has very broad authority as to the interests that can be created in exercising a general or special power of appointment. Absent a contrary provision in the instrument creating the power, the donee can: appoint the property outright or in trust (and can include spendthrift provisions in the trust), create life estates and future interests, impose conditions and limitations on the interests created, and create additional powers of appointment. [UPC §2-608(b)]

6. Contract to Exercise Testamentary Power of Appointment Is Invalid
The donee of a testamentary power of appointment (whether special or general) cannot contract to make an appointment; such a contract is invalid. *Rationale*: The donor's intent was that the donee was to retain the opportunity to make a judgment as to the power's appropriate exercise until his death. To permit the donee to contract for the power's exercise would transform a power that was intended to be testamentary into a presently exercisable power, which would defeat the donor's intent.

a. Contract to Appoint Benefiting Non-Object of Power Is Invalid
An additional concern is raised if the contract to appoint would benefit a non-object of the power of appointment. An exercise of the power pursuant to the terms of such a contract is invalid.

Example: Denise holds a power to appoint among her descendants. Denise enters into a contract under which she will exercise the power in favor of Child if Child agrees to pay $100,000 to Denise's husband. Because the husband is not a permissible appointee, the resulting exercise of the power in favor of Child is entirely void. [*In re* Carroll's Will, 274 N.Y. 288 (1937)]

G. NONPROBATE ASSETS CANNOT BE DISPOSED OF BY WILL

Only property owned by the decedent at death can be disposed of by will. A will cannot make a gift of "nonprobate assets"—i.e., interests that pass at death other than by will or intestacy. Also, nonprobate assets are not subject to the personal representative's possession for purposes of administering the decedent's estate. There are three principal categories of nonprobate assets.

1. Property Passing by Contract—Life Insurance Proceeds and Employee Benefits
Life insurance proceeds (and death benefits under an employee retirement plan) are payable to the beneficiary designated by the insured (or employee) in his contract with the life insurance company (or retirement plan carrier).

Example: Tom is the insured under a $50,000 Prudential life insurance policy that names Mary as primary beneficiary. Tom dies leaving a will that provides: "I direct that the $50,000 proceeds under my Prudential life insurance policy be paid to my brother Bill rather than to Mary." This will provision is ineffective. Payment of the insurance proceeds is governed by the contract between Tom and Prudential, and the beneficiary can be changed only by complying with the terms of the policy governing beneficiary designations. Mary takes the $50,000 proceeds.

2. Property Passing by Right of Survivorship
Property held by the decedent and another person as joint tenants with right of survivorship, and property held by the decedent and his spouse as tenants by the entirety, pass directly to the survivor outside of the probate process.

Example: H and W owned a house as tenants by the entirety. W filed for divorce, and the parties tentatively agreed upon a property settlement under which the house would be awarded to W. In anticipation of this, W executed a will that devised the house to C. However, W died before the hearing on the divorce petition was held. *Held:* W's will was ineffective as to the house because the parties were married at W's death. Title to the house passed to H by right of

survivorship. Moreover, there is no basis for impressing a constructive trust in C's favor because no wrongful conduct or unjust enrichment was involved. [Miller v. Miller, 487 A.2d 1156 (D.C. 1985)]

3. Property Held in Trust

When an inter vivos trust is established, legal title to the settlor's assets is transferred to the trustee, and if the trust continues in operation after the settlor's death, legal title remains in the trustee.

Example: Sam establishes a revocable self-declaration of trust that names himself as trustee. The trust provides that all income is to be paid to Sam for life. Upon Sam's death or incapacity, Miami National Bank is to become successor trustee. After Sam's death, all trust income is to be paid to Sam's wife, Wilma, for life. On the death of the survivor of Sam and Wilma, the trust principal is to be distributed to Sam's descendants. Sam dies; the trust continues in operation free of the probate process.

V. REVOCATION OF WILLS

A. IN GENERAL

1. Must Have Capacity to Revoke Will

A person who has testamentary capacity (i.e., is of sound mind, has the capacity to know the nature of the act he is doing, etc.) may revoke his will at any time prior to death.

2. Contractual Will May Be Revoked

Even a testator who has validly contracted not to revoke a will (*see* VI.C., *infra*) may do so, and the will must be denied probate. In this case, however, there may be an action for breach of contract against the decedent's estate, and the remedy may be the imposition of a constructive trust upon the beneficiaries under the will. (*See* Trusts outline.)

3. Methods of Revocation

Once validly executed, a will may be revoked only by the methods prescribed by statute or permitted by case law. These methods include revocation by operation of law, by subsequent instrument, and by physical act.

B. REVOCATION BY OPERATION OF LAW

In many states, a will may be partially or totally revoked by operation of law in the event of subsequent marriage, divorce, or birth or adoption of children. The theory of the rules providing for such revocation is that it is assumed the testator would not want the will (or the will provision) to operate in view of the changed family situation.

1. Marriage Following Execution of Will—Omitted Spouse

In most states, marriage following execution of a will has ***no effect*** on the earlier will, even though it makes no provision for the new spouse, on the theory that the new spouse is given adequate protection by the state's elective share statute (or, in community property states, by the community property system). However, in a minority of states and under the UPC, if

a person marries after executing a will and the spouse survives the testator, the new spouse takes an intestate share of the testator's estate as an "omitted spouse." In most of these states, the will is only partially revoked, i.e., only to the extent necessary to provide the spouse with an intestate share. In making up the omitted spouse's intestate share, the usual abatement rules (discussed in X.E., *infra*) apply. Property passing by partial intestacy (if any) is first used, then the residuary estate, then general legacies, demonstrative legacies, and, finally, specific devises and bequests.

Note that even in states with omitted spouse statutes, no revocation occurs and the spouse does not receive the intestate share if: (i) the ***will makes provision*** for the new spouse; (ii) the will provides that the spouse's ***omission was intentional***; or (iii) it appears that the will was made in ***contemplation of the marriage***. [*See* UPC §2-301]

2. Divorce or Annulment Revokes All Provisions in Favor of Former Spouse

In most states, by statute, divorce or annulment following execution of a will revokes all gifts and fiduciary appointments in favor of the former spouse. The rest of the will remains valid, and is read as though the ex-spouse predeceased the testator. The UPC extends the application of the rule to provisions in favor of the former spouse's ***relatives*** who are not relatives of the testator. The UPC also revokes any gift or fiduciary appointment in favor of the former spouse (or the spouse's relatives) in a decedent's ***revocable inter vivos trust***. [UPC §2-804]

Examples: 1) Tom's will devises Blackacre "to my wife, Wanda, if she survives me, but if she does not survive me, to my brother Ben." The will devises Tom's residuary estate to his son Sam. Wanda divorces Tom; then Tom dies survived by Wanda, Ben, and Sam. The gift to Wanda is revoked and, because the will is read as though Wanda predeceased the testator, Blackacre passes to Ben.

2) Same facts as above, except that the devise of Blackacre was "to my wife, Wanda, if she survives me, but if she does not survive me, to my ***wife's*** brother Ben." Under the UPC, both the gift to Wanda and the alternate gift to Ben are revoked, and Blackacre passes under the residuary gift to Sam.

a. Statutes Do Not Apply to Life Insurance Policies

The statutes apply only to wills and revocable trusts, not to insurance policies.

Example: Suppose, in the first example above, Tom had a $25,000 life insurance policy that named Wanda as primary beneficiary "if she survives me" and Ben as contingent beneficiary. After the divorce, Tom does not change the beneficiary designation. Wanda takes the $25,000 policy proceeds.

b. Statutes Apply Only to Divorce or Annulment by Testator or Settlor

The only divorce or annulment relevant under the statutes is the testator's or settlor's.

Example: T's will bequeaths property "to my brother's wife, Louise Ellstrom." Thereafter, T's brother divorces Louise, and Louise changes her name back to Smith, her maiden name. Louise takes the gift under T's will. The designation of "my brother's wife" was not a condition to the gift, but merely described which Louise T had in mind.

3. Pretermitted Children

Most states have pretermitted child statutes. (*See* VIII.B., *infra*.) Under these statutes, if the

testator fails to provide in his will for any of his children born or adopted after the will is executed, the child is entitled to a share of the estate equal in value to what he would have received if the testator had died intestate. In making up the child's share, the general rules of abatement apply. Thus, in the ordinary case, the pretermitted child's share comes out of the residuary estate, and the will is revoked to that extent.

C. REVOCATION BY WRITTEN INSTRUMENT

1. Instrument of Revocation Must Be Executed with Testamentary Formalities

A will or any part thereof may be revoked or altered by a subsequently written will, codicil, or other writing declaring such revocation, as long as there is a present intent to revoke and the instrument is executed with the same formalities as are required for the execution of a will. In states that recognize holographic wills, a valid holographic will may revoke a typewritten, attested will.

Example: A revocation can be by a writing that says nothing more than "I revoke my will," provided such writing is executed and attested with proper formalities. However, the usual method of revoking a will is to execute a new will that states: "This is my last will and testament, and I hereby revoke all earlier wills and codicils thereto."

2. Revocation by Implication—Inconsistent Provisions

Suppose that a testator executes a second testamentary instrument that does not contain any express language of revocation of an earlier will. To the extent possible, the two instruments are read together; i.e., the second instrument is treated as a codicil to the will. However, the second instrument revokes the first to the extent of any inconsistent provisions.

Examples: 1) T executes a will that leaves all of her property to John. Later, T executes a second will that leaves all of her property to Dolly, but the will does not contain an express clause revoking the first will. When T dies, Dolly takes T's entire estate, the first will having been revoked completely by the inconsistent provision of the second will.

2) By his first will, T bequeaths his stamp collection to Art and his residuary estate to Ruth. By a later instrument executed with proper formalities, T bequeaths his stamp collection to Jack, his Studebaker convertible to Susan, and $5,000 to Tom. This second instrument contains no words of revocation. The second instrument is treated as a codicil, and revokes the first will only to the extent of inconsistent provisions. Thus Jack (not Art) takes the stamp collection, Susan takes the Studebaker, Tom takes $5,000, and Ruth takes T's residuary estate.

D. REVOCATION BY PHYSICAL ACT

1. Requirements

a. Physical Act

The statutes of each state specifically prescribe the acts sufficient to revoke a will. Typically, these acts are burning, tearing, obliterating, or canceling a material portion of the will. The act must be shown to have had an actual effect on the will or its language.

Example: T writes "Void. Isadore Berman" at the bottom of each page of a

three-page will, not intersecting or coming into contact with any portion of the will. *Held:* The will was not revoked because the writing was: (i) not a revocation by subsequent instrument because it was not signed by attesting witnesses, and the jurisdiction did not recognize holographic wills; and (ii) not a revocation by physical act because no portion of the will was canceled, defaced, or obliterated.

1) Burning
Burning a material portion of the will's language is sufficient to revoke the will, but merely burning the will's outside cover or singeing the corners is insufficient.

2) Tearing
Tearing or cutting is sufficient if a material part, such as a dispositive provision or the testator's signature, is cut or torn.
Example: T cuts her signature off the will with scissors. *Held:* This is a valid revocation by physical act, as this act of canceling or defacing shows a clear intent that T intended to revoke the will in its entirety.

3) Obliteration
Revocation by obliteration (e.g., inking out or erasing) requires damage to a material part of the will.

4) Cancellation
Lining out or writing an "X" or the word "void" across a will is sufficient to revoke if the lines touch the words of the will. Thus, writing words of cancellation on the back or in the margin of the will are ineffective to revoke the instrument.
Example: T's act of writing "Not Valid" across the ***face*** of each page of a three-page will constitutes a sufficient canceling, defacing, or obliterating to revoke the will.

b. Intent to Revoke
The intention to revoke must be present ***at the time of the physical act*** for revocation to be effective.
Example: Tom's house is badly damaged by a fire. When advised that his will was among the items destroyed by the fire, Tom states: "That's all right; I wanted to revoke it anyhow." The will has not been revoked because the intent to revoke did not accompany the physical act of destruction.

2. Revocation by Proxy Permitted
In most states and under the UPC, a will may be revoked by physical act by a person other than the testator, provided that the revocation is: (i) ***at the testator's direction***, and (ii) in the testator's ***presence***. [*See* UPC §2-507(a)(2)]

3. Partial Revocation
Most statutes and the UPC authorize partial, as well as total, revocation by physical act. [*See* UPC §2-507(a)] The problem is in determining whether the testator intended a partial or full revocation. Extrinsic evidence is admissible to make that determination.

a. Only Residuary Gifts May Be Increased
Courts are reluctant to give effect to nontestamentary actions that operate to increase the size of a general or specific bequest, but the testator can always increase the size of a residuary gift by canceling or obliterating a general or specific bequest.

Example: T's will provides: "I devise Blackacre to A for life, remainder to B. The rest and residue of my estate to C." If T attempts to strike the words "for life, remainder to B," thus giving a fee simple absolute to A, the change will not be given effect. Increasing the gift from a life estate to a fee simple is like making a new gift without complying with testamentary formalities.

Compare: If, in the above example, T struck the entire devise of Blackacre, the change would be valid and the residue would be increased. C would take Blackacre along with the rest of the residue of the estate.

4. Presumptions as to Revocation

a. Will Not Found After Testator's Death
Where a will that was last seen in the testator's possession or under his control cannot be found after the testator's death, a presumption arises that the will was revoked (i.e., the reason the will cannot be located is that the testator destroyed it with the intent to revoke). However, if the will was last seen in the possession of a third person or if a person adversely affected by its contents (e.g., an heir, or a legatee under an earlier will) had access to the will, no presumption of revocation arises.

b. Will Found After Death in Mutilated Condition
Where a will last seen in the testator's possession or under his control is found after his death in a mutilated condition (e.g., torn in two, or crossed out with felt-tip pen), a presumption arises that the testator did the mutilating with the intent to revoke the will.

c. Evidence to Overcome Presumption of Revocation
To overcome the presumption of revocation raised in the foregoing situations, extrinsic evidence is admissible to show the testator's intention.

5. Effect of Revocation on Other Testamentary Instruments

a. Revocation of Will
The revocation of a will revokes all codicils to that will.

b. Destruction of Duplicate Will
Where a will has been executed in duplicate (both original and duplicate are signed and witnessed), an act of revocation performed by the testator upon ***either*** copy revokes the will. Both signed copies of the will are of the same legal stature.

However, the destruction of an ***unexecuted*** copy of the will, accompanied by an intent to revoke, does ***not revoke*** the will. The act of obliteration, destruction, etc., must be done on the will itself.

c. Revocation of Codicil
A physical act of revocation performed on a codicil ***revokes only the codicil***, not the

prior will. In the absence of evidence to the contrary, it is presumed that in revoking the codicil the testator intended to reinstate the will provisions changed by the codicil as though the codicil had never been executed.

Example: T executed a will and later executed three separate codicils to the will. Thereafter, T revoked the third and then the second codicil; then T died. *Held:* Read the will and first codicil as though the second and third codicils had never been made.

6. Lost or Destroyed Will—Contents Must Be Clearly and Distinctly Proved

Suppose that a will is accidentally destroyed in a fire, or that the will cannot be located after the testator's death, but the presumption of revocation that is raised by such facts is overcome by proof that the testator did not intend to revoke the will. All states permit probate of a lost or destroyed will provided that the following three elements can be proved: (i) ***valid execution***; (ii) the ***cause of nonproduction*** (i.e., that revocation is not the reason for nonproduction); and (iii) the ***contents*** of the will. The contents are usually proved by the testimony of at least two witnesses or by production of a carbon or photocopy of the will.

E. REVIVAL OF REVOKED WILLS

Under the minority rule, a will, once revoked, cannot be revived when the revoking instrument is itself revoked unless the earlier will is re-executed (i.e., re-signed and witnessed) or republished by a validly executed codicil. In this situation, in most states, however, a revoked will is presumptively revived (i.e., restored to effectiveness) unless it is shown by the testator's statements or other evidence that she did not intend to revive the earlier will. [UPC §2-509]

Example: T executes Will-1, which devises T's entire estate to a trust for the benefit of his niece Nora. Thereafter, T executes Will-2 which, after revoking all earlier wills, devises his estate outright to Nora. T does not destroy Will-1, however. Thereafter, T reads over the two wills, says to his sister, "You know, I have decided to leave my estate in trust for Nora after all," and tears up Will-2. Under the majority rule, this evidence corroborates the presumption that T intended to revive Will-1, and Will-1 is admissible to probate. (But if T had destroyed Will-1, it could not be revived.)

1. Reexecution

A will can be reexecuted with full testamentary formalities or by the testator acknowledging her signature on the will or acknowledging the will and having this attested to by two witnesses.

2. Republication by Codicil

Provided the first will is still in physical existence, it may be revived by the valid execution of a codicil that expressly refers to it.

F. DEPENDENT RELATIVE REVOCATION

1. Mistake of Law or Fact as to Validity of Another Disposition

Dependent relative revocation ("DRR") is an equity-type doctrine under which a ***court may disregard a revocation*** if it determines that the act of revocation was premised on a mistake of law or fact and would not have occurred but for the testator's mistaken belief that another disposition of her property was valid. If the other disposition is ineffective for some reason,

the revocation accompanying the attempted disposition also fails and the will remains in force. Necessary to application of DRR is that the disposition that results from disregarding the revocation comes closer to effectuating what the testator tried (but failed) to do than would an intestate distribution.

Examples: 1) Tillie validly executes a will that devises her entire estate to her sister Ann. Later, Tillie executes a second instrument that bequeaths $10,000 to her friend Fred and the remainder of her estate to Ann. However, the instrument is signed by only one attesting witness. Tillie, erroneously believing that the second instrument has been validly executed, tears up the first will. Tillie dies, survived by her sister Ann and her brother Bob as her nearest kin. The second instrument is not admitted to probate because it was not properly attested. On these facts, DRR would be applied so as to disregard the revocation of the first will, which would be admitted to probate upon compliance with the proof of lost wills statute. *Rationale:* Although Tillie revoked the first will by physical act, her act of revocation was based on her mistaken assumption that the second instrument was a valid will. Had Tillie known that the second will was invalid, she would not have revoked the first will. (Of course, if Tillie had known the true situation, she would have properly executed the second will! It's too late for that now, however.) Because Ann was the principal beneficiary under both instruments, disregarding the revocation of the first will comes closer to what Tillie tried (but failed) to do than would an intestate distribution, under which Bob would take one-half of Tillie's estate.

2) Tim's validly executed will includes a bequest of "$2,000 to my niece Nellie." Thereafter, Tim crosses out the "$2,000" and writes in "$5,000" above it, intending thereby to revoke the gift of $2,000 and replace it with a gift of $5,000. The attempt to increase the gift to Nellie is ineffective as an unattested writing. Although Tim's striking of "$2,000" was an effective partial revocation by physical act, DRR will be applied so as to disregard the revocation. Tim would not have revoked the $2,000 bequest but for the erroneous belief that the $5,000 bequest was valid. (But if Tim had attempted to reduce the $2,000 bequest to $500, DRR would not be applied. In this situation, by striking the $2,000 Tim in effect said, "I do not want Nellie to take $2,000." It cannot be assumed that Tim would prefer Nellie to take $2,000 rather than zero.)

Compare: Same facts as in the second example above, except that Tim strikes the entire "$2,000 to my niece Nellie," and writes in above it "$5,000 to my sister Sue." Here, DRR should not be applied. Tim's revocation of the gift to Nellie (in effect, "I do not want Nellie to take anything") would be ***independent*** of his ineffective attempt to make a gift to Sue. To disregard the revocation would defeat Tim's intent. On these facts, the conventional rules would be applied, and the bequest to Nellie would be revoked.

G. UNIFORM PROBATE CODE—HARMLESS ERROR STATUTE

The Uniform Probate Code's "harmless error" statute that applies to the execution of wills (*see* III.D.6., *supra*) also applies to the attempted revocation or alteration of a will, if the proponent

establishes by ***clear and convincing evidence*** that the decedent intended the document to be a partial or complete revocation of a will or an alteration of the will. [UPC §2-507]

VI. CONTRACTS RELATING TO WILLS; JOINT WILLS

A. CONTRACT TO MAKE A GIFT BY WILL

1. Contract Law Governs

Assuming the usual requirements of a valid contract are met, a contract to make, not to make, or not to revoke a will is valid. Problems in this area are controlled by contract law and not by the law of wills. The contract is not a will; it does not have to be executed with testamentary formalities; it cannot be probated. Likewise, the contract cannot be used to oppose the probate of a properly executed will that is inconsistent with the terms of the agreement. Such a will must be probated. There may be an action for damages or a suit in quasi-contract for the consideration provided, but the usual remedy is for a court of equity to impose a ***constructive trust*** upon the appropriate beneficiaries under the will.

2. Consideration

The promisee does not have any enforceable contract rights unless she provided some consideration for the testator's promise to name her as a will beneficiary. Without consideration, the testator's promise is merely a promise to make a gift in the future and is not enforceable. But note that in a contract to make a gift by will in exchange for a promise by the beneficiary to provide care to the testator, the mere fact that the testator died before the promisee could provide much in the way of care does not render the contract unenforceable—the promise to provide the care was sufficient consideration.

3. Formal Requirements

As a general rule, a contract to make a will or a gift by will need not be in writing unless land is involved. Many states have, however, enacted statutes requiring all such contracts to be in writing. Many follow the lead of the UPC, which states that a contract to make a will, not to revoke a will, or to die intestate can be established only by:

(i) ***Provisions in the will*** stating the material provisions of the contract;

(ii) An ***express reference*** in a will to the contract and extrinsic evidence proving the terms of the contract; or

(iii) A ***writing signed by the decedent*** evidencing the contract.

[UPC §2-514]

4. Remedies for Breach

a. During Testator's Life

Generally, there is no remedy during the testator's life because there is no way of knowing whether the testator will carry out his promise until his death. If the testator repudiates the contract after substantial performance by the promisee, however, the

promisee may seek damages, quantum meruit (value of services rendered), or equitable relief.

b. After Testator's Death
If the promisor fails to make the promised testamentary gift, the promisee can seek damages equaling the value of the property promised. If the promise was to devise specific property, however, the usual remedy is for the court to impose a constructive trust on the property for the promisee's benefit.

B. JOINT AND MUTUAL WILLS

A ***joint will*** is the will of two or more persons executed on the same piece of paper and intended to serve as the will of each. Thus, a joint will is a single instrument executed by two or more testators. A joint will is admissible to probate on the death of each testator; it is as if there were separate pieces of paper. If one of the joint testators should revoke his joint will, the document would still serve and be admissible to probate as the will of the other(s). ***Mutual wills*** are separate wills executed by two or more testators that contain substantially similar or "reciprocal" provisions. Thus, a mutual will is an instrument executed by only one person but which is similar in its provisions to the terms of another testator's will.

1. Revocability

Joint wills or reciprocal wills are revocable at any time during a testator's life in the same manner as any other will. This is true even if the wills are executed pursuant to a contract which provides that the wills shall not be revoked (although such revocation may give rise to a cause of action for breach of contract; *see* below).

2. No Presumption of Contract

The stated majority rule is that the mere execution of joint wills does not raise a presumption that the wills are contractual (i.e., that they were executed pursuant to a promise by each party not to revoke). However, many courts do in fact find that joint wills are contractual. By contrast, an overwhelming majority of courts find that mere execution of reciprocal wills (even when drafted by the same attorney and executed on the same day) does not constitute evidence that the wills are contractual.

C. CONTRACTS NOT TO REVOKE

Just as parties can enter into a contract to make a will or a gift by will, a testator may enter into a contract not to revoke her will. Most of these cases involve a joint will or reciprocal wills (*see* above).

1. Contractual Will Revocable During Both Parties' Lifetimes

Either party may revoke a contractual will provided she gives ***notice*** to the other party to the contract, so that the other party will have a chance to change his will.

2. Relief Denied If First Party Dies in Breach

If one party secretly revokes her will (i.e., does not give notice to the other party to the contract) and predeceases the other party, the survivor has no remedy because he has not been damaged. The survivor is alive and able to change his will so as to avoid sustaining any damage.

3. Constructive Trust Remedy If Survivor Dies in Breach

If the surviving party to a contractual will revokes her will and executes a new one, the new will is admissible to probate. However, because this is a breach of contract, the beneficiaries of the contractual will have a cause of action against the estate. The usual remedy is to impose a constructive trust on the property. The beneficiaries under the new will, which was executed in breach of contract, hold on constructive trust for the benefit of the contract beneficiaries; i.e., their duty as trustee is to convey the property to the contract beneficiaries.

Example: H and W execute a joint will that expressly provides that the will is contractual and that the survivor cannot revoke it after the first party's death. H dies and W probates the will and accepts its benefits. W then executes a new will that revokes the joint will and devises her estate to other beneficiaries. After W's death, both wills are offered for probate.

The joint will cannot be probated because W revoked it by a later will. The second will is admissible to probate because it was W's last will and it was validly executed. (Wills law controls to this extent.) However, the beneficiaries of the joint will can now bring an action to impress a constructive trust against the beneficiaries of the second will because execution of that will was in breach of W's contract with H.

a. Compare—Remedy for Breach During Survivor's Lifetime

If the surviving party to a contractual will attempts to dispose of property covered by the agreement (e.g., property received from the other contracting party) during his lifetime, the contract beneficiaries may be able to impress a constructive trust upon the property. In contrast, if the surviving party merely revokes his will (no inter vivos transfer or other act of clear repudiation) in breach of the contract, the contract beneficiaries have no cause of action until that party's death.

VII. CHANGES IN BENEFICIARIES AND PROPERTY AFTER WILL'S EXECUTION

A. LAPSED GIFTS AND ANTI-LAPSE STATUTES

1. Gift Lapses If Beneficiary Predeceases Testator

If a will beneficiary dies during the testator's lifetime, the gift to him lapses; i.e., it fails. A will cannot make a gift to a dead person.

Example: T's will provides: "I bequeath all of my Google stock to my good friend Jim Brown; and I bequeath my residuary estate to my sister Sarah Goode." Jim Brown predeceases T. The gift to Jim Brown lapses, and the Google stock falls into the residuary estate as undisposed-of property.

2. Anti-Lapse Statutes

Nearly all states have anti-lapse statutes that operate to save the gift if the predeceasing beneficiary (i) was in a ***specified degree of relationship*** to the testator, ***and*** (ii) ***left descendants*** who survived the testator. The beneficiary's descendants take by substitution under the anti-lapse statute. The anti-lapse statutes vary as to the scope of beneficiaries covered by

them. In several states, the anti-lapse statute applies only when the predeceasing beneficiary was a ***descendant of the testator***. Some states and the UPC extend the application of the statute to any predeceasing beneficiary who is ***the testator's stepchild, grandparent, or a descendant of the testator's grandparent***. [UPC §2-603]

Example: T's will provides: "I devise Blackacre to my brother William Baxter; and I devise my residuary estate to my husband, John." William predeceases T, leaving a will that bequeaths "all my property to my wife, Wanda"; William is survived by Wanda and by a child, Billy, both of whom also survive T. Under the most restrictive statute, the anti-lapse statute would not apply because William was not T's descendant. Under a UPC-type statute, however, the anti-lapse statute would apply because brother William was a descendant of T's grandparents. Billy would take Blackacre by substitution under the statute. *Note:* Blackacre does ***not*** pass to Wanda under William's will. The anti-lapse statute does not save the gift for the predeceasing beneficiary's estate. Instead, it provides substitute takers—here, William's descendant Billy. William, having predeceased T, had no interest in T's estate that he could devise by will.

Compare: Same facts, except that William was not survived by any descendants. Although William (T's brother) was within the scope of the UPC-type anti-lapse statute, the statute does not apply because William left no descendants. The gift of Blackacre lapses; Blackacre falls into the residuary estate and passes to T's husband, John.

3. Anti-Lapse Statute Does Not Apply If Contrary Provision in Will

The anti-lapse statute does not apply if there is a contrary will provision. In most states, this will be the case when words of survivorship are associated with the gift. Under the UPC, however, mere words of survivorship are ***not*** sufficient to negate application of the anti-lapse statute.

Example: T's will provides: "I bequeath $25,000 to my daughter Mary if she survives me." Mary dies during T's lifetime, leaving a child (Monica) who survives T. In most states, the anti-lapse statute does ***not*** operate in Monica's favor because the will shows a contrary intention. The gift to Mary was, by its terms, contingent on Mary's surviving T. Because Mary predeceased T, the condition to the gift was not satisfied. The gift fails according to its own terms.

Compare: Same facts, except T was domiciled in a UPC state. Because words of survivorship are not sufficient to prevent operation of the UPC anti-lapse statute, the statute will operate in favor of Monica, and she will take the $25,000 bequest.

4. Statute Applies Only to Gifts by Will

In most states, the anti-lapse statute applies only to testamentary gifts. In some states and under the UPC, however, it also applies to revocable and irrevocable inter vivos trusts, life insurance beneficiary designations, and other nonprobate transfers. [*See* UPC §§2-706, -707]

Examples: 1) T creates a revocable trust with the trustee directed to distribute all income to T for life with remainder at T's death to such of T's children as survive

him. T's eldest child, Bob, predeceases him. T dies survived by a daughter, Mary, and by Bob's only child, Jr. In most states, the remainder passes to T's sole surviving child, Mary. Under the UPC, however, the anti-lapse statute applies to save Bob's share of the remainder for his child, Jr. Hence the remainder will pass to Mary and Jr. in equal shares.

2) T's will creates an irrevocable trust with the trustee directed to distribute all income to T's spouse, Wanda, for life with remainder at her death to such of T's children as survive Wanda. At the time he created the trust, T had two children, Bob and Mary. Subsequently, Bob dies in an accident. He is survived by Wanda, Mary, and Jr. (Bob's child). Still later, Wanda dies. In most states, the remainder will pass to T's sole surviving child, Mary. Under the UPC, however, the anti-lapse statute applies to save Bob's share of the remainder for his child, Jr. Hence the remainder will pass to Mary and Jr. in equal shares.

5. Lapse in the Residuary Gift

a. Common Law—"No Residue of a Residue"

Suppose that a testator devises her residuary estate to two or more beneficiaries, one of the beneficiaries predeceases the testator, and the anti-lapse statute does not apply. At common law and in some states today, the share devised to that beneficiary does ***not*** pass to the remaining beneficiaries (unless the will so provides). Instead, the lapsed residuary gift "falls out of the will" and passes under the intestacy statutes to the testator's heirs. This was called the "no residue of a residue" rule.

Example: T's will devises "all the rest, residue, and remainder of my estate in equal shares to my friend Alan Adams, my Uncle Bill, and my sister Carrie." Alan Adams predeceases T, leaving a child (Alice) who survives T. Because Alan is not related to T, the anti-lapse statute does not apply, and Alan's one-third share lapses. Under the common law rule, the one-third lapsed share falls out of the will and passes by intestacy to T's heirs. Bill and Carrie each take one-third of the residuary estate as provided in the will.

b. Majority Rule—Surviving Residuary Beneficiaries Take

Most states have replaced the "no residue of a residue" rule with a statutory rule under which the residuary beneficiaries who survive the testator take the deceased beneficiary's share of the residuary estate. If the residue is devised to two or more persons and the share of one of them fails for any reason, absent a contrary will provision, his share passes to the other residuary beneficiaries in proportion to their interests in the residue.

Example: Consider the example immediately above, except that the majority rule applies. Again, Alan Adams predeceases the testator. Because Alan was not related to T, the anti-lapse statute does not apply. Under the "surviving residuary beneficiaries rule," the one-third share devised to Alan passes to the other residuary devisees. Bill and Carrie each take one-half of the residuary estate.

1) Exception If Anti-Lapse Statute Applies

If the predeceasing residuary beneficiary was within the scope of the anti-lapse

statute and left descendants, the anti-lapse statute takes precedence over the rule that the surviving residuary beneficiaries take.

Example: Suppose in the previous example that T's Uncle Bill predeceases T, leaving a child (Willette) who survives T. Suppose further that this occurs in a jurisdiction that has adopted a UPC-type anti-lapse statute. Because Bill was a descendant of a grandparent of the testator, the anti-lapse statute applies, and Willette takes the one-third share of the residuary estate that was devised to Bill. The "surviving residuary beneficiaries rule" gives way to the anti-lapse statute when the predeceasing residuary beneficiary is within the scope of the statute ***and*** leaves descendants who survive the testator.

6. Class Gifts

a. Class Gift Rule—Class Members Who Survive Testator Take Gift

If a will makes a gift to a class of persons ("children," "brothers and sisters," etc.) and a class member dies during the testator's lifetime, those class members who survive the testator take the gift (absent a contrary will provision). The rationale for the class gift rule of construction is that the testator did not want anyone other than members of the designated class to share in the gift. Another explanation for the rule is that the will is read and the takers are determined as of the testator's death, and only those who meet the class description at that time share in the gift. The best way to understand the class gift rule is to contrast it with the courts' treatment of gifts to individually named beneficiaries.

Example: Tom's will bequeaths 600 shares of Xerox stock "to the children of my good friend Homer Hanson," and devises his residuary estate to his sister. At the time the will is executed, Homer has three children: Dan, Fran, and Stan. Dan predeceases Tom, leaving two children who survive Tom. The anti-lapse statute does not apply because Dan was not related to Tom. Because the bequest of the Xerox stock was made to a class, Dan's share of the gift does not fall into the residuary estate. Instead, the class gift rule applies, and the class members who survived the testator share the gift. Thus, Fran and Stan each take 300 shares of Xerox stock.

Compare: Tammy's will devises Blackacre "in equal shares to my good friends, Al Anson, Bill Bryce, and Carol Carter," and bequeaths her residuary estate to her husband, Fred. Al Anson dies leaving two children; then Tammy dies. The anti-lapse statute does not apply because Anson was not related to Tammy. Because this was a gift of one-third shares to the three named beneficiaries, the share devised to Anson lapses and falls into the residuary estate. Tammy's husband Fred owns one-third of Blackacre along with Bill Bryce and Carol Carter.

b. Exception If Anti-Lapse Statute Applies

As with the "surviving residuary beneficiaries rule," the "class gift rule" gives way to the anti-lapse statute when the predeceasing class member was within the scope of that statute ***and*** left descendants who survive the testator. The anti-lapse statute applies whether the class member's death occurred before or after the execution of the will.

Example: Consider the same facts as in the previous example, except that the gift of Xerox stock was "to the children of my ***son*** Homer Hanson." Again, Dan predeceases Tom, leaving two children who survive Tom. Because Dan was Tom's descendant, his two children take by substitution under the anti-lapse statute. (This is true under any anti-lapse statute.) They take 100 shares each; Fran and Stan take 200 shares each.

7. Beneficiary Dead When Will Executed—Void Gift

If a will makes a gift to a beneficiary who was dead at the time the will was executed, the gift is void. In most states, the rules that apply to lapsed gifts (anti-lapse statute, "surviving residuary beneficiaries rule") also apply to void gifts.

B. ADEMPTION

Under the doctrine of ademption, when specifically bequeathed property is not in the testator's estate at death (e.g., it was destroyed, sold, given away, or lost), the bequest is adeemed; i.e., it fails. Ademption applies because the property that was to have satisfied the bequest was not owned by the testator at her death.

1. Applies to Specific Devises and Bequests

Ademption applies ***only*** to specific devises and bequests. A specific legacy is a gift of property that is particularly designated and is to be satisfied only by the receipt of the particular property described.

Examples: 1) T's will bequeaths "my Rolex watch to my sister Sue." After the will is executed, T sells her Rolex watch and uses the sale proceeds to purchase a Seiko watch. Ademption operates because the testamentary disposition was of a Rolex watch, not a Seiko, and T did not own a Rolex watch at her death.

2) T's will devises Blackacre to his brother Bill. Thereafter, T sells Blackacre for $30,000 and deposits the sale proceeds in a savings account. Unless evidence of T's intent is admissible (*see* below), ademption applies and Bill takes nothing. Neither the proceeds of the sold item nor similar items purchased with the proceeds go to the beneficiary.

a. May Not Apply to Gift of Sale Proceeds

Suppose, in the second example above, that T's will provides: "I direct that my executor sell Blackacre and distribute the sale proceeds to my brother Bill." Most courts hold that ademption does not apply, and that Bill takes the sale proceeds—to the extent that they can be traced. *Rationale:* Because the gift was of the proceeds from the sale, it should not matter whether Blackacre was sold by T during his lifetime or by the executor after T's death. T's intent can still be effectuated by giving the sale proceeds to Bill. (But if the sale proceeds cannot be traced—if, e.g., T has spent the proceeds—ademption applies.)

b. May Not Apply to Gift of Testator's Interest in Property

If the bequest is of the testator's interest in the property, rather than of the property itself, the gift may not be adeemed.

Example: T's will devises "all of my right, title, and interest in Blackacre to my brother Bill." T sells Blackacre on an installment contract under which

the vendee promises to pay T $10,000 per year for 10 years. The contract gives T a vendor's lien. Because the gift was not of Blackacre itself but of T's ***interest*** in Blackacre, Bill takes T's interest as it exists at T's death. Bill takes the remaining installment payments and T's security interest (the vendor's lien).

2. Partial Ademption

Partial ademption applies when, e.g., the testator devises a large tract of land, then sells a portion of the tract. Ademption applies to the portion of the property not in the estate, but the remaining portion in the estate at death passes to the beneficiary.

3. Ademption Does Not Apply to General or Demonstrative Legacies

Ademption applies only to specific devises and bequests. It does not apply to general or demonstrative legacies.

a. General Legacy

A general legacy is a bequest of a dollar amount that is payable out of the general assets of the estate without a claim on any particular source of payment.

Example: "I bequeath the sum of $5,000 to my nephew Ringo." At T's death there is not that much cash in his estate. It does not matter. Ademption does not apply to general legacies. Other property in T's estate must be sold, if necessary, to satisfy Ringo's general legacy. Alternatively, the personal representative could make a "distribution in kind" (i.e., a distribution of assets worth $5,000) in satisfaction of the legacy.

b. Demonstrative Legacy

A demonstrative legacy is a gift of a general amount that identifies a particular asset as the primary source of payment.

Example: "I bequeath $10,000 to my niece Nancy, to be paid out of the proceeds of my 3M stock." Before his death, T sells all of his 3M stock, and there is no such stock in his estate at his death. The $10,000 legacy is not adeemed; the $10,000 must be raised by the sale of other property in T's estate. Ademption does not apply to demonstrative legacies.

c. Bequests of Securities—Special Rules Apply

The courts will construe a bequest of securities as a general legacy, if it is possible to do so, in order to avoid application of the ademption doctrine. The cases turn on whether the testator made a gift of "200 shares" or "***my*** 200 shares."

Examples: 1) Tom's will bequeaths "my 200 shares of Acme common stock to my cousin Bill." Thereafter, Tom sells the Acme stock, and does not own any such stock at his death. Because the bequest is of "***my*** 200 shares" of Acme stock, this is a ***specific bequest*** of the shares that Tom owned at the time the will was executed. Ademption applies, and Bill takes nothing.

2) Tom's will also bequeaths "200 shares of Baker common stock to my niece Nora." Thereafter, Tom sells the Baker stock and does not own any such stock at his death. Here, the courts seize on the absence

of a possessive pronoun (he did not say "***my*** 200 shares") and conclude that Tom did not intend to make a gift of the 200 shares of Baker stock that he owned. Rather, Tom's will made a ***general legacy*** of the ***value*** of 200 shares of Baker stock. Because ademption does not apply to general legacies, Nora is entitled to the date-of-death value of 200 shares of Baker stock. (The courts would reach this result even if Tom owned exactly 200 shares of Baker stock at the time the will was executed!) The only way this strained "reasoning" can be explained is that the courts want to avoid application of the ademption doctrine in cases such as this.

4. Testator's Intent

a. Testator's Intent Irrelevant
Most courts apply the "identity" theory of the common law, under which the ademption issue is decided solely on the basis of an objective test: whether the specifically bequeathed property is a part of the testator's estate at her death. Under this approach, the testator's intent is irrelevant. The courts do not speculate on the reasons why the property was not in the estate or what the testator might have intended.

b. Statutory Modifications
Many states have enacted statutes that soften the ademption rule in certain circumstances [*see* UPC §2-606]:

1) Where ***casualty insurance proceeds*** for the loss of the specifically bequeathed property are paid after the testator's death, the beneficiary is entitled to the proceeds.

2) The beneficiary is entitled to the ***condemnation award*** in cases where the specifically devised property is taken by eminent domain before the testator's death, but the award is paid after the testator's death.

3) Where specifically devised property is subject to an ***executory contract*** at the testator's death, the beneficiary is entitled to all of the testator's rights under the contract, including the right to the remaining payments and any security interest retained by the testator.

4) Where a will makes a specific bequest of ***securities*** in one entity, the beneficiary is entitled to securities in another entity owned by the testator as a result of merger, consolidation, reorganization, or other similar action initiated by the entity.

5) If a testator becomes ***incompetent*** and the specifically devised property is ***sold by a guardian*** or a condemnation award or insurance proceeds are paid to the guardian for the property, the devisee is entitled to a general pecuniary legacy equal to the amount of the proceeds.

C. INCREASES TO PROPERTY AFTER EXECUTION OF WILL (ACCRETIONS)

1. Increases Occurring Before Testator's Death
Increases to specific gifts occurring during the testator's lifetime are distributed as follows:

income on property (e.g., rents and profits) goes into the general estate, but improvements to real property go to the specific devisee. (*See* below for rules regarding stock splits and dividends.)

2. Increases Occurring After Testator's Death

Any increase to specific gifts occurring after the testator's death passes to the specific beneficiary because the beneficiary is deemed to own the property from the time of the testator's death.

3. Stock Splits and Stock Dividends

At common law, a specific devisee of common stock was entitled to additional shares of that stock obtained by the testator as the result of a stock split, but not additional shares acquired as a stock dividend. Today, however, the UPC and nearly all states treat stock splits and stock dividends the same way, and they pass to the specific devisee. [UPC §2-605]

Examples: 1) T's will bequeaths "my 500 shares of Southwest Airlines stock to my daughter Carol." Thereafter, Southwest declares a 20% stock dividend, and a stock certificate for an additional 100 shares is issued to T. A year after that, Southwest declares a two-for-one stock split, and an additional 600 shares are awarded to T. On T's death, Carol takes all 1,200 shares of Southwest stock under T's will.

2) Same facts, except that T's will bequeathed "500 shares [not "***my*** 500 shares"] of Southwest stock to my daughter Carol." Thereafter, Southwest declares a 20% stock dividend and then a two-for-one stock split. Despite the absence of a possessive pronoun, this was a ***specific bequest*** of Southwest stock, and Carol takes the additional 600 shares produced by the stock split. Wait a minute! In the second example under B.3.c., *supra*, when the issue was ademption, a bequest of "200 shares of Baker stock" was classified as a general legacy! How can the same form of bequest be classified as specific when a stock split has occurred? Because, say the courts, different issues are involved. A bequest of stock can be classified as general for one purpose (ademption) and specific for another purpose (stock split).

VIII. RESTRICTIONS ON POWER OF TESTATION—PROTECTION OF THE FAMILY

A. PROTECTION OF THE SURVIVING SPOUSE—ELECTIVE SHARE STATUTES

Nearly all states have enacted elective share statutes designed to protect a surviving spouse from disinheritance. These statutes give the spouse an election to take a statutory share (usually one-third or one-half) of the decedent's estate ***in lieu of*** taking under the decedent's will.

1. Amount of Elective Share

The elective share amount varies from state to state. In most states, the amount is one-third of the net probate estate if the decedent is survived by issue and one-half if the decedent is not survived by issue. In other states, the amount varies based on the duration of the marriage. [*See*, *e.g.*, Mont. Code Ann. §72-2-221]

2. Property Subject to Election
In most states, the share is calculated from the decedent's net estate, which is the probate estate minus the payment of expenses and creditors' claims. In some states, however, the share fraction is applied to the decedent's "augmented estate," which includes certain lifetime transfers (*see* 6., *infra*).

3. Notice Must Be Filed
The right to an elective share is not automatic; the surviving spouse must file a notice of election within a specified period (usually within six months after the will is admitted to probate).

4. Right to Election Is Personal to Spouse
Generally, only the surviving spouse may make the election to take against the will. Election can be made, however, on behalf of a legally incapacitated spouse by a guardian, with court approval, upon a showing that an election is necessary to provide adequate support for the spouse during his or her life expectancy. In contrast, if the spouse dies before the election is made, the election ***cannot be made by the spouse's personal representative***. The reason for this is that the statute is intended to protect the surviving spouse against disinheritance, not to provide benefits to the spouse's heirs.

5. Effect of Election on Testamentary Plan
The elective share is paid in the manner causing the least disruption to the testator's testamentary plan. Thus, the elective share is first paid in cash or kind from the assets passing under the will that, but for the election, would have passed to the spouse outright. (Life estates are treated as though the spouse predeceased the testator, and the remainder is accelerated.) To the extent that these assets are insufficient to satisfy the share, the excess is paid pursuant to the abatement rules that apply to creditors' claims (*see* X.D., *infra*).

6. Lifetime Transfers to Defeat Elective Share
In most states that have addressed this issue by statute, lifetime transfers by the decedent are subject to the elective share if the grantor-spouse retained the power to ***revoke or to invade, consume, or dispose of the principal***. Thus, in these states, revocable trusts may not be used to defeat a spouse's right of election. If it were otherwise, the policy underlying the elective share statute could easily be defeated by these types of transfers. The UPC states, which are included in the above discussion, also include other lifetime transfers in which the decedent retained an interest (e.g., retained life estates, right of survivorship estates) in their concept of the ***"augmented estate"*** used for purposes of calculating the elective share. [*See* UPC §2-205]

B. PROTECTION OF CHILDREN—PRETERMITTED CHILD STATUTES

A testator may disinherit her children; i.e., a parent need not bequeath anything to her children. Pretermitted child statutes are not intended to address that issue but are designed to protect children from being ***accidentally omitted*** from the will.

1. Omitted Child Entitled to Intestate Share
In most states, the statute operates so that a child born or adopted ***after the will was executed*** takes an intestate share of the decedent's estate (i.e., the share he would have taken had the decedent died intestate), provided none of the exceptions below apply. In making up the child's share, the normal abatement rules apply. (*See* X.E., *infra*.)

2. Exceptions

Under most statutes, the pretermitted child will not take a share if:

(i) It appears from the will that the ***omission was intentional***;

(ii) At the time the will was executed, the testator had other children and devised substantially all of his estate to the ***other parent*** of the omitted child; or

(iii) The testator provided for the omitted child by a ***transfer outside of the will*** with the intent that it was in lieu of a testamentary gift.

Examples: 1) Mary had a child, Charles, at the time she executed her will. That will bequeathed one-third of her estate to her husband, Herb, and two-thirds of her estate to her sister Grace. The will made no mention of Charles or any future children that Mary might have. Thereafter, Mary and Herb adopted a child, Andrew, and then Mary died without having revoked or modified her will. Andrew takes a share of the estate as a pretermitted child, but Charles takes nothing because he was alive when the will was executed.

2) Same facts as above, except that shortly after Andrew was adopted, Mary took out a $100,000 life insurance policy that named Andrew as beneficiary. Andrew takes nothing as a pretermitted child because he was provided for by a substantial transfer outside the will.

3) Same facts as the first example (no life insurance policy), except that Mary's will bequeathed $10,000 to her sister Grace and her residuary estate to Herb. Andrew takes nothing as a pretermitted child because Mary's will devised substantially all of her estate to Andrew's other parent.

3. Omitted Child May Be Limited to Bequests to Other Children

Under the UPC and by statute in several non-UPC states, if the testator had other children at the time the will was executed and the will makes a provision for one or more of the children, the portion of the estate to which the pretermitted child is entitled is limited to the provisions made to the other children. The bequests to the other children are reduced, but ***no other beneficiary's bequest is reduced***. The pretermitted child takes such share of the bequests to the other children as he would have received had the testator included the child with the children upon whom benefits were conferred under the will, and had given an equal share of such benefits to each such child.

Examples: 1) Ted's will bequeaths 3,000 shares of Acme stock "in equal shares to my children, Annette and Beulah," devises his 5,000-acre ranch to his brother William, and devises his residuary estate to his wife, Wanda. Two years later, Ted and Wanda have another child, Carl, and then Ted dies without having revised his will. Under the UPC-type statute, Carl's share of the estate is limited to the bequest of Acme stock to the other children, and each child ends up with 1,000 shares. The devises of the ranch to William and the residuary estate to Wanda are not affected.

2) Same facts as above, except that Ted's will devised the 3,000 shares of Acme stock "to my sister Sarah if she survives me, but if she does not survive

me, in equal shares to my children, Annette and Beulah." Sarah survives Ted and takes the Acme stock under the will. As provision was made for Ted's other children, even though on a contingency that did not occur, Carl takes the same share as his siblings, which is zero.

4. Protects Children of Testator Only
In nearly all states, the pretermitted child statute operates only in favor of the testator's children; the testator's grandchildren are not covered.

C. HOMESTEAD, FAMILY ALLOWANCE, AND EXEMPT PERSONAL PROPERTY

1. Homestead
Most states have statutes that protect the family residence or farm from creditors' claims. These statutes usually exempt a certain amount of land from the claims of the decedent's creditors. The amount of land exempted depends on whether the residence is urban or rural. These homestead laws often include a provision that the surviving spouse or minor/dependent children are entitled to occupy the homestead as a residence for as long as they so choose despite the disposition of the residence in the decedent's will.

2. Family Allowance
Nearly all states authorize the payment of a family allowance to the decedent's surviving spouse or minor children. [*See* UPC §2-404] Some states limit the allowance to a specific dollar amount (e.g., $15,000), while others authorize payment of an amount needed to maintain the spouse and children for one year or a "reasonable amount" to be fixed by the court. The purpose of the allowance is to provide funds for support of the spouse and children during the period the decedent's assets are tied up in probate administration. The family allowance, which usually takes precedence over all claims other than funeral and administration expenses, is ***in addition to*** the amount passing to the spouse (or children) by will, intestacy, or elective share.

3. Exempt Personal Property
In addition to homestead rights and a family allowance, the surviving spouse of a decedent usually is entitled to petition to set aside certain items of tangible personal property listed in the statute. [*See* UPC §2-403] Typically, this exemption applies to household furnishings, appliances, personal effects, farm equipment, and sometimes automobiles. These items are ***in addition to*** amounts passing to the spouse under the decedent's will, by intestate succession, or under the elective share. If there is no surviving spouse, these items may be set aside for the decedent's minor children. The items are exempt from all claims against the estate except perfected security interests thereon.

IX. WILL CONTESTS

A. GROUNDS FOR CONTEST—IN GENERAL

A will contest challenges whether the document offered for probate is a valid will. The contestant may raise any matter tending to show that the will is not valid and should be denied probate. A will may be contested on any of the following grounds:

(i) ***Defective execution*** (e.g., only one witness when two are required);

(ii) The will offered has been validly ***revoked***;

(iii) The testator ***lacked testamentary capacity***;

(iv) The testator ***lacked testamentary intent***;

(v) The will or a gift therein is a product of ***undue influence***;

(vi) The will or a gift therein was procured by ***fraud***; or

(vii) The document was executed or a gift was made as the result of a ***mistake***.

Note that most wills are challenged on the grounds of lack of testamentary capacity or undue influence.

B. PROCEDURAL ASPECTS

1. Time for Contest

Although the statutory period varies from state to state, in most states, a will contest must be filed within ***six months*** after the will is admitted to probate.

2. Proper Contestants

Only ***interested parties*** have standing to contest a will. To be an interested party, the person must have a direct interest in the estate that would be adversely affected by the admission of the will to probate. Examples of interested parties are intestate heirs and legatees under earlier wills. Creditors do not have standing to contest a will because their claims can be asserted whether the decedent left a will or died intestate.

3. Necessary Parties

In most states, ***all legatees under the will and all heirs*** are necessary parties to a will contest and must be given notice.

4. Burden of Proof

The burden of proof is on the will contestant to establish the grounds.

5. Will May Fail Either Partially or Entirely

A will is void if its execution is procured by undue influence, fraud, duress, or mistake. If only a part of the will was so procured, only that part is void, and the remainder of the will is given effect.

C. TESTAMENTARY CAPACITY

1. Must Be Age Eighteen to Make a Will

In most states, a person must be 18 years of age or older to make a will. The requirement is applied as of the ***date of execution*** of the will, not as of the date of death.

2. Mental Capacity

The capacity required for making a will is a different and lower standard of capacity than

that required to make a contract. To have mental capacity to make a will, the testator must have sufficient capacity to be able to understand:

(i) The nature of her ***act***—i.e., she must actually know that she is executing a will;

(ii) The nature and extent of her property;

(iii) The persons who are the ***natural objects of her bounty***; and

(iv) The ***nature of the disposition*** she is making, i.e., to be able to relate the above factors and formulate an orderly scheme of disposition.

a. Testator's Capacity Determined at Time of Will's Execution
It is at the making of the will, not at death, that the mental capacity must exist. This being so, all circumstances existing at the time of execution are admissible on the capacity issue, as well as evidence relating to the testator's state of mind shortly before and shortly after the execution of the will. Generally, the more distant in time from the will's execution a particular fact might be, the less significance will be attached to that fact in determining the testator's capacity at the time of execution.

b. Testator with Physical Ailments or Drug Addiction
The fact that the testator was very old, physically frail or ill, that she possessed a failing memory, or was a habitual drinker or addicted to drugs, does ***not*** mean that she lacked the requisite mental capacity and was unable to comprehend the nature of her act.

c. Testator Adjudicated Insane
A person who has been adjudicated insane or for whom a guardian or conservator has been appointed does not necessarily lack testamentary capacity. While such an adjudication is ***evidence*** of a lack of the required mental capacity, it is ***not conclusive*** and can be overcome by showing that the testator still met the specific standards set out above.

3. Insane Delusion
"Insane delusion" is a distinct form of incapacity. A person may have sufficient mental capacity to conduct his affairs and to make a will, but may be suffering from an insane delusion so as to require a particular provision in a will to fail on the ground of testamentary incapacity. An insane delusion may invalidate the entire will or only a particular gift.

a. Causation Requirement
A will can be set aside on the ground of insane delusion only if, and to the extent it can be shown that, the delusion ***caused*** the testamentary disposition. The contestant must show that the testator would not have made the disposition in question ***but for*** the insane delusion.

b. "Insane Delusion" Defined
An insane delusion is a legal, not a psychiatric, concept. Such a delusion is a belief in facts that do not exist and that no rational person would believe existed.
Example: A belief that all children are spies for Communist China is an insane delusion. A belief that all children are cruel and mean, however, may not be an insane delusion if the testator's life experiences are such that a sane person could come to that conclusion.

4. Burden of Proof as to Mental Capacity on Contestant
Whether the testamentary disposition is rational or irrational, many states recognize a presumption that the testator was competent. The burden of introducing evidence to the contrary is on the contestant. If the contestant introduces evidence sufficient, if believed, to warrant a finding of mental incapacity, the presumption drops and the proponent must now introduce evidence of capacity.

D. UNDUE INFLUENCE

A will (or a gift in a will) is invalid if it is obtained through the exercise of undue influence. However, mere pleading, cajoling, nagging, or threatening the testator does not constitute undue influence. Influence is not undue unless the free will of the testator is destroyed and the resulting testamentary disposition reflects the desires, not of the testator, but of the party exerting undue influence.

1. Requirements
To establish undue influence, the contestants, who have the burden of proof, must establish that:

a. ***Influence*** was exerted on the testator;

b. The ***effect*** of the influence was to overpower the mind and free will of the testator; and

c. The ***product*** of the influence was a will that would not have been executed but for the influence.

2. Circumstantial Evidence Does Not, By Itself, Establish Undue Influence
Over half of the appellate cases in which the jury finds undue influence are reversed on appeal because the court finds only circumstantial evidence, and no direct evidence, that influence was exerted. These factors, by themselves, are insufficient to establish undue influence:

a. Mere Opportunity to Exert Influence
A will cannot be set aside on proof of facts that, at most, merely show that a party had ample opportunity to exert influence (e.g., she lived next door to her mother, had a key to her mother's house, held a power of attorney to act on her mother's behalf, took care of her mother's financial affairs, etc.).

b. Mere Susceptibility to Influence Due to Age or Physical Condition
The fact that the testator was elderly, in poor health, had memory lapses, took Valium, etc., does no more than indicate that the testator was susceptible to undue influence. This evidence does not establish that the testator's mind was in fact subverted and overpowered at the time the will was executed.

c. "Unnatural Disposition" that Favors Some Relatives Over Others
The mere fact that the will makes an unnatural disposition that favors some relatives over others (e.g., two-thirds of the testator's estate to her daughter, one-third to her church, and nothing to her son) is not sufficient to establish undue influence. It is only when all reasonable explanation for the bequests is lacking that the trier of fact may take this as a circumstance showing undue influence.

3. Presumption of Undue Influence

A presumption of undue influence is created by the following facts:

(i) A ***confidential relationship*** existed between the testator and the beneficiary who was alleged to have exercised undue influence; ***and***

(ii) The ***beneficiary participated*** in some way in procuring or drafting the will or in some other significant activity relating to the execution of the will.

(Some states add a third requirement—that the provisions of the will appear to be unnatural and favor the person who allegedly exercised undue influence.) Once these elements appear, the ***burden shifts*** to the proponent of the will to prove that it was not induced by his undue influence.

a. Confidential Relationship

A presumption of undue influence arises when a confidential relationship (e.g., attorney-client, doctor-patient) exists ***and*** the beneficiary participated in drafting the will. Other relationships in which it is shown that one person relied heavily upon, and placed more than a normal amount of confidence in, another may also suffice to show a confidential relationship.

Example: Granddaughter G, who took care of her 90-year-old blind and bedridden grandmother, cashed her Social Security checks, and paid her bills, was in a confidential relationship. Because G was active in procuring the will (which was written by a notary public who was G's close friend) and there were suspicious circumstances (other relations who were in the house at the time were unaware that the will was being signed by the testator and witnessed by two of G's friends), a presumption of undue influence arose.

1) No Automatic Presumption Between Spouses

Although a husband and wife share a confidential relationship, a presumption of undue influence does ***not automatically*** arise between spouses. This is due in part to the policy of preserving marriages, which an automatic presumption would thwart. In order for a spouse's influence to be "undue," the spouse must have exerted influence over the testator in such a manner that it ***overpowered the free will*** of the testator and resulted in a ***disposition reflecting the desires*** of the spouse exerting the influence.

Example: The day after their wedding, Husband drove Wife to his attorney's office where Wife drafted and signed her will. She left half of her estate to Husband's son even though she had never met him. Although Husband and Wife share a confidential relationship, there is not enough evidence to raise a presumption of undue influence.

Compare: After their marriage, Wife isolated Husband from his children by telling him that they were after his money. Husband was involved in a car accident that put him in critical condition. Wife brought a will

to the hospital for Husband to sign. The witness stated that Husband wanted to include his children in the will, but Wife would not let him. Here, there clearly is undue influence.

b. Procurement of Will

The criteria for determining whether the beneficiary was active in procuring the will can include one or more of the following: (i) the beneficiary's presence when the testator expressed the desire to make a will; (ii) the beneficiary's recommending an attorney to prepare the will; (iii) the beneficiary's giving an attorney instructions as to what the will should contain; (iv) the beneficiary's knowledge of the will's contents prior to its execution; (v) the beneficiary's securing witnesses for the will; (vi) the beneficiary's being present when the will is executed; and (vii) the beneficiary's safeguarding the will after its execution.

E. FRAUD

Where the execution of a will or the inclusion therein of a particular gift is the result of fraud, the will or the particular gift is invalid. A finding of fraud requires a showing that the testator has been willfully deceived as to the character or the content of an instrument, as to the extrinsic facts that would induce the will or a particular disposition, or with respect to facts material to a disposition. (Innocent misrepresentation does not constitute fraud, although relief might possibly be available on the ground of mistake.)

1. Causation

Fraud invalidates a will only if the testator was ***in fact*** deceived by and acted in reliance on the misrepresentation. In other words, a gift is invalid only if the testator would not have made it had she known the true facts.

2. Fraud in the Execution (Fraud in the Factum)

In the case of fraud in the execution, there is a misrepresentation as to the nature of the contents of the instrument.

Examples: 1) Upon hearing a statement by A that the instrument presented to T gives A a power of attorney to pay T's bills while T is in the hospital, T signs it. In fact, the instrument contains provisions devising all of T's property to A.

2) A tells T that the instrument is T's will, but in fact A has substituted a will containing different provisions.

3. Fraud in the Inducement

In the case of fraud in the inducement, the testator intends to execute the instrument as her will and to include the particular contents of that instrument, but she is fraudulently induced into making this will, or some particular gift therein, by misrepresentations as to facts which influence her motivation. The will or the particular gifts affected by the fraud must be set aside.

Example: Where Lilly tells T that his son, Isaac, is dead, it may be uncertain whether the new will, leaving everything to Lilly, was induced by the belief that Isaac

was dead or whether the will would have been made in the same fashion had T known that Isaac was still alive. T might wish to exclude Isaac, from whom he had not heard in many years, in favor of Lilly, who had remained a dutiful daughter.

Such situations are resolved by inferences drawn from the family circumstances and other extrinsic evidence (excluding T's oral declarations) as to what T's probable intent was.

4. Fraudulent Prevention of Will

Cases occasionally involve a fraudulent prevention of the execution of a will by one or more of the persons who would take by intestate succession. The cases are split as to whether any relief is available.

a. Intestate Succession Laws Apply

Some courts conclude there is no way of granting relief because a court "cannot write a will on behalf of a decedent"; hence, the intestate succession laws apply.

b. Better View Is to Impose Constructive Trust

The better view is that a constructive trust may be imposed against the intestate successors for the benefit of those who would have been beneficiaries of the will that the decedent was fraudulently prevented from executing. Some courts have even imposed constructive trusts in these cases on innocent heirs who were not themselves wrongdoers but who would be unjustly enriched.

F. MISTAKE

1. Mistake in Execution of Will

a. Mistake as to Nature of Instrument—Extrinsic Evidence Admissible

Extrinsic evidence is admissible to show that the testator was unaware of the nature of the instrument she signed (e.g., she believed it to be a power of attorney). Such a mistake relates to the issue of whether the testator had the requisite testamentary intent, without which the will would be invalid.

b. Wrong Will Signed—Courts Divided on Relief Question

In cases where the testator has signed the wrong will, the courts are divided on the question of whether relief should be granted. Suppose that reciprocal wills are prepared for H and W, under which each devises his or her estate to the other. By mistake, H signs the will prepared for W, and W signs the will prepared for H. Thus, the will signed by H reads, "I, Rose Snide, leave all my property to my husband, Harvey Snide." Some courts have denied relief on the ground that H lacked testamentary intent because he did not intend to execute the document that he signed. [*In re* Pavlinko's Estate, 148 A.2d 528 (Pa. 1959)] However, the better and modern view is that the court should

grant relief because both the existence and the nature of the mistake are very obvious. The court should insert "Harvey" for "Rose" and "husband" for "wife" (and vice versa), as appropriate. [*In re* Snide, 52 N.Y.2d 193 (1981)]

2. Mistake in Inducement—No Relief Granted

If the alleged mistake involves the reasons that led the testator to make the will (or the reasons for making or not making a particular gift therein), and the mistake was not fraudulently induced, no relief is granted. *Rationale:* To allow evidence as to the alleged mistake would open the door to fraudulent testimony because the testator is dead and cannot contradict the testimony as to the supposed mistake. Moreover, even if the alleged mistake were shown, this would not establish that the testator would have made a different disposition had the true facts been known.

Example: T's son Ron is a prisoner of war. Assuming that Ron is dead, T revokes a will that left everything in equal shares to Ron and T's other son, Don, and executes a new will leaving everything to Don. After T's death, Ron returns alive. Evidence of the mistake is not admissible, and Don takes T's estate under the second will.

a. Exception If Mistake Appears on Face of Will

The courts have recognized (more often in dictum than in actual holdings) that if the mistaken inducement appears on the face of the will, relief will be granted.

Example: Same facts as above, except that T's new will says, "Because my son Ron is dead, I revoke my earlier will and leave all of my property to my son Don." Several courts have stated in dicta that because the mistake is shown on the face of the will and extrinsic evidence need not be relied on to show the mistake, the court should deny probate of the second will and instead probate the will that benefits Ron.

3. Mistake as to Contents of Will

a. Mistaken Omission—No Relief Granted

Extrinsic evidence is not admissible to show that a provision was mistakenly omitted from a will, or that a provision contained in the will is not what the testator intended. Absent evidence of fraud, duress, or suspicious circumstances, it is conclusively presumed that the testator understood and approved the terms of the new will when she signed it. *Rationale:* The courts are reluctant to have property pass, not pursuant to the terms of a duly executed will, but on the basis of oral testimony.

Example: T executes a will that makes only minor changes from an earlier will (which was revoked by the new will). Unlike the earlier will, the new will does not contain a residuary clause. The attorney who prepared the new will makes a sworn affidavit stating that the omission was inadvertent and was contrary to T's instructions. The affidavit is not admissible, and the new will must be probated. Because the will is clear as to its meaning and is not ambiguous, extrinsic evidence as to T's intent is inadmissible. Correction would require the addition of a new provision, and ***the courts cannot reform a decedent's will***.

b. Plain Meaning Rule—Evidence Not Admissible to Contradict Plain Language
If the language of a will is unambiguous, evidence is not admissible to show that the testator made a mistake in describing a beneficiary or the property that was to be the subject of the gift. *Rationale:* The testator signed the will and is conclusively presumed to have read, understood, and intended its contents. To allow oral testimony to contradict the will's plain meaning would open the door to fraud.

Examples: 1) T's will bequeaths "200 shares of Acme stock" to B. Evidence, no matter how compelling, is ***not*** admissible to show that T actually owned 300 shares of Acme stock and intended to bequeath all 300 shares to B.

2) T's will bequeaths property "to my cousin, John Smith." T had a cousin John Smith whom he had not seen in 10 years. T also had a nephew John Smith of whom he was particularly fond, and T had told third parties that he had made a gift to the nephew in his will. Evidence is ***not*** admissible to show that T intended to make a gift to his nephew and not to his cousin.

4. Latent or Patent Ambiguity—Extrinsic Evidence Admissible to Cure Ambiguity

a. Latent Ambiguity
A latent ambiguity exists when the language of the will, although clear on its face in describing a beneficiary or property, results in a misdescription when applied to the facts to which it refers. Extrinsic evidence is admissible to cure the ambiguity. *Rationale:* Reliance on parol evidence does not have the effect of "rewriting" the will or adding to its terms. Instead, the evidence is being received to give meaning to the words the testator actually used. *But note:* If the extrinsic evidence does not resolve the ambiguity, the gift fails.

Examples: 1) T's will devises Blackacre "to my niece Nellie." T has two nieces named Nellie. Parol evidence is admissible to show which niece T intended to benefit.

2) Same facts as above, except that T does not have a niece named Nellie. He does, however, have a niece named Norrie and a cousin named Nellie. Parol evidence is admissible to show whether T intended to make a gift to cousin Nellie or to niece Norrie. But if the evidence does not establish which one T had in mind, the gift fails.

3) A devise of "Lot #6, Square #403," which T did not own, could be shown by extrinsic evidence to pass Lot #3, Square #406, which T did own. [Patch v. White, 117 U.S. 210 (1886)]

4) T's will bequeathed her residuary estate "to Apollo Medical Center as a memorial to my late husband." Apollo was acquired by another corporation, and the hospital's name was changed to Humana Hospital. Thereafter, T executed a new will that repeated the gift to the Apollo Medical Center. Evidence was admitted to show that T intended the gift for the hospital at which her husband was treated before his death, and that the name change did not defeat the gift. "[T]he misnomer of a

devisee will not cause the devise to fail where the identity of the devisee can be identified with certainty." [Humana, Inc. v. Estate of Scheying, 483 So. 2d 113 (Fla. 1986)]

b. Patent Ambiguity

A patent ambiguity exists when the uncertainty appears on the face of the will (e.g., where the will mentions two cousins, Mary Jones and Mary Smith, and then makes a gift "to my cousin Mary"). The traditional view is that extrinsic evidence is not admissible to correct a patent ambiguity, and that the gift fails because of the misdescription. However, the modern and better view is that such evidence is admissible.

Example: T's will bequeathed one-third of his business to A and B, but the will was unclear as to whether A and B were to receive one-third each or whether, instead, the one-third share was to be divided between A and B (giving them one-sixth each). *Held:* This was a patent ambiguity, and extrinsic evidence should be admitted to cure the ambiguity.

5. Reformation for Mistake Under the UPC

Under both the UPC and the Restatement (Third) of Property, a court may reform the terms of a will, ***even if the will is unambiguous***, to conform to the testator's intent if it is proven by ***clear and convincing evidence*** that the testator's intent and the terms of the will were affected by a mistake of fact or law. This includes mistakes involving both the expression of terms and inducement to make the will or any of its provisions. [*See* UPC §2-805; Restatement (Third) of Property §12.1]

G. NO-CONTEST CLAUSES

A no-contest clause (sometimes called an ***in terrorem*** clause) provides that a beneficiary who contests the will forfeits his interest under the will. A typical clause provides: "If any beneficiary contests this will or any of its provisions, he shall forfeit all gifts hereunder and shall take no part of my estate." Note that suits objecting to the court's jurisdiction, challenging the appointment of an executor, and asking the court to construe the will are not will contests within the meaning of most no-contest clauses.

1. Majority Rule—No Forfeiture If Probable Cause for Contesting Will

In most states and under the UPC, a beneficiary who unsuccessfully contests a will with a no-contest clause does not forfeit the legacy if the court finds that the beneficiary challenged the will in good faith and on the basis of probable cause. Thus, a contest does not trigger a forfeiture unless the court finds that no reasonable grounds existed for contesting the will (i.e., that it was a suit designed to provoke a settlement). Whether the beneficiary had probable cause is a question of fact. Of course, if the contest is successful and the will is denied probate, there is never a forfeiture because the no-contest clause is tossed out along with the will.

2. Minority Rule—No-Contest Clause Given Full Effect Regardless of Probable Cause

Some states (e.g., Illinois, Massachusetts) have not adopted the "probable cause" defense to enforcement of no-contest clauses. A provision that triggers forfeiture if a beneficiary contests the will is given full effect, regardless of whether there was probable cause for challenging the will.

X. PROBATE AND ESTATE ADMINISTRATION

A. TERMINOLOGY AND OVERVIEW

"Probate" refers to the proceeding in which an instrument is judicially determined to be the duly executed last will of the decedent (or, if there is no will, the proceeding in which the decedent's heirs are judicially determined). At the probate proceeding, a ***personal representative*** is appointed to carry out the estate administration. In most states, the personal representative is called an ***executor*** if named in the decedent's will, and an ***administrator*** if named by the court.

Testate estates must go through some form of administration. Intestate estates need not be administered if the heirs are able to agree as to the distribution of property; however, they often are administered in order to cut off creditors' claims and to ensure clear title in the heirs.

B. SUMMARY OF RULES AND PROCEDURE

The following is a summary of probate rules and procedure:

1. Any interested person may ***file*** a petition for probate.

2. The custodian of a will ***must produce it within a certain time*** (e.g., 30 days) after the death of the testator.

3. The ***testator's domicile at the time of death***, not the place of death, determines the place of "primary" administration of the estate (but "ancillary" administration, including probate, is also necessary wherever property to be administered is located).

4. A will ***must be offered for probate within a specified number of years***. For example, the UPC requires that a will be probated within three years or the decedent is deemed to have died intestate. [UPC §3-108]

5. A will must be ***probated*** in order for a person to ***take*** under its terms.

6. A probated will ***cannot be collaterally attacked*** (e.g., in a later will contest) when a specified short statute of limitations after probate has run.

7. A ***lost or destroyed will*** may be probated, provided its contents can be proved.

8. In a probate proceeding, the ***following facts must be proved***:

   a. That the testator is dead (this fact is jurisdictional);

   b. That the formalities of execution were observed; and

   c. That the notice requirements for probate have been complied with.

C. PERSONAL REPRESENTATIVE

1. Appointment of Personal Representative

Any person who has ***capacity to contract*** may serve as personal representative. Thus, an incompetent or a minor cannot serve.

a. How Executor or Administrator Is Appointed
If an "executor" is named in the will, he will be appointed as personal representative unless subject to a particular disqualification. If no executor is named in the will or if the executor named cannot serve, an "administrator cum testamento annexo" will be appointed as personal representative. If the decedent died intestate, an "administrator" will be appointed as personal representative.

b. Preference of Appointment
A typical statutory order of preference for appointment of a personal representative would be: (i) the person named as executor in the will; (ii) the surviving spouse, if a will beneficiary; (iii) any will beneficiary; (iv) the surviving spouse; (v) any other heir; and (vi) after 45 days, a creditor.

c. Authority of Representative
The authority of the personal representative is derived from his court appointment, and he serves as an officer of the court.

d. Bond Required for Issuance of Letters Testamentary
The personal representative must file a bond with sureties to secure the faithful performance of his duties, unless the testator has provided in his will that no bond shall be required. When the personal representative has filed the required bond, "letters testamentary" (for an executor or administrator cum testamento annexo) or "letters of administration" (for an administrator) are issued certifying his authority to act on behalf of the estate.

2. Powers and Duties of the Personal Representative
The personal representative has functions generally analogous to those of a receiver of a defunct corporation or a trustee in bankruptcy, and must take whatever steps are necessary to wind up the decedent's affairs. In that respect, the primary functions of the personal representative are to:

(i) ***Give notice*** to devisees, heirs, and claimants against the estate;

(ii) Discover and collect the decedent's assets and file an inventory;

(iii) ***Manage*** the assets of the estate during administration;

(iv) ***Pay expenses*** of administration, claims against the estate, and taxes; and

(v) ***Distribute*** the property.

Like the trustee, the personal representative serves in a fiduciary capacity. (*See* Trusts outline.) Unlike the trustee, however, the personal representative is primarily a liquidator, rather than a manager, and generally must have court approval for such activities as borrowing money, operating a business, or selling property.

3. Compensation of Personal Representative
The personal representative is entitled to compensation for his services rendered on behalf of the estate. Rates of compensation may be governed by statute, e.g., based on the estate's

value. If there is no controlling statute, the court has discretionary authority to award reasonable compensation. Factors a court might consider in determining reasonable compensation include the amount of time spent performing appropriate services, the degree of difficulty involved, and a reasonable hourly rate.

a. May Be Provided for by Will
The testator may provide compensation for the personal representative by means of a gift in the will. However, the personal representative may renounce such a testamentary gift and take whatever compensation to which he would otherwise be entitled.

b. May Be Denied for Wrongful Conduct
The court may deny compensation where the personal representative has engaged in dishonest or fraudulent conduct, or has otherwise acted in bad faith or willful neglect of his duties.

D. CREDITORS' CLAIMS

1. Notice
One of the personal representative's first tasks is to give notice to the creditors of the estate, advising them of the pendency of the administration and when and where claims must be filed. Notice may be accomplished by publication, but the personal representative must mail or personally deliver the notice to creditors who are known or are reasonably ascertainable.

2. Nonclaim Statutes
In most states, creditors' claims must be filed within a specified period of time (e.g., three months after notice), or they are barred. These statutes apply to all claims: liquidated and nonliquidated, matured and contingent, contract and tort.

a. Exception—Failure to Give Notice
If notice is not given to creditors in accordance with the statute, claims are barred only after a specified number of ***years*** have passed since the decedent's death.

3. Priority of Claims
Typically, statutes provide that claims are to be paid in the following order:

a. Administration expenses;

b. Funeral expenses and expenses of the last illness (up to specific dollar amount);

c. Family allowance;

d. Debts given preference under federal law (e.g., tax claims);

e. Secured claims (up to the value of the security interest);

f. Judgments entered against the decedent during his lifetime; and

g. All other claims.

E. ABATEMENT

Abatement is the process of reducing testamentary gifts in cases where the estate assets are not sufficient to pay all claims against the estate and satisfy all bequests and devises. The testator may set out an order of abatement in the will. If there are no contrary provisions in the will, estates in most jurisdictions abate in the following order:

(i) Property passing by intestacy;

(ii) The residuary estate;

(iii) General legacies, which abate pro rata;

(iv) Specific devises and bequests.

[*See* UPC §3-902] Within each category, some states provide that personal property abates before real property.

1. Demonstrative Legacies

To the extent that the property from which the gift was to be satisfied is in the estate at death, demonstrative legacies are treated as specific legacies for abatement purposes. To the extent the fund is insufficient, however, the demonstrative legacy is treated as a general legacy.

F. EXONERATION OF LIENS

At common law and in a few states today, if specifically devised property is, at the testator's death, subject to a lien that secures a note on which the testator was personally liable, the beneficiary is entitled to have the lien exonerated (unless there is a contrary will provision). Thus, the beneficiary is entitled to demand payment of the debt out of the residuary estate so that the property passes to him free of any encumbrance. However, the UPC and most states provide that liens on specifically devised property are ***not*** exonerated unless the will so directs. In these states, a specific devise passes subject to a security interest even if the will contains a general (rather than specific) provision to pay all debts. [*See* UPC §2-607]

G. GUIDELINES WHEN WILL AMBIGUOUS

It is commonly stated that where the language of a will is clear and unambiguous, there is no need for either interpretation or construction. The directions in the will must be followed. Where there is some ambiguity, the court will interpret the will and consider any admissible extrinsic evidence to determine the testator's intent. Only where there is no evidence of the testator's intent is it necessary to use a rule of construction as a presumption concerning that intent. Of course, inevitably the existence of rules of construction will influence a court when it sets out to interpret a will.

1. Interpretation—Testator's Actual Intent

a. Will Clear—Extrinsic Evidence Inadmissible

If the will clearly specifies a particular disposition, it must be carried out, and extrinsic evidence of a contrary intent of the testator, no matter how persuasive, is inadmissible.

b. Will Ambiguous—Extrinsic Evidence Admissible

If a provision in the will is ambiguous, the court should attempt to find the testator's intent within the "four corners" of the instrument. Only if that attempt fails should the

court admit certain extrinsic evidence that is probative on the issue of intent. Extrinsic evidence may be used only to explain the meaning of what is written in the will and cannot subtract from the will, add missing provisions, or show some entirely different meaning.

1) Testimony Regarding Surrounding Circumstances Permitted
Testimony regarding the testator's surrounding circumstances at the time of execution is permitted, e.g., the amount and character of his property, the natural objects of his bounty, his relations with his relatives, and their situations and circumstances.

2) Declarations of Testator Not Admissible
What would seem the most probative evidence of the testator's intent—his declaration as to what he meant to do—is generally ***not*** admissible because of the high chance of perjured testimony.

a) Exception—Equivocation
The only exception to this rule concerns a so-called latent ambiguity (*see* IX.F.4.a., *supra*) known as "equivocation." An equivocation is where the description of a beneficiary or of the property describes more than one person or more than one item of property. In such cases, and in those only, testimony of the declarations of the testator is admissible.

Example: T bequeaths $10,000 to "my cousin Bill," but unbeknownst to T he had two cousins named Bill. Testimony that he knew only one of them would be admissible as "surrounding circumstances." In addition, testimony by T's lawyer that T said, "I want $10,000 to go to my cousin Bill Smith of Chicago" is admissible.

c. Intent as of Time of Execution
The intention of the testator should be sought as of ***the time of execution*** of the will (or of a later codicil that republishes it).

Example: T leaves his estate to his "heirs." Thereafter the statute of descent and distribution is amended. The estate should pass to those who would have been T's heirs under the statute in force at the time the will was executed.

2. Rules of Construction
When there is no evidence of the actual intent of the testator, the court must resort to rules of construction such as those noted below:

a. Favor those who ***would take intestate***.

b. Favor the construction ***that avoids intestacy***.

c. Favor the construction that is ***consistent with the perceived "plan"*** of disposition.

d. ***Every portion*** of the will should be given effect if possible.

e. Between totally inconsistent clauses, the ***latter is most likely the final intent***.

3. Beware of Finding Gifts by Implication
As much as the court wants to find that the will disposes of all of the property, however, sometimes there will be a situation that the will does not cover. Do not invent or imply what the testator would have done.

XI. WILL SUBSTITUTES

A. IN GENERAL

Individuals wishing to avoid taxes and to eliminate the cost and inconvenience of probate often turn to various "will substitutes" to transfer their property upon death. Frequently, the decedent's testate or intestate takers argue (usually unsuccessfully) that these forms of transfer constitute "testamentary" transfers and are, therefore, invalid for failure to comply with the required formalities for execution of a will. The following are examples of will substitutes:

1. Life insurance;
2. Joint tenancies or tenancies by the entirety (*see* Multistate Real Property outline);
3. Inter vivos trusts (i.e., trusts created during the settlor's lifetime);
4. Bank arrangements;
5. Deeds;
6. Contracts; and
7. Inter vivos gifts, including gifts causa mortis (i.e., gifts made in contemplation of death).

B. LIFE INSURANCE

Life insurance is probably the most widely used will substitute. Assume that H takes out a life insurance policy on his life, payable to W. H owns the policy and can cash it in or change the beneficiary. The life insurance contract clearly has testamentary effect in the sense that at H's death an economic interest will pass from H to W. Nevertheless, it is not a "will," and the designation of W as beneficiary does not have to be attested by witnesses. Rather, the courts have held that a life insurance policy is a contract, and the disposition is governed by the terms of the contract. (Note that most life insurance policies provide that a change of beneficiaries can be effected by the owner only by notification to the company during the owner's life. Thus, a will cannot change the beneficiary designation, unless the terms of the contract permit this.)

C. BANK ARRANGEMENTS

1. Totten Trusts
A "Totten trust" (named after an early New York case) is a deposit of money in the depositor's own bank account in trust for another person. The majority rule is that such a transfer creates a valid revocable trust, even though the depositor retains complete control over the account during her lifetime and the transfer is complete only upon her death. The trust is revoked to the extent of withdrawals made by the depositor before her death, and may also be

revoked by the depositor's will. Creditors of the depositor can reach the funds in the account during her life.

2. Joint or Survivor Accounts

The deposit of money in a bank in the names of two persons "with right of survivorship" is generally held effective to give the survivor the absolute right to all of the money. However, in many states, extrinsic evidence is admissible to show that the dead depositor did not intend a gift to the survivor, and that the account was only a convenience for paying the depositor's bills. Where the survivor is not the spouse but someone else, this issue has been frequently litigated.

3. Payable on Death Designations

Many courts have held a payable on death ("P.O.D.") designation on a bank account ineffective, on the rationale that no interest of any type is transferred to the designated beneficiary during the depositor's lifetime, and hence the unattested designation violates the Statute of Wills. This result has been criticized by many authorities on the ground that a Totten trust is distinguishable from a P.O.D. designation only by the fact that the depositor has recited that he holds the deposit "in trust," and yet the Totten trust device is upheld. In response to this criticism, a number of states have enacted statutes specifically permitting P.O.D. accounts as valid will substitutes. [*See* UPC §§6-101 *et seq.*]

D. DEEDS

A deed deposited in escrow, with delivery conditioned upon the grantor's death, may be a valid nontestamentary transfer (*see* Multistate Real Property outline). Similarly, if a deed that is by its terms effective only upon the grantor's death has actually been delivered to the grantee, a court may sustain the transfer as nontestamentary by construing the deed as a present transfer of a future interest, subject to a life estate reserved in the grantor.

E. CONTRACTS

A contract that purports to dispose of property upon death is testamentary in nature and must comply with the formalities required for a will in order to be enforceable.

XII. ADVANCE HEALTHCARE DIRECTIVES: LIVING WILLS AND DURABLE HEALTHCARE POWERS

A. INTRODUCTION

The majority of states have enacted legislation governing the use of advance healthcare directives, which are instructions concerning what to do regarding an individual's health if he becomes unable to make healthcare decisions in the future. The two most common types of advance healthcare directives are ***living wills*** and ***durable healthcare powers***.

1. Living Will

A living will states an individual's desires, if he becomes ***terminally ill*** or is in a ***persistent vegetative state***, regarding: (i) whether to administer, withhold, or withdraw ***life-sustaining procedures***; (ii) whether to provide, withhold, or withdraw ***artificial nutrition or hydration***; and (iii) whether to provide treatment to ***alleviate pain***.

2. Durable Healthcare Power
A durable healthcare power (sometimes called a "durable power of attorney for healthcare") appoints an agent to make healthcare decisions on behalf of the principal. Unlike an ordinary power of attorney, which normally terminates on the incapacity of the principal, a durable healthcare power does not become effective ***until the principal becomes incapacitated***, and it remains effective despite the incapacity. Unless expressly limited, a durable healthcare power may extend to any and all healthcare decisions that might arise.

3. Scope of Advance Directives
Generally, a living will is a very limited instrument, dealing only with a terminally ill person and pertaining only to life-prolonging or pain-relieving measures. A durable healthcare power usually is much broader, covering all healthcare decisions. However, an individual can define the scope of a living will or healthcare power as broadly or as narrowly as he chooses.

B. CREATION AND EXECUTION

States differ on the execution requirements for living wills and durable healthcare powers. Most states require that they be: (i) in ***writing***, (ii) ***signed*** by the testator or principal or another at his direction, and (iii) ***witnessed*** by two adult witnesses. Most (but not all) of these states provide that the person designated as the agent cannot serve as a necessary witness. In contrast, the Uniform Health Care Decisions Act does not require any witnesses for a durable healthcare power.

1. Capacity Is Presumed
The testator or principal must be an adult, and most states require that he be of sound mind. An individual is presumed to have capacity to execute a living will or durable healthcare power. Thus, if capacity is challenged, the burden of proof is on the challenger to show that the testator or principal lacked capacity or was unduly influenced.

2. Family Consent Statutes
Even when a durable healthcare power is not properly witnessed, the designated agent may nonetheless have authority to act under a state's "family consent" statute. These laws, enacted in some states, permit a close family member to act as a surrogate decisionmaker for a person who has not properly designated an agent under the state's durable healthcare power statute.

C. REVOCATION

1. Living Will
A living will can be revoked by: (i) obliterating, burning, tearing, or destroying the will; (ii) a written revocation of the will; or (iii) an oral expression of intent to revoke the will. The majority of states allow a living will to be revoked at any time, regardless of the individual's mental or physical condition.

a. When Effective
The revocation is effective when communicated to the testator's primary physician.

2. Durable Healthcare Power
Generally, a durable healthcare power can be revoked by notifying either the agent or the principal's healthcare provider, and the revocation can be either ***oral*** or ***written***. Some states also allow revocation in the same manner as that for living wills, *supra*.

a. Revocation of Prior Powers
Unless otherwise provided, the execution of a valid durable healthcare power revokes any prior durable healthcare powers.

b. Former Spouse as Agent
The designation of a principal's spouse as his agent is ***automatically revoked*** if the marriage is annulled or dissolved. Some states also revoke the designation upon legal separation.

D. INDIVIDUALS ELIGIBLE TO ACT AS AGENT UNDER DURABLE HEALTHCARE POWER

A principal can appoint as agent anyone ***except*** an owner, operator, or employee of a healthcare facility at which the principal is receiving care (and that individual may be an agent if she is related to the principal).

E. AUTHORITY OF AGENT UNDER DURABLE HEALTHCARE POWER

The agent has the authority to make any healthcare decisions on the principal's behalf that the principal could have made for himself while having capacity. The authority of the agent is within the discretion of the principal and must be stated in the instrument creating the durable healthcare power. The agent must act in accordance with the principal's expressed instructions and wishes. If specific powers are not expressed or stated in the instrument creating the durable healthcare power, the agent must act in the principal's ***best interest***, as determined by the principal's personal values and by weighing the factors likely to be of importance to him.

1. Powers
Some of the powers that the agent has are: (i) the power to consent to or refuse any type of medical care; (ii) the power to admit or discharge the principal from a healthcare facility; and (iii) the power to access the principal's medical records.

2. Agent's Liability
The agent is not subject to civil or criminal liability or to discipline for unprofessional conduct relating to healthcare decisions, provided she acted in ***good faith***.

APPROACH TO EXAMS

WILLS

IN A NUTSHELL: At death, a person's property passes either by will or intestacy. Any property not passing under a will for any reason passes according to the statutory scheme of intestate succession—usually to a surviving spouse and descendants before any other relatives. To be valid, a will must be executed with the statutory formalities by a person (testator) with testamentary intent and testamentary capacity. A will may be revoked at any time prior to death by operation of law, subsequent written instrument, or physical act. A will offered for probate may be contested by any interested party, usually on the ground of lack of capacity, undue influence, fraud, or mistake.

I. INTESTATE SUCCESSION

A. Apply Intestacy Rules When:

1. No will;
2. Will fails (denied probate); or
3. Will does not dispose of all probate property (*i.e.*, undisposed-of property is subject to intestacy rules); or
4. Will specifies intestate distribution

B. Surviving Spouse's Share

1. In all states, surviving spouse takes the entire intestate estate if no descendants survive and, in most states, one-half or one-third of the estate if descendants survive
2. Some states and UPC provide for a dollar amount plus one-half or one-third if descendants survive
3. UPC—surviving spouse takes entire estate if all surviving descendants are surviving spouse's descendants

C. Shares of Descendants and Other Heirs

1. Descendants take share of estate not passing to surviving spouse
   a. Majority—per capita with representation
   b. Modern trend—per capita at each generation
   c. Minority—strict per stirpes (*i.e.*, division always at child level)
2. If no descendants survive, the intestate estate passes:
   a. To ***parents***
   b. If no parents, to ***descendants of parents***
   c. If no descendants of parents, to ***grandparents or their descendants***
   d. If no grandparents or their descendants, divided into maternal and paternal shares and pass to ***nearest kin*** (watch for laughing heir statute)
   e. If no relative capable of taking, the estate passes to the state ***(escheat)***

D. Special Cases

1. Adopted children—treated same as natural child in adopting family; all inheritance rights cut off in family of natural parents
2. Stepchildren and foster children—no inheritance rights unless adopted, but may be exception for adoption by estoppel

3. Posthumous children—child in gestation at decedent's death inherits as if born in decedent's lifetime
4. Nonmarital children—can inherit from father if:
   a. Father and mother married after child's birth,
   b. The man is adjudicated the father in a paternity suit, or
   c. After the man's death, he is proved to be the father of the child
5. In most jurisdictions, siblings of the half blood and the whole blood inherit equally

E. DISINHERITANCE CLAUSE

1. Majority—ineffective if partial intestacy
2. Minority and UPC—given full effect; heir treated as though he had disclaimed his intestate share.

II. PROBLEMS COMMON TO INTESTACY AND WILLS

A. Simultaneous Death

1. Under the Uniform Simultaneous Death Act ("USDA"), property of each person passes as though he survived the other person
2. Applies to probate and nonprobate transfers (*e.g.*, wills, trusts, insurance)
3. About half of the states have adopted 120-hour rule—must survive by 120 hours to take as a beneficiary, heir, etc., and avoid application of USDA
4. Governing instrument can make different provision

B. Disclaimers

1. Disclaimed property passes as though disclaimant predeceased decedent
2. Disclaimer must describe the property and must be in writing, signed by the disclaimant, and filed within nine months
3. Estoppel of disclaimer if benefits accepted

C. Decedent's Death Caused by Heir or Beneficiary

1. If one feloniously and intentionally causes death of a decedent, property passes as though killer predeceased decedent
2. Applies to probate and nonprobate transfers
3. Severs joint tenancy

D. Advancements and Satisfaction of Legacies

1. Lifetime gift presumptively not advancement of intestate share or in satisfaction of gift under will unless:
   a. Intent is shown by a contemporaneous writing by donor (or will provision in case of satisfaction) or
   b. There is a written acknowledgment by the donee

III. EXECUTION OF WILLS (FORMALITIES)

A. Requirements for All Wills

1. Testator age 18 and of sound mind (testamentary capacity)
2. Testamentary intent—present intent to make a will

3. Writing
4. Signature of testator

B. Requirements for Formal Attested Wills

1. All of the requirements in A., above, plus
2. Two attesting witnesses (or signed by a notary under UPC)
   a. Testator must acknowledge will or signature in witnesses' presence
   b. Witnesses must sign in testator's presence
   c. If witness is also a beneficiary, will is valid but gift to interested witness is purged unless:
      1) Witness is supernumerary
      2) Witness would take without the will (takes lesser gift)
      3) UPC provision (minority view) allows interested witness to keep gift
3. UPC harmless error: defectively executed will can be given effect if clear and convincing evidence testator intended it to be his will

C. Requirements for Holographic Wills

1. All of the requirements in A., above, plus:
2. Will must be in testator's handwriting
3. Witnesses not needed

IV. COMPONENTS OF A WILL

A. Integration

Pages present at execution are part of will if so intended

B. Codicil

1. Must be executed with same formalities as a will
2. Republishes will
3. Revocation of will revokes codicils; revocation of codicil revokes only codicil—not will

C. Incorporation by Reference

1. The document must be:
   a. In existence at the time the will was executed,
   b. Sufficiently described in the will, and
   c. The will must show intent to incorporate
2. Signed list of tangible personal property is valid even if made or altered after will's execution

D. Acts of Independent Significance

1. Will may identify beneficiaries or property by reference to acts or events that have significance apart from the will

E. Pour-Over to Inter Vivos Trust

1. Valid even if trust amended after will execution
2. Under Uniform Testamentary Additions to Trusts Act, trust need not be in existence at will execution

F. Powers of Appointment

1. General vs. special power—general power can be exercised in favor of donee; special power cannot
2. Appointive property not subject to elective share or creditors
3. Exercise
   a. Residuary clause does not, by itself, exercise testamentary power; must mention power
   b. Blanket exercise of power permissible ("including all property over which I have a power of appointment")
4. Contract to exercise testamentary power is invalid

G. Nonprobate Assets

1. Cannot be disposed of by will
2. Includes life insurance, property passing by right of survivorship, property in trust

V. REVOCATION OF WILLS

A. By Operation of Law

1. Marriage usually has no effect on will, but if there is an omitted spouse statute, the will is revoked to extent of spouse's share
2. Divorce or annulment revokes all provisions in favor of former spouse (and under the UPC, the former spouse's relatives)

B. By Written Instrument

1. Revoking instrument must be executed with same formalities as will
2. Inconsistent provisions in later instrument revoke prior ones by implication

C. By Physical Act

1. Burning, tearing, obliterating, or canceling ***with intent to revoke***
2. May partially revoke will
3. Will not found at testator's death is presumed revoked
4. Contents of accidentally lost or destroyed will may be proven

D. Revival of Revoked Wills

1. In a majority of states, destruction of revoking instrument presumptively revives revoked will unless testator did not so intend. Will always revived if:
   a. Reexecuted with formalities, or
   b. Republished by codicil
2. Dependent relative revocation—a court may disregard revocation if:
   a. Premised on a mistake of law or fact,
   b. Would not have occurred but for the mistaken belief that another disposition was valid, and
   c. The results from disregarding revocation come closer to testator's intent

E. Harmless Error Statute

1. UPC harmless error provision also applies to defective revocation

VI. CONTRACTS RELATING TO WILLS

A. Contract to Make a Gift by Will

1. A contract to make a will, not to revoke a will, or to die intestate can be established by:
   a. Provisions in the will stating terms of contract,
   b. Express reference in will to contract, plus evidence of contract terms, or
   c. Writing signed by decedent evidencing the contract
2. Remedies for breach are damages or constructive trust after decedent's death; there is no remedy during the promisor's lifetime

B. Joint and Mutual Wills

1. Mutual wills (*i.e.*, separate wills by two or more testators that contain substantially similar provisions) are not presumed contractual
2. Majority rule is that joint wills (*i.e.*, single will executed by two or more testators and intended as will of each) are not presumed contractual, but many courts treat them as contractual

VII. CHANGES AFTER WILL'S EXECUTION

A. Anti-Lapse Statutes

1. Lapsed gift is saved by statute if predeceasing beneficiary within specified degree of relationship to the testator and left surviving descendants
   a. UPC: saves gift if predeceasing beneficiary is testator's stepchild, grandparent, or a descendant of grandparent
2. Statute usually applies only to wills, but UPC applies it to trusts, life insurance, etc.
3. Does not apply if contrary will provision
   a. Most states: words of survivorship constitute contrary provision
   b. UPC: words of survivorship are not enough to negate application of anti-lapse statute

B. Ademption—Property Not in Estate

1. Gift fails
2. Applies only to specific devises and bequests
3. Bequest of securities is general bequest (no ademption) unless "my" is used
4. Ademption may be partial
5. Testator's intent is irrelevant
6. Exceptions
   a. Insurance proceeds and condemnation awards paid after death
   b. Property subject to executory contract (testator's rights pass)
   c. Securities owned as a result of merger, consolidation, etc.
   d. Property sold by guardian

C. Increases to Property After Execution of the Will (Accretions)

1. Increases before testator's death: income goes to general estate, but improvements to real property go to devisee
2. Increases after testator's death pass to specific beneficiary
3. Specific bequests include stock splits and stock dividends

VIII. PROTECTION OF THE FAMILY

A. Elective Share Statute

1. Spouse may take a statutory share instead of share (if any) in will
2. Amount—in most states, one-third of net probate estate if surviving descendants and one-half without surviving descendants
3. Share paid in manner causing least disruption

B. Pretermitted Child Statutes

1. In most states, afterborn or after-adopted children take an intestate share
2. Exceptions:
   a. Omission appears intentional
   b. At execution, testator had other children and left nearly all of his estate to other parent of omitted child
   c. Testator provided for omitted child outside of the will
3. Under UPC, omitted child may be limited to same bequest as to other children

C. Homestead, Family Allowance, and Exempt Personal Property

IX. WILL CONTESTS

A. Standing and Grounds

1. Contest may be brought by any person whose interest would be directly affected by the will's admission to probate
2. Grounds:
   a. Defective execution
   b. Will offered has been revoked
   c. Testator lacked testamentary intent or capacity
   d. The will or gift is a product of undue influence
   e. The will or gift was procured by fraud
   f. The document was executed or gift made because of mistake

B. Testamentary Capacity

1. Testator must be at least 18 years old at date of execution
2. Contestant must prove that testator could not understand:
   a. Nature of act
   b. Nature and extent of property
   c. People who are the natural objects of testator's bounty
   d. Nature of disposition
3. Capacity determined at time of will execution
4. Insane delusion invalidates will only to extent delusion caused disposition

C. Undue Influence

1. Requirements:
   a. Influence exerted on testator,
   b. Overpowered the mind and free will of testator, and
   c. Product was will that would not have been made but for the influence
2. Presumption of undue influence arises when:

a. There is a confidential relationship between the testator and beneficiary, and
b. The beneficiary participated in a significant activity related to execution of the will

D. Fraud

1. Willful deceit as to character or content of will or as to a material fact
   a. Fraud in execution—contents of instrument misrepresented
   b. Fraud in the inducement
   c. Fraudulent prevention of execution—possible constructive trust remedy
2. Will or gift as result of fraud is invalid

E. Mistake

1. Mistake as to instrument (did not know it was a will)—extrinsic evidence admissible
2. Mistake in inducement—no relief unless mistake appears on face of will
3. Mistake in contents
   a. No relief for mistaken omission
   b. Evidence not admitted to contradict plain meaning
   c. Latent ambiguity (ambiguous as applied)—evidence admissible
   d. Patent ambiguity (on face of will)—gift fails under traditional view, but modern view allows evidence of intent
4. Reformation—UPC and Restatement permit court to reform will terms (even if will unambiguous) to conform to testator's intent if clear and convincing evidence that testator's intent or will terms were affected by fraud or mistake

F. No-Contest Clauses

Will be enforced unless contestant had probable cause to challenge will

X. ESTATE ADMINISTRATION

A. Personal Representative

1. Order of preference—person named in will, surviving spouse (will beneficiary), any will beneficiary, surviving spouse, any heir, a creditor
2. Duties—give notice, collect assets, manage assets, pay expenses, distribute property

B. Creditor's Claims

1. Must be filed within time specified in statute or are barred
2. Priority—administration expenses, funeral and last illness expenses, family allowance, tax claims, secured claims, judgments, all other claims

C. Abatement

1. When assets insufficient, gifts reduced in this order:
   a. Property passing by intestacy
   b. Residue
   c. General legacies (pro rata)
   d. Specific devises and bequests

D. Interpreting Ambiguous Will Provisions

1. Evidence of surrounding circumstances permitted
2. Testator's declarations inadmissible
3. Rules of construction
    a. Favor intestate heirs
    b. Favor construction avoiding intestacy
    c. Favor construction consistent with perceived plan
    d. Every portion of will given effect if possible
    e. Between completely inconsistent provisions, one most recently added is favored

ESSAY EXAM QUESTIONS

INTRODUCTORY NOTE

The essay questions that follow have been selected to provide you with an opportunity to experience how the substantive law you have been reviewing may be tested in the hypothetical essay examination question context. These sample essay questions are a valuable self-diagnostic tool designed to enable you to enhance your issue-spotting ability and practice your exam writing skills.

It is suggested that you approach each question as though under actual examination conditions. The time allowed for each question is 45 minutes. You should spend 10-15 minutes spotting issues, underlining key facts and phrases, jotting notes in the margins, and outlining your answer. If you organize your thoughts well, about 30 minutes will be more than adequate for writing them down. Should you prefer to forgo the actual writing involved on these questions, be sure to give yourself no more time for issue-spotting than you would on the actual examination.

The BARBRI technique for writing a well-organized essay answer is to (i) spot the issues in a question and then (ii) analyze and discuss each issue using the "CIRAC" method:

C — State your ***conclusion*** first. (In other words, you must think through your answer ***before*** you start writing.)
I — State the ***issue*** involved.
R — Give the ***rule(s)*** of law involved.
A — ***Apply*** the rule(s) of law to the facts.
C — Finally, restate your ***conclusion***.

After completing (or outlining) your own analysis of each question, compare it with the BARBRI model answer provided herein. A passing answer does ***not*** have to match the model one, but it should cover most of the issues presented and the law discussed and should ***apply the law to the facts*** of the question. Use of the CIRAC method results in the best answer you can write.

EXAM QUESTION NO. 1

Horace and Winona, husband and wife, had two children, Van and Debbie. Horace also had a child, Lois, by a prior marriage. All three children were over age 21 when Horace died from a gunshot wound inflicted by Winona during one of their frequent altercations. Winona was sentenced and incarcerated after she pled guilty to murder.

Horace's will, which has now been filed for probate, made the following bequests:

1. All right, title, and interest in his residence on Elm Street to Winona;

2. All right, title, and interest in his 50-acre tract of property in Bibb County to Debbie;

3. All right, title, and interest in his Jaguar and his Bank Two stock to Van;

4. The remainder of his estate to Lois.

At the time of his death, Horace still owned his residence on Elm Street. Three months before Horace's death, Bibb County condemned 10 acres of the 50-acre tract; the county has paid Horace's executor $20,000, the value of the condemned property. Horace had then sold the remaining 40 acres to Mr. and Mrs. Neighbor; he financed the sale for the Neighbors, who gave him a promissory note for $100,000 and a deed to secure debt on the 40 acres to secure the debt obligation. Prior to his death, Horace had purchased a 2012 Jaguar to replace his 1989 Jaguar, which he gave to Van as a graduation gift. After his will was executed, Bank Two was bought by Major Bank so that Horace's Bank Two stock was replaced with Major Bank stock.

(1) Indicate to whom each of the following items of property owned by Horace at the time of his death will be distributed in accordance with the terms of Horace's will, and discuss the basis for each conclusion:

(a) Horace's residence on Elm Street.
(b) The $100,000 note and deed to secure debt executed by the Neighbors.
(c) The $20,000 in condemnation proceeds.
(d) The 2012 Jaguar.
(e) The Major Bank stock.

(2) Assume, for purposes of answering this question only, that Horace was not killed by Winona, but rather both of them were killed in an automobile accident. After finding no pulse on Horace, the paramedic heard Winona whisper, "Help us." Both were pronounced dead at the scene. Winona died intestate. To what extent, if any, would your answer to the preceding question as to the distribution of Horace's estate change under this set of facts? Explain your answer.

(3) Would your answer to question (2) above change if Winona's family offered a ***copy*** of her will to probate, providing that upon her death Winona's estate would be divided "equally among my husband and my children"?

EXAM QUESTION NO. 2

Ten years ago on January 1, Tom, a widower with no descendants, executed an inter vivos trust agreement known as Trust A with ABC Bank as Trustee. The agreement provided for payment of income of the trust to himself for his lifetime and for termination and distribution of all assets to his cousin Alice one year after his death. He reserved the right to amend or revoke the agreement at any time during his lifetime.

The following month, Tom properly executed a will, which included the following provisions:

> First: I give $20,000 to my friend Fred.
>
> ***
>
> Fifth: I give my farm in McLean County to my cousin Jane.
>
> Sixth: I give all the rest of my estate to ABC Bank as trustee of the trust known as Trust A under an agreement dated January 1 of this year, as in force at my death.
>
> ***
>
> Tenth: I name XYZ Bank as executor of this will.

Five years later, Tom amended Trust A to provide that upon termination of the trust, all assets were to be distributed to his cousin George. Two years later, he sold and conveyed 200 acres of his 500-acre McLean County farm to a neighbor and also sold the other 300 acres to another neighbor pursuant to a contract for deed providing for principal payments plus interest to be made over a period of 20 years and for delivery of a warranty deed to the purchaser upon payment of the purchase price in full.

Tom died last month, at which time Trust A as amended was in effect as was the contract for deed, which had a remaining principal balance of $125,000 to be paid over the next 15 years. When his will was removed from his bank safe deposit box, it was discovered that the words "friend Fred" in paragraph First had a single line drawn through them in ink (although the words were still legible) and the words "American Cancer Society" were written immediately adjacent thereto in Tom's handwriting together with his signature immediately beneath. A note attached to the will in Tom's handwriting indicated that the lining through and addition were made by him shortly after he had a falling out with Fred.

XYZ Bank, as executor of Tom's will, consults you and asks your opinion as to the following:

(1) What is the effect of the lining through and addition appearing in paragraph First of the will?

(2) What, if anything, will Jane take pursuant to paragraph Fifth of the will?

(3) Does paragraph Sixth constitute a valid devise of the residuary estate to ABC Bank as trustee of Trust A?

What is your advice? Give reasons.

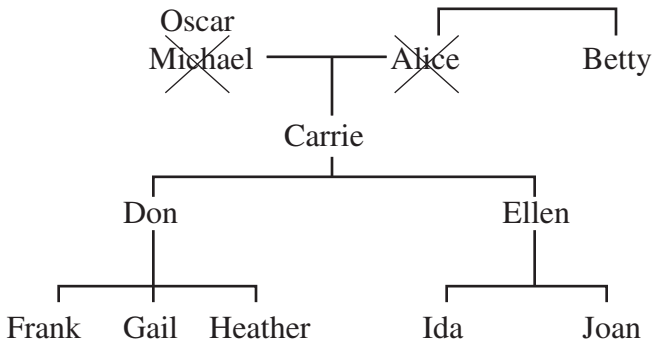
EXAM QUESTION NO. 3

Alice executed her will five years ago. Under the terms of this will, Alice bequeathed 500 shares of ABC common stock to her sister, Betty, and the residue of her estate in trust to pay the income to her daughter, Carrie. The will provided that upon Carrie's death the principal of the residuary trust should be distributed "to Carrie's issue." When the will was executed, Alice owned 500 shares of ABC common stock.

When Alice died last month, her estate consisted of 1,000 shares of ABC common stock and a substantial amount of other property. Alice had acquired the additional 500 shares of ABC common stock as a "stock dividend."

Alice was survived by her sister, Betty; her daughter, Carrie; Carrie's two children, Don and Ellen; Don's three children, Frank, Gail, and Heather; and Ellen's two children, Ida and Joan. Alice also was survived by her husband, Oscar, whom she married two years before her death. Alice's prior husband, Michael, the father of Carrie, had died 30 years ago.

Alice's family tree can be diagrammed as follows:



(1) What are Oscar's property rights, if any, in the assets of Alice's estate? Explain.

(2) What are Betty's rights with respect to the 1,000 shares of ABC common stock owned by Alice at the time of her death? Explain.

(3) If Don and Ellen were to predecease Carrie and Carrie was then survived by Frank, Gail, Heather, Ida, and Joan, how should the principal of the trust created under Alice's will be distributed among Carrie's issue at Carrie's death? Explain.

(Examinees in community property states should assume that all of Alice's property is sole and separate property and that the community had no interest in said property, and should analyze this problem accordingly.)

EXAM QUESTION NO. 4

Angelo developed a distinct artistic style as a painter of portraits while under the influence of LSD. He obtained the LSD from Vulture. Angelo, while driving under the influence of LSD, is killed in an automobile accident. The autopsy reveals severe brain damage from use of the chemical. This instrument is found in his coat pocket:

> 5 May 2012
>
> One thousand dollars each to Mary and Lamb. The rest to Val Vulture who has been good to me and anyone who opposes my gift to him loses their interest.
>
> /s/ Mike Angelo
>
> Witnesses:
> /s/ Fred Falcon
> /s/ Willie Fox

Angelo is survived by Mary and Lamb, his nieces, as his only heirs. Paintings worth $100,000 are in his estate. Vulture offers the instrument of May 5, 2012, for probate as a will, and Lamb comes to you for answers to the following questions:

(1) If she contests the purported will and loses, will she lose her $1,000?

(2) She owes Chortle's Mink Salon $10,000 for a mink coat and has no money other than what she might obtain from Angelo's estate. Can Chortle contest the purported will so Lamb will lose nothing if the contest fails?

(3) What grounds for contest offer the greatest promise for success and why?

Advise and discuss.

ANSWERS TO ESSAY EXAM QUESTIONS

ANSWER TO EXAM QUESTION NO. 1

(1) **Distribution Under Horace's Will**

(a) **Residence:** Horace's residence on Elm Street likely will be distributed to Lois. At issue is the effect of a beneficiary's killing the decedent. A beneficiary who feloniously and intentionally kills the testator forfeits her interest (under the will, by intestacy, etc.), which passes as if the beneficiary predeceased the decedent. A guilty plea to murder is conclusive proof that the killing was felonious and intentional. Here, Winona forfeits her bequest of the Elm Street residence because she pled guilty to Horace's murder. Thus, the gift lapses and falls into the residuary estate, which will be distributed to Lois. Note that most states' anti-lapse statutes will not save the gift for Van and Debbie because Winona is not Horace's descendant (or stepchild, grandparent, or descendant of a grandparent under the broader Uniform Probate Code ("UPC")). However, if the state is one of the few with a broad anti-lapse statute that applies to ***any*** beneficiary, Van and Debbie may be substituted as beneficiaries of the residence.

(b) **Note and Deed to Secure Debt:** The $100,000 note and deed to secure debt executed by the Neighbors will be distributed to Debbie. At issue is the effect of the testator's sale of specifically bequeathed property before his death. When specifically bequeathed property has been sold, given away, lost, or destroyed during the testator's lifetime, the gift is adeemed (i.e., it fails). However, if the bequest is of the testator's interest in the property, rather than of the property itself, the gift may not be adeemed if the testator still retains some interest at death. Here, Horace devised all "right, title, ***and interest***" in the 50-acre tract to Debbie. Because the gift was of Horace's interest in the 50-acre tract, Debbie takes Horace's interest as it exists at his death. Thus, she takes the note and deed to secure debt.

(c) **Condemnation Proceeds:** The $20,000 in condemnation proceeds likely will be distributed to Debbie. At issue is whether the beneficiary of specifically bequeathed property that has been condemned during the testator's lifetime is entitled to the condemnation award. Courts generally apply the ademption doctrine objectively, without regard to the testator's intent and without regard to why the asset is not in the estate at death. However, in many states and under the UPC, ademption does not apply if the property was taken by eminent domain before the testator's death, but the award is paid after the testator's death. Instead, the beneficiary is entitled to the condemnation award. Here, 10 acres of the 50-acre tract were condemned three months before Horace's death, but the county did not compensate Horace for the taking until after his death. Thus, Debbie is entitled to the $20,000 condemnation award.

(d) **2012 Jaguar:** The 2012 Jaguar likely will be distributed to Van. The first issue is whether the bequest of the Jaguar was satisfied by a lifetime gift. In most states, if the testator makes a lifetime transfer of property to a beneficiary that is the subject of a specific gift named in the will, the transfer will not be treated as in satisfaction of that gift unless shown to be intended as such. The UPC requires evidence of such intent be shown by a contemporaneous writing by the donor or a written acknowledgment by the donee. Here, Horace gave the 1989 Jaguar to Van as a graduation gift, but there is no evidence that Horace intended the gift to be a satisfaction of the bequest in his will; i.e., there is no writing by Horace or acknowledgment by Van. Thus, the bequest is probably not satisfied.

The second issue is whether the bequest is adeemed. A will takes effect only upon the death of the testator. Because of the ambulatory nature of a will, it operates upon circumstances and properties as they exist at the time of the testator's death ("a will speaks at the time of death"). Here, Horace specifically bequeathed Van "his Jaguar." Although at the time he executed his will Horace owned a 1989 Jaguar, at the time of his death—when his will became operative—he owned a 2012 Jaguar. Thus, Van will take the 2012 Jaguar under the will.

(e) **Major Bank Stock:** The Major Bank stock likely will be distributed to Van. At issue is whether a specific beneficiary of stock that is replaced with other stock as the result of an entity acquisition is

entitled to the new stock. In many states and under the UPC, where a will makes a specific bequest of securities in one entity, the beneficiary is entitled to securities in another entity owned by the testator as a result of merger, consolidation, reorganization, or other similar action initiated by the entity. Here, the Bank Two stock changed only as the result of Major Bank's acquisition of Bank Two. Thus, Van is entitled to the Major Bank stock.

(2) **Distribution If Deaths in Quick Succession**

Horace's Elm Street residence likely would be distributed in equal shares to Van and Debbie. At issue is whether Horace and Winona died simultaneously. Under the Uniform Simultaneous Death Act ("USDA"), when the title to property or its devolution depends on priority of death and there is ***no sufficient evidence*** that the persons have died otherwise than simultaneously, the property of each person is distributed as if he had survived the other. Here, there is sufficient evidence that Winona survived Horace for at least a moment because she spoke after Horace had no pulse. Thus, the USDA does not apply and the residence passes to Winona's estate. In most states, if an intestate is survived by children but no spouse, her estate passes in equal shares to the children. Thus, Van and Debbie take the Elm Street residence.

If the jurisdiction has adopted the 120-hour rule, Lois would take the Elm Street property. Under the 120-hour rule, an heir or beneficiary must survive the decedent by 120 hours in order to take from his estate. Heirs or beneficiaries who do not survive the 120 hours are treated as though they predeceased the testator. Thus, Winona would be treated as predeceasing Horace. The anti-lapse statute will not apply because Winona is not Horace's descendant (or a descendant of Horace's grandparents). The property will therefore pass as residue under Horace's will to Lois.

(3) **Distribution Under Copy of Winona's Will**

If the copy of Winona's will can be probated, the distribution of the Elm Street residence would be the same as that set out in (2), above. The first issue is whether and under what circumstances a copy of a will may be admitted to probate. If the original will cannot be found, a copy of the will (clearly proved to be such by subscribing witnesses and other evidence) may be admitted to probate. However, there is a presumption that the will was revoked by the testator, which must be rebutted by a preponderance of the evidence. Here, Winona's family may offer the copy of her will to the probate court, but they must establish that it is her will (as by testimony of the subscribing witnesses) and rebut the presumption of revocation.

If the will is accepted, the next issue is whether Lois is considered Winona's "child" for purposes of the bequest of her estate. Generally, stepchildren have no inheritance rights. The doctrine of adoption by estoppel allows a stepchild to inherit from her stepparent as though legally adopted where the stepparent gains custody of a child under an agreement with the natural parent that she will adopt the child. Here, there is no evidence of such an agreement. Thus, Lois will not take anything under Winona's will, and the property will pass to Van and Debbie.

ANSWER TO EXAM QUESTION NO. 2

(1) **Paragraph First**

The effect of the lining through of Fred's name and the addition of the American Cancer Society depends upon whether the state recognizes holographic wills and whether the original will is holographic. A holographic will is one that is entirely in the testator's handwriting and has no attesting witnesses. Most states that recognize holographic wills give effect to handwritten changes, such as substituting beneficiaries, made by the testator after the holographic will is completed. Thus, if the original will was a valid holographic will, the change of beneficiaries from Fred to the American Cancer Society will be given effect. The outcome may be different, however, if the original will is an

attested will. These types of changes are not usually given effect if made to an attested will unless the changes themselves are sufficient to constitute a holographic codicil (and the jurisdiction recognizes such codicils). Here, Tom's revisions were signed and together with the handwritten note were probably sufficient to constitute a holographic codicil. Thus, even if the original will was a typewritten, attested will, the beneficiary substitution will be given effect if the jurisdiction recognizes holographic codicils.

If the jurisdiction does not recognize holographic instruments, the next issue is whether the lining through caused a revocation. Most states authorize partial, as well as total, revocation by physical act. One method of revocation by physical act is obliteration (as by lining through) of a material portion of the will. When, as here, a particular provision is obliterated, the question is whether the testator intended to revoke the entire will or only that provision. It seems clear from these facts that Tom intended only to change that provision and leave the rest of his will intact. Thus, the gift to Fred was properly revoked. However, because the unattested addition of the American Cancer Society as beneficiary would not be recognized in these jurisdictions, the court must consider whether the doctrine of dependent relative revocation would apply. Under this doctrine, the court may disregard a revocation if it determines that the act of revocation was premised on a mistake of law or fact and would not have occurred but for the testator's belief that another disposition of his property was valid. The disposition that results from disregarding the revocation must come closer to effectuating what the testator tried but failed to do than would an intestate (or residuary) distribution. Here, the court must determine whether the gift to Fred or the $20,000 passing by the residuary clause would come closer to the testator's plan. Given his falling out with Fred and the alternative residuary beneficiary named in the will, the court would probably find that Fred's gift was revoked and the money passes into the residuary estate.

(2) **Paragraph Fifth**

Jane will take Tom's interest in the 300 acres sold to the neighbor pursuant to a contract for deed. At issue is the effect of the sale and conveyance of specifically devised property.

When specifically devised property is not in the testator's estate at death, the bequest is adeemed—it fails. A partial ademption occurs when, for example, the testator sells a portion of specifically devised land. Ademption applies to the portion of the property not in the estate, but the remaining portion in the estate passes to the beneficiary. Here the 200 acres sold and conveyed to the first neighbor is no longer part of the estate, and that portion of the bequest to Jane is adeemed. She is not entitled to any of the proceeds of that sale.

The 300 acres subsequently sold to the other neighbor, however, remain in the estate due to the nature of the sale. Because the sale was a contract for deed, Tom still held legal title to the property at his death. Moreover, when specifically devised property is subject to an executory contract at the testator's death, the beneficiary is entitled to all of the testator's rights under the contract, including the right to the remaining payments and any security interest retained by the testator. Therefore, in this case, Jane is entitled to the remaining payments over the next 15 years and legal title to 300 acres until the balance is paid in full. She succeeds to all of Tom's interest in the property, including any security interest.

(3) **Paragraph Sixth**

Paragraph Sixth constitutes a valid devise of the residuary estate to ABC Bank as trustee of Trust A. At issue is whether paragraph Sixth is a valid pour-over gift.

A will may dispose of property to the trustee of an identified, amendable inter vivos trust to be held and distributed according to its terms. Property passing under the will is governed by the terms of the trust, even as amended after the execution of the will.

Here, the trust was in existence at the time of the testator's death and is identified in the will. Thus, the will may dispose of property to the trustee (ABC Bank) according to the terms of the trust,

notwithstanding that the trust is amendable inter vivos or that the trust was amended five years after execution of the will.

ANSWER TO EXAM QUESTION NO. 3

(1) **Oscar's Rights**

Oscar is entitled to a forced or elective share. Oscar married Alice three years ***after*** she executed her will. Thus, the first issue is the effect on the will of the subsequent marriage. The states are divided on the effect of marriage on a previously executed will. Most states have no statute dealing with the effect of marriage on a previously executed will. In these states marriage, by itself, does not affect the will. The new spouse is given adequate protection by the elective share statute. A substantial minority of the states have statutes under which the testator's subsequent marriage revokes the will to the extent of providing the new spouse with an intestate share. After distribution of the spouse's intestate share, the will operates to distribute the remaining assets. Thus, depending on whether there is a statute, Oscar will either be entitled to an elective share or an intestate share.

Nearly all of the common law jurisdictions have enacted elective share statutes designed to give the surviving spouse some protection against disinheritance. These statutes give the spouse an election to take a statutory share of the decedent's estate in lieu of taking under the decedent's will. The elective share amount varies from state to state. In most states, the amount is one-third of the decedent's net estate if the decedent was survived by descendants, and one-half if the decedent was not survived by descendants.

In most states, the elective share is first paid in cash or in kind from assets passing under the decedent's will that would have passed outright to the surviving spouse but for the election. To the extent that such assets are insufficient, the elective share is paid pursuant to the abatement rules that apply to creditors' claims. That is, property passing by partial intestacy is first applied; then the residuary estate; then general legacies, demonstrative legacies, and specific bequests are abated (in that order). Here, the entire forced share would be payable from the assets bequeathed to the residuary trust for the benefit of Carrie and her issue.

(2) **Betty's Rights**

Betty is likely entitled to all 1,000 shares of ABC common stock. Whether Betty is entitled to the additional 500 shares of ABC common stock that Alice acquired as a stock dividend between the time the will was executed and the time Alice died depends first on whether Alice intended the bequest to be general or specific.

A general bequest is a gift that is payable out of the general assets of the estate and which does not require delivery of any specific asset or satisfaction from any designated portion of the testator's property. If Alice intended the bequest to be general, then Betty is not entitled to the additional 500 shares because this would be a greater share of the total estate than the value of the 500 shares that Alice specified in the will.

A specific bequest is a gift of a particular item of real or personal property that is capable of being identified and distinguished from all other property in the testator's estate. A specific devise or bequest can be satisfied only by the distribution of the specific asset. Ascertaining whether the testator intended a specific bequest depends on what issue the court is deciding. If the issue is whether property is adeemed by extinction (when it is no longer in the estate at the testator's death), courts will construe a bequest of "500 shares of ABC common stock" as a general bequest (which is not adeemed) rather than a specific bequest (which would result in the beneficiary's taking nothing), even if the testator owned exactly 500 shares of that stock when she made the will. In contrast, if the issue is accessions (increases or additions to the property), whether the testator owned the number of shares that she designated in her will is a critical factor in classifying the bequest as specific rather than general. Here,

since Alice's estate could have satisfied Betty's bequest if Alice had died immediately after the will was executed (because Alice owned 500 shares of ABC stock at that time), the bequest was probably a specific bequest.

Under the traditional view, the fact that the bequest of stock is specific would not resolve the issue of Betty's entitlement to the additional shares. While most courts have always granted a beneficiary of a specific stock bequest any additional shares of stock produced by a ***stock split***, traditionally they distinguished stock dividends, concluding that stock dividends do not pass to the beneficiary of a specific bequest of corporate stock. The rationale was that the shares of stock on hand after the stock split represent the same proportionate share of corporate ownership as before the split and therefore a beneficiary of stock subject to a stock split should receive the additional shares. On the other hand, stock dividends are paid out of the earned surplus of the corporation just the same as cash dividends. They should be treated as income on the original capital and not as part of the original capital. Thus, stock dividends paid during the testator's lifetime should be treated the same as cash dividends, and Betty would be entitled to only 500 shares of ABC stock. Today, most courts and the UPC take the position that the value of the original shares is diminished as much by the issuance of a stock dividend as by a stock split, and hence in either case the new shares should go to the legatee of the specific gift.

(3) **Distribution Among Carrie's Issue If Don and Ellen Predecease Her**

If Don and Ellen were to predecease Carrie and Carrie was then survived by Frank, Gail, Heather, Ida, and Joan, the principal of the trust created under Alice's will would be distributed on a per stirpes or per capita basis depending on state law.

Alice's will states that upon Carrie's death, the principal should be distributed "to Carrie's issue." The word "issue" includes children and grandchildren. While the court will look to the testator's intent to determine how the property should be distributed among Carrie's issue, in the absence of a contrary intent the court will follow the intestacy statute of the state to determine the distribution. When there is at least one taker at the first generational level (i.e., the child level), the shares are divided at the child level. This form of distribution is often called a "per stirpes" distribution. Thus, if Don had survived Carrie, he would have taken a one-half share to the exclusion of his own children, and Ellen's children would have divided in equal amounts the remaining one-half share.

If both Don and Ellen failed to survive Carrie, however, the question becomes how the five grandchildren will divide the property; i.e., are the shares determined at the child level (in which case Frank, Gail, and Heather will take one-sixth and Ida and Joan will take a one-fourth interest) or at the grandchild level (in which case each grandchild will take a one-fifth interest)?

Under the intestacy statute of most states, the shares are determined at the first generational level at which there are ***living*** takers. Each descendant at that generational level takes one share, and the share of each deceased person at that generational level is divided among his descendants by representation. This form of distribution is called "per capita with representation." Thus, if both children predecease Carrie, the five grandchildren would each take a one-fifth share of Alice's trust. Note that the same result would be reached in those states following the modern trend, which is a per capita distribution at each generational level. Under that scheme, the initial division of shares is made at the first generational level at which there are living takers, but the shares of deceased persons at that level are combined and then divided equally among the takers at the next generational level. In this case, the result does not change because all of the takers are at the same generational level. Other states apply a "strict per stirpes" rule. Under this rule, the shares are always determined at the first generational level, even if there are no living takers at that level. Applying a strict per stirpes distribution to the facts, Don's children would share in the one-half share he would have received. Frank, Heather, and Gail would therefore each take a one-sixth interest. Ida and Joan would share in the one-half interest Ellen would have received, and thus each would take a one-fourth interest.

ANSWER TO EXAM QUESTION NO. 4

(1) **Lamb's Contest**

If Lamb contests the purported will and loses, she likely will not lose her $1,000. At issue is whether Lamb has probable cause to contest the purported will.

No-contest clauses, such as the one in this instrument, are valid and enforceable in most states. In most states, the beneficiary who contests the will despite a no-contest clause forfeits her legacy ***unless she has probable cause*** for bringing the contest. Whether the beneficiary has probable cause is a question of fact. Here, although Lamb is unlikely to succeed in a will contest (*see* below), she almost certainly has probable cause to challenge the will given the medical evidence of Angelo's brain damage. Of course, should she be successful in the contest, the no-contest clause falls with the will, and she will take one-half of Angelo's estate.

A minority of states give a no-contest clause full effect, regardless of probable cause. In those states, Lamb would lose her $1,000 legacy if she contests the will.

(2) **Chortle's Contest**

Chortle cannot contest the purported will. At issue is whether Chortle has standing to contest the purported will.

Only interested parties have standing to contest a will. To be an interested party, the person must have a direct interest in the estate that would be adversely affected by the admission of the will to probate. Creditors, even creditors of the decedent, do not have standing to challenge a will. Thus, Chortle, a creditor of Lamb's, has no standing to challenge Angelo's will. If, however, Lamb assigns her interest under the will to Chortle, Chortle would be able to challenge the will.

(3) **Grounds for Contest**

The best possible basis for a will contest is that the influence of the drugs and the damage caused thereby led to a lack of testamentary capacity. This basis is very difficult to prove. The mental capacity required for making a will is a lower standard than that required for making a contract. The testator need only have sufficient capacity to understand: (i) the nature of his act (that he is executing a will); (ii) the nature and extent of his property; (iii) the persons who are the natural objects of his bounty; and (iv) the nature of the disposition. Nothing in the facts indicates that Angelo lacked understanding of any of these facts. In fact, the instrument itself evidences an understanding of some of these factors. For instance, the attesting witnesses and the formality of the document indicate that he understood this was a will, and the gift to his nieces indicates that he knew who were the natural objects of his bounty. The fact that a testator is addicted to drugs does not mean that he lacked the requisite mental capacity and was not able to comprehend the nature of his act. The medical evidence would have to be very substantial to prove that Angelo lacked capacity.

Another challenge could be advanced on the ground that it is not clear that the document was intended as a will; i.e., that the document lacks testamentary intent. For a will to be valid, the testator must intend that the particular instrument operate as his will. Where the instrument lacks a recital that it is a will, testamentary intent will be found only if it is shown that the testator: (i) intended to dispose of property; (ii) intended the disposition to occur only upon his death; and (iii) intended this instrument to accomplish the disposition. It seems clear from the instrument itself that Angelo intended this instrument to dispose of his property. The only question is whether he intended it to occur only upon his death. The attestation and formality of the document indicate that he intended a will. He certainly would not need this type of instrument to give his nieces cash and would probably not use such a document to transfer his paintings. A court would probably find that he intended the disposition of property to occur only upon his death, and that the requisite testamentary intent was present to make this instrument a valid will.

A contest could also be based on an allegation of undue influence on the part of Vulture. A will or gift therein obtained through undue influence is invalid. To establish undue influence, the contestants (who have the burden of proof) must establish that: (i) influence was exerted on the testator; (ii) the effect of the influence was to overpower the mind and free will of the testator; and (iii) the product of the influence was a will that would not have been executed but for the influence. While it is true that Vulture, as Angelo's drug supplier, was in a position to influence Angelo, circumstantial evidence of undue influence is generally insufficient. Thus, the fact that Vulture had an opportunity to influence Angelo, the fact that Angelo may have been more susceptible to influence because of the drugs, and the fact that the bequest to Vulture could be seen as an unnatural disposition (in that it favors a nonrelative over relatives, especially since there is no evidence of a personal relationship between Angelo and Vulture) all amount to circumstantial evidence and are insufficient on their own to establish undue influence.