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LAW SCHOOL ESSENTIALS:
WILLS AND TRUSTS

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WILLS AND TRUSTS

I. THE "RIGHT" TO INHERIT AND CONVEY

A. GENERALLY

While a decedent generally has the right to dispose of her property upon her death, states have broad authority to regulate that process. The complete abolition of the rights of an owner to dispose of her property rights, however, is a taking without just compensation, violating the owner's rights under the Fifth Amendment to the U.S. Constitution. *Hodel v. Irving*, 481 U.S. 784 (1987) (escheat provision of Indian Land Consolidation Act of 1983 constituted unconstitutional taking of decedent's property without just compensation).

B. PROBLEM OF THE "DEAD HAND"

Testators sometimes condition gifts to beneficiaries on the beneficiary doing something or behaving in a certain way after the testator has died. These attempts to control behavior from beyond the grave have generally been held **valid**, unless they violate public policy or the enforcement of the testator's condition would constitute state action that violates a fundamental constitutional right of the beneficiary.

1. Restraints on Marriage

a. Absolute restrictions are prohibited

Provisions in a will imposing a forfeiture of a gift if the beneficiary should ever marry are **void** as against public policy. Similarly, requirements that a beneficiary may marry only with the consent of executors or trustees who would profit under the terms of the will by withholding consent have been held invalid.

b. Partial restraints are generally valid

Most provisions, however, that might initially be viewed as absolute restraints on marriage have been construed as mere statements of the testator's motives or attempts by the testator to provide for a person until marriage, and as such, have been upheld. Conditions in partial restraint of marriage are not against public policy if they merely impose reasonable restrictions on marriage or attempt to prevent an ill-advised marriage (e.g., to a specific individual). A provision conditioning a gift upon the beneficiary's not marrying a person outside his own religious group has been held to be valid. *Shapira v. Union National Bank,* 39 Ohio Misc. 28 (1974) (upholding testator's testamentary gifts to sons requiring each to be married within seven years of testator's death to Jewish girl, both of whose parents were Jewish).

2. Other Conditions Violating Public Policy

a. Gift requiring practice of religion

Testamentary gifts that require a beneficiary to practice a particular religion have generally been held to be invalid as violative of the freedom of religion.

b. Gift requiring separation or divorce

Testamentary gifts that are conditioned on a beneficiary divorcing or separating from his spouse are void as against public policy. A gift that provides for a beneficiary's support in the event of divorce or separation, however, would be

valid. Courts look to the intent of the testator to decide validity. If the testator intended to encourage the divorce or separation through the gift, it will be invalid.

3. Remedy

In the event a conditional gift is found to violate public policy, to decide what happens to the gift, courts look to whether the instrument providing for the gift contains a "gift-over" clause that specifies what is to happen in the event a condition is not satisfied. If there is a gift-over clause, a court will strike the gift as violating public policy, but the court will not generally allow the beneficiary subject to the condition to take. Instead, the alternative beneficiary under the gift-over clause will receive the gift. If there is no gift-over clause in the instrument, most courts strike the condition and allow the beneficiary subject to the condition to take the gift despite the condition.

EXAM NOTE: On an exam, remember that conditional gifts are generally valid, so long as they do not fall within one of the exceptions discussed above.

II. INTRODUCTION TO PROBATE

Each state has a set of statutes (i.e., a Probate Code), which governs the intestate distribution scheme, the requirements for a valid will, and rules of construction and interpretation, etc. Probate performs three key functions: (1) **provides evidence** of transfers of title; (2) **protects creditors** by requiring payment of debts; and (3) **directs distribution** of the decedent's property after creditors are paid.

A. TERMINOLOGY

1. Personal Representative

When a person dies and probate is necessary, the first step is the appointment of a personal representative to oversee the winding up of the decedent's affairs. A personal representative is either named in the will (generally called an "executor") or appointed by the court (generally called an "administrator"). Any person with the capacity to contract may serve as a personal representative.

2. Probate Court

The court that supervises the administration of the probate estate is generally referred to as the probate court. One court in each county has jurisdiction over administration of decedent's estates. Sometimes this court is called a "surrogate's court," an "orphan's court," or the probate division of the district court. To "go through probate" means to have an estate administered by a probate court.

3. Probate Versus Non-Probate Property

A decedent's assets as of the date of his death are divided between probate and non-probate property.

a. Probate property

Probate property is property that passes under intestacy or under the decedent's will. Distribution of probate property generally requires a court proceeding involving the probate of a will or a finding of intestacy followed by appointment of a personal representative to settle the probate estate.

b. Non-probate property

Non-probate property passes under an instrument other than a will. Distribution of non-probate property does not involve a court proceeding, but is made in accordance with the terms of the controlling contract or trust or deed.

1) Joint tenancy property

Both real and personal property that is held under a joint tenancy will pass outside of probate. The decedent's interest vanishes at death and the survivor has the whole property, with no need for probate.

2) Life insurance

Life insurance proceeds from a policy on the decedent's life are paid by the insurance company directly to the beneficiary named in the insurance contract upon receipt of the insured's death certificate. No probate is needed.

3) Contracts with payable-on-death provisions

When a decedent has a contract with a bank, an employer, or some other entity to distribute property upon the decedent's death to a named beneficiary, all the beneficiary need do is provide a death certificate to the custodian of the property. Pension plans, for example, often provide survivor benefits.

4) Trust interests

Property held in a testamentary trust created under the decedent's will, will pass through probate. Property put into an inter vivos trust during the decedent's lifetime, however, does not pass through probate.

EXAM NOTE: When analyzing how to distribute property, first pass any **non-probate property** to those identified in the non-probate instrument. Any remaining property is **probate property**, and the takers of probate property depend on whether there is a valid will. If the decedent did not have a valid will (or if there is property not properly disposed of in the will), the property is distributed **intestate**, pursuant to the jurisdiction's statute on distribution.

B. PROCEDURE

1. Jurisdiction

The administration of the decedent's probate estate is governed by state statute. The Uniform Probate Code (UPC), originally promulgated in 1969 and substantially revised in 1990, 2006, and 2008, is representative of statutes regulating probate procedure in the states.

Note that because only a small minority of states has adopted the 2008 amendments, references to the UPC in this outline are to the 2006 version.

a. Primary jurisdiction

The county in which the decedent was domiciled at the time of his death has jurisdiction over the decedent's personal property and over any real property within that jurisdiction.

b. Notice

Most jurisdictions require that notice be given to interested parties before the administrator is appointed.

c. Ancillary jurisdiction

Ancillary jurisdiction applies to real property located in another jurisdiction for the purpose of protecting local creditors and ensuring adherence to the jurisdiction's recording system.

2. Personal Representative

Each state has a detailed statutory procedure for authorizing an executor or administrator to act on behalf of the estate. If an executor is not named in a will, then the court will appoint an administrator. In either case, the authority of the personal representative to act on behalf of the estate comes from the court. Generally, the personal representative must also file a bond, unless the will states otherwise.

a. Principal duties

The principal duties of the personal representative are to:

i) **Provide notice** to legatees, heirs, and claimants;

ii) **Inventory** and collect the assets of the decedent;

iii) **Manage** the assets during administration;

iv) **Receive** and pay claims of creditors and tax collectors; and

v) **Distribute** the remaining assets to those entitled thereto.

The scope of power to administer the estate varies among jurisdictions. Some jurisdictions permit unsupervised administration absent special circumstances with a final accounting to the court, while others require constant supervision and authorization.

b. Fiduciary duty

The personal representative of an estate is a fiduciary, and owes the highest duty of loyalty and care to those whose interests he represents, which means that he cannot profit from the trust instilled in him. The personal representative is not discharged from his fiduciary duties until the court grants such discharge. Common law permits a personal representative to be held personally liable for the actions of the estate. Under the UPC, personal representatives can be sued in their representative capacity only for a breach of the fiduciary duty. Unif. Probate Code §§ 3-712; 7-306.

c. Administration

After the court issues its "letters testamentary" or "letters of administration," the personal representative is authorized to begin performing his duties on behalf of the estate.

Bona fide purchasers from personal representatives or heirs are protected after the granting of letters of administration, even if the will presented at the time the letters were granted is subsequently invalidated.

3. Ex Parte Versus Notice Probate

Under common law, a will could be probated at any time, even decades after the testator's death. The UPC provides that probate proceedings must be brought within **three years of death**, after which there is a presumption of intestacy. The party requesting probate can choose to have it occur through either ex parte probate or notice probate. Unif. Probate Code § 3-102.

a. Ex parte probate (informal or no notice)

Ex parte probate under the UPC is informal and requires no notice for the representative to petition for appointment. The original will must accompany the petition and the executor must swear that, to the best of his knowledge, the will was validly executed.

Within 30 days of appointment, the personal representative must give notice to all interested persons, including heirs apparently disinherited by the will.

b. Notice probate (formal)

Notice probate under the UPC is a formal judicial determination made after notice is given to interested parties. Any interested party can demand formal probate. A formal proceeding may be used to probate a will, to block an informal proceeding, or to secure a declaratory judgment of intestacy. Formal proceedings are final if not appealed.

4. Creditors' Claims

a. Period of limitations

Each state has **non-claim statutes** that bar creditors from filing claims after a specified time period has elapsed. If a claim is not made within that specified period after probate is opened, then the claims are barred.

b. Notice

The personal representative must provide notice to creditors of the estate, advising them of when and where to file claims. Failure to give the proper notice to creditors extends the time period they have to file a claim against the estate.

c. Priority of claims

All jurisdictions have statutes that provide the order in which expenses and debts are to be paid:

i) Administrative expenses;

ii) Last medical expenses and funeral expenses;

iii) Family allowance;

iv) Tax claims;

v) Secured claims;

vi) Judgments against the decedent; and

vii) All other claims.

5. Closing the Estate

The personal representative is expected to complete the administration and distribute the assets promptly, including paying creditors and tax collectors. Judicial approval of the personal representative's actions is required to release the personal representative from potential liability. The personal representative may receive compensation for his services. The compensation is determined by statute based on the estate's value, or by the court. However, the court may deny compensation if the personal representative has breached his fiduciary duties.

C. AVOIDING PROBATE

The probate process can cost a lot of money. To avoid probate, theoretically, a person could put all of her property into non-probate arrangements. This can often be difficult to do. All states have a small estate probate process that allows for expedited probate with very limited court supervision to minimize the cost and time required. In Louisiana, "universal succession" applies to automatically pass the property to the appropriate heirs by operation of law, with no need for probate. The heirs are then required to pay the decedent's creditors from the property they receive.

III. PROFESSIONAL RESPONSIBILITY

A. MALPRACTICE CLAIMS IN ESTATE PLANNING

There is a split between the common law approach and the majority modern approach as to whether an attorney representing a client in wills and trusts work owes a professional duty to both the client who hired her and the intended beneficiaries of the client's estate planning.

1. Common Law Approach

At common law, courts construed the attorney-client relationship narrowly to protect attorneys from malpractice claims by persons who thought they would take under the decedent's will or other estate planning mechanisms but did not. For tort claims of malpractice, the common law held that the attorney owed a duty of reasonable care only to the testator client and not to any of the intended beneficiaries. Only a testator, while alive, or the personal representative of the estate after the testator's death, could sue for malpractice based on tort. For contract claims of malpractice, the common law required privity of contract and an attorney is only in privity of contract with her client, the testator. Thus, only the testator, while alive, or the personal representative of the estate after the testator's death, could sue the attorney for breach of contract.

2. Majority Modern Approach

The majority approach today extends the attorney-client relationship for both tort and contract purposes to intended beneficiaries, allowing them to also sue the drafting attorney for malpractice with regard to the testator's estate planning. For tort malpractice, courts look to whether the injury to the intended beneficiaries was "reasonably foreseeable." See *Simpson v. Calivas*, 650 A.2d 318 (N.H. 1994) (attorney drafting will owes duty of reasonable care to intended beneficiaries of will). For breach of contract, courts adopting the modern approach hold that a non-party may sue if she qualifies as a third-party beneficiary of the contract between the attorney and the testator.

EXAM NOTE: If the fact pattern on an essay exam does not tell you which approach the jurisdiction follows with regard to malpractice claims, be prepared to provide an analysis under both the common law and modern approaches.

B. DUTY TO DISCLOSE

An estate planning attorney may have a duty to disclose what would otherwise be considered the confidential information of the testator to another client of the attorney. In *A v. B*, 158 N.J. 51 (N.J. 1999), a law firm represented a husband and wife for purposes of planning their estates. Both the husband and wife signed a waiver of conflict of interest form, which permitted the law firm to disclose confidential information obtained from one party to the other, but said nothing about information obtained from outside sources. As the result of a clerical error, another attorney in the firm agreed to represent a woman who wanted to bring a paternity action against the husband for fathering her child. On realizing the conflict, the law firm withdrew from representing the woman in the paternity action. The estate planning lawyers believed, however, that they had an ethical duty to disclose to the wife the possible existence of an illegitimate child and the potential estate planning consequences of such a situation. Invoking the ethical duty of confidentiality, the husband sought to restrain the firm from revealing this information. The court concluded that under Rule 1.6(c) of the New Jersey Rules of Professional Conduct, the law firm was permitted (but not required) to disclose the confidential information to rectify the consequences of a client's criminal, illegal, or fraudulent act in furtherance of which the lawyer's services had been used. Concluding that the husband's decision not to disclose to the wife the information would have constituted a fraud on the wife, the court found disclosure proper. Note that New Jersey's Rules of

Professional Conduct are broader than the ABA Model Rules, which permit disclosure only when failure to do so would likely result in imminent death or substantial bodily harm. ABA Model Rule 1.6.

IV. INTESTATE SUCCESSION

Intestacy is the default statutory distribution scheme that applies when an individual dies without having effectively disposed of all of his property through non-probate instruments or a valid will. Intestacy statutes vary from state to state, but they generally favor the decedent's **surviving spouse** and **issue (descendants)**, followed by the decedent's other relations, and they direct that property escheat to the state only if none of the statutory takers survive the decedent. The actual intent of the decedent is irrelevant with regard to any property that passes by intestacy.

The individuals who are entitled to a decedent's property if she dies intestate are the decedent's "**heirs**."

EXAM NOTE: On an exam, if a will fails to dispose of all of the decedent's property, analyze the problem using the rules of intestacy for any property not included in the will.

A. GENERALLY

The primary policy involved in framing an intestacy statute is to carry out the probable intent of the average intestate decedent. The most common statutory scheme assumes that the decedent would wish for her surviving spouse to succeed to all of her property if she had no surviving issue, and otherwise to share her property with her surviving issue.

1. UPC Intestacy Scheme

The UPC is considerably more generous to the surviving spouse than are the provisions of most state intestacy laws. Under the UPC:

i) If all of the decedent's descendants are also descendants of the surviving spouse, and the surviving spouse has no other descendants, then the surviving spouse takes the entire estate to the exclusion of the decedent's descendants.

ii) If the decedent's descendants are not also the descendants of the surviving spouse, the surviving spouse takes $300,000 and 75% of the remainder of the estate if there are no issue, but there is a surviving parent of the decedent.

iii) The surviving spouse receives $225,000 and 50% of the remainder of the estate if all of the decedent's issue are also issue of the surviving spouse and the surviving spouse has other issue.

iv) If the decedent has issue not related to the surviving spouse, then the surviving spouse receives $150,000 and 50% of the remainder of the estate.

v) If the decedent has a spouse but no descendants or parents, then the surviving spouse takes the entire estate.

Unif. Probate Code §§ 2-102, 2-103, 2-105.

In addition to favoring the surviving spouse, the UPC also favors the state. The decedent's property escheats to the state much sooner than under most state statutes, as it does not consider the issue of parents. Unif. Probate Code § 2-102(1)(i).

Example: Wife dies with an estate worth $550,000 and is survived by her husband and a child from a prior marriage. Since there is a child from a prior marriage, the husband will take $150,000 plus 50% of the remainder of the estate ($200,000), or $350,000. If, however, Wife dies with $550,000, survived by her husband, her parents, her cousin Rhonda, and her best friend Jane, but not by any children, the

husband takes the entire estate under the UPC. The husband, as the surviving spouse, will take everything over all other people except children or issue.

2. Community Property

The general intestate distribution scheme presumes that the jurisdiction does not recognize community property. Community property considers all property acquired during a marriage as jointly owned by the parties unless it is a gift, inheritance, or devise given to only one spouse. In a community property jurisdiction, the community property of the decedent is divided equally and 50% of the community property is given to the surviving spouse. If the decedent was intestate, then the surviving spouse generally receives the decedent's remaining 50% share of the community property. The decedent's separate property is then distributed pursuant to the general intestate scheme.

B. INTESTATE SHARE OF SURVIVING SPOUSE

1. Marriage Requirement

To be entitled to take under an intestacy statute, the surviving spouse must have been legally married to the decedent. Several states, including Connecticut, Iowa, Maine, Massachusetts, New Hampshire, New York and Vermont, recognize same-sex marriage and spouses in such marriages would be entitled to intestate succession rights.

a. Cohabitation insufficient

Generally, unmarried couples who simply live together do not qualify as spouses.

1) Common law marriage

Some states recognize common law marriage, which exists when the parties: (i) agree they are married; (ii) cohabitate as husband and wife; and (iii) hold themselves out in public as married, even though no marriage ceremony has taken place and no license has been issued by the state.

2) Domestic partners and civil unions

A minority of jurisdictions afford couples who have registered as domestic partners or entered civil unions similar treatment to spouses for inheritance purposes.

b. Putative spouses

Even if a marriage is not valid, as long as one party believes in good faith in its validity, the spouses are termed putative and qualify as spouses for inheritance purposes.

c. Abandonment

In many states, if one spouse abandons the other for a prescribed period, then the marital relationship is terminated and the two are no longer considered spouses. The abandonment must be voluntary, permanent, and non-consensual on the part of the spouse who has been abandoned.

d. Separation

Spouses who are separated, or are in the process of obtaining a divorce, remain spouses until the issuance of a final decree of dissolution of the marriage. Decrees of separation that do not terminate the status of husband and wife do not constitute a divorce. Unif. Probate Code § 2-208(a). This treatment applies to a will in which a devise is made to a spouse as well as an intestacy distribution.

2. Survival Requirements

If an heir of a decedent fails to meet the survival requirement, then the heir is considered to have predeceased the decedent and does not take under the laws of intestacy.

a. Common law

The common-law requirement was that an heir must be proved to have survived the decedent by a **preponderance of the evidence**.

b. Uniform Simultaneous Death Act (USDA)

The USDA has been enacted in most states in an attempt to alleviate the problem of simultaneous death in determining inheritance. Originally, as enacted in 1940, the USDA essentially codified the common law rule, providing that when there was no sufficient evidence as to which person survived the other, the party claiming a right to take was to be treated is having predeceased the decedent. *See e.g., Janus v. Tarasewicz*, 135 Ill. App. 3d 936 (Ill. App. Ct. 1st Dist. 1985) (holding that there was sufficient evidence to find that wife placed on respirator survived husband).

The common law (original USDA) standard came under criticism because it was difficult to determine what constituted "sufficient evidence" of the order of deaths. The USDA standard was then changed in 1991 to require that an heir be proven **by clear and convincing evidence** to have survived the decedent by **120 hours** (five days) in order to take under his will or by intestacy, unless the testator has provided otherwise in his will. The 120-hour rule does not apply if its application would result in an escheat to the state.

The USDA is applicable to all types of transfers of property, whether through will, joint tenancy, contract, or intestacy. However, the USDA is applied only when there is no instrument to state otherwise.

c. UPC

The UPC has the same requirements with respect to survival as the USDA. The UPC also requires clear and convincing evidence that an individual in gestation at the decedent's death lived for 120 hours after the death. Unif. Probate Code § 2-104.

d. Determination of death

At common law, in most instances, death can be determined based upon the irreversible cessation of circulatory and respiratory functions. The modern standard redefines death as brain death. There are no established criteria for brain death, but a court will require that the determination of death under either the modern or the common-law standard adhere to the usual and customary standards of medical practice. *See Janus v. Tarasewicz*, 135 Ill. App. 3d 936 (Ill. App. Ct. 1st Dist. 1985) (determination of legal death must be made in accordance with usual and customary standards of medical practice).

e. Burden of proof

Survivorship is a question of fact that must be proven by the **party whose claim depends on survivorship** (i.e., the person attempting to take under the laws of intestacy has the burden of proof). At common law, a preponderance of the evidence standard applied. Some jurisdictions, including the UPC and USDA, have applied the higher "clear and convincing evidence" standard as a litigation deterrent.

Example 1: Husband and Wife are in a car accident together. Husband is pronounced dead at the scene. Wife is in a coma and does not die for another two days. Husband is survived by his son, A. Wife is survived by her daughter, B. They are both children from prior marriages. Wife has a $500,000 estate. Husband has a $1 million estate. Since Husband and Wife are treated under the USDA as having died simultaneously because they died within 120 hours of each other, each is treated as having predeceased the other for purposes of disposing of each person's estate. In which case, under the UPC intestacy statute (*see* § IV.A.1, *supra*), Husband's estate ($1 million) goes to his son A. Wife's estate ($500,000) goes to her daughter B. Simultaneous death means that in dividing Husband's estate, we assume that the wife had predeceased him, so that he did not have a surviving spouse. But in dividing up the wife's estate, we assume that her husband predeceased her and so she does not have a surviving spouse.

Example 2: Contrast example 1 with what happens when death is not simultaneous. Thus, Husband dies at scene of car accident, but Wife is rushed to the hospital and put on life support and does not actually die for more than 120 hours. After that 120 hour point, Wife is treated as having survived Husband. Thus, Wife will take her intestate share from Husband's estate. He had a $1 million estate. Under the UPC intestacy statute (*see* § IV.A.1, *supra*), she therefore takes $150,000 plus 50% of the rest of the estate ($850,000), which equals $575,000. Wife dies a few days later. Her daughter, B, then will take all of Wife's estate -- the $500,000 she had, and the money that Wife inherited from Husband who died first. Thus, B gets $1,075,000. A, Husband's son, only gets $425,000 (50% of $850,000) under this scenario.

C. ISSUE

1. Qualifications

A decedent's issue includes all lineal descendants, including children, grandchildren, great-grandchildren, and the like, but excluding the descendants of living lineal descendants. A parent-child relationship must be established for an individual to be classified as issue of another.

a. Married parents

1) Presumption

A child of a marriage is presumed to be the natural child of the parties to the marriage.

2) Posthumously-born children

A child conceived before but born after the death of his mother's husband is a posthumously-born child. In most jurisdictions, a rebuttable presumption exists that the child is the natural child of the deceased husband if the child is born within 280 days (ten lunar months) of the husband's death. A posthumously-born child born more than 280 days after the husband's death has the burden of proving that he is the deceased husband's natural child.

Note: The Uniform Parentage Act, Article 2, § 4 increases the number of days in which the rebuttable presumption applies to 300.

b. Adoption

References in a will to "children" are deemed to include adopted children unless the will otherwise indicates. An adopted child is treated as a biological child for purposes of inheritance.

1) Inheritance from and through parents

Adoption generally curtails all inheritance rights between the natural parents and the child. Unif. Probate Code § 2-119(a).

Historically, many courts held that an adopted child had the right to inherit from, but not through, her adoptive parents. The majority rule today, however, is to permit an adopted child to inherit both from and through her adoptive parents, unless the will expresses a contrary intent.

2) Stepparent exception

The majority of jurisdictions, including the UPC, modify the general rule curtailing an adoptee's inheritance rights from her natural parents when the adoption is by a stepparent. The adoption does sever the parent-child relationship with either natural parent, essentially replacing the child's family with a "fresh start." The adoption does not curtail the parent-child relationship or the inheritance rights of a natural parent who is married to the stepparent. Rather, the adoption establishes a parent-child relationship between the stepparent and child, including full inheritance rights in both directions.

However, a parent-child relationship still does exist with the other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through that other genetic parent. Unif. Probate Code § 2-119(b).

A minority of jurisdictions hold that the parent-child relationship with the natural parent is entirely severed. *See, e.g., Hall v. Vallandingham*, 75 Md. App. 187 (Md. Ct. Spec. App. 1988) (holding that an adopted child is no longer considered a child of either natural parent and loses all rights of inheritance from the natural parents).

Example: H and W are married and have a child, A. H dies, and W then marries Z, who subsequently adopts A. H's brother dies without any children of his own, without any issue, and without a surviving spouse. Can A take through his natural father, H, who would have taken part of his brother's estate, even though A has been adopted by Z? Under the majority rule, yes. The decedent was a descendent of the adopted child's grandparent. He is taking from his uncle. His uncle was the son of his grandparent. The adoptive parent, Z, was married to the child's other biological parent. The same thing happens if instead of H dying, H and W had divorced and W and Z had married and Z adopted A. Even then, the adoption will not prevent A from inheriting from or through his natural father.

3) Adoption after death of both parents

The UPC provides that when a child is adopted after the death of both natural parents, the child retains the right to inherit through both natural parents. Unif. Probate Code § 2-119(d).

4) Adult adoption

Most state intestacy schemes make no distinction between the adoption of a minor and the adoption of an adult. In some states, adoption of a person with whom one has had a sexual relationship is not permitted.

The majority rule today is to permit an adoptee, whether child or adult, to inherit both from and through her adoptive parents, unless the will expresses a contrary intent. Some courts, though, have been reluctant to apply this rule

when the adoptee is an adult. In *Minary v. Citizens Fidelity Bank & Trust Co.*, 419 S.W.2d 340 (Ky. Ct. App. 1967), a testatrix's will devised her estate in trust with income to her husband and three children for life and, on the death of the last beneficiary, the principal to be distributed to her "then surviving heirs" under the then existing Kentucky intestacy rules. After the testatrix's death, the husband and two of the three children died. The remaining child adopted his adult wife. Following the last child's death, his wife demanded that the bank distribute the principal of the trust to her, as an heir of the testatrix. The court held that the adoption statutes should not be interpreted to allow adoption of an adult for the purpose of bringing that person under the provisions of a pre-existing testamentary instrument when the person was not intended to be so covered by the instrument.

5) Inheritance from and through an adopted child

If an adopted child dies intestate, his property is distributed among those individuals who would have been his heirs had he actually been born to his adoptive parents. Unif. Probate Code § 2-119(b).

c. Equitable adoption

1) In general

Equitable adoption involves a situation in which the natural parents transfer their child to a person who agrees to adopt the child and treats the child as her own but then fails to legally adopt the child. Under the principles of equity, the child will be treated as the child of the person who promised to adopt with regard to the distribution of that person's intestate estate.

Thus, for example, a foster child who was never legally adopted may be treated as the child of a foster parent who dies intestate if the foster parent made an agreement with the natural parents of the child to adopt him and proceeded to treat the child as his own.

2) Agreement

The agreement may be oral or in writing and may be express or implied.

3) Limitations

Generally, under equitable adoption, a child can inherit from, but not through, the equitable adoptive parent. Additionally, the equitable adoptive parents cannot inherit from or through the child. Unlike a true adoption, the parent-child relationship and the inheritance rights between the child and the natural parents are not affected.

4) Cases

In *O'Neal v. Wilkes*, 263 Ga. 850 (Ga. 1994), a woman who had been raised by the testator, but never formally adopted, petitioned for a declaration of equitable adoption. The court denied the claim, finding that the woman's aunt, who had transferred physical custody of the woman when she was twelve to the testator, never had legal authority to consent to an adoption by the testator. The court held that a contract to adopt may not be enforced in equity unless it was entered into by a person with legal authority to consent to the adoption. The dissent argued that the doctrine of equitable adoption should apply whenever a child is led to believe that she was adopted.

Other courts have been less strict in requiring a contract. In *Welch v. Wilson*, 516 S.E.2d (W.Va. 1999), for example, the court did not require a contract

and primarily relied on the evidence of a close, loving parent-child relationship to allow a woman who was raised by her grandmother and step-grandfather to be treated as having been equitably adopted and to inherit the step grandfather's estate.

d. Half-bloods

At common law, relatives who shared only one common parent were not entitled to inherit from or through one another. The UPC and the majority of jurisdictions have abolished the distinction between whole- and half-blooded relatives. Unif. Probate Code § 2-107.

e. Children born out of wedlock

1) Common-law and modern trend

The common-law rule was that if a child was born out of wedlock, then he could not inherit from his natural father. The modern trend adopted by most jurisdictions is that an out-of-wedlock child cannot inherit from his natural father unless:

i) The father **subsequently married** the natural mother;

ii) The father **held the child out** as his own and either received the child into his home or provided support;

iii) **Paternity was proven** by clear and convincing evidence after the father's death; or

iv) **Paternity was adjudicated** during the lifetime of the father by a preponderance of the evidence. It is unconstitutional to deny inheritance rights to a nonmarital child when the father's paternity was adjudicated during his lifetime. *See Trimble v. Gordon*, 430 U.S. 762 (1977); *Reed v. Campbell*, 476 U.S. 852 (1986).

The current trend is to allow more ways for out-of-wedlock children to prove parentage after the alleged parent is deceased.

2) Uniform Parentage Act (UPA)

The UPA requires proof of paternity before a child can inherit from or through her natural father.

a) Presumption of paternity

The child can bring an action to establish paternity for inheritance purposes at any time if a presumption of paternity exists.

b) No presumption of paternity

A child must bring an action to establish paternity for inheritance purposes within three years of reaching the age of majority when there is no presumption of paternity, or the action is barred.

c) Acknowledgment of child

A presumption of paternity arises if the father acknowledges the child as his own, either by holding the child out as his own or by stating so in writing and filing the writing with the appropriate court.

f. New forms of parentage

1) Posthumously-conceived children

As science has developed reproductive technology allowing eggs and sperm to be frozen and used at any time, children can now be conceived after the death of a parent.

a) Intestacy

Jurisdictions are only beginning to confront the issue of whether a posthumously-conceived child can inherit under an intestacy act. Some, like New Jersey and Massachusetts allow inheritance under certain circumstances. In *Woodward v. Commissioner of Social Security*, 435 Mass. 536 (Mass. 2002), the Massachusetts Supreme Court held that a child posthumously conceived through reproduction technology may constitute "issue" under the state intestacy statute if there is a genetic relationship between the child and the decedent and the decedent consented to the posthumous conception and to the support of any resulting child. Other jurisdictions, such as Virginia, have adopted the Uniform Status of Children of Assisted Conception Act (USCACA), which does not recognize posthumously-conceived children as natural children of a parent who dies before conception.

b) Wills and trusts

A person can specifically provide in a will or other written instrument (e.g., an inter vivos trust) that a posthumously-conceived child is to be treated as her child under the instrument. If the instrument fails to specifically indicate the decedent's intent, the trend is to consider the child to be the child of the decedent. *See e.g., In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. 2008) (holding that when instrument is silent, posthumously-conceived child should be granted same rights as children conceived prior to parent's death).

c) UPC

The UPC provides that a posthumously-conceived child can inherit from a deceased parent if the parent authorized the posthumous conception in a signed writing, or there is clear and convincing evidence of consent, and the child is living in utero within 36 months of, or born within 45 months of the parent's death. Unif. Probate Code §§ 2-120; 2-705(b)(g).

2) Surrogate motherhood

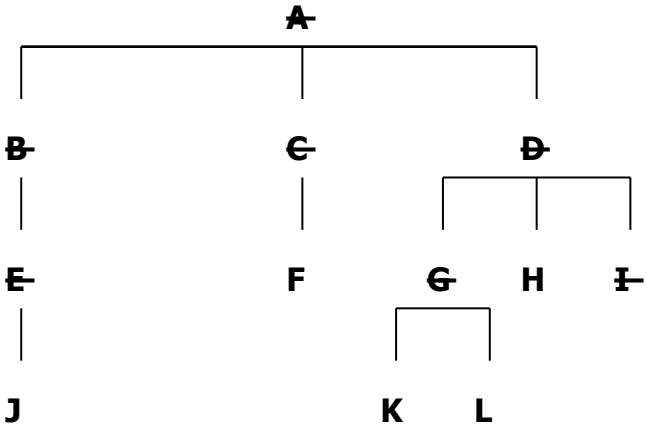
A surrogate mother contracts to bear a child for another person or couple, agreeing that the child will belong to that other person or couple. The child may or may not be genetically related to the surrogate mother. If the agreement breaks down, courts must determine who should have custody of the child and who constitutes the child's legal parents. Under the UPC, a "gestational carrier" does not constitute a parent unless she is the child's genetic mother and no one else has a parent-child relationship with the child. A person who entered into an agreement with the surrogate to be the parent would constitute the legal parent if the person functioned as a parent of the child within two years of the child's birth. Unif. Probate Code § 2-121.

2. Calculating Share

The UPC adopts the **per capita at each generation** approach, although most jurisdictions are split between the **per stirpes** and the **per capita with representation** schemes.

a. Per capita with representation

The per capita with representation approach divides the property equally among the first generation when at least one member survives the decedent, with the shares of each member of that generation who does not survive the decedent passing to the then-living issue of the non-living member. If the non-living member has no then-living issue, then the non-living member does not receive a share.



[Figure I]

Example: In Figure I, above, A dies and is predeceased by her children B, C, and D, all of whom have surviving issue. Application of a per capita by representation scheme causes A's estate to be first divided at E's generation (because there are no surviving members of B's generation) and then to be distributed among all living members and all non-living members who are survived by issue. Because I is deceased without issue, I does not receive a share, and E, F, G, and H each take one-fourth. At J's generation, J takes E's one-fourth share in its entirety, and K and L share G's one-fourth share.

b. Per stirpes

A distribution occurs per stirpes when the issue take in equal portions the share that their deceased ancestor would have taken, if living. The estate is first divided into the total number of children of the ancestor who survive or leave issue who survive.

Example: Applying a per stirpes distribution scheme to Figure I, above, A's estate is divided equally at B's generation even though there are no survivors. J takes B's share (because E predeceased A), F takes C's share, and G and H share equally in D's share. Because G has predeceased A, K and L will equally split G's share. I, who predeceased A and left no issue, gets nothing.

c. Per capita at each generation

The per capita at each generation approach, followed by the UPC, divides the property into as many equal shares as there are members of the nearest generation of issue who survive the decedent and deceased members of that generation with issue who survive the decedent. Unif. Probate Code § 2-106(b).

EXAM NOTE: When analyzing fact patterns using the per capita at each generation approach, begin as per capita with representation, but then divide the remaining shares equally among the members of the next generation.

Example: Applying a per capita at each generation scheme to Figure I., above, A's estate is divided into four shares: one each for F and H, who survived, and one each for E and G, who left living descendants. E and G's shares are pooled and divided among J, K, and L equally. In other words, F and H each get one-fourth, and J, K, and L divide the remaining one-half equally.

d. Negative inheritance

Under common law, the only way for an individual to disinherit an heir was to execute a will disposing of all of his property, because any property not so disposed of could potentially pass to that heir through intestacy.

The UPC allows an individual to disinherit an heir by properly executing a will expressing such intent, even if not all property is disposed of within the will. The barred heir is then treated as having predeceased the decedent. Unif. Probate Code § 2-101(b).

D. ANCESTORS AND REMOTE COLLATERALS

If no surviving spouse or issue exist to succeed to the decedent's estate, then the property may be distributed to the decedent's ancestors (e.g., parents, grandparents, great-grandparents) and more remote collateral relatives (i.e., those related to the decedent through a common ancestor, such as siblings, cousins, aunts, and uncles).

1. Parentelic Approach

The parentelic approach follows collateral lines until a live taker is found, at which point the decedent's property is distributed within that taker's parentelic line. A decedent's estate would first pass to the decedent's parents and their issue (the decedent's siblings); if there are none, then to the decedent's grandparents and their issue (aunts, uncles, and cousins), and so on.

2. Degree-of-Relationship Approach

The degree-of-relationship approach results in those with closer degrees of relationship to the decedent taking to the exclusion of more remote relatives. The degree of relationship is calculated by counting the number of relatives between the living taker and the decedent using the closest common ancestor.

3. Combined Approach

The parentelic approach is used as a tiebreaker in the event that the degree-of-relationship approach results in a tie between multiple living takers sharing the same lowest degree of relationship. Those in the closer collateral line take to the exclusion of those in the more remote collateral line.

4. UPC Approach

If there is no surviving spouse or descendant, then the estate passes in the following order to the individuals designated below who survive the decedent:

i) To the decedent's parents equally if both survive, or to the surviving parent;

ii) If there is no surviving descendant or parent, then to the descendants of the decedent's parents;

iii) If there is no surviving descendant, parent, or descendant of a parent, then the estate passes to the decedent's maternal and paternal grandparent, one-half to each, or to the descendants of the decedent's maternal and paternal grandparents if the grandparents are deceased;

vi) If there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, then the entire estate passes to the decedent's nearest maternal and paternal relative;

v) If there are no surviving relatives, then the entire estate passes to the descendants of any predeceased spouse; and

v) If there are no descendants of any predeceased spouse, the estate escheats to the state.

A parent cannot inherit through a child if her parental rights have been terminated, or if the child dies before the age of 18 and there is clear and convincing evidence that the parental rights of the parent **could** have been terminated under state law. Unif. Probate Code § 2-114.

V. TRANSFERS TO CHILDREN

A. ADVANCEMENTS

If a child wants to share in the intestate distribution of a deceased parent's estate, the child must permit the administrator of the estate to include in the determination of the distributive shares the value of property that the decedent, while alive, gave to child. Such gifts are known as "advancements." If the child can show that the transfer was intended as an absolute gift, not to be counted against her share of the estate, the doctrine would not apply. The doctrine of advancements usually applies only to intestate succession. However, there is some authority for the proposition that the doctrine of advancements would apply if a will leaves property to the testator's "heirs."

1. Common Law

At common law, any lifetime gift to a child was presumed to be an advancement of that child's intestate share and was binding on those who would have succeeded to the child's estate had the child predeceased the decedent.

a. Burden

The child had the burden of demonstrating that the lifetime transfer was intended to be an absolute gift that was not to be counted against the child's share of the estate.

b. Hotchpot

If a gift is treated as an advancement, the donee must allow its value to be brought into the **hotchpot**. The advancement is added back into the estate, and the resulting total estate is divided by the number of children taking. The advancement is then deducted from the total share of the child to whom it was given.

Example: D died intestate with a probate estate worth $150,000. D is survived by children A, B, and C, each of whom had received from D an inter vivos gift ($25,000 to A, $50,000 to B, and $75,000 to C). Under the advancement doctrine, the inter vivos gifts (totaling $150,000) are added back into the estate (for a total of $300,000) and then divided evenly among the three children (so each is entitled to $100,000) minus their individual gifts. As a result, A would take $75,000 (her $100,000 share less the $25,000 already received), B would take $50,000 (his

$100,000 share less the $50,000 already received), and C would take $25,000 (his $100,000 share less the $75,000 already received).

If a child receives an inter vivos share that exceeds the hotchpot share to which each child is entitled, then that child does not take, but is not required to pay back into the estate.

2. Modern Trend

The UPC approach, which is the modern trend, provides that a gift is an advancement only if:

i) The decedent declared in a **contemporaneous writing** (or the heir acknowledged in a writing) that the gift was an advancement; or

ii) The decedent's contemporaneous writing or the heir's written acknowledgment **otherwise indicates** that the gift was to be taken into account in computing the division and distribution of the decedent's intestate estate.

Unif. Probate Code § 2-109.

The value of an inter vivos gift is determined at the time the recipient takes possession or enjoys it, whichever is first. Unlike the common-law approach, the UPC applies to all heirs, not just the decedent's children.

3. Satisfaction of Legacies

Lifetime gifts to beneficiaries who take under a will are examined in a similar manner and follow the same rules as advancement of intestate shares. An inter vivos transfer occurring between the testator and beneficiary will satisfy the legacy under the will if (i) the testator intends that the transfer satisfy a testamentary gift and (ii) there is a written acknowledgment of such satisfaction by the testator or beneficiary. Inclusively, situations in which the testator's intent is not apparent and cannot be proven will satisfy the legacy and give rise to the doctrine of ademption, if the testator makes an inter vivos transfer to the beneficiary of the specifically-bequeathed item. *See* XII.C, *infra*.

B. TRANSFERS TO MINORS

As minors lack the legal capacity to hold property, the law provides various ways in which others might manage property for minors. The three property management options are: (i) guardianship, (ii) custodianship, and (iii) trusteeship. Custodianship and trusteeship are available only through the creation of a will.

1. Guardianship

A guardian has minimal power over property and must go through a difficult process to obtain the necessary court approval to act on behalf of a minor. The modern trend is to transform this function into a conservatorship, wherein the conservator acts as a trustee for the minor, with annual accounting to the court.

2. Uniform Transfers to Minors Act (UTMA)

The Uniform Transfers to Minors Act, enacted in all states, appoints a custodian to use the property of a minor at the custodian's discretion on the minor's behalf without court approval and with no accounting requirement. The custodian must turn any remaining property over to the minor upon the minor's attainment of age 21.

If the beneficiary was a minor at the time the will was executed, but attains age 21 prior to the testator's death, then the property passes directly to the minor absent an instruction otherwise contained in the will.

3. Trust

The third alternative is to establish a trust for a minor, which is the most flexible of the property arrangements. A testator can tailor a trust specifically to the family circumstances and to his particular desires.

Whereas under a guardianship or conservatorship the child must receive the property at age 18 or 21, a trust can postpone possession until a time when the donor thinks the child will be competent to manage the property.

VI. BARS TO SUCCESSION

A. HOMICIDE

In most states, by statute, a party cannot take property from a decedent when the party was responsible for the decedent's death. This includes an intestate share, an elective share, an omitted spouse's share, exempt property, a homestead allowance, and a family allowance. Additionally, a joint tenant loses the right of survivorship benefits. The UPC and the majority of jurisdictions treat the killer as if she had predeceased the decedent. Unif. Probate Code § 2-803(b). In the absence of a statute, courts are split on how to address the question. Some allow the killer to take the decedent's property. Other courts have taken the view that equity prevents the killer from taking the property because otherwise the killer would be profiting from her own wrongdoing. Still other courts impose a constructive trust in favor of the next persons in line to take the property. *See e.g., In re Estate of Mahoney*, 220 A.2d 475 (Vt. 1966) (with no statute on point, court imposed constructive trust to prevent wife convicted of manslaughter of husband from obtaining intestate share of his estate).

1. Intentional and Felonious

In general, for both statutory and judicial bars to succession based on homicide, the killing must have been intentional and felonious. For example, involuntary manslaughter and self-defense killings do not fall within the homicide doctrine, although assisted suicide killings do. If a conviction fails, the court nonetheless may make a determination as to the lawfulness of the killing, using a preponderance of the evidence standard.

2. Killer's Issue

Jurisdictions are split as to whether the killer's issue should also be barred from taking. The UPC treats the killer as if she disclaimed the property, which allows the killer's issue potentially to take under the anti-lapse, per stirpes, and per capita doctrines, if the issue qualify. Unif. Probate Code § 2-803(b).

3. Scope

Under the UPC, the homicide doctrine applies to all property, whether probate or non-probate. Purchasers of such property for value and without notice are protected, but the killer is liable for the proceeds. If a statute only covers probate property, a court might impose a constructive trust or apply principles of equity to prevent succession to non-probate property, such as joint tenancy property, life insurance, and pensions.

B. DISCLAIMER

Since acceptance of a testamentary gift is presumed, a party must actively disclaim if she wishes not to accept it. The disclaiming party is treated as if she had predeceased the decedent, and the property is distributed to the next eligible taker.

1. Requirements

Most disclaimer statutes have specific requirements that must be followed for the disclaimer to be effective. For example, an interest cannot be disclaimed once an heir

or beneficiary has accepted the property or any of its benefits. Most jurisdictions require that the disclaimer be in writing, signed, and filed within nine months of the decedent's death. The nine-month period begins to run at the later of the death of the decedent or the date the interest becomes vested. However, under federal law, and for the disclaimer to be valid for tax purposes, the disclaimer must be filed nine months from the later of the decedent's date of death or the heir's or beneficiary's attainment of age 21.

When disclaiming an interest acquired through joint tenancy, the surviving joint tenant has nine months from the date of the other joint tenant's death to disclaim the interest. With future interests, while certain jurisdictions allow an heir or beneficiary up to nine months from the date the interest vests in possession to disclaim an interest, to avoid federal taxation, the interest must be disclaimed within nine months of its creation. When the future interest being disclaimed is a life estate, the testator's remaindermen are determined at the testator's death rather than the life tenant's death as would generally be the case. The remainder is accelerated because the interest passes as though the disclaimant, in this case the life tenant, predeceased the decedent.

Jurisdictions vary as to whether the disclaimer statute applies to probate property (the traditional approach) or whether it also includes non-probate property (the modern approach) and must identify the decedent, describe the interest being disclaimed, and state the extent of the disclaimer.

2. Who May Disclaim

A disclaimer can be made by a third party, such as a guardian, custodian, trustee, or personal representative, on behalf of a minor, incompetent, or decedent. A spendthrift clause in a will does not preclude a disclaimer.

C. ABANDONMENT

Some states bar an individual from taking if she is guilty of abandonment. The individual is generally treated as having predeceased the decedent.

D. ELDER ABUSE

Some states bar an individual from taking if she is guilty of elder abuse. Jurisdictions vary on the requirements, with some barring a taker when the conduct is only short of homicide and others barring a taker after a showing of abandonment. Most jurisdictions treat the abuser as if they have predeceased the decedent.

E. NONCITIZENS

A few states restrict the inheritance rights of noncitizens who lack permanent resident status.

VII. WILL CONTESTS

A will contest is an objection raised against the validity of a will, based on the contention that the will does not reflect the actual intent of the testator. The basis of a will contest is the assertion that the testator: (i) lacked testamentary capacity; (ii) was operating under an insane delusion; or (iii) was subject to undue influence or fraud.

A. PERIOD OF LIMITATIONS

Jurisdictions vary, but in general, a will contest must be filed very soon (typically within six months) after the will is admitted to probate. Proper notice should also be given to all heirs and legatees under the will, as well as to creditors of the estate. Will contests must be made within the specified period after probate is opened, or the claims are barred.

B. STANDING TO CONTEST

Only directly interested parties who stand to benefit financially may contest a will, such as beneficiaries under the current or prior will. Creditors of beneficiaries, spouses of beneficiaries under prior wills, and pretermitted heirs cannot contest.

1. Decedent's Creditors

Because the decedent's creditors have the same rights regardless of whether the will is contested, general creditors cannot contest, though a judgment creditor of a beneficiary under a will may be able to contest.

2. Spouse of a Beneficiary Under a Prior Will

Neither a spouse nor any other prospective heir of a beneficiary under a prior will may contest.

3. Omitted Heir

Because the omitted heir's share is the same regardless of whether the will is contested, no omitted heir can contest a will.

C. TESTAMENTARY CAPACITY

1. Requirements

To execute or revoke a will, the testator must be at least **18 years old** and possess a **sound mind** at the time of execution or revocation.

The testator lacks the requisite mental capacity if he, **at the time of execution**, did not have the ability to know the:

i) Nature of the act;

ii) Nature and character of his property;

iii) Natural objects of his bounty; and

iv) Plan of the attempted disposition.

Note: The testator need only have the **ability** to know; actual knowledge is not required.

Old age alone is insufficient to constitute lack of capacity. Courts will uphold wills of elderly testators who at least grasp the big picture about their financial affairs. *See e.g.*, *Wilson v. Lane*, 279 Ga. 492 (Ga. 2005) (holding that evidence that testator was eccentric, feeble, and elderly at time will was signed not sufficient, by itself, to establish lack of testamentary capacity). Adjudication of incompetence is not dispositive on the issue of testamentary capacity; the above-listed factors must also be applied. Also, just because a conservator was appointed, it does not automatically mean that the testator lacks capacity.

Some states also require a deficiency in one of the following areas to prove lack of capacity: alertness and attention, information processing, thought processing, or mood modulation. Such deficiencies are also considered only if they significantly interfere with the individual's ability to understand and appreciate the consequences of his actions.

2. Burden of Proof

In general, once the proponent of a will adduces prima facie evidence of due execution of the will, the party contesting the will for lack of capacity will have the evidentiary

burden of persuasion. See Unif. Probate Code § 3-407. Only those parties that would financially benefit, if successful, have standing to contest a will.

3. Drafting Attorney's Ethical Responsibility

Under the Model Rules of Professional Conduct, a lawyer is not permitted to draft a will for a person the lawyer believes to be incompetent, but the lawyer may rely on his own judgment to determine if the client is competent. A lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

D. INSANE DELUSION

An insane delusion is a belief for which there is no factual or reasonable basis, but to which the testator adheres despite all reason and evidence to the contrary. Courts will generally not apply the doctrine to religious or spiritual beliefs. An insane delusion is not capable of correction. Even if you tell the testator the truth, it will make no difference. A mistake, on the other hand, can be corrected by telling the testator the truth. While the traditional rule is that a mistake in a will cannot be reformed or invalidated, an insane delusion can invalidate all or part of the will. *See e.g., In re Striimater*, 140 N.J. Eq. 94 (N.J. Ct. Err & App. 1947) (holding that will that is product of insane delusion cannot be probated).

1. Rational-Person Test

The majority rule is that a belief is an insane delusion if a rational person in the testator's situation could not have reached the same conclusion. A minority of jurisdictions hold that if there is any factual basis to support the testator's belief, it does not constitute an insane delusion.

2. "But For" Causation

Once it is determined that the testator suffered from an insane delusion, it must be shown that this was the sole cause of the testamentary disposition. The majority view requires "but for" causation, such that the testator would not have disposed of the property in the same manner but for the insane delusion. If an insane delusion is shown, but the delusion did not affect any dispositions, the will remains valid. *See e.g., Breeden v. Stone*, 992 P.2d 1167 (Co. 2000) (finding that testator suffered from insane delusion that everyone he knew was spying on him, but that there was insufficient evidence delusion materially affected the provisions of his will). The minority rule asks only if the insane delusion might have caused or affected the disposition. *See e.g., In re Honigman*, 168 N.E.2d 676 (N.Y. App. 1960) (denying probate to a will on grounds that the testator's failure to provide for his wife might have been caused or affected by his insane delusion that his wife was promiscuous).

> **EXAM NOTE:** Remember to discuss **causation** when analyzing whether an insane delusion exists. Under the majority rule, unless the insane delusion was the cause of the strange disposition, there is no defect in capacity.

E. UNDUE INFLUENCE

1. In General

Undue influence is mental or physical coercion, exerted by a third party on the testator with the intent to influence the testator, such that he loses control of his own judgment. Simply having an opportunity to exert influence or demonstrating the testator's susceptibility to being influenced (e.g., due to old age, poor health, or memory problems) does not establish that the testator's mind was overpowered.

Several factors are considered in determining the extent of a beneficiary's involvement in procuring the will. Among them are the beneficiary's recommendation of an attorney

and providing the attorney with instructions, the beneficiary's presence during the writing and execution of the will, and the beneficiary's securing of witnesses. Once a will is determined to have been the product of undue influence, it may be invalidated in whole or in part, as long as the overall testamentary scheme is not altered thereby. Most courts will invalidate only those portions that are infected by undue influence.

2. Traditional Doctrine

Under the majority view, the undue influence doctrine has the following elements, all four of which must be shown:

i) **Susceptibility** (the testator was susceptible to being influenced);

ii) **Motive** or predisposition (the influencer had reason to benefit);

iii) **Opportunity** (the influencer had the opportunity to influence); and

iv) **Causation** (the influencer caused an unnatural result).

EXAM NOTE: As with insane delusions, undue influence is extremely fact-sensitive. Remember to discuss causation and the specific facts of the particular case when analyzing whether the will was a product of undue influence. Unless the undue influence is the cause of the strange disposition, there is no defect in capacity.

3. Burden of Proof

The burden of proof rests on the contestant to show (i) the existence and exertion of influence and (ii) that the effect of the influence was to overpower the mind and will of the testator. The result must be a will that **would not have been executed but for the influence.**

4. Presumption

a. Confidential relationship

Because the defendant is in the best position to provide evidence, the majority of jurisdictions require a burden-shifting approach. If the elements of the jurisdiction's statute are satisfied, then a presumption of undue influence arises that shifts the burden to the defendant. A presumption of undue influence arises when the principal beneficiary under a will stands in a **confidential relationship** to the testator (such as the testator's attorney or physician), when he participated in executing the will, and when the gift to the beneficiary is unnatural or consists of the majority of the estate. Some jurisdictions also include whether the testator was of a weakened intellect.

Note: To have a confidential relationship, the testator must confide, trust, or rely upon on the other party as a result of his weakened or dependent state.

b. Burden of proof shifts

When a presumption of undue influence arises, the burden shifts to the beneficiary to show by a preponderance of the evidence that such influence was not exercised. Some courts have held that a higher standard applies, especially in cases involving alleged physician or attorney misconduct.

c. Treatment of a beneficiary

A beneficiary who is shown to have exerted undue influence is treated as having predeceased the testator to the extent that the gift to her exceeds her intestate share of the testator's estate.

5. Gifts to Attorneys

a. Special presumption

Most jurisdictions hold that a presumption of undue influence arises any time an attorney who drafts an instrument for a client receives a substantial gift under that instrument unless the attorney is married to or related to the client. To overcome the presumption, most jurisdictions require clear and convincing evidence that the testator intended to make the gift. A few jurisdictions make the presumption of undue influence irrebuttable.

One jurisdiction has extended the presumption of undue influence to an attorney with whom the testator had a continuing fiduciary relationship, even though the attorney did not actually draw up the will. *See, In re Will of Moses*, 227 So.2d 829 (Miss. 1969) (holding that a presumption of undue influence arises wherever an attorney with whom the testator had a continuing fiduciary relationship is a beneficiary under the will and that the presumption is not necessarily overcome merely by the fact that the will was actually drawn up by an independent attorney).

b. Ethical responsibility

Under Rule 1.8(c) of the Model Rules of Professional Conduct, a lawyer is not permitted to prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. Even if the lawyer is related to the client, the lawyer should exercise special care if the gift would be disproportionately large in comparison to gifts to others who are equally related. If a client wishes to make a gift to the lawyer, the lawyer should refer the client to a disinterested lawyer for preparation of the instrument. Model Rule 1.8 also requires that when an attorney is engaged to draft a will or trust that would name the attorney as executor or trustee, the attorney obtain the client's informed consent, advising the client of the nature and extent of the attorney's financial interest in the appointment, as well as the availability of alternative persons for the position.

F. DURESS

Duress is threatening or coercive behavior by one person that causes another person to do something that she would not otherwise do. It is undue influence that becomes overly coercive. A transfer that was procured by duress is invalid. *See e.g., Latham v. Father Divine*, 85 N.E.2d 168 (1949) (testator was prevented from executing new will in favor of intended beneficiary by duress, physical force, and fraud and court imposed constructive trust in favor of intended beneficiary). The duress must have been present when the instrument was executed.

G. FRAUD

Fraud, like undue influence and duress, must have been present when the will was executed. The burden of proving fraud is on the contestant.

1. Elements

The misrepresentation must be made **by the beneficiary** with both:

i) The **intent** to deceive the testator; and

ii) The **purpose** of influencing the testamentary disposition.

The result must be a will that would not have been executed but for the fraud.

EXAM NOTE: Even if there has been a misrepresentation, there is no cause of action unless causation and damages can be shown.

2. Fraud in the Inducement

Fraud in the inducement is a knowingly false representation that causes the testator to make a different will than he would have otherwise made. A fraudulently procured inheritance or bequest is invalid *only if* the testator would not have left the inheritance or made the bequest had he known the facts.

3. Fraud in the Execution

Fraud in the execution (or "fraud in the factum") is fraud as to the very nature of the instrument or its contents.

4. Constructive Trust

A constructive trust can be imposed upon the defendant to rectify any alleged fraud or undue influence perpetrated upon the testator. A constructive trust is sometimes said to be a fraud-rectifying trust. However, a constructive trust may also be imposed when no fraud is involved but the court believes that unjust enrichment would result if the defendant retained the property.

5. Probate Must be Contested

A person who objects to a will based on fraud or undue influence must contest its probate; the will may be partially probated if the fraud or undue influence goes only to certain provisions.

Note: If fraud, duress, or undue influence prevented the execution of a will in favor of the plaintiff, then she may request the imposition of a constructive trust, although some courts impose intestate succession laws.

H. NO-CONTEST CLAUSES

A no-contest clause (also called an "in terrorem" clause) is an express clause within a will designed to deter a beneficiary from suing over his share by causing him to lose his share entirely if he does so.

The majority of states and the UPC have held no-contest clauses to be unenforceable against claimants as long as the claimant had **probable cause** to contest. If the claim is spurious, then the clause is enforceable. Unif. Probate Code §§ 2-517; 3-905. A minority of states give the no-contest provision full effect, regardless of whether probable cause to challenge existed. Indiana and Florida do not enforce no contest clauses at all.

I. TORTIOUS INTERFERENCE WITH AN EXPECTANCY

1. In General

Section 774B of the Restatement (Second) of Torts recognizes the tort of intentional interference with a gift or inheritance. A plaintiff bringing a cause of action for tortious interference with an expectancy must establish: (i) the existence of an expected gift or inheritance; (ii) intentional interference with that expectancy through tortious conduct, such as undue influence, fraud, or duress; (iii) causation; and (iv) damages. *See Schilling v. Herrera*, 952 So.2d 1231 (Fl. Ct. App. 2007) (holding that a party who would have contested a will but was prevented from doing so by another's fraud could bring a claim for tortious interference with an expectancy). The action is not a will contest. It does not challenge the validity or probate of the will, but instead seeks to recover damages from a third party for interference.

2. Longer Statute of Limitations than Will Contests

Will contests typically have a short statute of limitations. The statute of limitations on tortious interference with an expectancy, on the other hand, is longer, starting to run at the time the plaintiff discovered or should have discovered the undue influence, duress, or fraud.

3. No-Contest Clause May Not Apply

Since a suit for tortious interference is not a will contest, a no-contest clause in a will (*see* § VII.H, *supra*) may not apply to discourage such suit.

4. Requirement to Pursue Probate Remedies First

Most states that recognize the tort require a plaintiff to first pursue probate remedies, if they are adequate (and available – the statute of limitations on the probate remedy may have expired, for example). A failure to do so will result in barring a tortious interference suit. If a plaintiff brings a will contest and loses, she will generally be barred under *res judicata* from subsequently bringing a tort suit.

5. Punitive Damages Apply

Unlike in a will contest, in a suit for tortious interference with an expectancy, punitive damages may generally be recovered.

VIII. EXECUTION OF WILLS

A. WILL FORMALITIES

Traditionally, for a will to be admissible to probate, the testator must have met the formal execution requirements of the applicable jurisdiction's statute of wills (i.e., that jurisdiction's requirements for the execution of a proper will). Although a will is usually contemplated to dispose of property, it does not necessarily have to do so. The requirements may vary depending on whether the will is in a traditional (i.e., witnessed) form or in a holographic (i.e., handwritten) form. At a minimum, most jurisdictions require a signed writing that has been witnessed for traditional attested wills. While the statute of wills varies from jurisdiction to jurisdiction, the sections below will detail the traditional requirements for a valid attested will (in addition to testamentary capacity, which is discussed above at § VII.C).

At common law, **strict compliance** with the formal requirements of wills was required, as these were thought to serve important ritual, evidentiary, and protective functions. *See e.g., In re Groffman*, 2 All E.R. 108 (1969) (holding that even though court was confident testator intended document to be his will, will was invalid because testator did not acknowledge signature in presence of two witnesses at same time).

EXAM NOTE: The validity of a will is one of the most frequently tested areas of the law of wills. Remember that a will requires a **writing** that the testator **signs** with present **testamentary intent** in the **joint presence** of two witnesses, that both witnesses **understand** the significance of the testator's act, and that the will has no legal effect until after the testator's death.

1. Writing Signed by the Testator

The entire will must be in writing and must be signed by the testator or by some other person in his presence and at his direction. Video wills have not been permitted, although a video of an execution ceremony may be admissible to prove due execution. Only one state, Nevada, permits an electronic will, meaning a computer file with a unique electronic signature. Nev. Rev. Stat. § 133.085.

a. Form of signature

While the writing must be signed, the testator's complete formal name is not required, as long as the signature indicates her desire to sign (e.g., even an "X" is acceptable). If the testator signs by a mark, some jurisdictions may require that the mark be made in the presence of a witness. Additionally, in most jurisdictions and under the UPC, the will may be signed by another provided that the "conscious presence" test is satisfied (i.e., the other person signs the testator's name, in the presence and at the express direction of the testator).

b. Location

Some states require the signature to be at the end of the will, whereas others (and the UPC) allow the signature on any part of the will. In these states, while a signature elsewhere will not invalidate the will, any language appearing after the signature will be held invalid.

c. Order of signature

Traditionally, the testator must have signed or acknowledged the will before the witnesses attest. The modern trend, though, is to allow a witness to sign before the testator, so long as all parties sign as part of a single or continuous transaction, meaning while all parties remain present in the room.

2. Witnesses

a. Signatures

The majority view is that a will must be signed in the joint presence of, and attested to by, two witnesses. There are jurisdictional differences as to the number of witnesses (e.g., some states require three). Also, the witnesses need not sign at the end of the will.

As noted above, will execution statutes commonly provide that another person may sign a testator's will if it is done at the testator's direction and in the testator's presence. Under the UPC, the witnesses, all of whom need not be present at the same time, must sign the will within a reasonable time after witnessing the testator sign or acknowledge the will. Unif. Probate Code § 2-502(a)(3).

Some courts have found that the testator's request that the two witnesses sign can be implied and does not have to be explicit. *See In re Estate of Graham*, 295 N.W.2d 414 (Iowa 1980).

b. Attestation clauses

An attestation clause in a will recites that the will was duly executed. An attestation clause is not required, but it can be helpful to prove due execution of the will in cases when the witness has no memory of signing or has a faulty memory. It gives rise to a **presumption of due execution** and the will can be admitted to probate even if the witnesses predecease the testator or cannot remember the events of execution.

c. Presence

The witnesses need not read the will, but they must be aware that the instrument is a will. In most jurisdictions, the testator must sign or acknowledge the will in the presence of the witnesses, and the witnesses must sign in the presence of the testator.

The UPC, however, does not require the witnesses to sign the will in either the presence of the testator or the presence of the other witnesses. Rather, each

witness must sign only within a reasonable time of the original signature by the testator, at his direction, or while observing the testator's acknowledgment of the will. Unif. Probate Code § 2-502(a)(3).

There are two other approaches followed by some jurisdictions: the line-of-sight test and the conscious-presence test.

1) Line-of-sight test

The "line-of-sight" test, which is the traditional approach, requires the joint presence of the witnesses and the testator, who must observe or have the opportunity to observe each other sign the will. If the testator does not sign in the witnesses' presence, then that signature must be acknowledged.

For example, when a witness signs from his office, while the testator signs in his home, the attestation requirements are not satisfied because of the risk that fraud as to the authenticity of the document being signed or the identity of the witness or testator, known by voice only, could occur.

2) Conscious-presence test

The modern approach, known as the "conscious-presence" test, is broader than the line-of-sight test. The conscious-presence test requires only that the party observing the act, either testator or witness, be aware that the act is being performed.

This method is endorsed by the UPC only for situations in which the will is signed by another person on behalf of the testator. Unif. Probate Code § 2-502(a)(2).

When a testator acknowledges her signature to witnesses over the telephone, courts have held that this does not satisfy the "conscious-presence" requirement—the witness must either observe the testator signing the will or observe the testator's acknowledgment of her will. *See In re Estate of McGurrin*, 743 P.2d 994 (Idaho Ct. App. 1987).

d. Age and competency

Witnesses must be of sufficient mental capacity and maturity to comprehend the value of the act of witnessing a will. Competency is determined as of the **time of signing**; the subsequent incompetence of a testator or witness does not invalidate a will.

e. Interest of a witness

At common law, a witness with a direct pecuniary interest under a will was not competent to witness the will. The will was invalid, unless two disinterested witnesses also witnessed the will.

1) Purging statutes

a) Majority rule

Most states now use a purge theory and invalidate the portion of the will providing an excess to the interested witness. To determine the portion to be purged, you calculate the amount the interested witness would receive if the will were invalid (i.e., under the intestacy statute or prior will) and the amount the witness stands to receive under the will. If the amount to be received under the will is greater, then the excess interest

is purged. A few states, such as Massachusetts, purge the witness of his entire devise. Mass. Gen. Laws c. 191, § 2.

b) Exceptions

If the interested witness is a third witness signing along with two other disinterested witnesses, his interest will not be purged. Similarly, if the interested witness would have taken had the will not been probated, most states allow him to take his full bequest.

A party who is adversely affected by a will can serve as a witness to the will because she will receive no beneficial distribution under the will. In *Estate of Morea*, 645 N.Y.S.2d 1022 (Sur. Ct. 1966) the court concluded that a decedent's son, who witnessed the decedent's will, had nothing to gain under the will because New York law provided that a party who was both a witness and a beneficiary was entitled to the lesser of an intestate share or the legacy under will. Thus the son constituted a disinterested witness and the decedent's will was, therefore, held valid.

c) UPC

The UPC, which previously followed the purge theory, has now abolished the interested witness doctrine, as have a large minority of the states. Unif. Probate Code § 2-505(b).

d) California

California law creates a rebuttable presumption that a bequest to a witness was procured by undue influence, duress, or fraud. Cal. Prob. Code § 6112.

3. Testamentary Intent

a. Understand the nature of the act

The testator must execute the will with present testamentary intent. When the testator signs the instrument, he must understand that he is executing a will and must intend that it have testamentary effect.

b. Know and approve

Testamentary intent is a question of fact to be determined by an examination of the will and the surrounding circumstances. The words in the will are not automatically conclusive.

A will is ineffective if the testator intends it only as a joke or to accomplish some other purpose. The testator need not read the will or understand all of its technical provisions, but he must generally know and approve of its contents.

B. CURATIVE DOCTRINES

1. Curing Defects by Ad Hoc Exception

As explained above, traditionally any mistake in execution was grounds to invalidate the will. Most jurisdictions still follow this approach. Courts have struggled with the harshness of this result, however, and that has led to inconsistent treatment of similarly-situated parties. Thus, in *In re Pavlinko's Estate*, 148 A.2d 528 (Pa. 1959), a husband and wife mistakenly signed each other's wills. After both had died, the person who had been named the residuary legatee of both wills tried to probate the wife's intended will, which the husband had mistakenly signed, leaving all the property to the husband. The court followed the traditional strict approach with regard to defects in

execution, concluding that a court may not rewrite a clear and unambiguous will even to implement the obvious intentions of the testator. Under very similar facts, the court in *In re Snide*, 418 N.E.2d 656 (N.Y. 1981), held that the will the husband signed could properly be admitted to probate, emphasizing that the wills were identical and the parties' intentions clear.

2. Substantial Compliance

One modern approach to curing an execution defect is the doctrine of substantial compliance. Under the doctrine, a court may deem a will that was defectively executed to be statutorily valid if the defective execution fulfills the purposes of the statutory formalities. *See e.g., In re Will of Ranney*, 124 N.J. 1 (N.J. 1991) (adopting rule that when witnesses, with intent to attest will, sign self-proving affidavit, but not will or attestation clause, clear and convincing evidence of intent may be produced to establish substantial compliance with wills statute).

3. Harmless Error Rule

A minority of jurisdictions and the UPC have adopted the harmless error approach (sometimes known as the "dispensing power"), under which a court can probate a will if there is clear and convincing evidence that the decedent intended the instrument to constitute his will. *See e.g, In re Estate of Hall*, 5 P.3d. 1134 (Mont. 2002) (holding that draft of joint will that had not been witnessed could be probated as valid will of testator where there was clear and convincing evidence that testator intended document to be his will).

C. NOTARIZED WILLS

Under the UPC, a will is valid if signed by two witnesses ***or*** by a notary or any other person authorized by law to take acknowledgments. Unif. Probate Code § 2-502(a)(3).

D. "SELF-PROVED WILL"

Under the UPC, a will that is executed with attesting witnesses may be made "self-proved" by the acknowledgment of the testator and affidavits of the witnesses before a court officer in substantial accordance with a prescribed form. The effect of executing a "self-proved will" is that it removes the necessity for testimony of the attesting witnesses in formal probate. Unif. Probate Code § 2-504. Moreover, in many jurisdictions the witnesses' signatures on an affidavit may be counted as signatures on the will if the witnesses failed to sign the actual will.

E. HOLOGRAPHIC WILLS

Holographic (i.e., handwritten) wills are recognized by the UPC (§ 2-502(b)) and in approximately one-half of the states.

1. Signed and Handwritten

A holographic will is one that is completely handwritten and signed by the testator. Unlike attested wills, a holographic will cannot be signed by another person on behalf of the testator. Jurisdictions differ on whether the entire will needs to be in the testator's handwriting. Some jurisdictions require a strict compliance approach under which any markings not in the testator's handwriting invalidate the will. Others, including the UPC, merely require that the material provisions of the will be written by hand. Unif. Probate Code § 2-502(b).

Holographic wills have been found on a variety of different materials, including clothing, napkins, wall paper, and furniture, and been admitted to probate.

Note: A holographic will **need not be witnessed**.

2. Dated

Some states require that a holographic will be dated. Other states, including those that have adopted the UPC, have no such requirement.

3. Testamentary Intent

It must be clear that the document was intended by the testator to be a will. *See e.g., Kimmel's Estate*, 123 A. 405 (Pa. 1924) (holding that testator's handwritten letter to children evidencing intent of conditional gift and intent to execute could serve as valid testamentary document). Intent can be presumed by the use of certain language (e.g., "I bequeath"), or by the testator's use of a printed form will.

The UPC expressly states that the testator's intent need not be found exclusively in the testator's handwriting, but it can be discerned from other written parts of the will or from extrinsic evidence. Unif. Probate Code § 2-502(c). *See Estate of Gonzalez*, 855 A.2d 1146 (Me. 2004) (holding that pre-printed portions of a form will could be considered part of a holographic will when a court finds testamentary intent to do so); *In re Estate of Kuralt*, 303 Mont. 335 (Mont. 2000) (holding that letter written by decedent, while on deathbed, evidencing intent that another "inherit" a specific bequest of property, was valid holographic codicil to decedent's formal will and could be probated). A jurisdiction requiring strict compliance, however, will require that the testator's intent be discernible by the handwritten parts of the will as opposed to pre-printed parts on a form will or extrinsic evidence.

4. Handwritten Changes

Interlineations after the will is complete are effective in most jurisdictions that recognize holographic wills.

F. NUNCUPATIVE WILLS

Nuncupative (oral) wills are generally valid only for the disposition of **personal property** in contemplation of immediate death and are invalid under the UPC and in most states. In jurisdictions where they are valid, nuncupative wills require at least two witnesses, can devise only a limited amount of personal property, and may require that the testator die within a prescribed period after making the oral will.

G. CODICILS

A codicil is a supplement to a will that alters, amends, or modifies the will, rather than replacing it. **A codicil must be executed with the same formalities as a will.**

A validly executed codicil republishes the will as of the date of the codicil and may even validate an invalid will if the codicil refers to the will with sufficient certainty to identify and incorporate it, or if the codicil is on the same paper as the invalid will. Courts look to the intent of the testator to determine whether to read the provisions of the will as having been republished as of the date of the codicil.

Note: A holographic codicil to an attested will and an attested codicil to a holographic will are valid.

IX. REVOCATION

A. ANY TIME PRIOR TO DEATH

A testator with testamentary capacity retains the ability to revoke his will at any time prior to his death, even if he has executed a valid contract not to revoke the will. In such a case, the revoked will must be denied probate, but the interested parties may bring an action for breach of contract against the estate of the decedent.

A will may be revoked wholly or partially in three ways: by **subsequent writings**, by **physical destruction of the will**, or by **operation of law**.

1. Subsequent Instrument

A testator can expressly revoke a will by a subsequent writing, a later will, or a codicil. Under the UPC, a subsequent writing expressing the intent to revoke must qualify as a valid holographic or attested will. Unif. Probate Code § 2-507(a)(1). The revocation can be express or can be implied by the terms of the subsequent instrument.

Note: An oral revocation of a will is not valid.

a. Inconsistency

To the extent possible, the will and any codicils are read together. If there are inconsistencies, then the **later document controls** and revokes the prior inconsistencies. If a later will contains a residuary clause (e.g., "I leave all remaining assets of my estate to my brother"), then it **revokes** the first will by inconsistency. If a later will has an express revocation clause, then the first will is revoked.

Note: If a subsequent will does not revoke a prior will in its entirety by inconsistency, then it is merely a codicil.

Example: T executes a will that leaves his house to A, his watch to B, and his car to C. One year later, T executes a new document that says in its entirety, "I hereby leave my car to Y." Assuming that the subsequent document was executed consistent with the requisite statutory formalities, that subsequent document will be a codicil. A is still going to get the house, B is still going to get the watch, but now Y is going to get the car and not C. If, however, the subsequent document had said, "I hereby leave my car to Y and everything else to Z," then it would have actually revoked the prior will because it is entirely inconsistent with the prior will.

EXAM NOTE: On an exam, you must be able to distinguish a codicil to an existing will from a new will. If the subsequent document has a residuary clause, then it is likely a new will. If the subsequent document does not have a residuary clause but the first document does, then the subsequent document is likely a codicil.

2. Destruction With Intent to Revoke

A will may be revoked by burning any portion thereof, or by canceling, tearing, obliterating, or destroying a material portion of the will with the intent to revoke it. Both the **act** and a simultaneous **intent to revoke** must be proven to yield a valid revocation.

a. Defacement of the language required

The majority rule is that an effective canceling of a will requires defacement of the language of the will (i.e., at least some of the language must be crossed out, including the signature). *See e.g., Thompson v. Royall*, 163 Va. 492 (Va. 1934) (holding that revocation by act not accomplished unless written words of instrument are mutilated or otherwise impaired). The UPC, however, rejects the majority rule and requires that the destructive act merely affect some part of the will. Unif. Probate Code § 2-507(a)(2). Some states require that the method of revocation be of a type specified by statute; any other non-specified method will be ineffective.

1) Presumption of revocation

If a will once known to exist cannot be found at the testator's death, or is found mutilated, then there is a rebuttable presumption of revocation. *See e.g., Harrison v. Bird*, 621 So.2d 972 (Ala. 1993). The presumption is inapplicable if a duplicate original is found. Extrinsic evidence is permitted to rebut the presumption.

Note: The attorney-client privilege does not apply to a lawyer's testimony concerning the contents of a will.

2) Only one copy destroyed

The prevailing view is that the effective revocation of the original or a duplicate original presumptively revokes all other copies of the will, but that destruction of an unexecuted copy does not.

b. Third party

A third party can revoke on behalf of the testator as long as the revocation is:

i) At the testator's **direction**;

ii) **Witnessed** by two persons; and

iii) In the testator's **presence.**

If a testator calls his attorney requesting that she tear up his will, then the revocation is not valid because it was not done in the testator's presence or proved by two witnesses.

Note: An attorney can be subject to liability for failing to advise his client regarding the proper revocation or execution of his will.

3. Operation of Law

a. Divorce

In most states, divorce revokes all will provisions in favor of the former spouse, unless it can be shown that the testator intended for the will to survive. Unif. Probate Code § 2-804. In some states, however, divorce revokes a will provision for the former spouse only if the divorce is accompanied by a property settlement agreement. If a divorced couple remarries before the testator dies, then the will provisions relating to the former spouse or domestic partner are revived.

Note: The UPC also applies the revocation by operation of law doctrine to will substitutes (i.e., non-probate property like life insurance, pension plans, and payable on death accounts). This is unlike the law of most states. Furthermore, the UPC takes a broader approach than many jurisdictions and revokes the provisions containing devises to the relatives of the ex-spouse. Unif. Probate Code § 2-804.

b. Separation

Separation without divorce *does not* affect the rights of the spouse or domestic partner unless a complete property settlement is in place.

4. Partial Revocation

The majority of jurisdictions and the UPC permit partial revocation to revoke a provision of a will. The majority of jurisdictions provide that if the revoked gift falls outside of the residuary, it is *not* given effect until re-execution (signed again) or republication

(new document) of the will. The UPC, however, provides that partial revocation is permissible regardless of the effect, even if it increases a gift outside of the residuary clause. Unif. Probate Code § 2-507(d).

5. Alteration

A testator cannot increase a gift to a beneficiary by canceling words in his will, but he may be able to decrease the gift as long as the alteration is made to the existing language of the will rather than through the addition of new language.

6. Holographic Wills

A holographic will can be altered or revoked in whole or in part by holographic changes and without a new signature. States that allow holographic wills also allow their revocation by formal wills and vice versa. On the other hand, some state statutes require both the holographic will and any changes be signed. *See* Unif. Probate Code § 2-502 and § 2-502 (b).

If a subsequent holographic will disposes of part of an estate already disposed of in a typewritten will, then the typewritten will is revoked only to the extent that it is inconsistent with the later holographic will.

B. LOST WILLS

If the decedent had possession of her original will before her death, but the will is not found among her personal effects after death, jurisdictions are split as to whether a rebuttable presumption arises that the decedent destroyed the will with the intent to revoke it.

1. Duplicates and Copies

Duplicate originals are two copies of the same will executed in the same manner, each complying with the same formalities. A duplicate original may be admitted to probate.

A copy of a will, such as a photocopy, cannot itself be admitted to probate, although it may be used as proof of testamentary intent in the case of a lost or missing will.

2. Burden on the Proponent

If a will cannot be found, then the burden is on the proponent of the existence of a will to prove the will's existence by clear and convincing evidence. An attorney's copy of an original is sufficient, whereas testimony by an interested witness is not.

3. Absence of Intent to Destroy

If there is proof that a will has been destroyed, but there is no evidence that the testator intended to revoke the will, then the will can still be probated if there is clear and convincing evidence of the lack of intent to revoke and of the contents of the will.

C. REVOCATION OF CODICILS

Revocation of a will revokes all codicils thereto, whereas revocation of a codicil does not revoke a will, but rather revives it.

Example: In 2005, the testator executes a will. One year later, he adds a codicil. In 2011, he revokes the codicil with the intention of revoking the will as well. The testator dies in 2012. The 2005 will is offered for probate, and it will be admitted because the revocation of the codicil revives the underlying will.

D. REVIVAL

1. Republication

Example: Testator executes Will 1, leaving his estate to friend A. Years later, he executes Will 2, which leaves his estate to friend B. Three years thereafter, Testator destroys Will 2 with the intention to revoke it. Testator dies one year later, survived by A, B, and Testator's child C. Who takes?

The outcome of the above scenario depends on which approach applies.

At **common law**, followed in just a few states, the revocation of a will or codicil that had revoked another will automatically revived the original will.

If the common law applies in the example above, Will 1 would be revived when Will 2 was revoked. Therefore, A would take the estate.

However, many states currently follow the **no-revival approach**. Under this approach, the second will is treated as two legal instruments, each with its own effective date. The second will functions as (1) a revoking instrument that is effective upon its execution and also (2) a dispositive instrument effective upon the testator's death. Therefore, even if the second will is revoked before the testator's death, the revocation of the first will remains in effect. If the no-revival approach applies in the example above, although the testator's assets would not be distributed until death, Will 1 was revoked immediately when Will 2 was published as if the testator physically destroyed Will 1. Because the revocation of Will 2 does not negate the revocation of Will 1, Testator's assets are distributed intestate and C takes.

The **modern approach adopted by the UPC** focuses on the testator's intent and applies a hybrid approach that depends on two considerations: (i) whether the second will is revoked by act or by another, later will; and (ii) if the second will is revoked by an act, whether the first will was wholly or partially revoked by that second will. Unif. Probate Code § 2-509.

If the second will is **revoked by another new will**, the previously revoked will (or its revoked parts if it was only partially revoked by the second will) is only revived if the terms of the new will show that the testator intended the previous will to take effect. In other words, **the court will not consider any extrinsic evidence** (e.g., oral statements by the testator) in determining whether the testator intended to revive the first will. Unif. Probate Code § 2-509(c).

If the second will is **revoked by a physical act** (i.e., burning, tearing, etc.), the burden of establishing the testator's intent depends on whether the first will was wholly or partially revoked by the second will. If the second will **wholly revoked the first will**, the court will presume that the testator did not intend to revive the first will, and the burden will be on the proponent of the first will to prove that the testator intended to revive that will. Unif. Probate Code § 2-509(a). If the second will **partially revoked the first will**, the court will presume that the testator intended to revive the revoked parts of the first will, and those portions of the first will are revived unless the challenger of the first will establishes that the testator did not intend them to be revived. Unif. Probate Code § 2-509(b). In either case, **the court is permitted to consider extrinsic evidence** (e.g., the circumstances of the revocation, testator's contemporary or subsequent statements) to determine the testator's intent. Unif. Probate Code § 2-509(a), (b).

If the UPC approach applies in the example, the court would look at how Will 2 was revoked and whether Will 2 wholly or partially revoked Will 1. Because Will 2 wholly revoked Will 1, and because Will 2 was revoked by an act, the burden will be on A to

persuade the court that Testator's intent was to revive Will 1. If A meets this burden, Will 1 will be revived and A will take the estate. If A cannot meet this burden, the court will presume that Testator did not intend to revive Will 1, and Testator's assets will be distributed intestate to C.

2. Dependent Relative Revocation (DRR)

Under certain circumstances, many jurisdictions employ the equitable doctrine of dependent relative revocation (DRR), which allows a court to disregard a testator's revocation that was based on a mistake of law or fact and would not have been made but for that mistake. The testator's last effective will, prior to the set-aside revocation, will once again control his estate. The doctrine of DRR can apply to partial revocations as well.

Typically, courts apply this doctrine only when there is a sufficiently close identity between the bequest that was revoked and the bequest that was expressed in the invalid subsequent will. Most courts apply the doctrine only if there is an alternative plan of disposition that fails or if the mistake is recited in the terms of the revoking instrument or is established by clear and convincing evidence. *See e.g., LaCroix v. Senecal*, 140 Conn. 311 (Conn. 1953) (holding that DRR applied to sustain bequest to testator's nephew when it was clear that testator's sole purpose in executing codicil that was invalid because of interested witness was to reaffirm gift to nephew).

Example: T creates a second will and then writes on the first will, "I am revoking this will because I made a new will." T did not realize that the second will was not valid. The revocation of the first will is set aside, and the first will is given effect.

EXAM NOTE: If you see an otherwise valid revocation based upon a mistake (whether of fact or law), begin your analysis by stating the DRR rule.

X. COMPONENTS OF A WILL

A. INTEGRATION OF WILLS

Through the doctrine of integration, a will consists of all pages that are present at the time of execution and that are intended to form part of the will, which can be shown either by physical connection of the pages or by the ongoing nature of the language of the will. Litigation often occurs when pages are not physically connected or there is evidence that a staple has been removed. Problems can be prevented by carefully fastening the pages before the testator signs and by having the testator sign or initial each numbered page of the will.

B. INCORPORATION BY REFERENCE

In most jurisdictions, a will may incorporate by reference another writing not executed with testamentary formalities, provided the other writing:

i) **Existed** at the time the will was executed;

ii) Is **intended** to be incorporated; and

iii) Is **described in the will** with sufficient certainty so as to permit its identification.

Unif. Probate Code § 2-510; *see also, Clark v. Greenhalge*, 411 Mass. 410 (1991). The UPC waives the requirement that the document have been in existence at the time the will was executed if the document disposes only of testator's tangible **personal property.** The will, however, must expressly state the testator's intent. Unif. Probate Code § 2-513.

In *Johnson v. Johnson*, 279 P.2d 928 (Okla. 1955), an instrument offered for probate consisted of a single page with three typed paragraphs giving away property and at the bottom of the page, in the handwriting of the decedent, the statement, "To my brother

James, I give ten dollars only. This will shall be complete unless hereafter altered, changed or rewritten" along with the decedent's signature. The court concluded that the handwritten statement at the bottom of the instrument constituted a valid holographic "codicil," which incorporated the typed portion of the instrument by reference, giving effect to the intent of the testator. A dissent asserted that there was nothing in the handwritten portion of the instrument that referred to the typewritten material and that incorporation by reference was not appropriate.

C. REPUBLICATION BY CODICIL

Under the doctrine of republication by codicil, a will is treated as re-executed as of the date of the codicil. The doctrine is not applied automatically, but only when updating the will carries out the testator's intent.

Example: In 2010, T executes a will in a state that has a statute requiring the purging of any gift to an attesting witness. The will devises all of T's property to A. A and B are the only witnesses to the will. In 2011, T executes a codicil devising his watch to C. C and D are the only witnesses to the codicil. In 2012, T executes a second codicil, devising $10,000 to C. D and E are the witnesses to the second codicil. Under the doctrine of republication by codicil, upon the execution of the second codicil with two disinterested witnesses, the will and the first codicil are deemed re-executed in 2012 and both A and C are not purged of their gifts.

D. ACTS OF INDEPENDENT SIGNIFICANCE

1. In General

A will may provide for the designation of a beneficiary or the amount of a disposition by reference to some unattested act or event occurring before or after the execution of the will or before or after the testator's death, if the act or event has some significance apart from the will. Unif. Probate Code § 2-512 ("Events of Independent Significance"). The act may be in relation to the identification of property or of beneficiaries.

EXAM NOTE: When analyzing a testator's acts on an exam, look to the timing of the event. Recall that the doctrines of republication by codicil and incorporation by reference apply only to events that occurred in the past. For example, republication by codicil looks at a will executed before the codicil and incorporation by reference requires the document to be in existence before the execution of the will (unless the UPC exception applies). The acts of independent significance doctrine, however, is the only doctrine that applies to future acts or events.

2. Independent Legal Significance

If the testator, the beneficiary, or some third person has some control over the act or event, it may still have independent legal significance if it is unlikely that the testator or other person would perform such act solely for testamentary reasons. The execution or revocation of a will of a third person is an act of independent significance.

Example: A will might leave a certain gift to "the man who is my niece's spouse at the time of my death." The law does not presume that the niece would marry or divorce merely to complete the terms of the will.

XI. WILL CONTRACTS

Will contracts include contracts to make a will, contracts to revoke a will, and contracts to die intestate, all of which are controlled by contract law.

A. WRITING REQUIREMENT

Proof of contract can be established if:

i) The will states the material provisions of the contract;

ii) The terms are contained in a written contract; or

iii) Express reference is made in the will to the contract and extrinsic evidence proves the terms.

The UPC requires that the contract be in writing and be within the will to be enforced through probate. Unif. Probate Code § 2-514. Otherwise, the contract must be enforced through contract law.

B. CONSIDERATION

As with any other contract, consideration must be given for a will contract to be enforceable. Situations in which the beneficiary promises to care for the testator in exchange for a bequest provide sufficient consideration and make the contract enforceable.

C. ENFORCEABILITY AND REMEDY

To be enforceable in most states, a contract relative to making or not making a will must be in writing and signed by the party sought to be charged; otherwise, the plaintiff may recover only his consideration, including the fair market value of any services rendered. Whether the contract is breached will not generally be known until after the testator's death. Thus, there is no remedy for a breach while the testator is still alive.

D. RECIPROCAL PROVISIONS

1. Joint Wills

A joint will is a will signed by two or more persons that is intended to serve as the will of each. A joint will that is not reciprocal is merely the individual will of each of the persons signing the same document (and is treated as if there were several separate wills). A will that is both joint and reciprocal is executed by two or more persons, with reciprocal provisions, and shows on its face that the devises were made in consideration of the other.

2. Reciprocal Wills

Reciprocal wills are wills with identical or reciprocal provisions. Because reciprocal wills are separate, there is no contract between the parties to dispose of the property in a particular way, which means that either party can modify his will without knowledge of the other.

3. Contract Not to Revoke

In most jurisdictions, and under the UPC, the mutual execution of a joint or mutual will does not create a presumption of a contract not to revoke the will. Unif. Probate Code § 2-514. However, if a contract not to revoke is proved and the second party attempts to make an inter vivos transfer not in accordance with the contract, or attempts to revoke her will after accepting the benefits under the first party's will, then a constructive trust may be imposed for the benefit of the original beneficiaries. In a joint will contract, on the death of one party, the transaction is said to become an irrevocable contract as to the survivor.

Example: H and W wish to leave everything to each other with the balance to their children. H and W can either create two separate wills with reciprocal provisions (reciprocal wills), or they can create one joint will that includes reciprocal provisions stating that the property of each goes to the survivor, if any, otherwise to the children.

A joint will labeled "joint and mutual," with other factors listed above, is likely to be deemed a contract not to revoke, whereas reciprocal wills are unlikely to be so deemed absent clear and convincing evidence to the contrary.

EXAM NOTE: Generally, if a fact pattern includes a joint will, then the issue of a contract not to revoke is likely being tested.

XII. CONSTRUCTION

A. CLASSIFICATION SYSTEM

Traditionally, a "devise" refers to a gift of real property by will, and a "bequest" or "legacy" refers to a gift of personal property by will. Classifying gifts establishes the order of distribution and abatement if the estate's assets are insufficient to satisfy all of the gifts contained in the will. The judiciary often assigns classifications with reference to the intention of the testator when the will was written. The classes of gifts made under the will are distinguished by the type of item given.

1. Specific

A specific legacy, devise, or bequest is a gift of property that can be distinguished with reasonable accuracy from other property that is part of the testator's estate.

Example: "My blue truck to my dentist."

2. General

A general legacy is a gift of personal property that the testator intends to be satisfied from the general assets of his estate.

Example: "$100,000 to John."

3. Demonstrative

A testator intends that a demonstrative legacy be paid from a particular source, but if that source is insufficient, then he directs that the legacy be satisfied out of the general assets of the estate.

Example: "$100,000 to John from my X account, but if funds are not sufficient, then the rest paid out of general funds."

4. Residuary

A residual legacy is a legacy of the estate remaining when all claims against the estate and all specific, general, and demonstrative legacies have been satisfied.

Example: "I give all the rest and residue of my property, wheresoever situated, whensoever acquired, and whether known to me or not, to John."

B. AMBIGUITIES AND MISTAKES

1. Plain Meaning Rule

The majority of jurisdictions have been reluctant to admit extrinsic evidence (i.e., evidence that is not contained in the text of the document, itself) regarding varying the terms of a will. The general approach has been that courts will not disturb the plain meaning of a will regardless of mistake, although they are apt to treat certain mistakes as ambiguities, some types of which could be resolved through extrinsic evidence.

Example: In *Mahoney v. Grainger*, 186 N.E. 86 (Mass. 1933)**,** T told her attorney she wanted to leave the residue of her estate to her 25 first cousins, equally. T also said

that her first cousins were her nearest relatives. In actuality, her maternal aunt was her nearest blood relative. Instead of naming each cousin in the will, the attorney drafted the will to leave the residue of T's estate to her "heirs at law," believing that the cousins would take as T's nearest blood relatives. After T's death, the aunt claimed the residue, as T's heir at law. The court, applying the plain meaning rule, found for the aunt, holding that the term "heirs at law," was not ambiguous.

a. Ambiguities

At common law, there was a distinction between patent and latent ambiguities: patent ambiguities appeared on the face of the will and were required to be resolved within the four corners of the instrument but without extrinsic evidence; latent ambiguities were not apparent from a reading of the will and were allowed to be resolved by extrinsic evidence.

b. Mistakes

Extrinsic evidence is admissible to show a mistake in the *execution* of a will, such as when the testator is unaware that she was signing a will. In a case of the wrong will being signed, courts are divided as to whether relief should be granted, although the modern trend is moving in the direction of granting relief.

At common law and under the approach taken by most states, no extrinsic evidence is allowed and no relief is granted, if the mistake involves the reasons behind the testator making the will or a particular gift. For example, if a testator would normally make a will leaving his estate to his two children, but, under the mistaken belief that one of his children has died, instead makes a will devising his entire estate to only the other child, the court would not allow evidence of the mistake and only the one child would take the estate. There is an exception to this rule if the testator was fraudulently induced or the mistaken inducement appears on the face of the will.

If a will is missing provisions, a court applying the traditional rules will not allow extrinsic evidence to show the omission was accidental and will not grant relief. The rationale is that the testator presumably knew of the will's contents when he signed it.

2. Modern Trend

a. Repudiation of plain meaning rule

In a trend against formalism, some courts have repudiated the common law plain meaning rule. Many states no longer distinguish between patent and latent ambiguities and allow both to be resolved by extrinsic evidence. If the ambiguity cannot be resolved, then the gift in question becomes part of the residue. Some states, while purporting to stick to the rule that no reformation of a will is allowed, have moved in ways that effectively permit reformation.

Example: In *Arnheiter v. Arnheiter*, 125 A.2d 914 (N.J. Chancery 1956), T's will instructed her executor to sell her interest in "304 Harrison Avenue" and use the sale proceeds to establish trusts for her beneficiaries. At the time the will was executed and at the time of her death, however, T owned no such property. She did own a 50 percent interest in 317 Harrison Avenue. The court allowed extrinsic evidence to establish the erroneous description and then struck the number 304 from the will, allowing it to construe an ambiguity in the will to mean T's actual Harrison Avenue property.

b. Scrivener's error doctrine

Some jurisdictions have adopted the "scrivener's error doctrine," under which if there is clear and convincing of a scrivener's error's effect on a testator's intent, extrinsic evidence is permissible to establish and correct the error.

Example: In *Erickson v. Erickson*, 716 A.2d 92 (Conn. 1998), two days before his marriage to W, T executed a will leaving the residue of his estate to her. Under Connecticut law, a marriage revokes a will made prior to the marriage unless the will expressly provides for the marriage. On T's death, his children from his first marriage sought to void the will and take a share of T's estate through intestacy. W sought to admit evidence that T's attorney mistakenly executed the will two days before the marriage without acknowledging the marriage in the will. The court applied the scrivener's error doctrine to hold that if there is clear and convincing of a scrivener's error and its effect on a testator's intent, extrinsic evidence is permissible to establish and correct the error.

c. Reformation

A few states have adopted the Restatement (Third) of Property's more liberal approach, which allows a court to openly reform a donative document based on clear and convincing evidence of (a) a mistake of law or fact or (b) the donor's intention. The UPC now provides, after amendment in 2008, that a "court may reform the terms of a governing instrument if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by mistake of fact or law, whether in expression or inducement." Unif. Probate Code § 2-805.

C. ADEMPTION

1. Ademption by Extinction

The doctrine of ademption applies only to specific bequests. If the subject matter of a specific bequest is missing or destroyed (i.e., extinct), then the beneficiary takes nothing, not even the insurance proceeds or the equivalent in cash. This rule does not apply when the testator was incompetent, unless the will was executed prior to the incompetency.

a. Traditional approach—"identity theory"

The intent of the testator is not relevant in most states if the bequest is extinct. If the specifically-bequeathed item is not a part of the estate at the testator's death, then it is adeemed.

1) Substantial change

A substantial change in the nature of the subject matter of a bequest will operate as an ademption, but a merely nominal or formal change will not.

2) Ademption disfavored

Courts are inclined to avoid ademption by a variety of means, including the classification of a specific bequest as general or demonstrative, the classification of an inter vivos distribution as a mere change in form, and the creation of other exceptions to the doctrine.

b. "Modified intention" approach

Some jurisdictions apply a "modified intention" approach to ademption, generally following the identity approach discussed above, but exempting property that was

transferred through an act that was involuntary to the testator or made without the testator's knowledge and consent. The beneficiary will get either the full value of the bequest, or whatever is left of the bequest less proceeds that were used to support the testator. See *In re Estate of Anton*, 731 N.W.2d 19 (IA 2007) (holding that identity rule adeeming bequests not specifically found in the estate would not be applied when specifically devised property was removed from testator's estate by act involuntary to testator).

c. UPC approach—"intent theory"

The UPC fully rejects the traditional identity approach to ademption, adopting an intent approach instead. Under the UPC, the testator's intent at the time he disposed of the subject matter of the bequest is examined. The UPC has essentially established a "mild presumption" against ademption and has created several doctrines to avoid it. The bequest to the beneficiary is adeemed if the facts and circumstances establish that the ademption was intended. The UPC permits a beneficiary of a specific extinct gift to inherit the property acquired by the testator as **replacement property** or, if the testator is owed money relating to the extinction, the **outstanding balance**. Unif. Probate Code § 2-606(a).

If neither the replacement property nor the outstanding balance doctrine applies, then the UPC provides that a beneficiary of a specific gift is entitled to money equivalent to the value of the specific property as of the date of disposition if ademption is inconsistent with the testator's:

i) Intent; or

ii) Plan of distribution.

Example: X's will devises 123 Main St. to his son, Y. At the time of the will's execution, X owned the property, but he later sold the property and used the proceeds to buy bonds. X still owned the bonds at this death. Under the majority rule and common law, Y would not receive the bonds at death, as the specific devise of property was adeemed. Under the UPC, Y would receive the bonds under the replacement property exception.

EXAM NOTE: If an exam question does not specifically indicate the approach the jurisdiction takes with regard to ademption by extinction, be prepared to discuss both the traditional approach and the modern trend.

d. Beneficiary entitlement

If a gift is adeemed, then the beneficiary is entitled to:

i) Whatever is left of the specifically devised property;

ii) The balance of the purchase price owing from the purchaser of the property;

iii) Any amount of condemnation award for the taking of the property, to the extent unpaid upon death; or

iv) Property acquired from the foreclosure of a security interest on a specifically devised note.

2. Exoneration of Liens

Under the common-law doctrine of exoneration, the specific devisee of encumbered real property was entitled to have the mortgage on the property paid from the estate as a debt of the decedent, unless there was evidence of a contrary intent on the part of the testator. However, in many states, the specific devisee of encumbered property

takes subject to the mortgage, notwithstanding the fact that the will contained a clause directing the executor to pay the decedent's debts. A specific devisee of encumbered property is not entitled to have the debt paid off by the residual estate unless the testator's intent to do so is clear in the will. Unif. Probate Code § 2-607. A testator can specifically require that a lien be exonerated, in which case the encumbered property will not abate to exonerate the lien unless specifically stated in the will.

Note: A general directive to pay debt is insufficient to direct the exoneration of liens.

3. Ademption by Satisfaction

A general, specific, or demonstrative devise may be satisfied in whole or in part by an inter vivos transfer to the devisee after the execution of the will, if it was the testator's intent to satisfy the devise by the transfer.

a. Intent controls

The testator's intent to adeem must exist before the legacy or bequest is rendered inoperative.

b. No presumption

The UPC presumes no ademption by satisfaction, absent an express writing, and it limits the sources of evidence of the testator's intent to adeem. Unif. Probate Code § 2-609.

4. Securities

a. Pre-death changes

At common law, the treatment of a gift of securities depended on whether it was a specific or general bequest. Many states hold that a stock dividend, like a cash dividend, is a property interest distinct from stock given by the specific bequest. A bequest of stock owned by a testator when the testator's will is signed excludes subsequently acquired shares of the same stock. A bequest of a certain number of shares of a security that were owned by the testator at the time the will was executed is deemed to include any additional shares of that security or of another security acquired by reason of a stock split, stock dividend, reinvestment, or merger initiated by the original security. However, the beneficiary is not entitled to any pre-death cash dividends or distributions. If the bequest is a generic gift (e.g., does not specify a number of shares), then the beneficiary does not take any additional shares.

Under the UPC, which rejects the common-law approach of classifying the type of bequest, a bequest of a security that was owned at the time the will was executed will include any additional shares of that security or of another security as long as the action was initiated by the corporate entity. A stock dividend is treated like a stock split instead of a cash dividend. Unif. Probate Code § 2-605.

b. Post-death changes

The classification of a gift controls the disposition of any income earned on the gift after the testator's death. Specific bequests carry with them all post-death income, such as interest, dividends, and rent. General bequests carry with them interest earned on the amount bequeathed beginning one year after the decedent's death, at a rate set by statute. Residual bequests are not interest-bearing.

D. LAPSE

1. Common-Law Rule

Under common law, if a beneficiary died before the testator, or before a point in time by which she was required to survive the testator under the will, then the gift failed and went to the residue unless the will provided for an alternate disposition. Absent a residuary clause, the gift passed through intestacy. A gift made by will to an individual who was deceased at the time the will was executed was treated as a lapsed gift.

2. Anti-Lapse Statute

Almost all states have enacted anti-lapse statutes providing for alternate disposition of lapsed bequests. Under the majority of the statutes, if the gift was made to a relation of the testator within a specific statutory degree, and the relation predeceased the testator but left issue, then the issue succeeds to the gift, unless the will expressly states the contrary. Most statutes require that the devisee who failed to survive was a grandparent, descendant of a grandparent, or a stepchild of the testator. Unif. Probate Code § 2-603. Most jurisdictions allow the statute to apply only to testamentary gifts. Under the UPC and the modern trend, however, anti-lapse protection may also apply to non-probate transfers. Unif. Probate Code §§ 2-706; 2-707.

Example: T's will provides, "I give $50,000 to my brother, B." B predeceases T. Under anti-lapse, B's issue would take the $50,000.

In *Ruotolo v. Tietjen*, 890 A.2d 166 (Conn. App. 2006), a testator devised one half of his property to his stepdaughter "if she survives me." The stepdaughter predeceased the testator and following the testator's death, the stepdaughter's daughter attempted to take her mother's share under an anti-lapse statute. The court concluded that words of survivorship in the testator's will did not constitute sufficient evidence of intent by the testator to prevent the application of the anti-lapse statute. Many states have reached the opposite conclusion adopting the view that if a testator specifically chose to include such words that shows intent to override the anti-lapse statute.

3. Class Gifts

At common law, a class gift is treated differently from a gift to an individual. A class gift is a gift to more than one individual that is intended to be taken as a group. There is an intrinsic right of survivorship among the members of the class. Whether a gift is to a class or just to multiple individuals with no right of survivorship is a question of the testator's intent. If the testator uses a generic class label, such as "to my nieces" in devising his property, that generally indicates a class gift. If the testator specifically names each beneficiary, that fact can suggest that the gift is not a class gift. Courts generally admit extrinsic evidence when the will is ambiguous as to the testator's intent. Many courts have held that when there is one gift in a will to multiple individuals that has an express right of survivorship in the will, the failure to include such an express right in another gift indicates that the testator did not intend for that gift to be a class gift. *See e.g., Dawson v. Yucus*, 239 N.E.2d 305 (Ill. App. 1968) (holding that when number of beneficiaries to a gift is certain and share each is to receive is certain and not dependent for amount on the number who shall survive, it is not a class gift but a gift to the specific individuals).

When a gift is to an entire class and one member of the class predeceases the testator, only the surviving class members take. However, if an anti-lapse statute applies (because the predeceased class member was related to the testator), then the issue of the predeceased member take the member's share. The majority of states and UPC

apply the anti-lapse statute first, before the determination of a class gift. Unif. Probate Code § 2-603.

The UPC extends anti-lapse to life insurance policies in which the beneficiary predeceases the policyholder. Unif. Probate Code § 2-706.

4. Residuary Rule and Future Interests

Under the UPC, if the residue is left to two or more persons and one dies, and if anti-lapse does not apply, then the remaining beneficiaries take in their proportionate shares. Unif. Probate Code § 2-604(b). This is contrary to the common law "no residue of a residue" rule, under which the testator's heirs succeeded to any lapsed portion of a residual bequest. *See Estate of Russell*, 444P.2d 353 (Cal. 1968) (applying no residue of residue rule when testator attempted to leave half of residue to her dog).

Likewise, if a future interest is left to two or more persons and the gift to one of them lapses, then her share passes to the other future interest holders unless anti-lapse applies.

5. Void Gifts

Although there may appear to be no difference between a void gift and a lapsed gift, the law sometimes makes a distinction and treats them differently. A gift is void if, unbeknownst to the testator, the beneficiary is already deceased at the time the will is executed. As noted above, a lapsed gift occurs when the beneficiary predeceases the testator **after** the will has been executed. Most states allow anti-lapse statutes to apply to void gifts.

E. ABATEMENT (FIRST TO LAST)

1. Order

Gifts by will are abated (i.e., reduced) when the assets of the estate are insufficient to pay all debts and legacies. The testator may indicate his intended order of abatement, but if he fails to do so, the law prescribes an order. If not otherwise specified in the will, gifts are abated in the following order:

i) Intestate property;

ii) Residuary bequests;

iii) General bequests; and

iv) Specific bequests.

Unif. Probate Code § 3-902.

Demonstrative legacies are treated as specific legacies for abatement purposes to the extent that they can be satisfied, and otherwise as general legacies. Within each classification, abatement is pro rata.

2. Specific Bequests

A specific bequest may abate to satisfy a general legacy only if such intent was clearly indicated by the testator.

XIII. WILL SUBSTITUTES

A will substitute is a method of transferring a decedent's property outside of probate. Distribution of these non-probate assets does not involve a court proceeding; it is done in accordance with the terms of a contract, trust, or deed. Will substitutes come in many forms, the most popular of which are described below in this section of the outline.

A. REVOCABLE TRUSTS

For more detailed discussion of trusts, *see* § XV, *infra*.

1. In General

Virtually all jurisdictions permit a revocable inter vivos trust to serve as a valid will substitute. If a trustee holds legal title and a beneficiary holds equitable title, there is no need to transfer title upon the death of the creator. Inter vivos trust property is non-probate property. Under the traditional and majority rule, a trust that is silent as to its revocability is deemed revocable. If the trust states an express and particular method of revocation, only that method of revocation is permissible. If the trust is silent as to the method of revocation, any method of revocation is generally permissible, unless real property is involved, in which case only written revocation is permitted.

2. Settlor's Power and Control

There is a split among the jurisdictions as to how much power and control the settlor can retain and still have a valid inter vivos trust. Most courts permit a settlor to retain a lot of control over the trust. *See e.g., Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955) (holding that even when settlor of trust retains power to revoke and appoints self as trustee, if beneficiary obtains any interest in trust before settlor dies, trust is valid inter vivos trust).

3. Rights of Settlor's Creditors Following Settlor's Death

Under the common law, if a settlor retains a life estate in an inter vivos revocable trust, when the settlor dies, the life estate ends and there is nothing for the settlor's creditors to attach.

The modern trend, as reflected in the Uniform Trust Code, asserts that since the assets were available to the settlor during his lifetime, the creditors of the settlor should be allowed to reach those assets after the settlor's death. Thus, if a revocable inter vivos trust is not revoked and the settlor retained a life estate in the trust, after the settlor's death, the settlor's creditors can reach the assets in the trust if the settlor's probate estate is insufficient to pay off the creditors. *See State Street Bank & Trust Co. v. Reiser*, 389 N.E.2d 768 (Mass. App. 1979) (holding that given the extent to which the settlor had power over the assets in a revocable inter vivos trust during his lifetime, such assets should be available to creditors after settlor's death, after exhausting settlor's probate assets).

4. Beneficiary's Lack of Standing to Challenge Revocable Trust Amendments

A beneficiary of a revocable inter vivos trust has no standing to challenge amendments to the trust because her interest is contingent and unenforceable during the settlor's lifetime. *Linthicum v. Rudi*, 148 P.3d 746 (Nev. 2006).

B. POUR-OVER WILLS

A pour-over will includes a clause wherein some or all of the decedent's probate property is given to the trustee of the decedent's inter vivos trust.

Example: "I give the rest and residue of my estate to the trustee of my inter vivos trust, to hold and distribute pursuant to its terms."

A true pour-over clause must be validated. If the will states the terms of the trust, the clause is not a pour-over clause, but instead creates a testamentary trust, which requires probate supervision. If the will does not set forth the terms of the trust and they are set forth in a separate document, the clause is a pour-over clause and must be validated.

As the law developed with regard to pour-over wills, two theories were generally applied to validate the pour-over of assets into an inter vivos trust: acts of independent significance and incorporation by reference. Under the acts of independence significance doctrine, the "act" that is referenced in the will was the reference to the trust. If the trust is funded inter vivos and has property in it at the time of the settlor's death, the trust has its own independent significance. The doctrine, though, did not permit pour-over into an unfunded inter vivos trust. Under the doctrine of incorporation by reference, the will would incorporate the inter vivos trust instrument into it, giving it effect and allowing it to dictate who takes the settlor's probate property. However, the doctrine of incorporation by reference would not allow a trust instrument to be amended after the will is executed. In addition, the trust instrument incorporated by reference only created a testamentary trust at the death of the settlor, which meant that it became subject to probate supervision, contravening the whole purpose of using a trust.

Due to the uncertainty of these doctrines and some errors that embarrassed lawyers, lawyers and estate planners sought the enactment of legislation that permitted a will to pour over probate assets into an *unfunded* inter vivos trust. Originally, the Uniform Testamentary Additions to Trusts Act (UTATA), included within the UPC, validated the pour-over of probate assets into an inter vivos trust only if the original trust instrument was executed before or concurrently with the will. Subsequently, the UTATA/UPC was amended to allow the trust instrument to be executed or amended after the will. Unif. Probate Code § 2-511. In addition, no property need be put into the trust until the death of the settlor. The trust is then still treated as an inter vivos trust that is not subject to probate court supervision.

EXAM NOTE: In attempting to validate a pour-over clause, try to apply the UTATA/UPC approach, unless told that is inapplicable, If that will not work, try to validate with the incorporation by reference or acts of independent significance doctrines. If none of those options work, the clause is invalid and the gift under it fails.

C. PAYBABLE-ON-DEATH CONTRACTS

At common law, the only type of contracts with payable-on-death clauses that were exempt from the formalities required for wills were life insurance contracts. *See e.g., In re Estate of Atkinson*, 175 N.E. 2d 548 (Ohio Prob. Ct. 1961) (holding that use of words "payable on death" on bank account created invalid testamentary disposition). Under the modern approach, as reflected in the UPC, all contracts with payable-on-death clauses are exempt from wills formalities. Thus, a decedent may have a contract with a bank, employer, or some other individual or entity to distribute the property held under the contract at the decedent's death to a named beneficiary. *See e.g., Estate of Hillowitz*, 238 N.E.2d 723 (N.Y. 1968) (holding that a partnership agreement with clause that each partner's interest would pass to his spouse on the partner's death was valid and enforceable). To collect property held under a payable-on-death contract, the beneficiary must file a death certificate with the custodian holding the property.

1. Life Insurance

A beneficiary of a life insurance policy takes by virtue of the insurance contract. The proceeds are not part of the decedent's estate, unless they are payable to the estate as beneficiary.

In most jurisdictions, life insurance proceeds are payable to the beneficiary named in the beneficiary-designation form filed with the insurance company, even if the insured names a different beneficiary in a later-executed will. This rule is typically justified as a matter of contract: life insurance policies generally provide that policy proceeds will be paid only to a beneficiary named on an appropriate form filed with the insurance company; other possible methods of changing a beneficiary are thus viewed as being

excluded by the insurance contract. *See, generally, Cook v. Equitable Life Assurance Society of the U.S.*, 428 N.E.2d 110 (Ind. 1981).

However, some courts have rejected the majority rule on the grounds that the requirement that a beneficiary change be evidenced by a form filed with the insurance company is for the exclusive benefit of the company. These courts permit an insured to change a beneficiary designation by will if his insurance company does not object. *See, e.g.*, *Burkett v. Mott*, 733 P.2d 673 (Ariz. 1986).

2. Bank Accounts and Securities Registered in Beneficiary Form

Amounts on deposit in a bank account may be transferred at death by means of a joint account designation or any other multiple-party account designation. The surviving tenant or tenants have an absolute right to the account proceeds, unless extrinsic evidence is introduced that the decedent added the tenant or tenants for convenience purposes only. For example, giving the other co-tenant check-writing privileges is considered a convenience. In that case, some courts, including those following the UPC, set aside the joint tenancy in the bank accounts. Unif. Probate Code § 6-212 cmt. Other courts still affirm the joint tenancy, relying on the parol evidence rule to exclude evidence of the depositor's intentions.

The owner of a security may register it in "beneficiary form" so that upon the death of the owner, the security is transferred to the designated beneficiary. Registration in beneficiary form does not limit the rights of a surviving spouse, domestic partner, or creditor.

3. Totten Trusts

A Totten trust, similar to payable-on-death bank accounts, is a form of inter vivos trust whereby the depositor sets up an account and makes deposits "for the benefit of" the beneficiary. The depositor retains legal title, and the beneficiary has equitable title. As a general rule, Totten trusts are revocable and permit the depositor to withdraw money.

D. DEEDS

A deed is an effective non-probate transfer if it is delivered to the grantee prior to the grantor's death, even if the grantor retains a life estate in his own favor, as long as the delivery is unconditional. A deed is likewise effective if it is delivered to an escrow agent during the grantor's lifetime with instructions to turn it over to the grantee upon the grantor's death. Even if a deed fails for want of delivery, and is thus ineffective, it cannot be a will.

E. JOINT TENANCIES IN REAL PROPERTY

Most family homes are owned either by joint tenancy or tenancy by the entirety, both of which establish a right of survivorship in the co-owners. Upon the death of one of the tenants, the survivor owns the property in its entirety, with no need for probate. A joint tenancy in real property requires the agreement of all tenants to take the most important actions with respect to the property. A joint tenant cannot devise his share of the property by will. To do so, the joint tenant must sever the joint tenancy during his life and convert it into a tenancy in common. A creditor of a joint tenant must seize the joint tenant's interest during the joint tenant's life. If the creditor does not, the interest vanishes upon the joint tenant's death and there is nothing for the creditor to attach.

XIV. LIMITS ON TESTAMENTARY POWER TO TRANSFER

A. RIGHTS OF SURVIVING SPOUSE

1. In General

The law generally provides for two different types of protection for a surviving spouse of a decedent. In virtually all states, through a combination of state and federal law, a surviving spouse has certain rights for support for the rest of the surviving spouse's life. A surviving spouse is also entitled to a share of the marital property.

2. Spousal Support

The surviving spouse is entitled to the following means of support: social security, pension plans, homestead exemption, personal property, and family allowance. These rights apply even if the decedent spouse tries to defeat such rights.

a. Social Security

The surviving spouse would be entitled to a benefit based on the decedent spouse's benefits. Only a spouse can receive a worker's survivor benefits from Social Security. The benefits cannot be transferred to anyone else.

b. Pension plans

The Employee Retirement Income Security Act (ERISA) requires pension plans to give spouses survivorship rights. Unlike Social Security, a surviving spouse can waive her rights in the spouse's pension plan, but such waivers are subject to strict requirements.

c. Homestead exemption

Under homestead exemption statutes, which vary by state, a certain acreage or value of real property is exempt from creditors' claims, is inalienable during the life of the owners without consent, and passes upon death by statute, not by will. The amount of the homestead exemption differs by state, but the UPC, as amended in 2008, recommends a lump sum payment of $22,500. Any minor child or children of the decedent are entitled to the exemption amount in the absence of a surviving spouse.

d. Personal property set-aside

The surviving spouse is entitled to claim certain tangible personal property, even when the decedent has attempted to devise that property in his will. Some states have a statutory list of tangible personal property or a monetary limit to which the surviving spouse or, if none, any minor child or children of the decedent, are entitled.

e. Family allowance

The surviving spouse has a right to a family allowance during probate, the amount of which varies by jurisdiction. Some jurisdictions permit minor children also to receive a family allowance. Depending on the jurisdiction, the family allowance is either a set amount or one based on the marital standard of living.

3. Spouse's Right to a Share of the Marital Property

a. Separate property approach versus community property approach

Most states follow what is called the "separate property" approach to marital property. Eight states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington) follow what is called the "community property" approach.

Alaska allows married couples to elect to treat their property as community property.

Under the separate property approach, whatever a worker earns is hers. If one spouse is the wage earner, while the other works at home, the wage-earning spouse will own all of the property acquired during the marriage other than gifts or inheritances from others or by the wage earner to the homemaker spouse. To protect the homemaker spouse (or a spouse who works at a lower paying job), the laws of almost all separate property states give the surviving spouse an "elective" or "forced" share in the estate of the decedent spouse.

Under the community property approach, the earnings of the spouses and the property acquired from such earnings are the property of both spouses, unless they both agree otherwise. Community property consists of the earnings and certain acquisitions of both spouses during the marriage. At the death of one spouse, one-half of the community property is already owned by the other, and only the decedent's half is subject to disposition by will. Quasi-community property is separate property that would have been community property had the parties been domiciled in a community-property state when acquired. Quasi-community property is treated like community property for distribution purposes.

b. Elective share

The application of the elective share, and the property to which it applies, varies depending on the jurisdiction. In common-law states, the elective share gives the surviving spouse a fraction (often one-third) of the decedent's estate if the surviving spouse elects to take the elective share rather than any gift contained in the will. The elective share applies to all property of the decedent, regardless of when it was acquired.

The elective share does not exist in community-property states. Instead, the surviving spouse is entitled to a forced share of one-half of the community property and quasi-community property. The spouse must elect to take this share in lieu of all other interests she may have under the testator's will and must file a notice of election within a specified time period. The elective share is personal to the surviving spouse.

1) Property subject to the elective share

Traditionally, and still in a number of states, the surviving spouse was entitled to a share of the decedent spouse's *probate* property only. As the use of non-probate transfers grew, courts struggled with ways to try to protect the surviving spouse. Some looked to whether the non-probate transfer was "illusory," meaning that the assets count as part of the decedent's assets to constitute the elective share. Some looked to whether the decedent spouse intended to defraud the surviving spouse by using the non-probate property transfer. To determine intent, some states applied a subjective test, while others applied an objective test. Other states looked to whether the decedent spouse had a present donative intent at the time the non-probate transfer was made. *See e.g., Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984) (establishing a prospective rule that if the settlor retains substantial rights and powers under an inter vivos trust instrument, the assets of the trust will be considered part of the estate for distribution to the heirs).

Many states, dissatisfied with the vague judicial standards described above, have enacted specific statutory criteria for determining what non-probate

transfers are subject to the elective share. The UPC statutory approach is described below.

2) UPC "augmented estate"

The UPC introduced the concept of the augmented estate. Under the augmented estate, the probate estate is "augmented" with certain non – probate transfers. The current version of the UPC subjects property acquired before marriage, as well as that acquired during marriage, to the "marital-property" portion of the augmented estate to which the surviving spouse is entitled. The UPC augmented estate is broader than the share under a community-property state, as it includes property acquired before the marriage and property gifted to the spouse during the marriage.

a) Increasing share

Under the UPC, the surviving spouse may take an elective-share amount equal to 50% of the value of the marital-property portion of the augmented estate. The marital-property portion is calculated by applying to the augmented estate a schedule of percentages that increase as the length of the marriage increases (e.g., 6% for the first year, 30% at five years). Unif. Probate Code § 2-203(a).

b) Satisfying share

The elective share is satisfied first from property already received by the surviving spouse, then from the rest of the estate. Life estates granted to the surviving spouse are considered support and do not count in the valuation. Unif. Probate Code § 2-209.

3) Right to set aside transfers

In many states, the surviving spouse can set aside inter vivos transfers by the decedent made during the marriage without spousal consent if the decedent initiated the transfer within one year of his death, retained an interest in the property transferred, or received less than adequate consideration for the transfer.

4) Personal to the surviving spouse

In most states and under the UPC, the election is personal to the surviving spouse. Thus, if a husband dies and before the surviving wife exercises her election she dies, all of the husband's property passes to the husband's heirs rather than to the wife's heirs. Unif. Probate Code § 2-212(a).

5) Incompetent spouse

If the surviving spouse is incompetent, a guardian of the spouse can decide whether an election is in the spouse's best interests under the supervision of the probate court. A majority of jurisdictions hold that all of the surrounding facts and circumstances should be considered in making such a decision. *See e.g., In re Estate of Cross*, 664 N.E.2d 905 (Ohio 1996). Such a view allows the guardian to consider the preservation of the decedent's estate plan and whether the surviving spouse would have wanted to follow the decedent's wishes. A minority of jurisdictions hold that the guardian must elect to take the share if it is to the economic benefit of the surviving spouse, as calculated economically.

The UPC provides that if the elective share is exercised for an incompetent spouse, the portion of the elective share that exceeds the share the spouse

would have taken under the will is to be placed in a custodial trust, with the surviving spouse having a life estate, and a remainder in the devisees under the will. Unif. Probate Code § 2-212.

6) Abandonment

In a minority of states, an elective share is not allowed for persons who abandoned or refused to support the decedent spouse.

7) Waiver

The right of the surviving spouse to take her elective or forced share can be **waived in writing** if the writing is signed after **fair disclosure** of its contents.

a) Scope

A spouse may waive in whole or in part, before or during the marriage, the right to receive any of the following from the estate of his spouse:

i) Property that would pass by intestate succession or by testamentary disposition in a will executed before the waiver;

ii) Homestead, exempt property, or family allowances;

iii) The right to take the share of an omitted spouse; or

iv) The right to take against the testator's will.

While the right to take under a will may be waived in a prenuptial agreement, if the testator, despite the agreement, devises property to the surviving spouse, the surviving spouse is not precluded from taking such property by the agreement.

b) Validity requirements

The terms of the waiver must be objectively fair and reasonable to both parties. The waiver must be voluntary and in writing and must be signed by the surviving spouse. It can be revoked or altered only by a subsequent writing signed by both parties, unless the waiver specifies other means of revocation. The surviving spouse must be represented by independent legal counsel at the time the waiver is signed. The surviving spouse must have had adequate knowledge of the property and financial obligations of the decedent at the time of the signing of the waiver. With regard to the standard for adequate knowledge, s*ee Reece v. Elliot*, 208 S.W.3d 419 (Tenn. Ct. App. 2006) (holding that adequate knowledge did not require husband to list value of company stock he owned when wife had independent counsel and could have asked questions about the value of the listed asset).

B. OMISSION

1. Omitted Spouse

a. In general

At common law, a premarital will was revoked upon marriage. In most states today, while a marriage after the execution of a will does not invalidate the will, a spouse who is not mentioned in a will is generally entitled to a special intestate share (generally one third) of the testator's estate if the marriage began after the execution of the will. When a spouse is omitted from a will, a rebuttable presumption is created that the omission was a mistake. In many states, the

presumption cannot be rebutted unless the intent to omit the spouse is apparent from the language of the will or the spouse was provided for outside of the will.

b. UPC approach

Under the UPC, the share for the omitted spouse is required unless:

i) A valid **prenuptial agreement** exists,

ii) The spouse was **given property outside of the will** in lieu of a disposition in the testator's will; or

iii) The spouse was **specifically excluded** from the will.

Unif. Probate Code § 2-301.

The UPC expands the allowable evidence that can be used to prove that the spouse's omission from the will was intentional to include, in addition to the language of the will, any other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse. Unif. Probate Code § 2-301.

Under the UPC, an omitted spouse has the right to receive no less than her intestate share of the deceased spouse's estate from that portion of the testator's estate that is not already devised to a child or descendant of the testator if:

i) The child is not a child of the surviving spouse; and

ii) The child was born before the testator married the surviving spouse.

2. Omitted Children

a. In general

A pretermitted child is a child that is born after a will was executed. Pretermitted heir statutes permit children of a testator under certain circumstances to claim a share of the estate even though they were omitted from the deceased testator's will. While the birth or adoption of a child after the execution of a will does not invalidate the will, such children are omitted from the will. If the testator then dies without revising the will, a presumption is created that the omission of the child was accidental.

Under the typical pretermitted heir statute, if the testator had no children at the time the will was written, then any after-born child or children will be entitled to their intestate share. If, however, the testator had children at the time the will was executed, then any after-born children (pretermitted children) are only entitled to get a share of the amount that was left to the earlier-born children named in the will.

Example: T writes a will leaving $75,000 to each of his two children A and B. After executing the will, T has another child C, who is not provided for in the will and T never amends his will. C is allowed to share in the bequests to A and B. The total bequest is $150,000. That means, instead of $75,000 per child, each child is only going to get$50,000.

b. Exceptions

In general, an omitted child statute will not apply if:

i) It appears that the omission of the child was **intentional**;

ii) The **testator had other children** at the time the will was executed and left substantially all of his estate to the other parent of the pretermitted child; or

iii) The testator **provided for the child outside of the will** (e.g., through a trust or through life insurance) and intended this to be in lieu of a provision in the will.

Pretermitted heir statutes generally fall under two types. Under the Missouri-type statute, it must appear from the will itself that the omission of the child or other heir was intentional. Extrinsic evidence of intent is not admissible. Under the Massachusetts-type statute, the child takes unless it appears that the omission was intentional and not occasioned by a mistake. Extrinsic evidence is admissible to show the presence or absence of intent to disinherit.

Mention of a child in only one of two instruments that are being read together or the republication of a will by codicil after the birth of a child will preclude that child from claiming as an omitted heir, although this rule is flexibly applied.

EXAM NOTE: For both a pretermitted spouse and a pretermitted child statute, pay close attention to the possibility of republication by codicil. A minor modification to a will after a child is born might transform that pretermitted child into a child who was in existence at the time the will was executed. Therefore, it might result in disinheritance of that child.

c. UPC

1) Presumption

Unlike the UPC omitted-spouse doctrine, the UPC omitted-child doctrine does **not** expand the scope of evidence admissible to show the testator's intent to omit the child. However, extrinsic evidence is permitted to show the testator's lack of intent to omit the child, and ambiguities are resolved in the child's favor. The UPC does not permit the presumption to be overcome when a substantial portion of the estate is transferred to the other parent of the omitted child.

2) Omitted child's share

If the testator had no other children when the will was executed, then the child takes her intestate share. If the testator has at least one other child living at the time of the execution of the will, and the will devised property to at least one of those children, then the omitted child's share is taken from that portion of property already devised to the other child, and it must equal the share the other child receives.

While the UPC does not extend the protection of the omitted-child statute to children of whom the testator was unaware, it does extend omitted-child status to children whom the testator believed to be deceased. Unif. Probate Code § 2-302.

3) Adopted children

Unlike the rules in many states, the UPC rule applies to children adopted after the execution of the will.

XV. TRUSTS

A. INTRODUCTION TO TRUSTS

A trust is a fiduciary relationship wherein one or more trustees are called upon to manage, protect, and invest certain property and any income generated from such property for the benefit of one or more named beneficiaries.

To create a trust, the grantor must have intended to create the trust. A trust is valid as long as it has a trustee, an ascertainable beneficiary, and assets. Trust interests are alienable, devisable, and descendible unless the terms of a trust expressly or impliedly provide otherwise.

Trusts are classified according to the method by which they are created. There are three main types of trusts: express trusts, resulting trusts, and constructive trusts. An express trust is created by intention and gratuitously for the benefit of individual beneficiaries. There are private and charitable express trusts. Resulting and constructive trusts are remedial trusts, equitable remedies created by operation of law.

When a trust fails in some way or when there is an incomplete disposition of trust property, a court may create a resulting trust requiring the holder of the property to return it to the settlor or to the settlor's estate. When a testamentary trust fails, the residuary legatee succeeds to the property interest. The purpose of a resulting trust is to achieve the settlor's likely intent in attempting to create the trust. The primary aim of a resulting trust is the prevention of unjust enrichment. Courts use constructive trusts to prevent unjust enrichment if the settlor causes fraud, duress, undue influence, breach of duty, or detrimental reliance by a third party on a false representation. There must have been wrongful conduct in order to impose a constructive trust. A party with unclean hands will usually be estopped from arguing for the creation of a constructive trust.

B. OVERVIEW OF EXPRESS TRUSTS

1. Bifurcated Transfer

A trust involves a bifurcated transfer. The creator or settlor transfers property to a second party trustee to be managed for the benefit of a third party beneficiary. The trustee holds legal title and the beneficiary holds equitable title. No consideration is required.

2. Ongoing Transfers

A trust involves an ongoing series of transfers. Trust property is divided between income and principal, and the equitable interest is divided between the beneficiary holding the possessory estate and the beneficiary holding the future interest.

3. Revocable versus Irrevocable Trusts

a. Presumption

In most jurisdictions, a trust is presumed to be **revocable** unless it expressly states that it is irrevocable. UTC § 602(a). Traditionally, and today in a minority of jurisdictions, a trust is presumed to be irrevocable. N.Y. Est. Powers & Trusts Law § 7-1.16.

b. Method of revocation

A settlor may amend or revoke a revocable trust:

i) By substantial compliance with a method provided in terms of the trust; or

ii) If the terms of the trust do not provide a method or the method provided is not expressly made exclusive, by;

a) A later will or codicil that expressly refers to the trust or specifically devises property that otherwise would have passed according to the terms of the trust; or

b) Any other method manifesting clear and convincing evidence of the settlor's intent.

When the terms of the trust expressly recognize the settlor's right to revoke the trust but are silent as to the settlor's right to amend the trust, the settlor has the right to amend the trust. UTC § 602(c).

4. Mandatory versus Discretionary Trusts

A mandatory trust requires the trustee to distribute all trust income. To protect the interests of the beneficiaries, a settlor may instead opt to create a discretionary trust, under which the trustee is given the power to distribute income at his discretion. The trustee does not abuse his discretion unless he acts dishonestly or in a way not contemplated by the trust creator.

5. Inter Vivos versus Testamentary Trusts

A trust that is created during the settlor's life is an inter vivos trust. An inter vivos trust may be created either by a declaration of trust, under which the settlor declares that she holds certain property in trust, or by a deed of trust, under which the settlor transfers certain property to another person as trustee. An inter vivos trust can be either revocable or irrevocable. Often inter vivos trusts are used to avoid the costs and delays of the probate process. Other perceived advantages of inter vivos trusts include lifetime asset management by a third party, privacy, and choice of law.

Testamentary trusts occur when the terms of the trust are contained in writing in a will or in a document incorporated by reference into a will. Testamentary trusts must comply with the applicable jurisdiction's Statute of Wills.

6. Rule Against Perpetuities

Because future interests are trust components, trusts are subject to the Rule Against Perpetuities, meaning that a trust may fail if all interests thereunder may not vest within the applicable period of perpetuities (usually a life in being plus 21 years).

Some jurisdictions take a "wait and see" approach to the application of the Rule, refraining from invalidating future interests until it is clear that they will not vest within the perpetuities period.

C. PARTIES TO AN EXPRESS TRUST

There are three parties to a trust—settlor, trustee, and beneficiary.

1. Settlor

The settlor, sometimes referred to as the grantor, is the creator of the trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion. Uniform Trust Code (UTC) § 103(15); Restatement (Third) of Trusts, § 3(1), cmt. a.

2. Trustee

The trustee holds the legal interest or title to the trust property.

Note: The same individual cannot serve as sole trustee and sole beneficiary of a trust, because such an arrangement would result in a lack of enforcement power by the

beneficiary against the trustee. If the trustee is the sole beneficiary, then title merges and the trust terminates.

a. Loss of a trustee

A trust will not fail if a trustee dies, becomes disabled, resigns, or refuses to accept the office. Once the appointment has been accepted, however, the trustee must obtain the court's permission to resign. Instead, the court will appoint a successor trustee, unless the settlor expressed an intent that the trust was to continue only as long as a particular trustee served.

If the settlor fails to designate a trustee, then the court will appoint one.

Example: Settlor gives T $50,000 to invest, with income to A for life, remainder to B. T silently accepts the money. T's acceptance of the trust is presumed because he accepted the trust property. However, if T refuses to serve as a trustee, then the court will appoint a new trustee to comply with the settlor's intent that a trust be created.

b. Duties to perform

A trustee must be given specific duties to perform, or the trust will fail and legal and equitable title will merge in the beneficiary. The expressed intention of the settlor to create a trust along with the identification of trust property and beneficiaries is usually sufficient for the court to infer duties to be performed by the trustee.

Example: A gives $1,000 to T as trustee for A's child, B, with the trust to terminate when B graduates from college. A does not outline any duties for T to perform. The court will infer the duty to accumulate income and to invest principal, to be paid to B when B graduates from college. The trust will not fail for lack of express duties.

c. Qualifications of a trustee

A named trustee must have the capacity to acquire and hold property for his own benefit and the capacity to administer the trust. Minors or insane persons will not qualify as trustees, as they can hold property but cannot administer it. Additionally, those eligible to serve as trustees may be limited by statute. A named trustee who fails to qualify will be replaced by the court, unless the trust names a successor trustee.

d. Removal of a trustee

Several grounds exist through which the court may remove a trustee. These include conflict of interest, old age, serious breach of trust, and habitual drunkenness, among others. However, if the settlor knew of the grounds for removal when she created the trust, then the court may allow the trustee to continue. The court's primary concern is ensuring the integrity and continuity of the trust. Beneficiaries may also be able to remove a trustee if the trust instrument specifically grants them this power of removal.

3. Beneficiary

As the name implies, the beneficiary is a person for whose benefit property is held in trust. A trust may have one or more beneficiaries. Restatement (Third) of Trusts, § 3(4), cmt. 4; *See* UTC § 103(3).

4. Multiple Roles

While there are three parties to a trust, one person may serve in more than one capacity. A settlor may also be a trustee and a beneficiary of the trust. A trustee may also be a beneficiary of the trust, but, because a trust involves the bifurcation of ownership interests in the trust property, when a purported trust has only one trustee, and that trustee is the sole beneficiary, a trust is not created or, if a trust was valid when created, the trust terminates due to the merger of the interests. Restatement (Third) of Trusts, §§ 2, 69; UTC § 402(a)(5).

Example: A landowner purports to create a trust and transfers title to the land to the trust. In the trust instrument, the landowner names himself as the only trustee and as the sole beneficiary of the trust during his life and his estate as the sole beneficiary of the remainder interest on his death. A trust has not been created.

XVI. CREATION OF A PRIVATE EXPRESS TRUST

An express trust is created as a result of the expressed intention of the owner of the property to create a trust relationship with respect to the property. A private express trust clearly states the intention of the settlor to transfer property to a trustee for the benefit of one or more ascertainable beneficiaries.

A. ELEMENTS OF A VALID PRIVATE EXPRESS TRUST

1. Intent

No special form is necessary to create a trust. The settlor must intend to make a gift in trust, though. The use of common trust terms (such as "in trust" or "trustee") will create a presumption of intent to create a trust, but these words are not required or even necessary. *See e.g., Lux v. Lux*, 288 A.2d 701 (R.I. 1972) (holding that will that provided that real property "be maintained" for benefit of testator's grandchildren and should not be sold until youngest grandchild reached age 21 indicated intent to create a trust). The settlor's intent may be manifested orally, in writing, or by conduct. Intent is only required to be expressed in writing when the Statute of Wills (i.e., the jurisdiction's requirements for the execution of a will) or the Statute of Frauds (UCC § 2-207) applies. To determine a settlor's intent, both in creating and administering a trust, the courts consider:

i) The specific terms and overall tenor of the words used;

ii) The definiteness or indefiniteness of the property involved;

iii) The ease or difficulty of ascertaining possible trust purposes and terms, and the specificity or vagueness of the possible beneficiaries and their interests;

iv) The interests or motives and the nature and degree of concerns that may be reasonably supposed to have influenced the transferor;

v) The financial situation, dependencies, and expectations of the parties;

vi) The transferor's prior conduct, statements, and relationships with respect to possible trust beneficiaries;

vii) The personal and any fiduciary relationships between the transferor and the transferee;

viii) Other dispositions the transferor is making or has made of his wealth; and

ix) Whether the result of construing the disposition as involving a trust or not would be such as a person in the situation of the transferor would be likely to desire.

Restatement (Third) of Trusts, § 13. The manifestation of intent must occur either prior to or simultaneously with the transfer of property. If the transfer does not take place immediately, then the intent should be manifested anew at the time of transfer. A promise to create a trust in the future is unenforceable unless the promise is supported by consideration sufficient for the formation of a contract.

a. Ambiguous language

The intent to create a trust differs only slightly from the intent to make a gift. A determination must be made regarding whether a bifurcated transfer was intended and, if so, whether the intent was more than a mere hope or wish.

b. Precatory trusts

If a donor transfers property to a donee using language that expresses a hope or wish (rather than creating a legal obligation) that such property be used for the benefit of another, then the gift may be considered a precatory trust, which is not a trust at all, but merely a gift with a recommendation about how it should be used. The governing document must be construed in light of all the facts and circumstances. Determinations of intent can be very uncertain and result in litigation.

c. Failed gifts

When a donor has the intent to make an inter vivos gift, but the gift fails because it is never delivered (e.g., if the donor dies prior to delivery), the donee may attempt to save the failed gift by arguing that the donor intended to create a trust, appointing himself as trustee, and thus delivering the property. The Restatement (Third) of Trusts rejects the argument that a failed gift can be saved by a re-characterization of the donor's intent. *See also, Hebrew University Association v. Nye*, 169 A.2d 641 (Conn. 1961) (holding that a gift that is imperfect due to lack of delivery may not be turned into a trust in the absence of an express manifestation of intent). If a donee changes her position in reliance on the promised gift, such that it would be inequitable to not enforce the gift, a court of equity may compel the donor to complete the gift. The theory of enforcement would not be because the imperfect gift is being turned into an express trust, but instead to impose a constructive trust to prevent unjust enrichment.

2. Trust Property

A valid trust must contain some property that was owned by the settlor at the time the trust was created and was at that time transferred to the trust or to the trustee. Put differently, the trust must be "**funded**." Any property interest, including real property, personal property, money, intangibles, partial interests, or future interests (whether vested or contingent) will suffice, although a mere expectancy will not.

Example: In *Uthank v. Rippstein*, 386 S.W.2d 134 (Tex. 1964), a few days before his death, C sent R a letter promising to give R $200 a month and stating that C's estate would be liable for the payments if C died. Upon C's death, R argued that this created a trust, while the executor of C's will argued that the promise was unenforceable. The court held that the promise was not a trust since there was no trust property and that the letter was merely a promise without consideration to make future gifts, which could not be enforced. Note that under modern statutes like the UPC, the letter might be given testamentary effect as a holographic will.

If a trust that is invalid for lack of assets is later funded, a trust arises if the settlor re-manifests the intention to create the trust. The exception is a "pour-over" gift, which is valid even if made before there is identifiable trust property.

a. Trust res

The requirement of identifiable trust property, or **res,** distinguishes a trust from a debt. A trust involves the duty of one party to deal with specific property for another, whereas a debt involves the obligation of one party to pay a sum of money, from any source, to another.

Note: If the recipient of the funds is entitled to use them as if they are his own and to commingle them with his own monies, then the obligation to pay the funds to another is a debt, not a trust.

b. Segregation

Trust property must be identifiable and segregated. The property must be described with reasonable certainty.

c. Future profits

Most courts hold that future profits do not constitute adequate property for purposes of funding a trust. Some courts have held that future profits do constitute an adequate property interest for purposes of making an inter vivos gift. *See e.g., Speelman v. Pascal*, 178 N.E.2d 723 (N.Y. 1961) (holding that producer's gift to secretary of five percent of future profits of stage musical was effective as present transfer (gift) of his interest). Note that even though future profits are not adequate property to fund a trust, once such profits are actually earned, if the grantor still has an intent to hold them in trust, they then become sufficient to fund the trust, which will be created at that time.

3. Valid Trust Purpose

A trust can be created for any purpose, as long as it is not illegal, restricted by rule of law or statute, or contrary to public policy, and is possible to achieve. The trust and its terms must be for the benefit of its beneficiaries. UTC § 403.

Trust provisions that restrain a first marriage have generally been held to violate public policy. However, a restraint on marriage might be upheld if the trustee's motive was merely to provide support for a beneficiary while the beneficiary is single. *See* Restatement (Third) of Trusts § 29 (2003).

In situations in which one of several trust terms is violative of public policy, any alternative terms provided by the settlor will be honored, and, if there are none, the term will be stricken from the trust, but the trust will not fail altogether unless the removal of the term proves fatal.

4. Ascertainable Beneficiaries

The beneficiaries of a private trust must be ascertainable (i.e., identifiable by name) so that the equitable interest can be transferred automatically by operation of law and directly benefit the person. The settlor may refer to acts of independent significance when identifying trust beneficiaries. If the names of the beneficiaries are not expressly stated in the trust document, the trust must state a method by which the court can objectively determine the beneficiaries. (Note that this rule is different for charitable trusts, which do not fail for lack of a definite beneficiary).

Example: In *Clark v. Campbell*, 133 A. 166 (N.H. 1926), decedent left her personal property to her trustees to dispose of to "such of my friends as they, my trustees, shall select." The court held that the term "friends" was too indefinite. The trust failed because the beneficiaries could not be adequately determined. Note that a few courts

would treat the failed trust has automatically transformed into a power of appointment (*see* § XIX, *infra,* for discussion of powers of appointment).

Courts generally hold that terms such as children, issue, nephews, nieces, aunts, and uncles are objectively ascertainable.

a. Unborn children exception

Trusts for the benefit of unborn children will be upheld even though the beneficiaries are not yet ascertainable at the time the trust is created.

Example: S conveys property to T "in trust for A for life, remainder to A's children." The beneficiaries are sufficiently ascertainable even if A has no children at the time of the conveyance, because the identification of A's children will be possible at the time of A's death.

b. Class-gift exception

A trust to a reasonably definite class will be enforced. Even a trust that allows the trustee to select the beneficiaries from among the members of a class is acceptable, but traditionally, a trust to an entirely indefinite class will not be enforced as a private trust. Under the Uniform Trust Code (UTC), though, a trustee can select a beneficiary from an indefinite class, unless the trustee must distribute equally to all members of an indefinite class. *See* UTC § 402(c).

c. Charitable trusts exception

Only private trusts must have ascertainable beneficiaries. Because, by definition, charitable trusts exist for the good of the public at large, charitable trusts must not have individual ascertainable beneficiaries.

d. When beneficiary dies without settlor's knowledge prior to creation of trust

If a beneficiary has died without the settlor's knowledge prior to the creation of the trust, the trust will fail for lack of a beneficiary. In this case, a resulting trust in favor of the settlor or his successors is presumed.

5. Possible Writing Requirement

a. General rules

At common law and in most states, if a trust involves real property, the Statute of Frauds generally requires that the trust be in writing. Similarly, if the trust is a testamentary trust, the Statute of Wills generally requires the terms of the trust to be in writing. Otherwise, though, no writing is typically required to find a trust. Thus, a writing is not generally required to transfer personal property to a trust and may be proved by oral testimony. *See e.g., In re Estate of Fournier*, 902 A.2d 852 (Me. 2006) (holding that oral trust of personal property need not be in writing where clear and convincing evidence showed settlor's intent to create it). A few states, though, by statute do require all trusts to be in writing.

The trustee takes legal title upon the delivery of a deed or other document of title for real property, or upon the delivery of personal property.

b. Parol evidence

Generally, evidence outside of the written agreement is permitted to show the settlor's intent only if the written agreement is ambiguous on its face. A few states allow the introduction of parol evidence even if the writing is unambiguous.

An oral trust may be proved by oral testimony.

c. Testamentary trusts that do not meet a writing requirement

If a testamentary trust does not meet the requirements of the Statute of Wills, it may still be deemed a constructive trust or a resulting trust, depending on whether it is "secret" or "semi-secret."

1) "Secret" trust

A "secret" trust is not a testamentary trust. It looks like a testamentary gift, but it is created in reliance on the named beneficiary's promise to hold and administer the property for another. The intended beneficiary is permitted to present extrinsic evidence to prove the promise. If the promise is proven by clear and convincing evidence, then a constructive trust is imposed on the property for the intended beneficiary, so as to prevent the unjust enrichment of the "secret" trustee.

2) "Semi-secret" trust

A "semi-secret" trust is also not a testamentary trust. A semi-secret trust occurs when a gift is directed in a will to be held in trust, but the testator fails to name a beneficiary or specify the terms or purpose of the trust. In this situation, extrinsic evidence may not be presented, the gift fails, and a resulting trust is imposed on the property to be held in trust for the testator's heirs. *See e.g., Oliffe v. Wells*, 130 Mass. 221 (1881) (holding that semi-secret trust failed and imposing resulting trust to distribute property through intestacy).

3) Modern trend

The majority of courts still respect the common-law distinction between "secret" and "semi-secret" trusts. However, the modern trend and that adopted by the Restatement (Third) of Trusts, § 18, calls for the imposition of a constructive trust in favor of the intended beneficiaries (if known) in both "secret" and "semi-secret" trust situations.

XVII. RIGHT OF BENEFICIARIES AND CREDITORS TO DISTRIBUTION

It is the beneficiary's right to receive income or principal from the trust. Various devices have been developed to protect the trust property (and thus the beneficiary's interest) from creditors. Generally speaking, however, once trust property has been distributed to the beneficiary, any attempt to restrain the transferability of the beneficiary's interest will be invalid.

A. RIGHTS OF BENEFICIARIES

1. Mandatory Trust

A mandatory trust is the most restrictive type of trust. The trustee of a mandatory trust has no discretion regarding payments; instead, the trust document explains specifically and in detail how and when the trust property is to be distributed.

2. Discretionary Trust

If the trustee is given complete discretion regarding whether or not to apply payments of income or principal to the beneficiary, then a discretionary trust exists. This allows a settlor to postpone and delegate responsibility to the trustee over to whom to make distributions, in what amounts, and the timing of distributions.

a. Duties to beneficiary

In exercising his discretion, the trustee owes a fiduciary duty to the beneficiary and has a duty to inquire as to the beneficiary's needs. If the trustee fails to make an inquiry, he will be deemed to have breached his fiduciary duty to the beneficiary. *See e.g., Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. 1991) (finding breach of duty to inquire into beneficiary's financial situation where beneficiary brought loss of employment to trustee's attention in effort to gain payment of principal and trustee responded by asking for explanation in writing and never followed up when no written explanation was forthcoming).

In deciding whether to make a payment, the trustee must act reasonably (an objective standard) and in good faith (a subjective standard). A settlor can change that standard by expressly stating in the trust instrument that the trustee will have absolute discretion. Even then, though, the trustee is generally still required to act in good faith. *See e.g.,* UTC § 814.

b. Consideration of other resources of beneficiary

Whether a trustee is required to consider a beneficiary's other sources of income in deciding whether to make a payment is a question of the settlor's intent. If that intent is unclear, most courts find a presumption that the settlor intended to provide for the beneficiary regardless of any other resources.

c. Exculpatory clauses

The beneficiary of a fully discretionary trust lacks standing to challenge the actions or inactions of the trustee unless there is a clear abuse of discretion. Discretionary trusts often include an exculpatory clause that protects the trustee against liability for breach of trust, absent willful negligence. Such clauses are generally upheld, but usually construed very narrowly. Under the UTC, if the trustee drafted the exculpatory clause or caused it to be drafted, it will be presumed invalid, unless the trustee proves it is fair under the circumstances and its existence and contents were adequately explained to the settlor. UTC § 1008(b).

d. Creditor rights

If the trustee exercises his discretion to pay, then the beneficiary's creditors have the same rights as the beneficiary, unless a spendthrift restriction exists (discussed *infra* at § XVII.B.3). If the discretion to pay is not exercised, then the beneficiary's interest cannot be reached by her creditors.

B. RIGHTS OF THE CREDITORS OF THE BENEFICIARY

1. Alienation

A beneficiary's equitable interest in trust property is freely alienable unless a statute or the trust instrument limits this right. Because a transferee cannot have a greater right than what was transferred to him, any transferee from a beneficiary, including a creditor, takes an interest identical to what was held by the beneficiary.

Unless otherwise provided by statute or under the trust instrument, a beneficiary's equitable interest is also subject to involuntary alienation. A beneficiary's creditors may reach trust principal or income only when such amounts become payable to the beneficiary or are subject to her demand.

2. Creditor Rights Regarding Discretionary Trusts

a. Pure discretionary trusts

In a pure discretionary trust, in which the trustee has absolute, sole, or uncontrolled discretion over the distributions to the beneficiary, a creditor has no recourse against the beneficiary's interest in the trust. The creditor cannot, by judicial order, compel the trustee to pay her. Since the beneficiary has no right to compel a distribution, neither does a creditor.

The creditor, may, however, be entitled to a court order requiring the trustee to pay the creditor before making any further distributions to the beneficiary. Thus, a creditor can deprive the beneficiary of any distributions, even if the creditor, herself, does not get paid.

b. Support trusts

A support trust directs the trustee to use his discretion to pay income or principal as necessary to support the trust beneficiary. In this context, "necessary" is not limited to bare essentials, but rather includes maintaining the standard of living to which the beneficiary is accustomed (typically either at the time the trust is created or at the settlor's death), as well as support for the beneficiary's spouse and children, even if living elsewhere. Although it is considered within the trustee's discretion to increase distributions to compensate for inflation or to accommodate the beneficiary's changing needs, an increase in the standard of living is generally acceptable only if doing so would be consistent with both the trust's level of productivity and the settlor's intent. Restatement (Third) of Trusts § 50, cmt. d.

Creditors cannot reach the assets of a support trust, except to the extent that a provider of a necessity to the beneficiary can be paid directly by the trustee.

The Internal Revenue Code set an "ascertainable standard" limiting distributions to amounts needed for a beneficiary's "health, education, support, and maintenance." I.R.C. § 2041(b).

c. Modern approaches

The UTC makes no distinction between discretionary and support trusts and provides that, subject to an exception for claims by children and spouses for support and alimony, a creditor of a beneficiary cannot require a discretionary distribution even if the beneficiary could compel one. UTC § 504. Section 60 of the Restatement (Third) of Trusts allows creditors to reach any distribution by the trust or that the trustee is required to make in the exercise of discretion.

3. Spendthrift Trust (Restraint on Alienation)

A spendthrift trust expressly restricts the beneficiary's power to voluntarily or involuntarily transfer his equitable interest. (Note that a trust restricting only involuntary transfers would be void as against public policy.) Spendthrift provisions are often inserted into trusts to protect beneficiaries from their own imprudence.

a. General rule

In general, spendthrift clauses are valid and enforceable, even with regard to remainder interests in trusts. *See e.g., Scheffel v. Krueger*, 782 A.2d 410 (N.H. 2001) (holding that tort judgment creditor of beneficiary of spendthrift trust was barred from reaching beneficiary's interest in trust).

The spendthrift restriction applies only as long as the property remains in the trust, and it is inapplicable after it has been paid out to the beneficiary. An attempted

transfer by the beneficiary in violation of the spendthrift restriction is only effective in that it provides authorization for the trustee to pay funds directly into the hands of the attempted transferee.

b. Exceptions

A beneficiary's creditors usually cannot reach the beneficiary's trust interest in satisfaction of their claims if the governing instrument contains a spendthrift clause prohibiting a beneficiary's creditors from attaching the beneficiary's interest. Although generally valid, most states allow certain classes of creditors to reach a beneficiary's assets, notwithstanding the spendthrift clause.

In general exceptions to the validity of a spendthrift clause include:

i) Children and spouses entitled to support; and

ii) Holders of federal or state tax liens.

Some jurisdictions do allow creditors who provided the beneficiary with "necessaries," such as health care, may reach the beneficiary's interest in satisfaction of any unpaid debt despite a spendthrift clause. Restatement (Third) of Trusts §§ 59, 60 cmt. c.

b. Statutory limitations

A number of states have statutes that specifically limit the amount of the beneficiary's interest in the trust that can be protected against creditors' claims through a spendthrift clause.

Additionally, if a trust contains a spendthrift clause, then under federal law, the beneficiary's interest is not reachable in bankruptcy proceedings. Further, the federal ERISA law mandates that an employee's pension benefits cannot be reached by creditors.

c. Settlor as beneficiary

In general, courts will also not enforce spendthrift clauses if the settlor is both the settlor and the beneficiary, as this would provide an easy way for individuals to avoid their creditors. When the settlor of a trust is also a trust beneficiary, his creditors are entitled to the maximum amount that could be distributed from the trust to the settlor, even when withdrawals are discretionary or limited by a support standard. If it is unclear whether the settlor is also the beneficiary, the courts will examine who provided the consideration for the creation of the trust.

In recent years, a few states, including Delaware, have enacted statutes that authorize self-settled discretionary trusts. The trust must be irrevocable and the trust interest must be discretionary, and the trust must not have been created to defraud creditors.

XVIII. TRUST MODIFICATION AND TERMINATION

A. IN GENERAL

If the settlor creates a revocable trust, the settlor, by himself, can terminate or modify (by terminating and then creating a new trust with the modified terms) the trust. A revocable or irrevocable trust automatically terminates only when the trust purpose has been accomplished. An irrevocable trust can be modified or terminated if the settlor and all the beneficiaries consent. This is the case even if the trustee has an objection and even if the trust includes a spendthrift clause.

Subject to the *Claflin* doctrine, discussed below, a trust may terminate **by consent** if the settlor is deceased or has no remaining interest in the trust, and if all beneficiaries and the trustee consent to the termination. If so, the beneficiaries can agree to a distribution of the trust assets that does not comport with the terms of the trust. If all beneficiaries wish to terminate, but the trustee objects, then most courts allow the trustee to block the termination if she can show that termination would violate the settlor's intent.

1. Unfulfilled Material Purpose

Under the *Claflin* doctrine, a trustee can block a premature trust termination—even one to which all of the beneficiaries have consented—if the trust is shown to have an unfulfilled material purpose. Examples of a trust that intrinsically has an unfulfilled material purpose include discretionary trusts, support trusts, spendthrift trusts, and age-dependent trusts (those that direct the payment of principal to a beneficiary only after he attains a certain age).

Example: In *In re Estate of Brown*, 148 Vt. 94 (1987), the decedent's testamentary trust authorized the trustee to use income and principal to educate the decedent's nephew's children**.** Upon completion of that purpose, the trust property was to be used to care and maintain the nephew and his wife. When the educational purpose was fulfilled, all of the beneficiaries petitioned to terminate the trust. The trustee objected and the court agreed that even though the educational purpose had been fulfilled, the material purpose of care and maintenance of the nephew and his wife had not been fulfilled.

The most common example of a trust that has an unfulfilled material purpose is one in which the settlor provided for successive interests, in which case both the present and the future beneficiaries must agree in order for the trust to be terminated prematurely. Restatement (Third) of Trusts § 65(2).

Example: If a testator leaves property in trust "to A for life, remainder to B" and B dies before A, leaving his interest to A, A may terminate the trust because its purpose has been accomplished.

2. Revocation by Will

The traditional rule required a trust to expressly provide for its revocability by will. The UTC authorizes trust revocation by will unless the trust expressly provides for another method of revocation.

3. Revocation by Divorce

Traditionally, a spousal interest created by a trust, unlike one created by a will, was not revoked upon divorce. However, the trend now is to treat a spousal interest under a trust similarly to one under a will. *See*, Unif. Probate Code § 2-804.

4. Court Modification and Termination

A court may modify a trust if unanticipated events have caused its purposes to be frustrated by its terms. *See* UTC § 412; *In re Riddell* 157 P.3d 888 (Wa. 2007) (holding that court may use equitable deviation to modify trust when circumstances not anticipated by settlor occurred and modification would further primary purposes of trust and be consistent with law or policy). A court may prematurely terminate a trust if the trust's purpose has been achieved, or if it has become illegal, impracticable, or impossible.

A court may not alter the rights of beneficiaries due to changed circumstances, no matter how compelling, but may interpret certain changes as frustrating to the trust purposes in order to make such modifications. Extreme fluctuations in market

conditions and substantial changes to the tax law have both been used to justify trust modifications.

B. SETTLOR'S INTENT

In most states, a settlor must expressly reserve the right to modify or terminate a trust to be granted such powers. In the absence of such a reservation, modification or termination can occur only with the consent of all beneficiaries and if the proposed change will not interfere with a primary purpose of the trust. Under the third Restatement, for a trust to be terminated, there must be a finding that the trust grantor intended the spendthrift provision to bar premature trust termination. *See* Restatement (Third) of Trusts § 65, cmt e (Tent. Draft No. 3).

Although it is possible for a court to modify or terminate a trust over the objections of the settlor, a modification or termination is much more likely to be granted if the settlor joins in the action, because the *Claflin* material-purpose test is satisfied under such circumstances.

C. TRUSTEE'S POWER TO TERMINATE

A trustee, acting alone, does not have the power to terminate a trust unless the trust instrument contains express termination provisions.

D. REMOVAL OF A TRUSTEE

Traditionally, if the settlor selected a particular trustee, the trustee cannot be removed, even if all the beneficiaries consent, unless the trustee is unfit to serve or has committed a serious breach of trust. While jurisdictions differ, generally, a trustee may be removed by the court under the following circumstances:

i) The trustee becomes incapable of performing his duties;

ii) The trustee materially breaches one or more of his duties;

iii) A conflict of interest arises;

iv) A serious conflict between the trustee and one or more beneficiaries, or between co-trustees, develops; or

v) The trust is persistently performing poorly as a result of the trustee's actions or inactions.

If any of the foregoing circumstances exist at the time the trustee is named and are known by the settlor, they will not necessarily suffice as grounds for removal.

Traditionally, a settlor did not have the right to petition for a trustee's removal. The modern trend, as reflected in UTC § 706, gives the settlor standing to petition for a trustee's removal.

XIX. POWERS OF APPOINTMENT

A power of appointment gives the person who holds the power the ability to distribute trust property. It allows the settlor to leave the responsibility to others in the future to deal with changing circumstances. Usually given to a beneficiary, a power of appointment enables the holder to direct a trustee to distribute some or all of the trust property without regard to the provisions of the trust.

The person who creates the power of appointment is the **donor** of the power. The person who holds the power is the **donee**. The donee of a power of appointment can direct the appointment of an interest of equal or lesser value to that specified in the power given to her. Thus, if a donee can appoint trust assets outright, she can also give, for example, a life estate to a permissible beneficiary. The persons for whom the power may be exercised are the **objects** of the power. When a power is exercised in favor of a person, that person becomes an **appointee**. If the donee

fails to exercise the power, the persons who will receive the property are called **takers in default**. The property that is subject to the power is called the **appointive property**.

The power of appointment is personal to the donee, meaning the donee cannot transfer the power to anyone else. The power may be (i) testamentary (i.e., exercisable only by the donee's will) or (ii) presently exercisable (i.e., the donee may exercise the power during his lifetime).

If the power to appoint property in trust is created, it is usually given to one of the beneficiaries of the trust.

A. TYPES

There are two general categories of powers of appointment: **general** powers of appointment and **special** powers of appointment.

1. General Power of Appointment

A power of appointment in which there are no restrictions or conditions on the donee's exercise of the power is a general power of appointment. Thus, the donee may appoint himself, his estate, his creditors, or the creditors of his estate as a new owner. As such, if the donee exercises a general power, then the donee's creditors can reach the appointive property. The same holds true if the donee is also the donor of the power. Failure to exercise a general power of appointment causes the appointive property to revert back to the donor's estate. *See*, Unif. Probate Code § 2-608.

2. Special Power of Appointment

a. Exclusive

A special power of appointment is a more limited power than a general power of appointment in that it allows the donor to specify certain individuals or groups as the objects of the power, to the exclusion of others. This makes the power an exclusive special power of appointment. As such, the donor may decide to exclude the donee, the donee's creditors, the donee's estate, or the creditors of the donee's estate. In fact, a special power is presumed to be exclusive because it may favor some objects over others. In addition, the donor may make the donee's exercise of the power conditional on whatever factors, within legal bounds, the donor desires. Unlike with a general power, creditors are prevented from reaching the appointive property—even if the donee exercises the power—unless the transfer of property was intended to defraud the creditors.

b. Nonexclusive

A nonexclusive special power of appointment allows the donee to exercise the power to appoint among a class of individuals (e.g., grandchildren). It is nonexclusive because the donee cannot exclude a member of the class; he must appoint an equitable share to all appointees to prevent favoring one or two appointees over all others. When the donee fails to exercise the power, and when no gift in default of appointment is provided for in the will, the court will imply a gift to the objects of the special power and direct a distribution.

B. SCOPE OF AUTHORITY

1. Exercising Power

The donor's intent controls what is necessary to exercise a power of appointment. Any instrument, unless the donor directs otherwise, may be used to exercise a power of appointment. However, if the power is testamentary, then it may be exercised only by a will. Most jurisdictions hold that a residuary clause that does not make any reference to a power of appointment is insufficient to exercise any power of

appointment held by the testator as donee. *See* Unif. Probate Code § 2-610. If there is a blanket power of appointment included within the residuary clause, then the courts will give effect to the power. A phrase such as, "including any power of which I may have a power of appointment" would constitute a blanket power of appointment.

A blanket exercise clause is effective to exercise powers unless the donor of the power of appointment specifically requires the donee to refer to the instrument creating the power when exercising the power. Most states allow a donee to exercise his power of appointment to create a trust for the benefit of the object of the power rather than transferring the property outright.

2. Contracting the Power

When a donee is given a testamentary power of appointment, a contract to make an appointment is invalid because it would defeat the donor's purpose of having the donee exercise the power of appointment at the donor's death. On the other hand, if a donee is given a presently exercisable power of appointment, then a contract to appoint would be valid.

3. Releasing a Power of Appointment

Although a contract to exercise a testamentary power is not enforceable, a similar result can sometimes be obtained by releasing the power of appointment.

4. Limitations on Exercise of Power

In almost all jurisdictions, the donee of a general power of appointment can appoint the property, as she desires, outright, in trust, or subject to a new power of appointment. The donee of a special power, however, has not traditionally been permitted to appoint in further trust and must appoint the property outright, absent express authority in the instrument creating the special power. The modern trend, however, allows the donee of a special power of appointment to appoint either in trust or subject to a new power of appointment so long as the donee and the objects of the new power are included in the original class of objects.

5. Exclusive versus Non-exclusive Power

If a special power is exclusive, the donee may appoint all the property to one or more members of the class of permissible appointees, excluding other objects. If the power is non-exclusive, the donee must appoint some amount to each object. It is unclear exactly how much, however. In some states, the amount appointed must be a reasonable amount. Whether a power is exclusive or non-exclusive is determined from the intent of the donor, as set forth in the governing instrument. The words "to any one or more" or "to such of" are usually held to mean an exclusive power. The words "to all and every one" or "to each and every one," are usually held to mean a non-exclusive power.

Example: T leaves a fund to X in trust for Y for life, remainder as Y shall appoint by will to "each and every one" of Y's children. Y has three children, M, N, and O. The power is non-exclusive and therefore Y must give some amount to M, N, and O, if Y exercises the power. If the power had been exclusive, Y could appoint all of the property to one of his children.

6. Fraud on a Special Power

An appointment that is in favor of a person who is not an object of the power is invalid. Similarly, an appointment to an object to circumvent a limitation on a power is considered a "fraud on the power" and is void.

7. Ineffective Exercise of a Power of Appointment

If the donee intends to exercise a power of appointment, but the exercise is ineffective for some reason, it may be possible to carry out the donee's intent through the doctrines of allocation or capture.

a. Allocation

Allocation, sometimes called marshalling, can apply when appointive property and other property owned by the donee are inappropriately mixed in a common dispositive instrument (e.g., the donee's will). The blended property is allocated to the various interests in such a way as to increase the effectiveness of the disposition.

Example: A holds a special testamentary power created by her father to appoint trust property among A's descendants. The trust property is worth $100,000 and A's own separate property is worth $350,000. A's will provides that she "gives all my property, including any property over which I have a power of appointment under my father's will, as follows: $100,000 to B, my daughter-in law; and all the rest to my daughter D. Since B is not an object of the special power, none of the trust property can be allocated to her. Under the doctrine of allocation, B would take $100,000 of A's own property and D would take the trust property, plus the $250,000 of A's property.

b. Capture

If the donee of a general power of appointment expresses the intent to exercise the power and blends the exercise with the distributive provisions of his own will, if any of the appointment gift fails, the donee is held to have appointed the failed gift to himself and the failed appointive property is distributed as part of the donee's general assets.

8. Failure to Exercise a Power of Appointment

Traditionally, if the donee fails to exercise a general power of appointment, the appointive property passes to the takers in default. If there is no such provision in the instrument creating the power, the property reverts to the donor or the donor's estate. If the donee of a special power of appointment fails to exercise it and there are no express takers in default under the instrument creating the power, if the class of objects is defined and limited, the court may imply that the donor intended that the appointive property be distributed equally among the members of the appointive class. *See Loring v. Marshall*, 484 N.E.2d 1315 (Mass. 1985). Otherwise the property reverts to the donor or the donor's estate.

XX. TRUST ADMINISTRATION AND THE TRUSTEE'S DUTIES

Before any duties are imposed, the trustee must accept the trusteeship. The trustee is then charged with safeguarding the trust property by purchasing insurance, earmarking assets, recording deeds, identifying and locating beneficiaries, and following the settlor's instructions. The trustee acts as a fiduciary, and, in most cases, his powers are not personal but rather attach to his office.

If there are two trustees, the majority of states require them to act with unanimity absent a contrary intent expressed in the trust agreement. However, if there are more than two trustees, most states require a majority only.

As a general proposition, a trustee's duties cannot be unilaterally enlarged by the settlor after the trustee has accepted his office. A well-drafted trust instrument will therefore include an **additions**

clause if the settlor contemplates enlarging the trustee's responsibilities with additional trust assets. Even then, a trustee may be able to reject additions.

A. POWERS

1. Within a Trust Document

Common law grants no powers to the trustee outside of those authorized within the trust document itself.

a. Judicial authorization

The trustee can petition the court to obtain powers not expressly authorized in the trust.

b. Modern trend

The modern trend is for the court to grant the trustee all those powers necessary to act as a reasonably prudent person in managing the trust. There have been two different approaches. Some jurisdictions adopt a statute that sets forth a detailed list of powers it is presumed a trustee would need, allowing settlors to incorporate the statutory list by reference. Other jurisdictions grant the trustee a broad set of powers unless the settlor specifically provides that the trustee is not to have such powers.

2. Power to Sell or Contract

Unless otherwise provided in the trust instrument, a trustee generally has the implied power to contract, sell, lease, or transfer the trust property.

If the settlor specifies that the trustee may not sell certain property, then such property may not be sold without a valid court order permitting the sale, which order will be granted only if selling is necessary to save the trust.

3. Liability of Third Parties

A third party can potentially be held liable for his role in a breach of trust. Common law presumed that the purpose of a trust was to preserve the trust property, requiring those dealing with trustees to carefully inspect the trust property before dealing with the trustee. The modern trend presumes that the purpose of a trust is to hold and manage the trust property, and it provides greater protection to third parties.

a. Uniform Trustees' Powers Act (UTPA)

The UTPA obligates third parties to act in good faith and to give valuable consideration. Under the UTPA, third parties are protected as long as they act without actual knowledge that such action constitutes a breach of trust.

4. Other Common Trustee Powers

There are a variety of powers that the trust settlor may give to the trustee to carry out the trust's purpose.

a. Power to revoke

When the settlor names himself as trustee, the trust normally contains a power to revoke, which allows the settlor as trustee to revoke the trust in part or in its entirety.

b. Power to withdraw

Many trusts give the trustee the power to withdraw income, principal, or both from the trust to carry out the trust's purpose. The power to withdraw could also be

conferred upon settlor, which would enable the settlor to withdraw assets from the trust without revoking it.

c. Power to modify

The settlor may include the power to modify to give the trustee the ability to change provisions of the trust to reflect the settlor's intent.

B. DUTY OF LOYALTY AND GOOD FAITH

A trustee is bound by a broad range of fiduciary duties designed to ensure that she acts solely in the best interests of the beneficiaries when investing property and otherwise managing the trust. The trustee has a duty to administer the trust in good faith, in accordance with its terms and purposes, and in the interest of the beneficiaries. Any beneficiary has standing against the trustee if his interests are violated, and he can choose either to set aside the transaction or to ratify the transaction and recover any profits therefrom.

Even if a trustee is granted complete discretion under the trust instrument, her actions are not immune from review if it can be shown that she failed to exercise judgment. When the trustee's decision is based exclusively on personal reasons unrelated to the settlor's goals, the trustee's decision may be overturned.

EXAM NOTE: On an exam, determine whether the trustee acted reasonably (objective standard) *and* in good faith (subjective standard). Good faith alone is not enough.

1. Self-Dealing

When a trustee personally engages in a transaction involving the trust property, a conflict of interest arises between the trustee's duties to the beneficiaries and her own personal interest. A trustee breaches her duty of loyalty to the beneficiaries when she engages in self-dealing. *Hartman v. Hartle*, 95 N.J. Eq. 123 (1923). The following are generally prohibited transactions with trust property:

i) Buying or selling trust assets (even at fair market value);

ii) Selling property of one trust to another trust that the trustee manages;

iii) Borrowing from or making loans to the trust;

iv) Using trust assets to secure a personal loan;

v) Engaging in prohibited transactions with friends or relatives; or

vi) Otherwise acting for personal gain through the trustee position.

Example: Trustee sells stock from the trust to himself for fair market value. If the stock then goes up in value, the beneficiaries can trace and recover the stock for the benefit of the trust.

a. Irrebuttable presumption

When self-dealing is an issue, an irrebuttable presumption is created that the trustee breached the duty of loyalty.

Note: A trustee can employ herself as an attorney and can receive reasonable compensation, as long as the use of an attorney does not constitute a breach of trust.

b. No further inquiry

Once self-dealing is established, there need be no further inquiry into the trustee's reasonableness or good faith because self-dealing is a **per se breach of the duty of loyalty.**

c. Exceptions

Even when self-dealing is authorized by the settlor under the terms of the trust, by court order, or by all beneficiaries, the transaction must still be reasonable and fair for the trustee to avoid being liable for breach.

Courts tend to strictly interpret attempted exculpatory clauses relieving trustees from liability. Complete exculpatory clauses are void as contrary to public policy, and limited clauses are only honored if there is no finding of bad faith or unreasonableness.

1) Uniform Trusts Code (UTC)

Under the UTC, a trustee can avoid liability if he can prove that the transaction was objectively fair and reasonable, and not affected by a conflict of interest.

2) Statutory exceptions

Many states have enacted statutes permitting a bank trust department to deposit trust assets in its own banking department, and trustees are authorized to receive reasonable compensation for their services.

2. Conflicts of Interest

If an alleged conflict of interest arises that cannot be characterized as self-dealing, then the "no further inquiry" standard is inapplicable, and the transaction is assessed under the "reasonable and in good faith" standard. Thus, for example, in *In re Rothko*, 372 N.E.2d 291 (N.Y. 1977), a testator's will appointed three friends as executors of his estate, which was made up mostly of 800 valuable paintings. The executors entered into a contract with an art gallery to buy 100 of the paintings and sell the remainder on consignment. The testator's daughter brought an action, contending that the executors had violated their duty of loyalty by entering into a contract with a business in which they had an interest and selling the paintings for less than market value. The court, in analyzing the contract, found that one executor had a conflict of interest because he was a director and officer of the art gallery and the contract resulted in the executor getting paid more by the gallery and getting favorable treatment for his own art collection. The court also found that a second executor had a conflict of interest in that he was a struggling artist who was seeking to gain the gallery's favor so that it would buy and sell his own paintings. The court determined that the transaction was not fair and reasonable and did not meet the best interests of the beneficiaries.

The UTC provides that an investment in a corporation in which the trustee has an interest that might affect the trustee's best judgment is presumptively a breach of the duty of loyalty. The presumption of a breach can be rebutted by showing that the terms of the transaction were fair or that the transaction would have been made by an independent party. *See* Uniform Trust Code § 802(c).

Example: T is the trustee for trusts A, B, and C, and sells assets from trust A to trust B at fair market value. The assets increase in value after the sale. T had a conflict of interest as both the buyer and seller, but because T did not personally benefit, the presumption of self-dealing is not applicable. If T acted in good faith and did not

reasonably anticipate a significant change in value, then T may not be liable for any lost profits by beneficiaries of trust A.

3. Legal Attacks on Trusts

Unless a challenge is well founded, the trustee must defend the trust against legal attacks.

4. Abuse of Discretion

Even if a trustee has complete discretion over a trust, she must still act in the best interests of the trust and its beneficiaries.

5. Co-trustees

Traditionally, if there is more than one trustee of a private trust, the trustees must act as a group and with unanimity, unless the trust instrument indicates otherwise. One of a group of trustees does not have the power to transfer or deal with the property alone. Since they must act jointly, a co-trustee is liable for the wrongful acts of a co-trustee to which she has consented or which by her negligence she enabled the co-trustee to do.

In many states and under UTC § 703(a), however, a majority of the trustees can act if there are three or more trustees. Even in the absence of unanimity, though, a co-trustee is still required to take reasonable steps to prevent a breach of trust by the other trustees, and must bring suit, if necessary to stop any improper action. Note that for a charitable trust, no unanimity is required. A majority can act for the charitable trust.

C. DUTY OF PRUDENCE

As a fiduciary, a trustee is required to invest the assets of a trust as a prudent person would in the management of his own affairs. *In re Estate of Janes*, 90 N.Y.2d 41 (N.Y. 1997). At common law, a trustee could not delegate any discretionary responsibilities because doing so would be assumed to be contrary to the settlor's intent. Under modern law, the trustee may delegate responsibilities if it would be unreasonable for the settlor to require the trustee to perform such tasks.

Note: If a function goes to the heart of the trust or constitutes a critical function concerning the property, then the function is discretionary and is not delegable. Otherwise, the function is merely ministerial and can be delegated. These same rules apply when a trustee delegates to a co-trustee.

1. Duty to Oversee Decisions

A trustee can delegate the determination of management and investment strategies, and other duties as would be prudent under the circumstances, but must oversee the decision–making process. Otherwise, the trustee is responsible for actual losses, regardless of cause.

2. Trust Investments

At common law, trustees were limited to statutory lists of acceptable investments unless the trust instrument expressly authorized a deviation from the list. Only a few states continue to adhere to such lists.

a. Statutory legal lists

Statutory lists can be either permissive, which means the trustee may invest in securities that are not on the list, or mandatory, in which case the trustee must invest only in securities that are included on the list. In either case, the trustee

must use reasonable care, caution, and skill. Additionally, the trustee must be expressly authorized to carry on the testator's business. Generally, unsecured loans and second mortgages are improper investments. Other investments such as stocks, bonds, government securities, and mutual funds are considered proper investments.

b. Model Prudent Man Investment Act (MPMIA)

The MPMIA, first adopted in 1940, is still followed in some states and permits any investment that a prudent man would make, barring only speculative investments.

c. Uniform Prudent Investor Act (UPIA)

The UPIA, adopted by the Restatement (Third) of Trusts and the Trustee Act of 2000, requires the trustee to act as a prudent investor would when investing his own property but puts less emphasis on the level of risk for each investment. The trustee must exercise reasonable care, caution, and skill when investing and managing trust assets unless the trustee has special skills or expertise, in which case he has a duty to utilize such assets.

Determinations of compliance under the UPIA are made with reference to the facts and circumstances as they existed at the time the action was made, and they do not utilize hindsight. In assessing whether a trustee has breached this duty, the UPIA requires consideration of numerous factors, including (i) the distribution requirements of the trust, (ii) general economic conditions, (iii) the role that the investment plays in relationship to the trust's overall investment portfolio, and (iv) the trust's need for liquidity, regularity of income, and preservation or appreciation of capital. Unif. Prudent Inv. Act § 2.

1) Duty to diversify assets

The trustee must adequately diversify the trust investments to spread the risk of loss. *See Wood v. U.S. Bank, N.A.*, 828 N.E. 2d 1072 (Ohio 2005) (holding that even if trust instrument allows trustee to retain assets that would not normally be suitable investments, the trustee still has a duty to diversify, unless there are special circumstances or trust instrument specifically states otherwise). Under the UPIA, investing in one mutual fund may be sufficient if the fund is sufficiently diversified.

a) Individual versus corporate trustees

A presumed greater expertise creates a higher standard for professional or corporate trustees than for individual trustees.

b) Duty not absolute

A trustee is justified in not diversifying if the administrative costs of doing so (including tax consequences or changes in controlling interest of a family-run business) would outweigh the benefits.

With respect to a revocable trust, a trustee's duties are owed exclusively to the settlor. When a trust is irrevocable, acting in accordance with a settlor's directives is inadequate to absolve a trustee from liability because the trustee's obligations are owed to trust beneficiaries. However, when there are no income beneficiaries other than the settlor, the settlor may be treated as the effective owner. *See* Uniform Prudent Investor Act § 3.

2) Duty to make property productive

The trustee must preserve trust property and work to make it productive, by pursuing all possible claims, deriving the maximum amount of income from investments, selling assets when appropriate, securing insurance, paying ordinary and necessary expenses, and acting within a reasonable period of time in all matters.

3) Commingling trust funds

The common-law approach required each trust fund to be separated from other trust funds and from the trustee's own funds. To decrease costs and increase diversity, the modern trend is to allow some commingling of trust funds and investment in mutual funds.

However, if a trustee commingles trust assets with his own property and some property is lost or destroyed, there is a presumption that the lost or destroyed property was the trustee's and that the remaining property belongs to the trust.

Additionally, if one part of the commingled assets increases in value and another part decreases in value, there is a presumption that the assets with increased value belong to the trust and that the assets with decreased value belong to the trustee.

4) Decision making

Part of being prudent is taking care to make informed decisions regarding the investment scheme and/or delegating such decision making to an expert.

d. Modern trend—portfolio approach

The UPIA assesses a trustee's investments based on the total performance of the trust, as opposed to looking at individual investments, so that a high-risk investment that would have been considered too risky under the common law can be offset by lower-risk investments.

The law has evolved away from the common-law statutory lists and toward the prudent investor standard and the modern trend portfolio theory. Diversification has become increasingly important, as has the trustee's duty to create a paper trail supporting the reasonableness of his actions. It is recognized that in today's market, there is a strong correlation between risk and reward, and it is undesirable for trustees to be limited to low-risk investments in the current climate. However, risk tolerance varies greatly depending upon the size and the purpose of the particular trust, both of which will be taken into account in evaluating the actions of the trustee.

e. Authorized investments

Exculpatory clauses that expressly authorize all investments do not protect a trustee who acts in bad faith or recklessly, but they do give trustees more room for minor lapses in judgment.

3. Duty to Be Impartial

A trustee has a duty to balance the often-conflicting interests of the present and future beneficiaries by investing the property so that it produces a reasonable income while preserving the principal for the remaindermen.

a. Duty to sell

Regardless of what the trust document says about the trustee's ability to retain trust assets, a trustee has a duty to sell trust property within a reasonable time if a failure to diversify would be inconsistent with the modern portfolio approach.

Any delay in disposing of under-performing or over-performing property creates a duty in the trustee to reallocate sale proceeds to those beneficiaries who were adversely affected by the delay.

EXAM NOTE: If a fact pattern on an exam indicates that either (i) the trust principal is appreciating but not generating a reasonable stream of income, or (ii) the trust is producing a good amount of income but the principal is depreciating, then your analysis should center on the duty of impartiality. In these situations, the trustee may be favoring one class of beneficiaries over the other.

b. Allocating principal and income

Generally, life beneficiaries are entitled to the trust income, and remaindermen are entitled to the trust principal. The beneficiary of trust principal is not entitled to trust principal until termination of all preceding estates. The remainder beneficiary has no immediate right to the possession and enjoyment of any trust property. The remainder beneficiary must await the termination of the trust to receive any trust property. All assets received by a trustee must be allocated to either income or principal. The allocation must be balanced so as to treat present and future trust beneficiaries fairly, unless a different treatment is authorized by the trust instrument.

1) Traditional approach

The traditional approach assumed that any money generated by trust property was income, and that any money generated in connection with a conveyance of trust property was principal. The traditional approach serves as the starting point for the modern approach.

2) Modern approach

The Uniform Principal and Income Act (UPAIA), adopted in most states, focuses on total return to the trust portfolio, regardless of classifications of income or principal. Under the UPAIA, a trustee is empowered to re-characterize items and reallocate investment returns as he deems necessary to fulfill the trust purposes, as long as his allocations are reasonable and are in keeping with the trust instrument.

The trustee may not make adjustments under the UPAIA if he is also a trust beneficiary.

a) Factors to consider

The trustee must balance the following factors in determining how best to exercise such allocation:

i) The intent of the settlor and the language of the trust instrument;

ii) The nature, likely duration, and purpose of the trust;

iii) The identities and circumstances of the beneficiaries;

iv) The relative needs for regularity of income, preservation and appreciation of capital, and liquidity;

v) The net amount allocated to income under other sections of the Act and the increase and decrease in the value of principal assets;

vi) The anticipated effect of economic conditions on income and principal; and

vii) The anticipated tax consequences of the adjustment.

b) Unitrust

Under a unitrust, the distinction between income and principal is not relevant because the lifetime beneficiaries are entitled to a fixed annual share of the value of the trust principal.

c) Unproductive property rule

Under the traditional approach, if a trust asset produced little or no income upon the asset's sale, then an income beneficiary was entitled to some portion of the sale proceeds under the theory that such portion represented delayed income thereon. With the emphasis having shifted to the total return from the entire portfolio and away from individual investments, this rule is now seldom applied.

d) Distributions of stock

Under UPAIA § 6(a), a distribution of stock, whether classified as a dividend or as a split, is treated as a distribution of principal. This is also true under the Revised Uniform Principal and Income Act (RUPIA). The RUPIA gives a trustee a limited power to allocate the stock dividend between income and the principal when the distributing corporation made no distributions to shareholders except in the form of dividends paid in stock.

c. Allocation of receipts

Generally, except in cases in which the application of the UPAIA is justified, allocation rules follow traditional accounting rules.

1) Receipts from an entity

Cash money received from an entity is characterized as income unless the money is a capital gain for federal income tax purposes or is received following a partial or complete liquidation of the entity. All property other than cash money received from an entity (i.e., stock dividends) is characterized as principal.

2) Contract proceeds

Proceeds from life insurance policies or other contracts in which the trust or trustee is named as a beneficiary are allocated to principal unless the contract insures the trustee against loss, in which case the proceeds are allocated to income.

3) Deferred compensation plan proceeds

Receipts from a deferred compensation plan (e.g., a pension plan) are considered income if characterized as such by the payor and likewise are principal if so characterized. If the payor does not characterize the payment as income or principal, then 10% of the payment is income and the rest is principal.

4) Liquidating assets

A liquidating asset is one whose value diminishes over time because the asset is only expected to produce receipts over a limited period (e.g., patents or copyrights). Proceeds from liquidating assets are also allocated as 10% income and 90% principal.

5) Mineral rights

Oil, gas, mineral, and water rights payments are also allocated as 10% income and 90% principal.

d. Allocation of expenses

1) Expenses charged to income

Trust income will be charged with the following expenses:

i) One-half of the regular compensation to the trustee and to those who provide investment, advisory, or custodial services to the trustee;

ii) One-half of accounting costs, court costs, and the costs of other matters affecting trust interests;

iii) Ordinary expenses in their entirety; and

iv) Insurance premiums that cover the loss of a trust asset.

2) Expenses charged to principal

Trust principal will be charged with the following expenses:

i) The remaining one-half of the regular compensation to the trustee and to those who provide services to the trustee;

ii) The remaining one-half of accounting costs, court costs, and the costs of other matters affecting trust interests;

iii) All payments on the principal of any trust debt;

iv) All expenses of any proceeding that concerns an interest in principal;

v) Estate taxes; and

vi) All payments related to environmental matters.

D. INFORM AND ACCOUNT

1. Duty to Disclose

A trustee must disclose to the beneficiaries complete and accurate information about the nature and extent of the trust property, including allowing access to trust records and accounts. *See e.g., Fletcher v. Fletcher*, 480 S.E.2d 488 (Va. 1997). The trustee must also identify possible breaches of trust and promptly disclose such information to the beneficiaries.

a. Settlor's intent

The UTC requires the trustee to promptly provide a copy of the trust instrument upon request, unless otherwise provided by the settlor in the instrument.

b. Duty to notify

Unless disclosure would be severely detrimental to the beneficiaries, the trustee must notify the beneficiaries if he intends to sell a significant portion of the trust assets.

2. Duty to Account

A trustee must periodically account for actions taken on behalf of the trust so that his performance can be assessed against the terms of the trust. Trustees of testamentary trusts must account to the probate court. The UTC allows the settlor to waive the trustee's duty to report to the beneficiaries, or the beneficiaries can waive the receipt of reports.

Note: Waiver of the duty to report does not relieve a trustee from liability for misconduct that would have been disclosed by a report.

a. Constructive fraud

If an accounting includes **false factual statements** that could have been discovered to be false had the trustee properly investigated, then constructive fraud results.

E. OTHER DUTIES

1. Duty to Secure Possession

The trustee must secure possession of the property within a reasonable period of time. In the case of a testamentary trust, the trustee must monitor the executor's actions to ensure that the trust receives all of that to which it is entitled.

2. Duty to Maintain

In caring for real property, the trustee must take whatever steps an ordinary owner would take, including insuring, repairing, and otherwise maintaining the property.

3. Duty to Segregate

The trustee must separate his personal property (such as money and stocks) from trust assets to ensure that they cannot be switched if one outperforms the other. An exception to this duty to segregate applies when a trustee invests in bearer bonds.

Under common law, the trustee was strictly liable for damages to the trust property even if they were not caused by a breach of the duty to segregate. The modern trend holds the trustee liable only when the breach causes the damage to the trust property.

F. TRUSTEE'S LIABILITIES

1. Beneficiaries' Right of Enforcement

Lost profits, lost interests, and other losses resulting from a breach of trust are the responsibility of the trustee, and beneficiaries may sue the trustee and seek damages or removal of the trustee for breach. The trustee is also not allowed to offset losses resulting from the breach against any gains from another breach. However, if the beneficiaries joined the breach or consented to the trustee's actions, equity will prevent the beneficiaries from pursuing an action against the trustee. Note though that a beneficiary's failure to object to the breach does not rise to the level of consent.

2. Liabilities for Others' Acts

a. Co-trustee liability

Co-trustees are jointly liable, although the liability may be limited if only one trustee acts in bad faith or benefited personally from the breach.

A co-trustee may be liable for breach for:

i) Consenting to the action constituting the breach;

ii) Negligently failing to act to prevent the breach;

iii) Concealing the breach or failing to compel redress; or

iv) Improperly delegating authority to a co-trustee.

b. Liability for predecessor and successor trustees

If a trustee knew of his predecessor's breach and failed to address it or was negligent in delivering the property, then the trustee will be liable for his predecessor's breach. Successor trustees can maintain the same actions as the original trustees.

c. Trustee's liability for agents

A trustee is not liable for breaches committed by an agent unless the trustee:

i) Directs, permits, or acquiesces in the agent's act;

ii) Conceals the agent's act;

iii) Negligently fails to compel the agent to redress the wrong;

iv) Fails to exercise reasonable supervision over the agent;

v) Permits the agent to perform duties that the trustee was not entitled to delegate; or

vi) Fails to use reasonable care in the selection or retention of agents.

No clear-cut standard for the delegation of duties to agents exists, but it is clear that a trustee cannot delegate his duties in their entirety, but rather should limit the delegation to ministerial duties.

3. Third Parties

a. Trustee's liability to third parties

Unless otherwise specified in the trust instrument or in the governing contract, a trustee is personally liable on contracts entered into and for tortious acts committed while acting as trustee. If he acted within the scope of his duties, then he is entitled to indemnification from the trust.

b. Liability of third parties to a trust

When property is improperly transferred as a result of a breach of trust to a third party who is not a bona fide purchaser—one who takes for value and without notice of impropriety—the beneficiary or successor trustee may have that transaction set aside. If, on the other hand, the third party is a knowing participant in the breach, then he is liable as well for any losses suffered by the trust.

Because only the trustee is allowed to bring a cause of action against the third party, the beneficiary is limited to bringing a suit in equity against the trustee to compel the trustee to sue the third party. In a situation in which (i) the trustee is a participant in the breach, (ii) the third party is liable in tort or contract and the trustee fails to pursue a cause of action, or (iii) there is no successor trustee, then the beneficiary is given the option of directly suing the third party.

XXI. CHARITABLE TRUSTS

For a trust to be considered charitable, it must have a stated charitable purpose and it must exist for the benefit of the community at large or for a class of persons the membership in which varies. For public-policy reasons, charitable trusts are usually construed quite liberally by the courts.

Neither the settlor nor a potential beneficiary has standing to challenge a charitable trust. Only the state attorney general possesses such a right.

EXAM NOTE: If a trust fails as a charitable trust, it still may be valid as a private express trust.

A. CHARITABLE PURPOSE

Purposes generally considered to be charitable include:

i) The relief of poverty;

ii) The advancement of education or religion;

iii) The promotion of good health;

iv) Governmental or municipal purposes; and

v) Other purposes benefiting the community at large or a particular segment of the community.

While a certain political party is not deemed to be a charitable beneficiary, those seeking to advance a political movement may be charitable beneficiaries. A determination as to whether a beneficiary is charitable involves an inquiry into the predominant purpose of the organization and the determination of whether the organization is aimed at making a profit.

The rules applying to charitable trusts are not applicable to those with both charitable and non-charitable purposes, unless two separate and distinct trust shares are capable of being administered, in which case the rules are applicable to the charitable share.

A charitable purpose can be found even if the settlor created the trust out of non-charitable motives.

1. Benevolent Trusts

A merely benevolent trust is not a charitable trust unless the acts called for therein fall under the acceptable charitable purposes listed above. Most courts no longer belabor the distinction between benevolent and charitable trusts.

2. Modern trend—validate as charitable

The modern trend is to characterize a trust as charitable if possible.

B. INDEFINITE BENEFICIARIES

The community at large, or a class comprising unidentifiable members, not a named individual or a narrow group of individuals, must be the beneficiary of a charitable trust. It is possible that a very small class may qualify as a charitable beneficiary. Further, even though the direct beneficiary may be a private individual, a charitable trust may be found when the community at large is an **indirect** beneficiary of the trust; for example, when a trust is established to put a beneficiary through law school, but it stipulates that the beneficiary must spend a certain number of years of legal practice in the service of low-income clients.

C. RULE AGAINST PERPETUITIES

Charitable trusts are not subject to the Rule Against Perpetuities and may continue indefinitely. A trust can be created that calls for transfers of interest among charities, but it cannot direct the transfer of interest between a charitable beneficiary and a non-charitable beneficiary.

Example: A gift **"**to Sussex County Courts for as long as the premises is used as a courthouse, and if the premises shall ever cease to be so used, then to Sussex County United Way" is valid.

D. CY PRES DOCTRINE

In an effort to carry out the testator's intent, under the cy pres doctrine a court may modify a charitable trust to seek an alternative charitable purpose if the original charitable purpose becomes illegal, impracticable, or impossible to perform*. See e.g., In re Neher*, 279 N.Y. 370 (1939) (holding that when will gives real property for general charitable purpose, gift may be reformed by cy pres doctrine when compliance with particular purpose is impracticable). The court must determine the settlor's primary purpose and select a new purpose "as near as possible" to the original purpose.

Because the Rule Against Perpetuities is not applicable to charitable trusts, courts are called upon to apply cy pres often. The settlor's intent controls, so if it appears that the settlor would not have wished that an alternative charitable purpose be selected, the trust property may instead be subject to a resulting trust for the benefit of the settlor's estate. However, there is a rebuttable presumption that the settlor had a general charitable purpose. UTC § 413; Restatement (Third) of Trusts § 67.

EXAM NOTE: If it is difficult to achieve the charitable trust purpose, apply the cy pres doctrine before applying a resulting trust.

1. Inefficiency Insufficient

Cy pres is not invoked merely upon the belief that the modified scheme would be a more desirable, more effective, or more efficient use of the trust property.

2. Uniform Trust Code (UTC) and Restatement (Third)

The UTC and the Restatement (Third) of Trusts both presume a general charitable purpose and authorize the application of cy pres even if the settlor's intent is not known.

E. CONTRAST: HONORARY TRUSTS

An honorary trust is a legally enforceable trust that is not created for charitable purposes but has no definite human beneficiaries. Traditionally, because such a trust lacked a beneficiary who was capable of enforcing the terms of the trust, the trustee was not legally bound to comply with the settlor's directions, but instead was on her honor to do so, hence the name "honorary" trust. Today, two types of honorary trusts are recognized by statute: animal trusts and noncharitable purpose trusts. Restatement (Third) of Trusts, § 47; UTC §§ 408, 409.

1. Animal Trusts

Because the beneficiary of a private trust must be capable of taking and holding property, an animal may not be the direct beneficiary of a private trust. However, all jurisdictions permit the creation of a trust for the care of one or more animals alive during the settlor's lifetime. *E.g.,* Ohio Rev. Code Ann. § 5804.08; UTC § 408.

Although often this type of trust is referred to as a "pet" trust, typically the applicable statute does not require the animals that benefit from the trust to be pets of the settlor.

a. Time limit on trust

Typically, the trust terminates on the death of the animal or, if the trust involves the care of more than one animal, the last surviving animal. UTC § 408(a).

b. Enforcement of trust

An animal trust may be enforced by a person appointed in the terms of the trust (trust director) or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to

appoint a person to enforce the trust or to remove a person appointed. UTC § 408(b); Uniform Directed Trust Act (UDTA) § 6, cmt.

c. Trust property

Property of an animal trust must be applied only to the intended use of the property (i.e., care of the named animals). If the court determines that the value of the trust property exceeds the amount required for the intended use, the court imposes a resulting trust on the excess property, requiring it to be distributed to the settlor, if then living, or otherwise as part of the settlor's estate. UTC § 408(c).

2. Noncharitable Purpose Trusts

Almost all jurisdictions also permit the creation of a trust for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. UTC § 409. For example, a settlor can create a testamentary trust to fund the saying of prayers for the settlor or to maintain the settlor's grave. A settlor can also create a trust that gives the trustee the discretion to choose worthy purposes to receive the income from the trust on an annual basis, even though some of those purposes would not qualify as charitable purposes.

a. Time limit on trust

Typically, the authorizing statute will limit the enforcement of the trust to a set period, with 21 years being the most common, or subject the trust to the general rule against perpetuities in effect in the jurisdiction. UTC § 409(1). However, some jurisdictions have adopted a statute authorizing a trust for a specific purpose, typically the care of a grave, which does not subject the trust to a specific time limit. *E.g.,* N.Y. Est. Powers & Trusts Law § 8-1.5.

b. Other rules

The rules regarding enforcement of a noncharitable purpose trust and the use of trust property parallel those for an animal trust. UTC § 409(2),(3).

F. STANDING TO ENFORCE

The attorney general of the state of the trust's creation and members of the community who are more directly affected than the general community usually have standing to enforce the terms of the trust and the trustee's duties. Under UTC § 405, a settlor also has standing to enforce the trust, even if she has not expressly retained an interest. *See also Smithers v. St. Luke's-Roosevelt Hospital Center*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (holding that estate of donor of charitable gift had standing to sue to enforce terms of gift).