WILLS AND TRUSTS OUTLINE

Fall 2011
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I. Introduction

a. Class Introduction

i. Generally

1. Talking about the law that governs transmission of wealth around death—but is about the living and the choices under the law that living people make

2. Wills—almost exclusively state law (sometimes fed law plays a role i.e. tax)

ii. Principles and Themes of Wills and Trusts

1. Idea that when you die, property passes to family or to who you choose in a will

a. Very natural/intuitive idea in American—ingrained in our laws—that its almost a natural right, but it came about due to custom

b. For centuries, no natural right to property passing

2. In 1987, the SC held in Hadel v. Irving that a person could not be required to not control the disposition of their property without just cause—a takings case—not yet clear how this will pay out

a. We've made decisions along the way about inheritance—i.e. to honor/facilitate wealth transfer through wills/inheritance.

iii. Terminology

1. Probate (narrow): the process of proving a will valid

2. Probate (broad/common): administration of the estate, collecting assets, distribution

3. Probate property—property that passes through A) a will or B) intestacy (default sys)

4. Non-probate property—property passes outside of a will (joint tenancy, life insurance, Ks payable upon death—does not involve court proceeding)

b. Why Transmit Property at Death: Justifications and Limitations

i. The right to inherit and the right to convey:

1. The right to inherit can easily be mistaken as something natural, when it has been established by long and inveterate custom
2. Wills and testaments, rights of inheritance and successions, are creatures of the civil or municipal laws.

ii. Justifications for private transmission of wealth from generation to generation

1. Inheritance is natural and proper—reinforces family ties—good for a healthy society
2. We live in a society based on private property
3. A way to beget affection or responsibility
4. A way to bring forth creativity—so people work harder to pass something along
5. Encourages savings—which are essential to society's capital base

iii. Arguments Against private transmission

1. Perpetuates wide disparities in the distribution of wealth
2. Concentrates economic power in the hands of a few
3. Denies equality of opportunity to the poor

iv. General re: Inheritance in the US

1. 80% of wealth is inherited.
2. Congress has established substantial estate and gift tax on the rich

c. <u>Dead Hand Control</u>

i. **Analysis for against Public Policy with Dead Hand Control**:

1. Absolute or Partial Restriction?
    a. If absolute—then yes, against public policy
    b. If partial—then proceed to next question
2. Reasonable? (Look to numbers)
    a. If yes—not against public policy
    b. If no—against public policy

ii. Generally: The Problem of the dead hand

1. During life, a person can use her wealth to influence the conduct of friends, question becomes—should they have the right to do so after death?
2. US law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of a donor's decision re: how to allocate his or her property—just facilitates—does not regulate

iii. <u>Shapira v. Union National Bank</u> (1974)

Facts: Will contains restriction that sons must marry jewish girl with jewish parents w/in 7 years. He controls not only who gets property after death but also how they get the property (control by dead hand). Plaintiff argues (1) this is unconstitutional under 14th amd and (2) public policy bc it crossed the line
Held: court says (1) no—it's constitutional, a testator may restrict son's inheritance, if we conceive this as state action (mere enforcement of a will) we'll have so many more problems and (2) only against public policy when *absolute* restriction and here partial restriction—so we ask "is it reasonable"—here court looks to numbers—how many Jewish girls can he pick from

a. Not Like *Maddox v. Maddox*—where restriction was 5 or 6 people

Tensions in this case: a) right to transfer wealth as one wishes (donor's rights—wins), b) right to inherit (beneficiary's rights), c) right to transfer as you wish, d) societal goals

iv. POLICY Rationale for Why Dead Hand Control Wins in Society

1. We get some amount f certainty bc we're sure of the testator's intent
2. Incentive to work and save while alive
3. Encourages productivity on part of donees and donors

II. Intestacy

a. Introduction to Intestacy

i. The Basic Scheme

1. UPC and Intestate Succession

> UPC § 2-101 Intestate Estate
> (a) Any part of the decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this Code, except as modified by the decedent's will
> (b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his (or her) intestate share.

2. Generally:
    a. **Decedent**: child, grandchild, linear, "issue" in CA
    b. **Heir**—someone who receives property upon someone's death through intestacy laws.
        i. (Heir apparents—when you're still alive)
    c. **Forced share**—how much if any of decedent's property—are we going to force them to give, if any.

3. Basic organizing principles behind intestacy laws:
    a. Attempt to dispose of property in a way that most decedents would want
    b. States differ in their laws—choice of law issue
    c. Law of state where real property is located governs its disposition
    d. Law of state where person dies governs personal property.

4. Testate v. Intestate
    a. People who die leaving a will that provides for the disposition of their property at a death die **testate**.
    b. Others die without a will and they die **intestate.**

5. Intestacy law
    a. Governs the distribution of an **intestate** decedent's **probate** property.
    b. This is the background law that lawyers plan around: **default rules**.
    c. Lawyers always advise clients to *avoid* intestacy by executing a will
    d. The probate property of a person who dies without a will is governed by the **state's** statute of **descent and distribution**.

6. Partial Intestacy
    a. If a will disposes of only part of the probate estate, then the result is partial intestacy in which the part of the probate estate not disposed of by the will passes by intestacy:
        i. The law of state **where the decedent lived at death** governs the disposition of **personal property**, and the law of the state **where the decedent's real property is located** governs the disposition of **real property**.
    b. "I give my vacation home to Negin Lajevardi"—partial intestacy

7. Meaning of heirs and transfer of expectancy
    a. In the eyes of the law, **no living person** has heirs

b. Living people have **heirs apparent**.
c. They have an **expectancy**, which could be destroyed by A's deed or will
d. Expectancy cannot be transferred at law but can be taking into considerable and may be enforceable in equity as a K if the court sees it as fair under the circumstances.

8. Examples of instruments:
   a. Life insurance policy—non probate property, will substitute—no intestacy
   b. Jewelry: intestacy + probate property (not mentioned in will)
   c. Checking Account—if joint—then non probate, if alone, probate and intestacy
   d. Hawaii home—will/probate
   e. Stock—probate/intestacy
   f. Furniture/household—intestacy/probate

ii. Surviving Spouse's Share

1. UPC and Share of Spouse

UPC § 2-102 Share of Spouse

The intestate share of a decedent's surviving spouse is

- (1) The entire intestate estate if
  - (A) no descendant or parent of the decedent survives the decedent or
  - (B) all the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the descendent
- (2) The first [$300,000], plus ¾ of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent
- (3) The first [$225,000], plus one-half of any balance of the intestate estate, if all the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent
- (4) The first [$150,000] plus ½ of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

2. CA and Share of Spouse

CA § 6401

- (a) As to community property, the intestate share of the surviving spouse is the ½ of the community property that belongs to the decedent
- (b) As to quasi-community property, the intestate share of the surviving spouse is the ½ of the quasi-community property that belongs to the decedent
- (c) As to separate property, the intestate share of the surviving spouse, or surviving domestic partner, is as follows:
  - (1) The entire estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister
  - (2) One-half of the intestate estate in the following cases:
    - (A) Where the decedent leaves only one child or the issue of one deceased child
    - (B) Where the decedent leaves no issue but leaves a

parent or parents or their issue or the issue of either of them
- (3) One-third of the intestate estate in the following cases:
  - (A) Where the decedent leaves more than one child
  - (B) Where the decedent leaves one child and the issue of one or more deceased children
  - (C) Where the decedent leaves issue of two or more deceased children

3. CA v. UPC
   a. CA has no hard amount—giving less to Surviving spouse—more %.
   b. CA takes into account siblings, the way UPC does not

4. Generally:
   a. In the last 50 years, trying to make spouse's share larger.
   b. Under current intestacy laws in most states, the surviving spouse usually receives at least a one-half share of the decedent's estate, an increase from the one-quarter or one-half that was typical years ago.
   c. Current UPC provision for surviving spouse is generous
   d. If there is no descendant, roughly half of the state provides, as does the UPC 2-2012(2) that the surviving spouse share the estate with the decedent's parents if any.
   e. With community property provision:
      i. The decedent's spouse acquires the decedent's ½ of the community property
      ii. Because the surviving spouse already owns ½ of the community property, the survivor then holds an interest in the entire property
      iii. If the decedent died intestate, the surviving spouse in community property jxs also is entitled to a share of the decedent's separate property

iii. Simultaneous Death and Survival

1. UPC and Simultaneous Death and Survival

UPC § 2-104: Requirement of Survival by 120 Hours
- (a) For purposes of intestate succession, the following rules apply:
  - (1) An individual born before a decedent's death who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent. If it is established by clear and convincing evidence that an individual born before the decedent's death survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period
  - (2) An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent's death lived 120 hours after birth, it is deemed that the individual failed to survive for the required period.

2. CA and Simultaneous Death and Survival:
   a. Same rule as UPC
   b. Like an umbrella provision in UPC—this UPC is about Daeth from common cause, so UPC does not address 1 person dying from Tylenol and the other dying from suicide.

3. Generally
    a. A person succeeds to the property of a decedent only if the person survives the decedent for an instant of time.
    b. Neither inherits from the other if no evidence about who died first.

4. Case: Janus v. Tarasewiz (Ill App. Court 1985)
    Facts: Husband and wife died after they ingested Tylenol that had been laced with cyanide. Husband's mom said there was no evidence that she survived her husband. Death certificates for the two were given more than three weeks apart.
    Held: Court gives deference to the hospital doctors (experts) and says that wife survived husband.

iv. Shares of Descendants

1. English per stirpes

English per stirpes Approach for Shares of Descendants:
- (1) Dividing shares at children's generation—at the top of the tree
- (2) Number of primary shares = number of living children and dead children (if they have survivors)
- Treats each line of descendants equally
- The children of each deceased descendant represent their deceased parent and are moved into their parent's position beginning at the first generation below the designated person.
- Decides at child level if all children have died

2. Modern per stirpes: CA approach

Modern per stirpes (CA) Approach for Shares of Descendants
- (1) If any children survive descendent—then distribution is the same as English per stripes.
- (2) BUT if no living children—go to living takers (survivors of children) and divide equally at those levels. (usually at level of grandchildren)

3. 1990 UPC: Per capita at each generation

UPC Approach for Shares of Descendants:
- (1) Start with modern per stripes (generation with living takers)
- (2) Take shares of dead descendants, add to pot, and divide for each descendant equity.
- Focuses on horizontal equity
- Everyone of same generation should get same amount.

4. Generally:
    a. Here: trying to track patterns of conduct and so we should expect descendants to get a substantial part of the intestate estate.
        i. Our society values passing of assets to descendants
        ii. So in all states after shares go to Surviving Spouse, all assets go to descendants.
        iii. So if descendant is deceased before decedent, all states expect living descendants to take share of non-living descendants

5. Negative Disinheritance
    a. An old rule of law holds that disinheritance is not possibly by declaration in a will that "my son John will receive none of my property"

b. Because in order to disinherit John, John's parent must devise his entire estate to other people.
c. If there is partial intestacy, John will take an intestate share of the intestate property notwithstanding the provision in the will disinheriting him.

d. **UPC Allows Negative wills**:

UPC § 2-102(b) (Intestate Estate)

- (b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his or her intestate share.

v. Shares of Ancestors and Collaterals

1. UPC and Shares of Ancestors and Collaterals

UPC § 2-103 Share of Heirs Other than Surviving Spouse

- (a) Any part of the intestate estate not passing to a decedent's surviving spouse, or the entire intestate estate if there is no surviving spouses, passing in the following order to the individuals who survive the decedent:
  - (1) To the decedent's descendants by representation
  - (2) If there is no surviving descendant, to the decedent's parents equally if both survive or to the surviving parent, if only one survives
  - (3) if there is no surviving descendant or parent, to the descendant's of the decedent's parents or either of them by representation
  - (4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the material and paternal sides by one or more grandparents or descendants of grandparents
    - ½ of the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both or deceased, the descendants taking by representation
    - ½ of the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both or deceased, the descendants taking by representation
  - (5) If there is no surviving descendant, parent or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner described in (4)
- (b) If there is no taker under (a) but the decedent has:
  - (1) One deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to

that spouse's descendants by representation or
- (2) More than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants by representation.

2. CA and Shares of Ancestors and Collaterals

CA § 6402 Intestate Share of Heirs who take after a SS or DP

The part of the intestate estate not passing to the SS or SDP passes as follows:

- (a) To the issue of the decedent, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take in the manner provided under modern per stirpes.
- (b) If there is no surviving issue, to the decedent's parent or parents equally
- (c) If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship o the decedent, but if of unequal degree those of more remote degree take under modern per stirpes
- (d) if decedent is survived by one or more grandparent or issue of grandparent, to the grandparent(s) equally or to their issues, the issue taking equally if in the same degree unless of different degree and then MPS.
  - (diff than UPS 2103(a) where half to maternal half to paternal gps)
- (e) if decedent is survived by issue of a predeceased spouse (stepchildren) and if of varying degrees then we use MPS
- (f) The decedent is survived by next of kin (laughing heirs), those who claim through the nearest ancestor are preferred to those claiming through an ancestor more remote
- (g) Parents of a predeceased spouse—equally or if unequal degree then under MPS.

3. Introduction
   a. Whenever the intestate decedent is survived by a descendant, the decedent's ancestors and collaterals do not take.
      i. In half of states, when there is no descendant, after deducting the spouse's share, the rest of the intestate's property is distributed to the decedent's parents, as under the UPC
      ii. If there is no spouse or parent, the decedent's heirs will be more remote ancestors or collateral kindred
         1. All persons related by blood to the decedent but who are not descendants or ancestors are called collateral kindred.
         2. Descendants of the decedent's parents, are called first line collaterals.
         3. Descendants of the decedent's grandparents are called second-line collaterals.
      iii. If the decedent is not survived by a spouse, descendant, or parent, in all jxs intestate property passes to brothers and sisters and their descendants.
      iv. If no first-line collaterals, states differ on who is next in the line of succession:

1. **Parentelic System**
    a) The intestate estate passes to grandparents and their descendants
2. **Degree of relationship system**
    a) The intestate estate passes to the closest of kind, counting degrees of kinship
        i. To ascertain the degree of relationship of the decedent to the claimant you count the steps up from the decedent to the nearest common ancestor of the decedent and the claimant, and then you count the steps down to the claimant from the common ancestor.
        ii. Total number of steps= degree of relationship

b. The number of possible collateral kindred is immense
c. Should the law permit intestate succession by these remote collaterals, known as laughing heirs?
d. 3 cases
    i. If the intestate leaves no survivors entitled to take under the intestacy statute, the intestate's property **escheats** to the state.
        1. Escheats of substantial estates are rare.

4. Problems:

(1) Decedent is survived by his mother's grand-nephew, Brad, and his father's three sisters: Sally, Sonia, and Sarah. Distribute decedent's estate under:

i. UPC: 2-103(4)→ ½ to Brad, 1/6 to Sally, 1/6 to Sonia, and 1/6 to Sarah.
ii. Degrees of relationship: 2-103(3): Sally: 1/3, 1/3 Sonia, 1/3 Sarah.
iii. CA→ 6402 (d): issue of grandparents→ Brad= ¼, Sally= ¼, Sarah= ¼, Sonia= ¼.

(2) Decedent is survived by her great grandmother's great-great grand-daughter and her great great grand-father's great grandson. Distribute her estate under:

iv. UPC—no one—state
v. Degrees of relationship: each gets ½ (bc both are 7)
vi. CA system: 6402(f): great grandmother's great great grand-daughter (**default to parentelic tie breaker**)

b. Transfers to Children—Posthumously Born children

i. Meaning of "Children"

1. Adopted Children
    a. UPC and Adopted Children

UPC § 2-118 General rule

- (a) A parent-child relationship exists bw an adopted child and the adoptive parent
- (b) A parent child relationship does **not** exist bw an adopted child and the child's genetic parents (pursuant to exceptions

UPC § 2-119 Exceptions

- (b)(1) A parent child relationship exists bw an adopted child who is adopted by the spouse of either genetic parent and the genetic

parent whose spouse adopted the individual (i.e. person who remarried)
- (b)(2) A parent child relationship exists be an adopted child who is adopted by the spouse of either genetic parent and the other genetic parent but only for the purpose to inherit through and from (earl case)
- (c) A parent child relationship exists bw both genetic parents and adopted child who is adopted by a **relative** or their spouse but only for purpose to inherit through and from.
- (d) A parent child relationship exists bw both genetic parents and an adopted child who is adopted **after** the death of **both** genetic parents, but only for the purpose to inherit through and from (not like Restatement).
- (Stepparent adoption and UPC: the children can adopt from their genetic relatives but they cannot adopt from the children)

b. Restatement and Adopted Children

Restatement § 2.5 Parent and Child Relationship

- 2.5(2)(A): If adopted child is removed from families of **both** genetic parents, the adopted is not a child of either genetic parent
- 2.5(2)(B): If a relative (or other spouse or Surviving Spouse) of either genetic parents adopts the adopted child, then the child remains a child of both genetic parents
- 2.5(2)(C): If a stepparent adopts the child, then the child is still the child of the person married to the stepparent. ALSO, the adopted stepchild is still the child of the other genetic parent for purposes of inheritance from and through the child (different from Earl case)
- 2.5(3): If stepparent does not adopt the child then the child is not the stepparent's child.
- 2.5(4): A foster child is not the child of foster parents.
- 2.5(5): A parent who has refused to acknowledge or has abandoned his child, or whose parental rights are terminated, is barred from inheriting from and through the child.

c. CA and Adopted Children 6451 p. 27

CA § 6451 Legal Consequences of Adoption

- (a) An adoption severs the relationship of parent and child between an adopted person and a natural parent unless both of the following requirement are satisfied
  - (1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to or cohabiting with the other natural parent at the time the person was conceived and died before the person's birth
  - (2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents
- (b) Neither a natural parent or a relative of a natural parent, except for a whole-blood brother or sister of the adopted person or the issue of that brother or sister, inherits from and through the adopted person and the natural parent that satisfies the requirements of (1) and (2) unless the adoption is by the spouse

or SS of that parent
- (c) For purposes of this section, a prior adoptive parent and child relationship is treated as a natural parent and child relationship.

d. Introduction
   i. **Historically**
      1. "Child" depended on blood and whether parents were married
      2. 1st change: allowed to inherit from child's mother but not father unless proof of parentage
         a) In US—strong racial element w/ slave-owners sleeping with slaves
         b) Statutes in US re: inheritance came about before UK
         c) So law of adoption has evolved in many ways over the years
      3. UPC: distinguishes bw half-bloods and full-blood

   ii. **Today**
      1. Generally:
         a) Adoption law—totally statutory—not something naturally
         b) Probably court disallows dual inheritance while interpreting this statute bc of the fairness issue
            i. Also ct wants to validate adoption
         c) Perhaps unfair bc they may have had a relationship w/ Earl's father.

      2. Case—Hall v. Vallandingham
         Facts: Earl dies in 1956. Had 4 kids. Wife remarries. New husband adopts the 4 kids. 25 years later, Earl's brother dies w/o descendants and intestate. Earl's brother's twin bro says kids have no standing
         Held: The right to receive property by devise or descent is not a natural right. Adoption doesn't confer upon the adopted child more rights than those possessed by a natural child. Otherwise they would have a superior status.

e. Adult Adoption
   i. **Generally**:
      1. Most intestacy statutes draw no distinction bw adoption of minor or adoption of an adult
      2. But some states like NY do not permit adoption of your lover bc its incompatible/repugnant with the parent child relationship

   ii. Advantages of adult adoption
      1. May be useful in preventing a will contest by denying standing to potential contestants
      2. The only people with standing to challenge the validity of a will are those who would take if the will were denied probate

a) But, in order to gain standing, the decedent's collateral relatives must first over turn the adoption

f. Equitable Adoption.

i. CA statute and Equitable adoption

CA § 6454 Foster Parent or Stepparent

For the purpose of determining intestate succession by a person or the person's issue from or through a foster parent or stepparent, the relationship of parent and child exists between the person and the person's foster parent or stepparent if both of the following are met:

- (a) The relationship began during the person's minority and continued throughout their joint lifetimes of the person and the person's foster parent or stepparent
- (b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

CA § Judicial Doctrine of Equitable Adoption not Affected

Nothing in this chapter affects or limits application of the judicial doctrine of equitable adoption for the benefit of the child or child's issue.

ii. CA Courts and Equitable adoption with foster children

1. In re Estate of Ford
   a) Court rejected foster child's claim to an intestate share of the decedent's estate, giving the property instead to a nephew and niece who had not seen the decedent for 15 years.
   b) Person must have said an intent to adopt and that was never shown

iii. Generally:

1. Under the equitable adoption doctrine, an oral agreement to adopt A, between H and Q and A's genetic parents, is inferred if H and Q take baby A into their home and raise A as their child.
   a) Equitable adoption permits an equitably adopted child to inherit from foster parents
   b) On the other hand, foster parents and their relatives cannot inherit from the child.
      i. Many courts refuse to apply this principle

iv. **O'Neal v. Wilkes** (1994 Georgia SC)

Facts: π born out of wedlock and raised by her mom. She dies when π is 8. Bio dad never recognized her. Raised by her aunt. Then 2 randoms came to pick her up and raised her. They paid for her education, she lived with them till she was married. Father called her kids his grandchildren. He dies intestate. She is denied a share.

Held: This case is about equitable adoption—which comes in when legal requirements are not met (i.e. no paperwork filed)—but adoption nonetheless for

purposes of intestacy laws. No equitable adoption here, bc person who gave her to father was legal custodian and could not enter into agreement for equitable adoption. So even if it was her maternal aunt at the beginning, she could not have contracted for her adoption. Someone needed to petition for guardianship in order to K for her adoption.

a) Seeks unfair—but really in ct's view: equitable adoption→ someone w/ legal authority to K for adoption Ks to agree to an adoption but perhaps by some glitch (i.e. no paperwork) not ever completed.

Dissent: almost looking at a K bw the child & the new parent—look at child's behavior—when child has contracted—act as a child? (i.e. take care of parent in declining years, etc)

b) Advantages of dissent: looking at intent of adoptive parent and less towards legal authority

2. Posthumous Children
   a. **Generally**:
      i. The typical posthumous child case involves a child who is conceived before, but born after, her father's death
      ii. Where, for purposes of inheritance it is to a child's advantage to be treated as in being from the time of conception (rather than from the time of birth, the child will be so treated if born alive.
      iii. Courts have established a rebuttable presumption that the normal period of gestation is 280 days (10 lunar months). If the child claims the conception dated more than 280 days before birth the burden of proof is on the child

   b. Case: Hecht v. Superior Court – (used to be leading case)

   Facts: D devised 15 vials of his sperm to his gf. His gf's 2 children sought an order to destroy the sperm.
   Held: court ruled in favor of gf

   c. Case: Woodward v. Commissioner of Social Security

   Facts: 3.5 years after marriage, H + W found out that H was going to die from leukemia. They set his sperm aside. He died 10/93. 10/95 W gives birth to twins. 1/96 she applied for both "child's" and "mother"s social security. SS rejects her claims bc she didn't establish they were H's kids.
   Reasoning: Interests to be balanced:

   1. Best interests of children
      a) Among rights given to all children are rights o financial support from their parents and their parents' estates.
   2. State's interest in order administration estates
      a) Intestacy statute requires certainty of filiation bw issue and decedent
         i. Under the intestacy statute, *posthumously conceived children must obtain a judgment of paternity as a*

necessary prerequisite to enjoy inheritance rights.
(Burden rests w/ surviving parent)

b) Intestacy statute establishes limitation periods for commencement of claims against the intestate estate
   i. Court seems to think that 1 year time period if not enough + burdensome
   (Burden rests w/ surviving parent)

3. Reproductive rights of genetic parent
   a) The deceased intestate parent must *affirmatively consent* to the *posthumous reproduction*.
   b) The deceased intestate parent must *affirmatively consent* to *support any resulting child*.

Held: in certain limited circumstances, a child resulting from posthumous reproduction may enjoy inheritance rights.
Balancing of interests
Analysis:
1. Are the children the "issue" of the deceased
2. Did the deceased intestate parent affirmatively consent to the posthumous reproduction
3. Did the deceased intestate parent affirmatively consent to supporting any resulting child?

d. CA reaction to Woodward

CA § 249.5 Posthumous Child's Inheritance Rights

- A child of the decedent conceived and born after the death of the decedent shall be deemed to have been born in the lifetime of the decedent, if the child proves by clear and convincing evidence that:
- (a) The decedent, in writing, specifies that his or her genetic material shall be used for the posthumous conception of a child of the decedent, subject to the following
  - (1) The specification shall be signed + dated by the decedent.
  - (2) The specification may be amended or revoked only by writing.
  - (3) A person is designated by the decedent to control the use of the genetic material

e. UPC Reaction to Woodward

UPC § 2-120

A posthumously conceived child inherits from the deceased parent if:

- (1) During life
  - (a) The parent consented to posthumous conception in a signed writing OR
  - (b) Consent is otherwise proved by clear and convincing evidence
- (2) The child is:
  - (a) In utero not later than 36 months OR
  - (b) Is born not later than 45 months after the parent's death

3. Nonmarital Children
    a. **Traditionally**
        i. A child born out of wedlock could not inherit from mother or father

    b. **Modernly**
        i. Generally
            1. All states have alleviated this rule and now permit inheritance of non-marital children from their mothers. BUT rules regarding inheritance from fathers varies

        ii. Case: Trimble v. Gordon (SC 1977)
            Held: Unconstitutional under Equal Protection to deny a non-marital child inheritance rights from the father

        iii. Case: Lalli v. Lalli (SC 1978)
            Held: Not unconstitutional for a statute to permit inheritance by a non-marital child from father only if the father had married the mother or had been formally adjudicated the father by a court during his lifetime

    c. **Most state statutes**:
        i. Have amended their intestacy statutes to liberalize inheritance by non-marital children
        ii. Usually can establish paternity by:
            1. Evidence of the subsequent marriage of the parents
            2. By acknowledgement of the father
            3. By an adjudication during the life of the father
            4. By clear ad convincing proof about his death

    d. DNA testing and Non-Marital Children
        i. Question: if exhumation should be allowed to establish paternity
        ii. The clear trend is towards allowing exhumation since DNA analysis has made paternity testing both fairer and more accurate.

4. Reproductive Technology and New Forms of Parentage
    a. Posthumously conceived children (born and conceived after the death of one or both of the child's genetic parents)—is different than a posthumous child
    b. Discussed in Hecht.

5. Surrogate Motherhood and Married Couples
    a. **Generally**:
        i. There may be a genetic connection of both husband and wife to the child, or a genetic connection of only one of them to the child, or no genetic connection bw husband and wife and child.

    b. Types of surrogate motherhood
        (1) Wife's egg and husband's sperm
        (2) Wife's egg fertilized by third party sperm
        (3) Surrogate mother's egg fertilized by husband's sperm
        (4) Third party's egg and husband's sperm

(5) Third party's egg and third party sperm

c. Case: Johnson v. Calvert (**CA** 1993)

Facts: H+W signed K with surrogate providing that W's egg would be fertilized by H's sperm and would be implanted in S. S agreed to relinquish all parental rights but then changed her mind.

Held: Parenthood in surrogate mother cases should turn on the **intent** of the parties as shown by the **surrogacy contract** and not on who gave birth or who contributed genetic material

d. UPC and Surrogacy

UPC § 2-121

With respect to a child born to a surrogate, in the absence of a court order to the contrary, the surrogate **does not** have a parent-child relationship with the child unless,

- (1) The surrogate is the child's genetic mother AND
- (2) No one else has a parent-child relationship with the child.

An intended parent of the child has a parent-child relationship with the child if the person functioned as a parent of the child w/in two years of the child's birth.

6. Assisted Reproduction and Same-Sex Couples

a. Lesbian adoption

i. Generally:

1. When one partner is pregnant with their child

ii. Case: In adoption of Tammy (Mass. 1993)

Facts: Dr. Love conceived child by artificial insemination and court approved adoption of the child by her lesbian partner

Held: Both the genetic mother and the adoptive mother had post-adoptive rights and that the adopted child would inherit from and through both mothers as the child of each.

b. UPC and Same-Sex adoption—2 parts

UPC § 2-121(c) (Part 1)

- A child conceived by assisted reproduction other than gestational surrogacy is in a parent-child relationship and is thus entitled to inherit by, from, or through the child's birth mother

UPC § 2-121(f) (Part 2)

- There can **also** be a parent-child relationship with another person if the other person either (a) consented in writing to the assisted reproduction by the birth mother with the intent to be the child's other parent or (b) functioned as a parent of the child within two years of the child's birth

ii. Advancements

1. Generally:
    a. These are gifts made by someone during their lifetime so that it takes away/reduces share of probate estate received by that person after death
        i. Only applies w/ concept of intestacy
        ii. Take amount of the advancement and add it to the full estate
            1. I.e. If I give C1 an advancement of 10K and when I die my estate is 50 K and I have three kids: I take 50 K (total of my estate) + 10K (advancement) and divide by 3: So 20K. Then I give 20K to C2 and 20K to C3 and C1 just gets 20K
    b. Must specify that this is an advancement.

2. Common law:
    a. Any lifetime gift by the decedent to a child was presumed to be an advancement
    b. The child had the burden of establishing that the transfer was intended as an absolute gift

c. Disqualification by Misconduct (Bars to Succession)

i. Disqualification by Homicide

1. Case: In re Estate of Mahoney (SC VT 1960)

    Facts: W shoots H and H dies intestate. No issue left behind. Just W and H's Mother and father. Under intestate law—W should get money. VT has no statute to turn to

    Held: Legal title should pass to constructive trust which is an equitable remedy. Unjust enrichment standard is key (whether o not it was about inheriting under intestacy law)

    POLICY: Not too narrow bc we're not limit to people who kill just to inherit under intestacy laws. Here court says involuntary manslaughter will bar succession

2. Conviction or Acquittal Necessary

CA § 254
▪ (a) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this part ▪ (b) In the absence of a final judgment of conviction of felonious and intentional killing, the court may determine by a preponderance of the evidence whether the killing was felonious and intentional for the purposes of this part. The burden of proof is on the party seeking to establish that the killing was felonious and intentional

3. Bar to Inheritance if Felonious Homicide
    a. CA and Felonious Homicide

CA § 250
A person who feloniously and intentionally kills the decedent is not entitled to: ▪ Property, interest or benefit under a will ▪ Any property of the decedent by intestate succession ▪ Any of the decedent's quasi-community property

b. UPC and Felonious Homicide

UPC §2-803
An individual who feloniously or intentionally kills the decedent forfeits all benefits under this article with respect to the decedent's estate, intestate share, elective share, child's share, homestead allowance, exempt property, and family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his or her intestate share

c. Generally:
   i. Basically under UPC, descendants of a killer can take—treat slayer as if they had not disclaimed
   ii. CA does not extend (like UPC) to descendants—this may cause us pause bc descendants may have had something to do with the wrongdoing
      1. So we'd want to know what the relationship w/ the decedent and killer would be about, look to their behavior, their age
      2. CA: descendants of slayer can take if they're innocent—treating slayer as predeceased
      3. Other states: cannot take by caselaw.
   iii. If statute says nothing, court takes it into account in terms of equity
   iv. Really depends on facts and courts look to see the facts and use equity powers.
   v. Both UPC and CA extend bar beyond intestacy to wills and will substitutes
      1. Want consistency bc policy along these areas is consistent
      2. This causes huge problems in *mercy killings* context—so cant create wills around this area
   vi. If convicted and on appeal?
      1. Laci Peterson case: there is a prima facie case of felonious and intentional killing and burden is on convicted to overcome it (Scott did not)

ii. Disqualification by Other Conduct

1. Generally:
   a. CA extends its slayer statute to elder abuse/child abuse situations
      i. Statute

CA § 259
Any person shall be deemed to have predeceased a decedent when: ▪ (a) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or fiduciary abuse of the decedent, who was an elder or dependent adult/

      ii. Policy reason
         1. Done because of treatment of elders
            a) One side: there are already penal codes put in place to deal with these situations
            b) Other side: could get messy—people could accuse other relatives about elder abuse

iii. Disqualification by Favorable Conduct

1. Chinese approach:
    a. Punishes bad behavior and rewards good behavior
    b. I.e. can reward someone who took care of an elderly person but unrelated and they can inherit.

d. Disclaimer

i. Generally:

1. Gives a beneficiary the means to reject a gratuitously given gift
2. Basically people have a right to say "I don't want this" under intestacy laws
    a. Wasn't this way in the past—done to protect donee's rights
3. When someone disclaims, we treat them as though they've pre-deceased
    a. Problem—we're giving grandchildren a lot higher share

ii. POLICY and Disclaimer

1. Avoiding Creditors: Most disclaimer statutes provide that a disclaimer relates back for all purposes to the date of the decedent's death
2. Thus if A disclaims her interest in O's estate, most cases have held that A's ordinary creditors cannot reach her share of O's estate.

iii. CA and Disclaimer

CA § 282(b) (p 227)

When disclaimer is filed:

- (a) The beneficiary is not treated as having predeceased the decedent for the purpose of determining the generation at which the division of the estate is to be made under Part 6 or other provision of a will trust or other instrument

III. Wills

a. Introduction to Wills

i. Start with common challenges in this section

1. Testamentary capacity, undue influence, insane delusion

a. Here: understand burdens of proof—burden shifting and how that might actually affect cases and why it might matter in cases why there is a burden shift.

b. Common Challenges of Wills

i. Mental Capacity

1. Introduction:

a. **Generally**:

i. In the law of wills, the requirements for mental capacity are minimal

ii. The test is one of capability—not *actual* knowledge

b. **Professional Responsibility**:

i. A lawyer may not draft a will for someone the lawyer believes is incompetent, but the lawyer may rely on her own judgment of the client's capacity.

c. **Ante Mortem Probate**:

i. Ante Mortem statutes permit probate of a will during the testator's life—they authorize a person to institute during life an adversary proceeding to declare the validity of a will and the testamentary capacity and freedom from undue influence of the person executing the will

1. Trying to figure out if someone has testamentary capacity while alive.

ii. All beneficiaries named in the will and the Testator's heirs apparent must be made parties to the action

iii. States like Arkansas, North Dakota and Ohio have adopted statutes

d. **Capacity Thresholds**:

i. Generally:

1. In most states, capacity to make a will requires *less* capacity and is governed by a different legal test than to make a contract or to complete an irrevocable *lifetime* gift

ii. High Standard: Lifetime Gift

1. To make an irrevocable lifetime gift, T must:

(1) Have capacity to make a will, and
(2) Must be capable of understanding the effect that the gift may have on the future of their own financial security and financial security of any dependents.

iii. Low Standard: Will

1. To make a will, T can have a lower standard of capacity

a) **Modern view**: This standard applies to making revocable trusts

2. Requirements to be competent to make a will:
    (1) Testator must be an adult
    (2) Testator must be capable of knowing and understanding generally:
        (a) The nature and extent of his or her property
        (b) The natural objects of his or her bounty
        (c) The disposition that he or she is making of that property
        (d) Must be capable of relating these elements to one another and forming an orderly desire regarding the disposition of property.

3. Case: In re Estate of Washburn (SC NH 1997)—minority rule
    a. **Held**: start out with presumption that every testator is sane—and the challenger has the burden of production to rebut that presumption and if the burden is met, then the proponent of will has the burden of persuasion
    b. **Test 1**:
        i. (a) Presume Testator sane/testamentary capacity
        ii. (b) Evidence to rebut that presumption—burden of production is on challenger (**ASKKKKKKK about this burden!!!**) put in some evidence- very little-
        iii. Proponent has burden of persuasion loses when the facts are wishy -washy—burden of persuasion on proponent—hard for them
    c. **Minority rule**:
        i. Putting the burden of proof on the proponent to show testamentary capacity

4. Case: Wilson v. Lane—majority rule (CA rule)
    a. **Held**: require that you have a prima facie case that testator had ok capacity—but once you've established the prima facie case—we will establish presumption of sanity and burden of persuasion is on challenger of the will to show lack of testamentary capacity.
    b. **Test 2**:
        i. (a) Prima Facie case evidence that T possessed testamentary capacity (by proponent) raises PRESUMPTION of testamentary capacity such that
        ii. (b) The burden of persuasion is now on the challenger to show that there was no testamentary capacity
    c. **POLICY**: This standard protects the testator and their family and gives them confidence
    d. **Majority rule**: once the proponent adduces prima facie evidence of due execution, the party contesting the will on the grounds of the lack of capacity has the burden of persuasion.

ii. Insane Delusion

1. Introduction:
    a. **Generally**
        i. A person may have a sufficient mental capacity generally to execute a will but be suffering from an insane delusion so as to cause a will to fail or lack of testamentary capacity nonetheless.
        ii. Much of insane delusion litigation revolves around **causation**.
        iii. Insane delusion—with respect either to certain or to all provisions of the will—can invalidate some provisions and not necessarily all of them.

b. Mistake versus Insane Delusion

i. Mistake: susceptible to correction if the testator is told the truth

ii. Insane Delusion: a belief not susceptible to correction by presenting the testator w/ evidence indicating the falsity of the belief.

c. Analysis

i. (1) **Does this person suffer from an insane delusion, and**

1. 2 tests:

Cunningham Test—challenger has burden, or

a) Mental capacity to make a will requires:

(a) T understands the nature of her act
(b) T knows the extent of her property
(c) T understands the proposed testamentary disposition
(d) T knows the natural objects of her bounty
(e) the will represents her wishes

Insane Delusion Test—burden on challenger (majority view)

a) A party asserting that a testator was suffering from an insane delusion must meet the burden of showing that T suffered from such delusion

b) Case: Breedon v. Stone

Facts: T killed himself after publicized hit + run. Cops found handwritten document saying he wanted everything to go to Sydney Stone.
Held: 1) Holographic will okay, 2) Both insane delusion test and Cunningham test (not mutually exclusive) are ok. Also no causation was shown.

(2) **Has this insane delusion caused this disposition of property (new will)—burden on challenger (majority view)**

2. If yes→ then,

a) Did insane delusion affect dispositions?

i. If no→ then will stands

ii. If yes→ then will was a product of the insane delusion and must be struck (or some provisions must be struck)

3. If no→ then, the will is fine. (No causation shown)

iii. Undue Influence

1. Introduction:

a. Generally

i. To have undue influence, we're looking to see if there's coercion, which can be present in different forms

b. **Restatement § 8.3** (doesn't give us lots of guidance)

(a) A donative transfer is invalid if procured by undue influence

(b) A donative transfer is procured by undue influence if the wrongdoer overcame the donor's free will and caused the donor to make a donative transfer that the donor would not have otherwise made

c. Bequests to Attorneys

i. Many courts, concerned w/ the appearance of impropriety hold that a presumption of undue influence arises when an attorney drafter receives a legal, except when the attorney is related to the testator

1. It can only be rebutted with clear and convincing evidence

d. Model Rule 1.8 (c)

i. A lawyer shall not solicit any substantial gift from a client including a testamentary gift unless the lawyer or other recipient of the gift is related to the client

1. Unless client should have the detached advice that another lawyer could provide.

2. Analysis

(1) **Proponent of the will has the burden of persuasion to prove that the formalities of the execution of the will have been followed**.

i. Show due execution of formalities of the will.

(2) **The burden of persuasion is shifted to the challenger of the will to prove undue influence**. Challenger can do this by showing:

(a) Confidential relationship

1. *Fiduciary relationship*
   a) Bw donor and hired professional (i.e. attorney-client, person w/ power of attorney)

2. *Reliant relationship*
   a) Question of fact—the contestant must establish that there was a relationship based on special trust and confidence (i.e. the donor was accustomed to be guided by the judgment or advice of the alleged wrongdoer—think financial adviser and customer, or doctor-patient)

3. *Dominant-subservient*
   a) Question of fact—the contestant must establish that the donor was subservient to the alleged wrongdoer's dominant influence (i.e. hired caregiver and ill feeble donor or adult child and ill feeble parent)

b) California law

CA § 21350(a)(6)

No provision of any instrument shall be valid to make any donative transfer to:

- (6) A care custodian of a dependent adult who is the transferor

CA § 21351 (byzantine exception)

To rebut the presumption of undue influence, a care custodian may show the involvement of an independent lawyer who signed a statutory "certificate of independent review."

(b) The person enjoyed bulk of the estate (suspicious circumstance)
(c) The decedent's intellect was weakened (suspicious circumstance)

(3) **Now, burden to disprove undue influence is shifted back to the proponent of the will to show by clear and conviction evidence that grantor acted freely, intelligently, and voluntarily**

3. Cases:
   a. Case: Estate of Lakatosh
      Facts: Roger befriended T who was 70 and living along. He visited her once a day, drove her to appointments. Few mths later, he suggests she give him power of attorney. She executed a new will giving him money and POA. Couple years later T is living in squalor. She revoked POA before she died.
      Held: Burden of disproving undue influence shifted to Roger and he failed bc confidential relationships, she had weakened intellect, and under disputed will, Roger would receive bulk of the estate—So will is struck down.

   b. Case: In re will of Moses
      Facts: 3 yrs before D dies, she made a will devising all her property to her lover (lawyer) through an independent lawyer. He's her attorney in other areas, he's her confidante, counselor, she's much older, and suffered health problems.
      Held: 1) confidential rel bc he's her attorney, 2) he got the bulk of her estate, 3) she's sick so physically weak. Also does not matter she met with independent lawyer bc he did not really question her.

   c. Case: Estate of Reid
      Facts: T adopted law student in his late 20s. Adopted son developed intimate relationship with T and son had POA and T was old
      Held: presumption of undue influence that is not overcome-able.

   d. Case: In re Kauffman (1964)
      Facts: rich gay dude from DC to NYC. Fam doesn't know he's gay. Meets Walter. Live together for 8 year. During 8 years, D drafted wills giving W bigger shares of assets.
      Held: undue influence (looking at timing of case): 1) sexual intimacy –confidential relationship, 2) bulk of estate, 3) intellect is weakened by nature of relationship – obviously different outcome today.

e. Case: Lipper v. Weslow

Facts: Grandchildren contesting will. Children of D's son from first marriage. Δs are children of D from second marriage. L is Δ prepared the will. In will, D explains why GCs should not inherit (bc they suck and don't visit)

Held: MINORITY Undue Influence Test: Burden of persuasion on challenger until the end of the inquiry: There was undue influence, but its overcome bc there are independent people who testify that D hates the πs.

1. If it was majority rule—then there prob would have been enough facts for undue influence—L lived next door, hated his bother, T was 80

4. Strategies

a. No-Contest Clause

i. Generally:

1. Explanation of why she's cutting them out
2. A beneficiary who contests the will shall take nothing, or a token amount, in lieu of the provisions made for the beneficiary in the will

ii. Problem with factual recitations

1. Keep them vague or else if you're wrong, then you are screwed.

iii. Courts pulled in opposite directions

1. **Perspective 1**:
   a) Enforcing no-contest clauses discourages unmeritorious litigation, family quarrels, and defamation of the testator's reputation

2. **Perspective 2**:
   a) Enforcing no-contest clauses might inhibit a lawsuit that would prove lack of capacity or undue influence, thereby nullifying the safeguards built around the testamentary disposition of property

b. Other strategies:

- Record a video discussion
- Letter to the lawyer
- Hold a family meeting where T explains rationale
- Professional examination of client's level of capacity immediately before executing the will
- Use disinterested witnesses
- Put property in an inter vivos trust.

c. Wills: Formalities and Forms of wills

i. Attested Wills

1. Formalities of Attested Wills

a. UPC and Attested Wills

UPC § 2-502 Witnessed or Notarized Wills
A will must be: ▪ (1) In writing ▪ (2) Signed by the testator or in the testator's name by some other

individual in the testator's conscious presence and by testator's direction, +

- (3) either
  - (a) signed by at least two individuals, each of whom signed within a *reasonable* time after the individual witnessed either the signing of the will or the testator's acknowledgment of that signature or acknowledge of the will, or
  - (b) acknowledged by the testator before a notary public

b. CA and Attested Wills

CA § 6110

A will must be:

- (1) In writing
- (2) Shall be signed by the testator or in the testator's name by some other person in the testator's presence and by the testator's direction
- (c)(1) The will shall be witnessed by being signed *during the testator's lifetime* by at least two individuals each of whom
  - (A) Being present at the same time, witnessed either the signing of the will or the testator's acknowledgement of the signature or of the will and
  - (B) Understand that the instrument they sign is the testator's will
- (c)(2) If will is not executed in compliance w/ (c)(1), it will be treated as if it *was* executed in compliance if proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will.

c. **Basic formalities for attesting a will**:

(1) WRITING

- Generally
  - All states require the will to be in writing, but different interpretations of writing (i.e. scratches in car, typewritten but not my movements in the air)
  - A will need not be on paper—all that is required is a reasonably permanent record of the markings that make up a will.

- Case: In Estate of McCabe
  Facts: Lawyer prepared a will for D who was very ill. James wrote an "X" in hospital room where his name was printed. 2 attesting witnesses.
  Held: ok for probate

- Case: Taylor v. Holt
  Facts: D composed will on computer. Instead of signing by hand, he typed his name into word processor in cursive font and then printed doc.
  Held: will is valid.

- Oral Wills:
  - Is a question of fact re: matter of time—if no time to write it up, they are close to death—maybe okay
  - Since 1982: CA does not allow oral wills

- UPC and Video Recordings
  - UPC is purposefully agnostic on whether a video recording could constitute "a document or writing" sufficient to be admitted under the harmless error rule—ok if clear and convincing evidence that it was intended to be a will.

(2) SIGNATURE BY TESTATOR

- Generally:
  - All states and UPC require signing of the will but are flexible in how they define "signature" because it shows evidence of finality—it's the last draft

- Exact order of signing is usually *not* too important.
  - In general, T must sign or acknowledge the will before witnesses attest, but if they all sign "as part of a **single or continuous transaction**, then the exact order of the signing is not critical."
  - Case: In re Colling

    Facts: T made a will while in hospital. Before he finished signing, Sister Newman had to attend to another patient. He died.

    Held: will invalid—bc testator did not complete his signature while both witnesses were present and later acknowledgement did not suffice.

- "Subscription"
  - Some states require T to sign at the very end
  - UPC and CA don't have this requirement

(3) ATTESTATION REQUIREMENT

1. Presence requirements
   a) Presence: Witnesses must sign w/in presence of each other and testator (*Stevens v. Casdorph*)
      i. UPC: no w/in reasonable time
      ii. CA: no, during lifetime
   b) Presence: Witnesses must together be present at T signing or acknowledgment? (*Groffman*)
      i. UPC: no
      ii. CA: yes
   c) Presence: Testator must sign or acknowledge in the presence of the witnesses? (*Wade*)
      i. UPC: yes
      ii. CA: yes

2. Presence Tests
    a) **Line of Sight Test**:
        i. Requirement that the witness sign in the presence of the testator is satisfied only if T is capable of seeing the witness in the act of signing. Doesn't have to actually see but should be able to if he looked

    b) **Conscious Presence Test**:
        i. The witness is in the presence of T if T, through sight, hearing, or general consciousness of events, comprehends that the witness is in the act of signing

    c) **UPC and Presence**:
        i. Dispenses altogether w/ the requirement that the witnesses sign in T's presence

3. Case: Stevens v. Casdorph
    Facts: couple goes to bank so D can execute his will. After he signs it he finds two other bank employees to have them sign as witnesses. But they didn't witness him place signature on will and D didn't acknowledge his signature to them.
    Held: Wade exception not met. So will not okay.

4. Case: Wade v. Wade:
    Held: acknowledgement of signature at the TIME of the signature is okay—but not afterwards. Cts are hesitant to create broader and broader exceptions—
        i. At some pt if we move too far away from formalities we may be concerned that the fxns of formalities are going away.
        ii. That's why our cts have defined "presence" in different ways—going to a more "conscious presence" standard—"line of sight test"

5. Interested witnesses
    a) **Generally**:
        i. No states today will invalidate a will bc there are interested witnesses
        ii. Real q: what to do w/ share of interested witnesses—a person who would take more under the will than if other option—i.e. intestacy

b) **Before**:
   i. They cannot have anything

c) Today: Purging Statutes
   i. A will stands but interested witness's gift is purged (bc we choose ppl close to us as our witnesses). Some states: IW give up nothing. Others: give up more than what they would have taken
   ii. CA: gives them a chance to rebut this presumption
   iii. UPC: don't care—they can take full share

d) UPC and Interested Witnesses

UPC § 2-505(b)
A will is valid even if witnessed by an interested party, and the interested witness does not forfeit his bequest even if it is greater than that which he would have received under a prior will or intestacy

e) CA and Interested Witnesses

CA §6112 (c)
(c) Unless there are at least two other subscribing witnesses to the will who are disinterested witnesses, the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, meance, fraud, or undue influence. This presumption affects burden of proof. If presumption not rebutted—they take what they would have under intestacy (not throwing out will altogether)

f) Case: Estate of Morea

Facts: Bequest to D's friend Buonaroba—2/3 attesting witnesses: B's husband and D's son (who is also set to inherit).
Held: Kev attesting will was not beneficial to him bc he would have received larger inheritance if he testified against the will. Thus, disposition to B is not void bc Kev counts as ½ of Uninterested witnesses.

d. **Functions of Formalities of Attested Wills**:
   i. <u>Ritual Function</u>
      1. The formalities of transfer generally require the performance of some ceremonial for the purpose of impressing the transferor w/ the significance of his statements and thus justifying the court in reaching the conclusion, if the ceremonial is performed, that they were deliberately intended to be operative

ii. Evidentiary Function
1. The existing requirements of transfer emphasize the purpose of supplying satisfactory evidence to the court.

iii. Protective Function
1. Under modern conditions, wills are probably executed by most testator in the prime of life and in the presence of attorneys—not on sick bed

iv. Channeling Function
1. If D's wishes were recording in a standardized form

2. Curing Defects in Execution of Attested Wills

a. Excusing Defects by Ad Hoc Exception

i. Generally:
1. Under the traditional rule of **strict compliance** almost any mistake in execution invalidates the will
2. Some courts have occasionally corrected an obvious correction defect
a) But they vary on whether they apply strict compliance or not
b) Cases show court inconsistencies

ii. Case: In re Pavlinko's Estate (1959)
Facts: H+W retain a lawyer to draw up their wills and to leave property to each other. By mistake, W signs H's will and H signs W's will.
Held: no correction by the court—strict compliance with Wills Act

iii. Case: In re Snide (NY 1981)
Facts: H+W sign each others will by mistake. Their oldest kids execute waivers. Youngest child (represented by guardian) refuses to make concession.
Held: looking at 8 corners of both of their wills—corrected mistake.

b. Excusing Defects by Curative Doctrines

i. Substantial compliance

Substantial Compliance
The court may deem a defectively executed will as being in accord with the statutory formalities if the defective execution nonetheless *fulfills the purposes of those formalities*.

1. Case: In re Will of Ranney (SC 1991)
Facts: Lawyer here drew up a two-step self-proving will (witnesses had to sign both the will and the affidavits). But everyone only signed affidavit (which said they signed the will)
Held: Affidavit was not part of the will but the will substantially complied w/ NJ state law so its valid.

i. **POLICY**: Rigid insistence on literal compliance often frustrates the purpose of a will and defeats the intent of the testator."
ii. **CA law**: has 2-step self-proving wills section 8221.

ii. Harmless error

UPC § 2-503

Although a document or writing added upon a document was not executed in compliance w/ section 2-502, the document or writing is treated as if it had been executed in compliance with that section

- If the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute
  - (i) The decedent's will
  - (ii) A partial or complete revocation of the will
  - (iii) An addition to or alteration of the will or
  - (iv) A partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

1. Case: In re Estate of Hall (SC Montana 2002)
   Facts: H+W go to attorney to make a "Joint Will." H asked attorney if draft could stand as will until final version sent to him. No witnesses. Attorney notarized w/o anyone present
   Held: under Harmless Error this is ok bc H intended the Joint Will to be his will.

ii. Notarized Wills

1. Generally:
   a. UPC accepts notarized wills

UPC § 2502 Witnessed or Notarized Wills

A will must be:

- (1) In writing
- (2) Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by testator's direction, +
- (3) Either
  - (a) Signed by at least two individuals, each of whom signed within a *reasonable* time after the individual witnessed either the signing of the will or the testator's acknowledgment of that signature or acknowledge of the will, or
  - (b) **Acknowledged by the testator before a notary public**

   b. A notarized will serves the ceremonial, protective, and evidentiary functions of will execution formalities
   c. A notarized will almost always be upheld under UPC harmless error rule

2. Benefits of Notarized Wills
    a. Allowing notarization as an optional method of execution can benefit practice (bc sometimes attorneys fail to notice that a client or a witness has unintentionally neglected to sign one of the documents)

3. Case: In re will of Feree
    a. Facts: T's last will—portions of will found next to his body that were in handwriting. The will was notarized but not attested.
    b. Held: no substantial compliance—but if it was a UPC jx—it could have been probated.

iii. Statutory Wills

1. CA and Form Wills:
    a. CA § 6240 is the California statutory will form (p. 84 supplement)
    b. It is in simple form
    c. Instructs to read the will, fill in the blanks, and date and sign the will and have two witnesses sign it.

2. Concerns of Statutory Wills:
    a. Because it's a form, it may not take into account individual needs
    b. Therefore it can still be susceptible to fraud.

3. Benefits of Statutory Wills
    a. Encourages use of wills
    b. Sticks to the formalities
    c. Is more accessible to people who cannot necessarily afford attorneys

iv. Holographic Wills

1. Introduction
    a. **Generally**
        i. In slightly half of states, holographic wills are permitted (CA is one of them)
        ii. This is because we are more likely to believe that this is the person's document they've written it by hand.
        iii. Attested witnesses are not required
        iv. Evidentiary function is being met here (i.e. handwriting experts have evidence)
        v. Testamentary intent is shown very clearly

            1. Case: In re Kimmel's Estate

                Facts: D mails a letter to sons w/ valuable papers saying "if enny thing happens.. do this." He died suddenly the same day
                Held: "if enny thing happens" was still existing when D died on same day—and he's thinking about the possibility of his own death and about what he could do w/ property—testamentary intent.
                    i. Here, despite letter seeming too relaxed—we're still asking was this document something he intended as his will—similar to harmless error.

        vi. Courts are usually willing to probate holographic wills even if condition is about a stated event

1. Case: Eaten v. Brown

Facts: T wrote will: "I'm going on journey and may not return. If I don't, I leave everything to my son." She returned from journey and died months later
Held: will probate—presumption that the language of condition does not mean that he will is to be probated only if the stated event occurs, but is merely a statement of the inducement for execution of the will, which can be probated upon death from any cause.

b. **Proponents**:
   i. This is really the testator's intent
   ii. Last minute chance for somebody to devise assets, etc.

c. **Critics**
   i. Concern: capacity/mental state
   ii. Because no one is there to witness – all we're requiring is it be in handwriting and signed by the testator (no longer a witness standard)—so we've lost *evidentiary function* standard in attested wills.
   iii. They are not sufficiently thought through
   iv. These are momentary decisions with regards to precise pieces of property instead of looking at the overall piece of property

2. Holographic wills in extremis
   a. **Generally**
      i. Holographic wills are often written in *extremis* when the testator is close to death under heartrending circumstances
      ii. Forms of holographic wills: nurse's petticoat, chest of drawers, cigarette carton, bedroom wall, eggshell

   b. Case: Estate of Harris

   Facts: T is a wheat farmer. Accidentally puts tractor in reverse and it kills him. While he's stuck, he writes on the tractor: "In case I die in this mess, I leave all to my wide, Cecill. Geo. Harris." The piece was taken off the tractor and submitted to probate
   Held: it was valid

3. Will fails as formal will: holographic will?
   a. **Generally**:
      i. If a testator writes her will by hand on a typed or preprinted will form but fails to have the form property attested—it fails as a formal will
      ii. Whether it can be probated as a holographic will depends on how much of the instrument is in the testator's writing.

   b. Case: Estate of Gonzalez

   Facts: D wants to prepare will before trop to Fl. Printed out two copies of preprinted will form + had two witnesses sign second copy where he planned to more neatly rewrite the will. He died before rewrite.

Held: handwriting his wishes on a preprinted will form was a valid holographic will bc his intent was clear.

4. Structure of Holographic wills
    a. **Requirements**
        (1) Signature
            1. Generally:
                a) In almost all states allowing holographs, the will may be signed at the end, beginning, or anywhere else on the face of the document
                    i. But if not signed at the end, there may be doubt about whether the decedent intended his name to be a signature.

            2. Case: Williams v. Towle
                a) **Held**: D did not sign his name at the end but wrote his name in block letters on the top of the paper. Court admitted to probate

        ii. (2) Handwriting

3 categories of statutes

(1) First generation statutes: "**entirely written, signed, and dated**"

a) Require that holographs be entirely written, signed, dated in the handwriting of the testator

(2) Second generation statutes (1969 UPC): "**material provisions**"

b) Require only that the signature and the material provisions of the holographic be in the testator's handwriting

(3) Third generation statutes (1990 UPC): (a) "**material portions**" and (b) **extrinsic evidence allowed**

c) Generally:

i. Here a will is valid as a holographic will whether or not witnessed, if the material portions of the document are in the testator's handwriting (UPC 2-502(b))

ii. Also, extrinsic evidence is allowed to establish testamentary intent (2-502 (c)).

UPC §2-502(c) Extrinsic Evidence
Intent that a document constitute the testator's will can be established by extrinsic evidence, including for holographic wills, portions of the document that are not in the testator's handwriting

d) CA Law:

CA § 6111
(a) A will that does not comply with Section 6110 is valid as a holographic will, whether or not

witnessed, if the signature and the **material provisions** are in the handwriting of the testator.
(c) Any statement of testamentary intent contained in a holographic will may be set forth either in the testator's own handwriting or as part of a commercially printed form will

(CA statute like 3rd generation statute bc (c) eases up material provisions language in (a))

e) Case: In re Estate of Kuralt
Facts: D =CBS anchor. Has affair w/ Pat. Long-term romance. 3 weeks before death he wrote a letter assuring her she would inherit Montana property
Held: letter may be probated as holographic codicil bc its extrinsic evidence as to testator's intent re will

d. Revocation and Revival of Wills

i. **Introduction**:

1. A will is an ambulatory document, which means that it is subject to modification or revocation by the testator during his lifetime
2. Talking about the effect of probating a will now on an earlier document:
3. Revocation: eliminating an older will
4. Revival: bringing an old will back to life
5. All states permit revocation of a will in 1 of 2 ways:
   a. (1) Written document executed w/ testamentary formalities
   b. (2) By a physical act

ii. Revocation of Wills

1. Revocation by a Subsequent Writing

a. Generally:
   i. The clearest revocation by subsequent writing will state that this will is revoking an earlier will, but if no mention—can still revoke by *inconsistency* any prior wills
      1. Is it supplementing the former will (think codicil) versus is it different/inconsistent (in re Kuralt)
   ii. Oral revocation is inoperative in all states bc of fear of fraud.

b. UPC and Revocation by Writing

UPC § 2-507(a)(1) Revocation by writing
(a) A will is revoked
- (1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency.

c. CA and Revocation by Writing

CA § 6120 Revocation by subsequent will
A will or any part thereof is revoked by any of the following
- (a) A subsequent will which revokes the prior will or part expressly or by inconsistency

d. Revocation by Inconsistency:
    i. The modern view is to treat a subsequent will that does not expressly revoke the prior will, but makes a complete disposition of the testator's estate, as presumptively replacing the prior will and revoking it by inconsistency
        1. If the subsequent does *not* make a *complete disposition*, then it is not presumed to revoke, but is viewed as a **codicil**
        2. The property not disposed of under the codicil is disposed of in accordance with the prior will.
            a) **Codicil**: a testamentary instrument that supplements, rather than replaces an earlier will.

2. Revocation by a Physical Act

a. Full Revocation by a Physical Act
    i. UPC and Revocation by Physical Act:

UPC § 2-507
(a) A will or any part thereof is revoked: ▪ (2) by performing a revocatory act on the will, if the testator performed the act in the testator's conscious presence and by the testator's direction. "Revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroy the will or any part of it. A burning, tearing, or cancelling is a revocatory act on the will *whether or not* the burn, tear, or cancellation touched any *words* on the will

    ii. CA and Revocation by Physical Act

CA § 6120 Revocation by Physical Act
A will or any part thereof is revoked by any of the following ▪ (b) Being burned, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking it, by either 1) the testator, or 2) another person in the testator's presence and by the testator's direction.

    iii. UPC Harmless Error and Revocation

UPC §2-503
Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: ▪ (i) the decedent's will ▪ (ii) **a partial or complete revocation of the will** ▪ (iii) an addition to or an alteration of the will ▪ (iv) a partial or complete revival of his or her formerly revoked will or of a formerly revoked portion of the will (So harmless error applies to revocation)

    iv. Analysis for destruction of wills
        1. Questions:

(1) **Does the evidence establish that the decedent had possession of the will before her death**?

i. Yes→ next question

(2) **Was the will found among her personal effects?**

ii. Yes→ then presumption arises that she destroyed the will

(3) **Did she destroy the copy of the will in her possession?**

iii. Yes→ A presumption arises that she revoked her will and all duplicates, even though a duplicate exists that is not in her possession

iv. This presumption is rebuttable and the burden is on the proponent of the will.

2. Case: Harrison v. Bird

Facts: D executed will. Two years later called attorney to revoke will. He tore it into 4 pieces and mailed her a letter and the four pieces. She dies. 4 pieces not found.

Held: Formalities are not met here→ D was not in the person of the person who ripped up the will or did not rip it up herself.

i. If 4 pieces found in her possession→ may be evidence of her testamentary intent, but probably not revoked bc formalities of revocation were not met.

ii. If pieces found in file labeled "revoked will."—we have testamentary intent but formalities are still not met!

v. Lost Wills and Revocation by Physical Act

1. Generally:

a) **Unless statute says otherwise**:

i. If a will is lost or destroyed *without* the consent of the testator, OR

ii. If a will is destroyed with consent of T but not in compliance with revocation statute

iii. It CAN be admitted into probate if the contents are proved.

2. Some courts: preponderance of the evidence

a) Case: Estate of Turner

Held: The presumption was rebutted under a preponderance of the evidence standard by the testimony of a disinterested witness who saw the will on the day of T's death and the fact that T's disinherited siblings had access to the testator's house immediately after T's death

3. Some courts: clear and convincing evidence
    a) Case: Estate of Pallister:
        i. **Held**: The presumption of revocation was rebutted under clear and convincing evidence standard where the relative who would have benefited by revocation had access to T's house and safe deposit box and had complained to the scrivener about being disinterested.

4. Fraudulently destroyed
    a) Some state statutes prohibit the probate of a lost or destroyed will unless the will was "in existence" at the testator's death or was 'fraudulently destroyed' during Testator's life
        i. So accidentally thrown out by housekeeper cannot be probated bc not fraudulent.

5. Case: Thompson v. Royall
    Facts: D signed a will and told friend to destroy both. Instead of destroying, on the back cover friend wrote "this will is null and void" and D signed it.
    Held: no revocation—w/in statute—need marks or lines across written parts of instrument: not enough to write on the blank part that you are revoking
        i. Would have been ok under UPC
        ii. Even harmless error could help

6. Revocation of a Copy
    a) Cannot revoke a copy—not a Valid revocation

b. Partial Revocation by a Physical Act
    i. **Generally**
        1. In several states a will cannot be revoked in part by an act of revocation, it can only be revoked *in part* only by a subsequent instrument

    ii. Case: Estate of Malloy:
    Held: Partial revocation by physical act would not be permitted where the intent and effect of the change would result in a substantial enhancement of another bequest.
        a) Restatement disapproves of this approach

    iii. Partial revocation and pencil
        1. Some courts: when pencil is used, its not revocation

c. Dependent Relative Revocation and Revival
    i. **Generally**:
        1. In limited circumstances, revocation of part or all of a will is not ok if it was based on a mistaken assumption

a) I.e. T believed an alternative estate plan would be substituted
b) Presumptive intent—not actual intent
i. When applied, testator thinks he created a new will but he did not

2. Disregarding valid revocation

ii. Limits on DRR:

1. DRR applies only:
a) (1) **Where there is an alternative plan of disposition that fails, or**
i. alternative plan of disposition: usually in the form of another will, either duly or defectively executed (so the kind of extrinsic evidence allowed is narrowed)

b) (2) **Where the mistake is recited in the terms of revoking instrument, or possibly, is established by clear and convincing evidence.**

iii. Case: LaCroix v. Senecal (SC CT 1953)

Facts: D left her niece as her heir at law. She made a codicil amended nephew's name. Other half is to still go to Senecal.
Held: DRR applies—so Senecal gets her share—bc its clear that D's intention to revoke the will was conditioned upon the execution of a codicil which would be effective to continue the same disposition to her residuary estate.

iii. Revival of Revoked Will

1. Generally:
a. **Majority View**:
i. Upon revocation of will #2, will #1 is revived if the testator so intends

b. **Minority View**:
i. Generally
1. Once a will is validly revoked, the previous will is not automatically revived w/o testamentary formalities

ii. Case: Estate of Alburn

Facts: 2 wills. T moved to Kankakee and revoked Milwaukee will. Mistake expectation.
Held: In this jx (minority)—once you revoke, you don't automatically revive old will. So old will not revived.
a) So diff if we apply UPC and CA

2. UPC and Revival of Revoked Will

UPC § 2-509
▪ (a) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act under Section 2-507(a)(2), the previous will remains revoked unless it is revived. The previous will is revived if it is evidence from the circumstances of the revocation of

the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

- (b) If it is evidence from circumstances of the revocation of the subsequent will or from testator's contemporary or subsequent declarations that the testator did not intent the revoked part to take effect as executed, then previous will is not revived.

iv. Revocation by Operation of Law

1. Generally:
   a. In all but a handful of states, statutes provide that a divorce revokes any provision in the decedent's will for the divorced spouse
   b. In that handful of states, revocation occurs only if divorce is accompanied by a property settlement.
      i. These revocation statutes ordinarily only apply to wills, not to life insurance policies, pension plans, or other non-probate transfers

2. UPC and Revocation by Operation of Law

UPC § 2-804

A court order made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage: revokes any revocable disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.

3. Marriage:
   a. If the testator executes her will and subsequently marries, statutes in a large majority of states give the spouse his intestate share, unless it appears from the will that the omission was intentional or the spouse is provided for in the will or by a will substitute with the intent that the transfer be in lieu of testamentary provision.
4. Child:
   a. Almost all states have pretermitted child statutes, giving a child born after the execution of a parent's will, and not mentioned in the will, a share in the parent's estate.

e. Components of the Will

i. Generally:
   1. In this section we are more concerned with 1) incorporation by reference and 2) doctrine of acts of independent significance
      - To determine who takes what property belonging to the testator
        - By permitting extrinsic evidence to resolve the identity of the
          - Persons or
          - Property

ii. Incorporation by Reference
   1. **Generally**
      (1) Must be in existence at the time the will was executed
      (2) Incorporated in the language of the will
      (3) Describe the writing sufficiently to permit its identification

2. UPC and Incorporation by reference

UPC § 2-510
A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

3. CA and Incorporation by Reference

CA §6130
A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permits its identification (Same as UPC)

4. Items of Tangible Personal Property

a. Generally

i. Here, talking about "items of tangible personal property" – people often want to make decisions and will want to continue to make decisions regarding personal pieces of tangible property—even after a will is executed—so its about flexibility—particularly when we're in a jx that doesn't accept holographic wills (ONLY applies to tangible property)

b. UPC and Items of Tangible Personal Property

UPC § 2-513
A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. The writing must be signed by testator and must describe the items and the devisees with reasonable certainty. The writing may be prepared before or after the execution of the will, it may be altered by the testator after its preparation.

c. CA and Items of Tangible Personal Property

CA § 6132
(a) A will may refer to a writing that directs disposition of tangible personal property not otherwise specifically disposed of by the will, except for money. Must be: ▪ An unrevoked will refers to the writing ▪ The writing is dated and is either in the handwriting of, or signed by the testator, ▪ The writing describes the items and the recipients of the property with reasonable certainty (e) The total value of tangible personal property identified and disposed of in the writing shall not exceed $25,000, and each item cannot exceed $5000 (So CA has a similar provision as UPC but monetary limits).

d. Case: Clark v. Greenhagle

Facts: T executed a will which named G (cousin) as executor. Id'd him as principal beneficiary and he must distribute her goods. She has a notebook where she made a list of her possessions. Nurses see her edit it. She tells them painting goes to Virgy. She dies. G wont give painting to Virgy. Says not in will

Held: note book was incorporated by reference

e. Case: Johnson v. Johnson

Facts: Attorney D had three paragraphs devising stuff says it's a will, but wasn't dated or signed or attested.
Held: This is a holographic codicil. A codicil doesn't need to be called a codicil to be considered a codicil—and its incorporated by reference

1. Cannot cure defects of earlier execution

iii. Doctrine of Acts of Independent Significance

1. **Generally**:
   a. If the beneficiary or property designations are identified by acts or events that have a lifetime motive and significance *apart* from the will, the gift will be upheld under the doctrine of acts of independent significance

2. **Examples**
   a. Example 1
      i. Automobile I own at my death goes to X
         1. We may accept that bc independents significance of a purchase of a car—makes CA and UPC say ok no problem
         2. We are willing to recognize it as a testamentary devise—bc its not JUST a testamentary devise—it has other significance
   b. Example 2:
      i. Contents of my house go to Sue
         1. She would get it because you're making decisions about what to make the contents of your house based on other reasons than what you want to give to Sue
   c. Example 3:
      i. To Rick, the contents of right hand drawer of desk
         1. Probably not upheld
         2. Might change our analysis if there was a lock, a key, or something of that sort.

3. UPC and Acts of Independent Significance

UPC § 2-512
A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether the acts and events occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event

4. CA and Acts of Independent Significance

CA § 6131
A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether the acts and events occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

iv. The Doctrine of Integration of Wills

1. **Generally**:
    a. Wills are often written on more than one sheet of paper
    b. Under the doctrine of integration, all papers present at the time of execution, intending to be part of the will, are integrated into the will
    c. Litigation involving integration arises when the pages are not physically connected and there is no internal coherence, or there is evidence that a staple has been removed or one page is in one font and the rest is in another font

2. Case: Estate of Rigsby:

Facts: Dispute re: D's holographic will. Both pages were in his handwriting and each was initialed and dated. Two pages were not fastened together and he only signed the first page
Held: second page not admitted to probate bc it could easily be interpreted as a worksheet listing his assets as a preliminary step before drafting first page.

v. The Doctrine of Republication by Codicil

1. **Generally**:
    a. Under the doctrine of republication by codicil, a will is treated as re-executed (republished) as of the date of the codicil—whether or not the codicil expressly republishes the prior will, unless the effect would thwart the testator's intent
        i. In a codicil the practice is to say: "this codicil is republishing the will"
        ii. Only applies to a prior validly executed will
        iii. It does not cure defects of earlier execution
    b. The fundamental difference bw republication by codicil and the doctrine of incorporation:
        i. Is that republication applies only to a prior validly executed will, whereas incorporation by reference can apply to incorporate into a will language or instruments that have never been validly executed.

2. Case: In Estate of Bielson

Facts: T drew lines through dispositive provisions of typewritten will and wrote bw the lines. Near the margin of these cancellations he initialed and dated
Held: the handwritten words constituted a holographic codicil bc they didn't intent to incorporate the attested typed material. The holographic codicil republished the typewritten will, as modified.

f. Construction of Wills

i. Mistaken or Ambiguous Language in Wills

1. Traditional Approach
    a. **Generally**:
        i. A majority of jxs follow two traditional rules that bar admission of evidence to vary the terms of the will:
            1. Plain Meaning or No Extrinsic Evidence Rule
                a) Here, extrinsic evidence may be admitted to resolve some ambiguities, but the plain meaning of the words of the will cannot be disturbed by evidence that another meaning was intended

b) Advantages: reduces litigation, prevents court from having to make a judgment call on testator's intent, we want people to be careful about what they say—if we allow extrinsic evidence, people would be less careful

2. No reformation Rule
   a) Reformation is an equitable remedy that, if applied to a will, would correct a mistaken term in the will to reflect what the testator intended the will to say.
   b) The justification for refusing to reform wills is that a court is thereby compelled to interpret the words that the testator actually used not to interpret the words that the testator is purported to have intended to use.

ii. Narrow refusal to change wills

iii. However, in some cases, extrinsic evidence may be allowed if the words of the will are *ambiguous* or *lack a plain meaning*.

b. Extrinsic Evidence not allowed:

i. Case: Mahoney v. Grainger

Facts: T was trying to leave her estate to her 25 cousins. Attorney comes to hospital writes "heirs at law." Turned out her aunt was her only heir at law. Cousins don't get anything. Mass: degree of relationship. Not parentelic

Held: Where no doubt exists as to property bequeathed or identity of beneficiary—no room for extrinsic evidence—will stands

c. Extrinsic Evidence Allowed: Ambiguity or Lack of Plain Meaning

(1) Patent Ambiguity

1. Appears on the face of the will
2. Under traditional law, extrinsic law is not admissible to clarify a *patent* ambiguity—the court is confined to the four corners of the will, even if as a result the will or devise fails and the property passes by intestacy

(2) Latent Ambiguity

Generally:

-A latent ambiguity manifests itself when the terms of the will are applied to the testator's property or designated beneficiaries.

-There are two types: (a) Equivocation and (b) when description doesn't exactly fit a person or thing

(a) Equivocation

a) Generally:
   i. Admission of extrinsic evidence first began in these cases bc extrinsic evidence merely made the terms of the will more specific w/o adding to the terms.

b) Personal Usage Exception
   ii. If the extrinsic evidence shows that the testator always referred to a person in an idiosyncratic manner, the evidence is inadmissible to show that the testator meant someone other than the person with the legal name

c) Case: Mosley v. Goodman
   Facts: T left $20K to "Mrs. Mosley." Mrs. Lenore Mosley—wife of cigar store owner where T went tried to claim but he never met her
   Held: Bequest went to Mrs. Lillian Trimble who T called "Mrs. Mosley"

(b) When description doesn't fit person or thing

a) Case: Ihl v. Oetting
   Facts: T devised his home to "Mr. and Mrs. Wendell Richard Hess residing at Barbara Circle." But they divorced and H remarried.
   Held: Court admitted extrinsic evidence to show intent to go to first wife.

2. Correcting Mistakes without Power to Reform Wills
   a. **Introduction**:
      i. Generally
         1. Talking about when we have undue influence, testamentary capacity, duress, and fraud
         2. If intentional wrongdoing causes a mistaken terms in a will (fraud) that term can be struck or its effect undone
         3. But if mistaken terms has an innocent cause (mistake)—then no relief is available to correct the error

      ii. Wills Act Chart

	Effect: Lack of volition	Effect: Mistake terms
Cause: intentional wrong	Undue influence, duress (relief granted)	Fraud (relief granted)
Cause: innocent acts	Lack of capacity, insane delusion (relief granted)	Mistake (no relief)

   b. Case: Arnheiter v. Arnheiter
   Facts: D left a will. Paragraph 2 said to sell her undivided ½ interest in 304 Harrison Ave and establish trusts for two nieces. She owned 317
   Held: not correcting this, but applying principle of "*mere erroneous description does not vitiate*" so strike 304 and give effect to what's left

c. Case: Estate of Gibbs

Facts: H+W died. In their wills they each bequeathed money to their friend Robert J Krause. Their friend Robert W. Krause lived at a different address

Held: Court struck middle initial and street address and then makes sense of it

3. Openly Reforming Wills for Mistake

a. UPC and Reformation to Correct Mistakes

UPC § 2-805
The court may reform the terms of a governing instrument, *even if unambiguous*, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement. (not just limited to scrivenor error—unlike *Erickson*)

i. How far is UPC going?
   1. Still have the clear and convincing evidence standard

b. CA and Reformation to Correct Mistakes

CA § 6111.5
Exstrinsic evidence is admissible to determine whether a document constitutes aw ill pursuant to Section 6110 or 6111, or to determine the meaning of a will or a portion of the will, if the meaning is unclear.

i. CA has not gone as far as UPC—does allow extrinsic evidence to determine if a document means a will or determine portion of a will if unclear—"ambiguity"
ii. Under 6111.5, most courts have been willing to determine bw latent and patent ambiguity
iii. Statute requires that the meaning be unclear from language itself (far cry from UPC)

c. Case: Erickson v. Erickson

i. Facts: π is D's daughter. D executed a will 2 days before he married Dorothy.
   Held: Exstrinsic evidence allowed to show mistake of scrivener (if he misled T into executing a will on belief that it will be valid notwithstanding T's subsequent marriage)
   1. NARROW Exception: Only allowing extrinsic evidence for mistake of scrivener and proof must be established by clear and convincing evidence.

d. Reforming mistakes by the scrivener

i. Case: Estate of Lord
   Held: Residuary clause was mistakenly drafted to refer to a trust and a trustee that never came into existence, but the court interpreted these words to mean "estate" and "personal representative"

ii. Case: Estate of Getman
   Held: Court corrected language in a will that identified an inter vivos trust as created of this date—court substituted the word youngest for the world oldest

where extrinsic evidence showed that "oldst" did not make any sense as was a scrivener's mistake.

e. Liability by Attorneys

i. Case: Ventura County Humane Society v. Holloway

1. **Held**: attorney is not liable for drafting an ambiguous document

g. Changes in Circumstances:

i. Death of Beneficiary Before Death of Testator

1. Introduction

a. **Generally**

i. If a devisee doesn't survive the testator—the devise **lapses** (Fails).

ii. All gifts made by will are subject to a requirement that the devisee survive T, unless T otherwise specified

iii. Nearly all states have anti-lapse statutes—which substitute another beneficiary for the predeceased devisee

b. Residuary Devise

i. If a specific or general devise lapses, the devise falls into the residue

1. If the residuary devise lapses, the heirs of the testator take by intestacy.

2. **No residue of a residue rule**: If only a share of the residue lapses, such as when ½ predeceases T, at common law the lapsed residuary share passes by intestacy to T's heirs rather than to the remaining residuary devisees.

a) CA and UPC reject this rule

b) Majority of states reject it as well—the assumption is that the testator would rather have A receive entire estate- not intestacy.

c. Class Gifts

i. With class gifts, at common law, when 1 member of a class predeceases—the surviving members of the class take his share

d. Void Devise

i. Generally:

1. **Occurs when**:

a) Devisee is already dead at the time the will is executed OR

b) Devisee is a dog or cat or other ineligibles taker

2. Same default rules govern the disposition of a void devise as govern a lapsed devise

ii. Case: Estate of Russell:

Facts: T died leaving a valid holographic will leaving everything to her friend Chester and her dog Roxy. Her niece wants to take the dog's portion

Held: this has lapsed bc dog is an illegible taker and so it goes to T's heir at law at intestacy—which is the niece.

a) Court is applying No residue of a residue rule
   i. Most states reject this rule

2. Antilapse Statutes
   a. **Generally**
      i. Substituting other beneficiaries for the stated beneficiaries
      ii. So no lapse at all—no default rules bc statute tells you where it goes
      iii. Idea here—*presumed intent*—rather go to descendants of beneficiary versus through intestacy.
      iv. When antilapse statute doesn't apply—goes to residual takers

   b. Questions About Scope:

(1) How broadly should we apply anti-lapse statute

1. UPC 2-603:

a) Now includes stepchildren
b) Page 376

(b) If a devisee fails to survive the testator and is a grandparent, a descendent of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

- (1) If the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator.
- (2) If the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendant's of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he (or she) would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants
- (3) Words of survivorship, such as in a devise to an individual "if he survives me," or in a devise to "my surviving children" are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section
- (4) If the will creates an alternative devise with respect to a devise for which a substitute gift is

create by paragraph (1) or (2), the substitute gift is created is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will

- (5) Unless the language creating a power of appointment expressly excludes the substitution if the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

2. CA 21110

a) Broader than UPC
b) Page. 297

(a) If a transferee is dead when the instrument is executed, or fails or is treated as failing to survive the transferor or until a future time required by the instrument, the issue of the deceased transferee take in the transferee's place in the manner provided in Section 240 (modern per stirpes). A transferee under a class gift shall be a transferee for the purpose of this subdivision unless the transferee's death occurred before the execution of the instrument and that fact was known to the transferor when the instrument was executed
(b) The issue of a deceased transferee do not take in the transferee's place if the instrument expresses a contrary intention or a substitute disposition. A requirement that the initial transferee survive the transferor or survive for a specified period of time after the death of the transferor constitutes a contrary intention. A requirement that the initial transferee survive until a future time that is related to the probate of the transferor's will or administration of the estate of the transferor constitutes a contrary intention.
(c) As used in this section, "transferee" means a person who is kindred of the transferor, or kindred of a surviving deceased, or former spouse of the transferor.

c) Blood relationship—kindred

3. Some states:

a) Limit anti-lapse statutes to descendants of testators

4. Other states:

a) Don't limit anti-lapse statutes at all
b) I.e. "I leave my house to my niece Sue and the remainder of my estate to my good friend Gill. Sue has predeceased me, leaving a child.

Under UPC, Sue's child inherits bc she's a lineal descendant of my grandparents

(2) To whom are we giving this gift? (Who can substitute in for deceased beneficiary?)

1. I.e. I leave my house to my only daughter and residue to good friend Gill. Debbie predeceases me but leaves no children, but surviving spouse, Harry.
    c) Under UPC, Gill gets house, bc no issue—can only go to Debbie's descendants
2. CA, UPC, and All states
    d) Limit this question to the issue of the beneficiary
        i. POLICY: based on presumed intent—they will yield to other thoughts

c. Words of Survivorships

i. Majority:
1. Words of survivorship such as "if he survives me" are sufficient to preclude application of anti-lapse statute
2. CA § 21110 follows this approach

ii. Minority:
1. Words of survivorship are not enough to stop application of anti-lapse statute

2. UPC And Words of Survivorship

UPC § 2-603(b)(3)
(b) If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following will apply: ▪ (3)Words of survivorship, such as in a devise to an individual "if he survives me" are not a sufficient indication of an intent contrary to the application of this section.

d. Case: Ruotolo v. Tietjen

Facts: T left ½ of residue of estate to Hazel if she survives him. She dies. Hazel's daughter tries to take her share. CT follows UPC approach
Held: Antilapse statute still applies

3. Class Gifts
    a. **Generally**:
        i. Under the common law lapse rule, a class gift is treated different from a gift to individuals.
        ii. If a class member predeceases the testator, the surviving members of the class divide the total gift, including the deceased member's share
            1. So crucial question: What is a class?
                a) Test: whether the testator was "group minded"
                    i. Group minded if the testator used a class label in describing the

beneficiaries—i.e. to A's children, or to my nephews

b. Case: Dawson v. Yucus

Facts: D devised her interest in late husband's family farm to 2 nephews on husband's side of the family. ½ nephews dies. Residue divided bw Ina and Hazel
Held: Not a class gift, so it lapses and goes to Ina and Hazel.

ii. Changes in Property After Execution of Will

1. Ademption by Extinction
   a. **Introduction**:
      i. Generally:
         1. If you have a specific or real property—its going to extinguish if it's no longer the testator's when he dies (part of will set)

      ii. Ademption by extinction only applies to specific devises
         1. I.e. my pen, my piano, etc.
            a) (General devise: $10,000 to Sue—does not adeem by extinction)

      iii. Demonstrative devise: treated as a general devise—will not adeem
         1. I.e. I give B the sum of $100,000 to be paid from the proceeds of my Apple Stock

      iv. Intent theory of Ademption
         1. If the specifically devised item is not in the testator's estate, the beneficiary may nonetheless be entitled to the replacement for, or cash value of, the original item depending on whether the beneficiary can show that this is what the testator would have wanted
            a) This is the *Modern* View
               i. The traditional view would say—if its not in the estate—it's extinguished

   b. Case: Estate of Anton:

   Facts: T married H. During marriage she and H built a duplex on property that H's daughter from a different marriage deeded them. T writes will and bequeaths the duplex to H's daughter. Her daughter, N, comes to take care of her in her later life. N has Power of Attorney to take care of mom's financial affairs. N begins selling mom's assets to pay for mom to live. No evidence that T knew duplex was sold.
   Held: sale of the duplex was not an ademption of the bequest bc N should not have sold it.
      1. Is adopting UPC approach

   c. UPC and Ademption by Extinction

UPC § 2-606
(a) A specific devise has a right to the specifically devised property in the testator's estate at death and ▪ (6) Unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent w/ the testator's manifested plan of

distribution, the value of the specifically devised property to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered in (1-5)

(catch all provision)

d. Fire of Casualty Insurance

i. Generally:

1. Many jxs give devisee any unpaid amount of a condemnation award for the property or any unpaid fire or casualty insurance proceeds after the property has been destroyed.

ii. Case: Estate of Sagel

Facts: T died in small plane crash in plane he owned. He had bequeathed rolex and plane to son
Held: Son was entitled to the insurance proceeds from destruction of plane and the watch.

e. Stock splits

i. Modern courts:

1. When stocks are split—modern courts have discarded old approach and have held that absent a contrary showing of intent, a devisee of stock is entitled to additional shares received by the testator as a result of a stock split

ii. UPC 2-605

1. Stock dividends are treated the same as stock splits—the beneficiary gets them along with other shares.

f. Exoneration of Liens

i. When a will makes a specific devise of land, on which there is a mortgage, the question may arise whether the devised land passes free of the mortgage.

ii. Some jxs apply *exoneration of liens doctrine*:

1. Here: when a will makes a specific disposition of real or personal property that is subject to a mortgage to secure a note on which the testator is personally liable, it is presumed that the testator wanted the debt to be paid out of residuary estate

iii. Assumption today:

1. We expect mortgage to go with the property

2. Ademption by Satisfaction

a. Same as advancement in intestacy

3. Abatement

a. **Introduction**:

i. Generally:

1. Applies when estate doesn't have enough property to satisfy all of T's devises.

ii. Order of Abatement
    1. Residue Abates
    2. Generate devises abate
    3. Specific and demonstrative devises abate

b. UPC and Abatement

i. UPC § 3-902
ii. Cares about intent – so will rearrange order of abatement based on intent

c. CA and Abatement

CA § 21402 Order of Abatement
▪ (1) Property not disposed of by the instrument
▪ (2) Residuary gifts
▪ (3) General gifts to persons other than the transferor's relatives
▪ (4) General gifts to the transferor's relatives
▪ (5) Specific gifts to persons other than the transferor's relative
▪ (6) Specific gifts to transferor's relatives

i. CA thinks that to those whom default rules apply—that general devises to non-relatives abate before general devises to relatives
    1. Same concept applies to specific devises to relatives and non-relatives.

IV. Will Substitutes

a. Introduction

i. Two Doctrinal Questions:

(1) Should Wills Act formalities apply to will substitutes
(2) Should the rules of construction be applied to will substitutes

ii. Generally:

1. Life insurance companies, pension plan operators, commercial banks, savings banks, investment companies, brokerage houses, stock transfer agents, and a variety of other financial intermediaries are functioning as free-market competitors of the probate system and enabling property to pass on death w/o probate and w/o will.
    a. The law of wills no longer governs succession of most of decedent's property

iii. Pure will substitutes

1. Generally:
    a. Each reserves to the owner complete lifetime dominion including the power to name and to change beneficiaries until death.

2. Four Will Substitutes

(1) Life insurance

i. Usually a person has several life insurance policies
ii. Life insurance functions exactly like a will
    (a) It is revocable until the death of the testator
    (b) The interests of the devisees are ambulatory (non-existent until T's death)
iii. Unless restricted by K

(2) Pension Accounts

i. Most working Americans have interests in pension accounts
ii. All of these pension accounts contain will substitutes—beneficiary designations that pass the owner's interest to the persons of his choice in the event that he dies before exhausting the account in its retirement payout phase.

(3) Bank, Brokerage, and Mutual Fund Accounts

i. The joint bank account is manipulated to do the work of a will
ii. Joint accounts of personalty differ from true joint tenancies because by the privilege of withdrawal of either cotenant may assume the account
iii. They are revocable and ambulatory—like a will

(4) Revocable Inter Vivos Trust

i. Standard form revocable trusts with fill in te blank beneficiary designations are widely offered in the banking industry.

iv. Imperfect Will Substitutes

1. Joint Tenancies
    a. Closely resemble complete lifetime transfers
    b. Because joint tenancies ordinarily effect lifetime transfers, they are imperfect will substitutes

c. When you have joint tenancies—cotenant acquires an interest that is no longer revocable and ambulatory.

b. Will Substitutes and the Wills Act

i. Revocable Trusts

1. Generally:
   a. Revocable trust is the most flexible of all will substitutes because the donor can draft both the dispositive and the administrative provisions to the donor's liking
   b. A *trust* is an arrangement whereby a trustee manages property in a fiduciary capacity for one or more beneficiaries
      i. The trustee holds legal title and the beneficiaries hold equitable title
   c. A trust may be created during the settlor's life—**inter vivos trust** (revocable or irrevocable)—or by will – **testamentary trust** (irrevocable)

2. Revocable Trust (Inter Vivos)
   a. Generally:
      i. May be created by a *deed of trust* whereby settlor transfers the property to be held in trust to the trustee
      ii. May be created by a *declaration of trust*—the settlor simply declares himself to be the trustee of certain property for the benefit of himself during his life, with the remainder to pass to others at his death

   b. Traditional Approach (no longer valid law)
      i. Case: Farkas v. Williams

         Facts: D was a vet 4 times: he purchased stock of investors Mutual Inc. At the time of each purchase he instructed them to issue the stock to his name as a trustee for Richard J. Williams. IMI accepted.
         Issue: (1) Whether said trust instruments created valid inter trusts effective to give Williams title to the stop.
         Held: This was a valid inter vivos trust not attempted testamentary dispositions. some interest had passed during Farkas' lifetime—and because some it had pissed—not a will—different than a will bc with a will you have standing to challenge only when someone is dead—here Williams would have had some standing to challenge during lifetime
            a) When you actually pass over a stock—we all know that is not w/in realm of wills act. But what Farkas is doing is so far removed from this concept—so we are no closer at determining when an interest is passing and if its under the Wills Act.

   c. Modern View: UTC 603
      i. UTC 603

UTC § 603
(a) While a trust is revocable and the settlor has the capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor
(b) During the period the power may be exercised, the holder of a

power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

While the settlor is alive the trustee of a revocable trust owes duties only to the settlor

ii. Case: Linthicum v. Rudi

Facts: Cobb (D) has 2 siblings. D executed a will and revocable inter vivos trust. Named herself trustee and a revocable inter vivos trust w/ power to amend and revoke. Name siblings as primary beneficiaries. 2004 D executes a new will/amd to the trust. Replaced siblings with Rudi. When D dies, goes to Rudi—siblings upset. D still alive

a) Rudi—argues they don't have standing to challenge bc D is still alive
b) D has standing – bc its revocable—bc he made it
c) Siblings—don't have standing

Held: Here court is saying that these two siblings don't have standing to sue– and bc it was a revocable inter vivos trust—no interest has passed

d) Here, court is accepting alignment bw revocable trust and will—saying a revocable trust is a will substitute—not about conveying a present interest—until the settlor dies, beneficiary has no rights—can only sue at death
e) Replacing old view—Farkas—when we said it was different than a will and with a will you have standing to challenge only when D is dead

iii. UTC § 604

UTC § 604

A person may bring suit to challenge a revocable trust, but only after the trust becomes irrevocable by reason of the settlor's death

iv. Generally

1. Basic situation: revocable trust is the same thing as a will
2. What does this mean then for what to do about the application of wills act and wills formalities?
    a) To the extent that Farkas depends wholly on the fact that interest has passed—the law has recognized over time that no interest has passed (Rudi)
    b) So if testamentary statement that something should pass at death—then we need wills formalities.

ii. Payable on Death Contracts and Other Non-probate Transfers

1. Cases:

a. Case: In re Estate of Atkinson

Facts: D made deposits in the Willard United Bank and took 3 certificates of deposits—all said "payable on death." D made a will specifically providing that his widow should not share in his estate. After D dies, widow wants to take spousal forced share of F's estate and wants certificates to be made out to her.
Held: "payable on death" is testamentary and therefore subject to Wills act—no interest has passed—by relying on formalism—its testamentary—and therefore it must comply with Wills Act (similar reasoning to Farkas—but diff. result)

b. Case: Estate of Hillowitz

Facts: D was part of an investment club and after he died they paid his widow $2800 representing his interest in the partnership (bc of P. Agreement). Widow: this is an enforceable K. Executor of estate: an asset passed under his will as an asset of his estate
Held: here, court upholds payable on death K. Formalities of K- this occurred during course of formalized poceedings—it's a testamentary instrument btu can be valid if the functions of formalities or enough formalities are here to make us comfortable w/o complying with Wills Act

c. Reconciling Hillowitz and Atkinson

i. Atkinson:
   1. Here testamentary so default—is not okay—we need wills formalities
      a) And even when we look to see whether at least some of the functions of the formalities were being met—not really
      b) Other side of the argument: D had to go down to the bank 3 times and really think of POD accounts

ii. Hillowitz:
   1. Here testamentary so default—is not okay—we need wills formalities
      a) But when we look to see if okay—some of the functions of the formalities were met, there were negotiations, formal meetings

iii. Directions we've gone:
   (1) These are testamentary instruments, and
   (2) We've found other ways to say that they still don't have to abide by wills act formalities
      a) Majority view: These testamentary instruments don't have to comply with the Wills Act

2. UPC Non-probate Transfers on Death

UPC § 6-101
A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated

security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is non-testamentary. Thos subsection includes a written provision that:

- (1) Money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;
- (2) Money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand
- (3) Any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed as the instrument, or later.

UPC: saying its non-testamentary—you don't have to comply with Wills Act.
Prof Green: it is testamentary this is a legal fiction. But UPC is probably just trying to make sense of it bc its so damn confusing.

c. Will Substitutes and the Subsidiary Law of Wills

i. Introduction

1. Restatement: Application of Will Doctrines to Will Substitutes

RST § 7.2

Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and the rules applicable to testamentary dispositions.

2. Generally:
    a. Here: talking about the law of wills beyond the law of formalities that should apply to will substitutes
        i. (i.e. presumption of revocation, testamentary capacity, slayer statutes, lapse and anti-lapse statutes, how to determine spousal share, etc)
    b. looking to when and why the Restatement is appropriate: because these are essentially testamentary devises (Will substitutes)—pretty much serve the same function as a will.

3. Benefits of Will Substitutes
    a. Amount of time it takes to go through probate and perceived costs and procedure for the delay
    b. Pensions/ERISA plans
    c. Count further privacy interests—not published
    d. May be easier to establish some of these
    e. May be able to avoid subsidiary law of wills
    f. For the most part—no tax benefits.

ii. Revocable Trusts

1. Generally:
    a. The revocable trust is the most will-like of all the will substitutes

i. Most controversial wills law applied to revocable trusts: lapse and anti-lapse statutes.

b. As a result, courts will apply subsidiary rules from the law of wills—such as abatement and ademption (to revocable trusts) when:
   i. (1) Abatement: there is not enough trust property to satisfy the provisions calling for distribution on the death of the settlor or
   ii. (2) Ademption: the trust does not include a specific item of property that is to be distributed to a particular beneficiary

2. Case: In re Estate and Trust of Pilafas

Facts: Steve P. executed a will and revocable inter vivos trust. Twice he updated both, the last revisions: 1 mth before he died. Steve B named himself as trustee and funded both with substantial assets. Lawyer gave him both updated versions of will and trust. When he dies, his son cant find both documents.

Held: will is revoked by physical act. Inter vivos trust is not revoked bc involved the present transfer of property interests to beneficiaries that can only taken away in accordance w/ provision w/in trust. No compliance with provision= no revocation.

3. UTC approach

UTC § 602 (c)

The settlor may revoke or amend the revocable trust:

- (1) By substantial compliance with a method provided in the terms of the trust
- (2) If the terms of the trust do not provide a method or the method provided in the trust is not exclusively made exclusive,
  - (if you didn't say "this is the ONLY way you can revoke" the trust)
- (3) A later will or codicil that specifically refers to the trust or discusses items that would have passed or
- (4) Any other method that manifests clear and convincing evidence of the settlor's intent.

4. Case: State Street Bank and Trust Co v. Reiser

Facts: SSBTC is trying to reach the assets of an inter vivos trust to pay a debt to the bank owed by the estate of the settlor (d) of the trust. D created an inter vivos trust w/ power to amend or revoke during his lifetime.

Held: Bank can get at the inter vivos trust—bc you could do the same with a will – which also serves as a testamentary devise—and if we allow creditors to get at other testamentary devises—and this is acting as a testamentary devies—they should be able to get at your inter vivos trust (same as UPC and RST)

i. This court's view is the prevailing view
ii. All non-probate assets are not created equal when it comes to satisfying debts of decedebnts
   1. I.e. life insurance proceeds are protected from creditors if payable to spouse or child
   2. UPC 6-102: permits the decedent's creditors to reach non-probate transfers (Except joint tenancies in real estate) such as inter vivos trusts and joint bank accounts, if the probate estate is insufficient to pay the debts.

iii. Life Insurance

1. Introduction:
    a. **Generally**:
        i. Life insurance contracts have long been effective to transfer property without wills act formalities
        ii. The principal purpose of life insurance: to shift the financial risk of premature death to an insurance company
        iii. For a person with dependents, should buy life insurance worth at least 6-10 times annual income

    b. **Types of Life Insurance**:
        (1) Whole Life Insurance
            1. Involves both life insurance and a payment plan—eventually becomes paid up and no further premiums are owed

        (2) Universal/Variable Life Insurance
            1. Also combines life insurance w/ a savings account but allows more investment options or greater flexibility

        (3) Term Insurance
            1. No savings feature—most common type
            2. Insurance company is obligated to pay the named beneficiary if the insured dies within the policy's stated term of years

    c. Settlement Options
        i. Depending on the policy terms, the owner of the life insurance policy may select different settlement options for the receipt of death benefits.

2. Majority:
    a. Case: Cook v. Equitable Life Assurance Society
        Facts: D Cook purchased a whole life insurance policy naming "Doris" his wife at the time as the beneficiary. They divorced. The decree made no mention of insurance policy. D. Cook never changed beneficiary designation post divorce. 9 mths later, D. Cook marries Margaret and has Daniel (Son) with her. 11 years later, D. Cook made a holographic will leaving his insurance policy to wife and son.
        Held: Cannot do this, because policy terms required a written notice to the company to change the beneficiaries

3. Minority: UPC

UPC 2-804
Divorce revokes dispositions in favor of the divorced spouse in a "governing instrument," which includes revocable inter vivos trusts as well as other will substitutes, such as life insurance, pension plans, and POD and TOD contracts (so if Cook was decided under UPC, D's interest in life insurance K would have be revoked)

4. Superwill
    a. **Generally**:
        i. Would it be a good idea to permit a super-will that is to allow the testator's will to trump the beneficiary designations in all non-probate transfers?
            1. A superwill could resolve the problem of updating beneficiary designations across the testator's many and sometimes forgotten non-probate instruments

    b. Restatement § 7.2:
        i. Endorses a modified version of a super-will
        ii. When insurance company has notice of new beneficiary it should pay the new beneficiary (if it still hasn't paid out)—otherwise if they've already paid out then the funds should be kept in a constructive trust until it's all figured out.

iv. Pension and Retirement Accounts

1. Introduction
    a. **Generally**:
        i. The US federal government has long permitted a death beneficiary to be named on US savings and war bonds.
        ii. Beginning in 1960s, Congress allowed death beneficiaries to be put on various types of retirement plans—including pensions and 401Ks.
        iii. Pension plans have long been subject to complex overly of federal regulation—most significantly Employee Retirement Income Security Act (ERISA)

    b. Forms of Pension Plans

    (1) Defined Benefit Plan
        1. The employer promises to pay an annuity on retirement (i.e. a set percentage of the average of the employee's top three years of wages)
        2. An annuity shifts the financial risk of living too long to a pension fund or insurance company
            a) By buying into a pool w/ other people worried about the same risk, those who die younger pay those who die older

    (2) Defined Contribution Plan
        1. The employer or the employee of both make contributions to a specific pension account for the employee
        2. Upon retirement the employee may make withdrawals from the account, subject to various rules.
        3. Defined Contribution Plans often lead to lump-sum payments on the death of her worker or her spouse

2. Cases:
    a. Case: Egelhoff v. Egelhoff

    Facts: Washington statute (like UPC) says that the designation of a spouse as the beneficiary of a non-probate asset is revoked automatically upon divorce. ERISA's preemption statute states that ERISA shall supersede any and all state laws related to any employee benefit plan ERISA covers. Donna and David E. were married. He worked at Boeing. Had a life insurance

policy and pension plan (both governed by ERISA) given to him there. They divorced. She was listed as beneficiary at time of death. David E/ kids from previous marriage say Donna cant get the money.
Held: ERISA Act preempts Washington statute—ex-wife wins—because statute is "connected to" ERISA

1. POLICY: we want uniformity v. statutes trying to achieve different end goals

b. Case: Metropolitan Life Insurance Co. v. Johnson

Facts: H tried to replace ex-wife as his beneficiary under pension plan, but on the beneficiary change form he checked the wrong box. Under ILL law, the beneficiary change would have been effective under substantial compliance
Held: ERISA preempted Illinois law—but ERISA federal common law recognized substantial compliance, so its okay

c. Case: Ahmed v. Ahmed:

Issue: Whether a slayer may take under ERISA regulated insurance policy
Held: even though ERISA preempts Ohio statute, as a matter of federal common law, a slayer may not take under ERISA plan.

v. Multiple-Party Bank and Brokerage Accounts

1. Introduction

a. Generally:

i. The various types of multiple party bank and brokerage accounts include joint and survivor, POD, agency, or convenience, and savings accounts
ii. Because banks and brokerage houses often give their customers a joint tenancy (as opposed to a joint account i.e.) form w/o regard to the customer's particular intention, courts are often left with the problem of discerning which type of account was actually intended

b. Three possibilities of what to do with a joint account:

(1) Intention to create a true joint tenancy with the right of survivorship—present gift
(2) Truly a will substitute—pay on death account with control during lifetime
(3) Agency/convenience account—depositor means for the other person to have some power now (to draw on the account for the convenience of the depositor) but not for huge control that's payable on death

2. Case: Varela v. Bernachea

Facts: V and B are Argentineans who began a romantic relationship. B is retired and rich. V stopped working and moved in with B and B paid off her expenses. V says she didn't know B was married, B says she knew and was ok being his mistress. 1/2/02 B adds V as a joint tenant w/ right of survivorship to his Merrill Lynch account. B's banker: he explained everything in Spanish to B. V received a check card. B has a heart attack, V calls 911, B's daughters fly in and ban her from being there. B writes herself a $280K check on CMA account. Merrill Lynch approves. B gets better. Wants money back. ML complies. V sues

Held: When a joint bank account is established w/ funds of one person, a gift of the funds is presumed—can only be rebutted by clear and convincing evidence to the contrary. V wins ½ interest in CMA balance. Convenience account was not created.

3. UPC provisions

UPC § 6-201, 6-227
▪ The UPC authorizes a joint tenancy account w/ the right of survivorship, an agency account, and a POD account ▪ Under the UPC, joint accounts belong to the parties during the joint lifetimes in proportion to the net contribution of each to the sums on deposit unless there is clear and convincing evidence of a different intent o Extrinsic evidence is admissible to show that a joint account was opened solely for the convenience of the depositor

UPC § 6-212
▪ Imposes a requirement of survivorship on beneficiaries of a POD bank account and as well as on beneficiaries of securities in TOD registration but NOT on beneficiaries of POD contracts generally

4. Pour Over Wills
   a. The pour over will of probate asets into an inter vivos trust allows O to establish an inter vivos trust that can serve as a single receptables for all the settlor's probate and non-probate property

V. Protecting Spouses and Children

a. Rights of Surviving Spouse

i. Introduction to Marital Property Systems

1. In common law—separate property system
    a. We calculate the ENTIRE probate estate—not like community property—which only looks to property since time of marriage.

ii. Rights of Surviving Spouse to Support

1. Social Security
2. Employee Pension Plan
3. Homestead
4. Personal Property Set-Aside
5. Family Allowance
6. Dower and Curtesy

iii. Rights of Surviving Spouse to a Share of Decedent's Property

1. The Elective Share and Its Rationale
2. Same-Sex Marriage and Domestic Partners
3. Incompetent Surviving Spouse
4. Property Subject to the Elective Share
    a. Generally:
        i. Community property system is simpler than separate property (elective share) system
            1. Because each spouse just gets 50% of interest in each item of community property
        ii. Most states today include more than probate estate in separate property

    b. Elective Share v. Intestacy Share:
        i. **Intestate share**: decedent's spouse gets most, if not all, of decedent's estate in intestacy.
            1. Reasoning: Law's best guess of what average or typical married decedent would want his spouse to take
                a) Under UPC—take ALL of D's intestate estate if no descendants
            2. Larger portion of a smaller pie

        ii. **Forced Share**: public policy limitation on testamentary freedom—we know what you did but you have to do this
            1. Mandatory minimum share that decedent leaves his spouse
            2. Smaller portion of a larger pie

        iii. So Surviving Spouse may choose to take elective share/forced share rather than intestate share depending on value of non-probate instruments if they're worth more.

    c. What to include in Elective Share (Separate property):
        i. **Generally**:
            1. Some states—legislatures have spoken
            2. Other states—legislatures haven't spoken and its up to the courts to figure it out

ii. **Traditional view**:
    1. Original elective share statutes gave the surviving spouse a fractional share, usually 1/3 of the decedent's "estate".
    2. "Estate" was understood as the *probate estate*.

iii. **Most states**:
    1. A revocable trust created by the decedent spouse is included in determining the surviving spouse's elective share.

iv. UPC and Out of State Elective Share

UPC § 2-202(d)
The right, if any, of the surviving spouse of a decedent who dies domiciled outside of this state is governed by the law of the decedent's domicile at death

    1. Not all states agree with UPC

d. Judicial Responses whether non-probate transfers may reach elective shares

i. **Generally**:
    1. How courts decide when these questions are not delineated by statute.

ii. Case: Sullivan v. Burkin:

Facts: H+W are separated but still married. H executes an inter vivos trust and names Δs as the beneficiaries (not W). W claims that the dispositions in the trust were testamentary in nature and belong in probate estate. He also has a will that says his wife cannot inherit from the trust.
Held: new rule: treating assets of an inter vivos trust created during the marriage by a deceased spouse over which he alone had a general power of appointment as part of the "Estate of the deceased"—Here if Decedent retained power and control over this trust—this will be included from now on in estate when we calculate the forced share—(odd that its included in divorce—but not in death—so changing it)
    a) This is about being equitable—the interests of one spouse in assets of another have greatly increased
    b) Limited holding: only applies to revocable trusts created during the marriage.

iii. Case: Bongaards v. Millen

Facts: J was life tenant of trust established by her mom. She had limited power of appointment which she could terminate (to get proceeds). Instead 10 days before she dies, she appoints it to her sis
Held: Trust property is not subject to J's husband's elective share bc the trust was created by a third party—court does not want to update statute bc they no longer suffice to serve their intended purpose

a) The point of this: despite the fact that we're in a common law system (where surviving spouse gets an elective share), isn't this why we have these will substitutes? To keep it some degree of control
b) The more power/control you have—the more likely we are to say that you own it.

iv. Surviving Spouse's Elective Share Tests for Non-probate Transfers

1. Illusory transfer test
   a) **Generally**:
      i. Most widely adopted judicial test
      ii. The key: the amount of control retained by the decedent spouse.
      iii. Courts rarely have held life insurance policies as illusory—bc spouse/decedent cannot really take part of the life insurance policy during their life either.
      iv. Many states and UPC do count life insurance policies
      v. When decedent has bank accounts naming daughter as payable on death beneficiary custodian—it would be illusory bc he still has control.

   b) **Case: Newman v. Dore**:
      Held: revocable inter vivos trust established by H during marriage was "illusory and invalid."

   c) If applied to Sullivan
      i. Illusory revocable trust is a calid trust, but it counts as part of the decedent's assets subject to the elective share.

2. Intent to Defraud Test:
   a) **Generally**:
      i. Looking for evidence to show intent to defraud—facts
      ii. If shown that they intended to cut it out—then its pulled into the pot as probate estate
      iii. If not intended to defraud—then its given as a given to the beneficiaries

   b) Subjective Version:
      i. Looking for subjective intent to defraud surviving spouse of her elective share
      ii. Don't really analyze under this version—looking for mere statements that they intend to defraud?
      iii. Prof. Green says its not that important.

c) Objective Version:

i. Looking for objective evidence of intent to defraud surviving spouse of her elective share

ii. I.e.: control retained by transferor, amount of time bw the transfer and death (bc if close in time—shows ok maybe they do want to defraud), and the degree to which the surviving spouse is left w/o an interest in the decedent's property or other means of support.

3. Present Donative Intent

a) **Generally**

i. Looking at whether decedent had a present donative intent to transfer an interest in the property

ii. The test focuses not on what the transferor retained, but on whether the transferor intended to make a present gift.

b) Case: Karsenty v. Schoukroun

Held: Court adopted a multifactor balancing test from all of the above tests—lesson: lawyers should advise clients to exercise caution in making non-probate transfers w/o the other spouse's consent that might have the effect of diminishing the other spouse's elective share.

4. Law that applies/Migration issues:

a) UPC 2-202 (d) provides that the law of the decedent's domicile shall govern the right to take an elective share of property located in another state.

b) Some states, however, say that the law of the state where the real property is located govern the elective share in such real property.

e. Illustrative Legislative Responses

i. **Generally**:

1. Dissatisfied with vague tests laid down by courts, many states have enacted statutes providing *objective criteria* for determining what non-probate transfers are subject to the elective share. – called *net* or *augmented* estate
2. These states reject illusory test, intent to defraud, present donative intent tests
3. Instead: they favor a list of specified non-probate transfers that are added to the probate estate to constitute a net estate which the surviving spouse's elective share is applied.

ii. NY statute

1. NY statute now gives Surviving Spouse $50,000 or 1/3 of decedent's net estate, whichever is greater, plus a personal property set aside.
2. It also has a list of what is subject to the elective share
    a) Gifts of tangible personal property
    b) Gifts made within one year before death
    c) Savings Account
    d) Joint bank accounts,
    e) Property payable on death to a person other than the decedent.

iii. Delaware approach

1. Delaware defines the property subject to the elective share as all property includable in the decedent's gross estate under the federal estate tax, whether or not an estate tax return is filed.
2. If a non-probate transfer is taxable at death, the surviving spouse can reach it.

f. Approaches of 1969, 1990, 2008 UPCs

i. **Generally**:

1. UPC approach is what we focus on

ii. 1969 UPC: Augmented Estate:

1. Augmented Estate: Take probate estate and add to it certain non-probate estate and give SS – 1/3 of it
2. Surviving spouse is entitled to an elective share of 1/3 of the augmented estate.
3. The augmented estate includes the probate estate and certain non-probate and inter vivos transfers made without consideration at *any time during the marriage*—i.e. any transfer upon which decedent retains the right to possession or income from the property.
    a) Excluded life insurance
    b) But included non-probate transfers to the spouse—so spouse didn't get too much—preventing double dipping by surviving spouse
4. One goal: stopping decedent from using will substitutes as a way of defeating elective share
5. (Similar to NY)

iii. 1990 UPC

1. Generally:
    a) Tries to get closer to community property notion of partnership
    b) Instead of only considering the non-probate transfers made during marriage, 1990 UPC included transfers made before marriage if decedent retained a large amount of control.
    c) Adopted the *sliding scale*—as an option for concerns of common law forced share system

2. Community Property System:
    a) Add up all the property of both spouses and split it according to a percentage based on the length of the marriage

iv. 2008 UPC

1. Generally:
    a) At the very least, the surviving spouse is getting $75,000 as the forced share
    b) Biggest change from 1990: equal split of property
    c) Is a sliding scale—at the end of 15 years—you're entire pots are marital property.
    d) Trying to be pushed toward community property ideals—i.e. partnership—but not 100% there.
        i. POLICY choices that any jx will have to deal with when dealing with these choices

2. How UPC works:
    a) **Steps**:

(1) Determine value of decedent *net* probate estate (and subtract out homestead, any enforceable claims by creditors
(2) Then take value of decedent's non-probate transfers to those other than surviving spouse (inter vivos transfers, life insurance paid to others, and gifts within two years of death if their over $13,000 to any person) and add this together- put to side for now.
(3) Then add value of decedent's non-probate transfers to the surviving spouse
(4) Then add value of surviving spouse's net assets at the decedent's death.
(5) Then add value of surviving spouse's non-probate transfers to those other than surviving spouse

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= Value of Decedent's Net/**Augmented Probate Estate**
(6) Then determine percentage of Augmented Estate that will be considered the "marital" estate (UPC saying over time more and more of Augmented Estate will be deemed marital property subjected to marital share)
(7) Look to chart on UPC to determine how long they've been married to determine percentage

(8) Then give surviving spouse ½ of what we deem to be marital estate

_____

= (Remember there is a floor of $75,000 or this figure we came up with—whichever is larger)= this is **elective share**

(9) Deduct Decedent's transfers to the surviving spouse already (look to what they get in the will, non-probate transfers)—this is all Look to UPC 2-209 (what SS has already received in Augmented estate)

(10) Deduct surviving spouse's already owned portion of marital assets is multiplied as same percentage as applied to augmented estate. (not dividing that number (comes from multiplication) by 2 because trying to figure out what she already owns of marital estate)

_____

= That is **forced share**. (Should seek forced share if it's a positive number)

b) Example 1
   i. Augmented Estate= 10 million. Marriage lasted 5 years. Marital estate= 30% SS= owns 1 mil property purchased before marriage and decedent gave her life insurance policy 500K.
   ii. **Elective share**: 1.5 million
   iii. **Forced share**: 1.5 million- 500,000 = 1 million→ 1 million x (30/100) = 300,000→ 1 million-300,000= $**700,000**.

3. How UPC Pays for this
   a) Paid by pro rata contributions from other beneficiaries of probate estate, of intestacy, of non-probate transfers.
   b) Basic idea: these people will have to force this amount out.

5. Must the Surviving Spouse Accept a Life Estate
   a. The surviving spouse is usually credited with the value of all other interests given her by the will once the amount of the elective share has been determined.
   b. Under 1969 UPC, when surviving spouse would renounce life estate and take her share in fee simple, she is not charged for the value of the life estate
      i. In 1975: UPC amended—so that a surviving spouse who rejects a life estate is charged an amount equal to ½ the total value of the property subject tot the life estate.
      ii. 1993: UPC amended again to 1969 standard—now not charged if surviving spouse doesn't take life estate.

6. Spouse Omitted from Pre-Marital Will
    a. **Generally**
        i. Changes in circumstances between execution of a will and the testator's death may render the will stale in various respects
        ii. Pretermitted spouse statutes: Trying to satisfy intention of the testator
            1. These statutes are a mere default
            2. Can still provide evidence that testator knew what they were doing.
            3. Whether/When: Courts interfere in situations where there is a validly executed will but the SS is left out—these are our default rules
            4. What: What intestacy shares will do?
                a) Rich surviving spouse can take a forced intestate share → under a partnership theory of marriage.
                    i. If they are a pretermitted spouse (because we're going to T's intent)

    b. Common Law:
        i. A premarital will was revoked on marriage or on marriage followed by the birth of issue.

    c. Modern Rule
        i. Generally:
            1. This obsolete rule, though still in force in a few states has been overridden in most states by statutes that give a surviving spouse who is omitted from a premarital will a spousal intestate share but otherwise leave the premarital will intact.
            2. Most states today: wont revoke the entire will—they will provide the spouse with some share—usually intestate—if premarital will leaves spouse out.

        ii. UPC Generally:

> UPC § 2-301 (a)
>
> (a) If a testator's surviving spouse married the testator after the testator executed his (or her) will, the surviving spouse is entitled to receive, as an intestate share no less than the value of the share of the estate he (or she would) have received if the testator had died intestate as to that portion of the testator's estate, if any, that is neither devised to a child of the testator who is not a child of the surviving spouse nor devised to a descendant of such a child or passes under sections 2-603 or 2-604 to such a child or to a descendant of such a child, unless:
>
> (be careful—if a validly executed will is devised solely to T's child or to a child of T's child—then we are not going to let pretermitted statute exceptions come into play—not going to give it to surviving spouse)
> (diff situation if the validly executed will was going to T's alma mater)

iii. Exception: Omitting the spouse was not a mistake:

1. Generally:

a) Here: talking about what evidence is sufficient to show that omitting the surviving spouse was not a mistake

b) UPC cares about the money—you start with intestate share you would have gotten if T died intestate – so if you would have gotten nothing

2. UPC and Evidence to Rebut General Rule

UPC 2-301 (a)(1-3), (b)

Evidence that can be shown to rebut resumption that SS gets intestate share if omitted from will:

- (a) (1) It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse
- (a) (2) The will expresses the intention that it is to be effective notwithstanding any subsequent marriage, or
- (a) (3) The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under sections 2-603 or 2-604 to a descendant of such a child, abate as provided in section 3-902.

a) UPC Rules:

i. When a surviving spouse elects against a will, in many states the spouse is entitled to include non-probate assets as part of the decedent's estate (augmented estate)

ii. A spouse omitted from a will made before marriage is not able to reach non-probate assets; her share is solely of the probate estate

iii. If the surviving spouse is richer than the decedent spouse, effectively the surviving spouse has no forced share in 2008 UPC.

iv. But a richer SS omitted from a premarital will can take an intestate share.

3. CA and Pretermitted Statute:

CA § 21610—Share of Omitted Spouse

(Except as provided in 21611) If a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the omitted spouse shall receive a share in the decedent's estate, consisting of the following property in said estate:

- (a) The ½ community property that belongs to the decedent under section 100
- (b) The ½ of the quasi-community property that belongs to the decedent under section 101
- (c) A share of the separate property of the decedent equal in value to that which the spouse would have received if the decedent had died without having executed a testamentary instrument, but in no event is the share to be more than ½ the value of the separate property in the estate.

a) <u>Exceptions to omitted spouse's protection by pretermitted statute</u>

CA § 21611

Mirrors UPC approach

The spouse shall not receive a share of the estate under section 21610 if any of the following is established:

- (a) The decedent's failure to provide for the spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments
- (b) The decedent provided for the spouse by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence
- (c) The spouse made a valid agreement waiving the right to share in the decedent's estate.

4. Case: In re Estate of Prestie

Facts: M married T. They divorce. T has a son. T executes will and inter vivos trust and son is beneficiary of (both) and trustee of trust. M and T hook up again. T gives M Life Estate in condo in trust. They marry 9 mths before he dies. M argues she deserves intestate share. Son argues LE enough

i. POLICY: M argues that he failed to update his will in light of his

subsequent marriage, so we're trying to make this right: T intent

Held: Only evidence allowed to rebut statute about omission of spouses from wills is a marriage contract because statute lists evidence/exceptions it allows. Amendment to the trust is not admissible

b. <u>Rights of Descendants (Children) Omitted From The Will</u>

i. Protection from Intentional Omission

1. <u>The Domestic Approach</u>
   a. **Generally**:
      i. In all but 1 state—no forced share for children
         1. Why? Some people don't believe in inheritance, there are other ways to sever legal ties with spouse but not with children, support theory
      ii. In all states, except Louisiana, a child or other descendant has no statutory protection against intentional disinheritance by a parent.
         1. No requirement exists that testator leave anything to a child
      iii. Parents should leave something to their kids bc otherwise it invites a will contest with "testamentary capacity," "fraud," and "undue influence" coming into play and juries are usually for the kids

   b. **Louisiana**
      i. <u>General rule:</u>
         1. Forced share or—*legitmite* –for children—protects against disinheritance—under 23, mental infirm, or disabled.

      ii. <u>Exceptions</u> (must be at play at time of will's execution):
         1. The child has raised his hand to strike a parent
         2. The child has been cruel or injurious to parent
         3. The child, when a minor, married w/o consent of parent
         4. After minority, child failed to contact parent for 2 years

ii. Protection from Unintentional Omission

1. <u>Introduction</u>:
   a. **Generally**
      i. Talking about pretermission statutes designed to prevent the *unintentional* disinheritance of descendants
      ii. Republishing by codicil: makes pretermitted child share void
         1. Case: Estate of Azunce
            a) Held: the execution of the codicil republished the will as of the date of the codicil, hence child was not pretermitted

b. Strict interpretation of statutes

i. Case: Gray v. Gray

Facts: T married M. T executes will leaving all to M. They had son. T had 2 kids from a previous marriage. T divorces M. Never changes his will. Divorce nullifies M's share. Divorce provides for a trust for S. S says: I want to inherit. Statute says he can't if T had 2 kids and did not provide for them in the will.
Held: Interpret statute strictly—son cannot inherit

c. 2 patterns of Pretermission statutes:

(1) Protect only children born or adopted after execution of will

1. Like UPC

(2) Protect children alive when will was executed as well as after-born children.

2. Here: failure to name all of the testator's living children invites a challenge under the pretermitted child statute.

d. 2 Types of Pretermission Statutes

(1) "Missouri" Type Pretermission Statutes

1. Statute usually is drawn to benefit children "not named or provided for" in the will → it must appear that omission of a child or other heir was intentional.
2. Extrinsic evidence of intent is not allowed

(2) "Massachusetts" Type Pretermission Statutes

1. Under statute, the child takes "unless it appears that such omission was intentional and not occasioned by any mistake."
2. Extrinsic evidence re: absence or presence of intent to disinherit is allowed.
3. Minority of states: statute applies not just to *children* but descendants as well!

e. Express v. Indirect disinheritance

i. Case: In Estate of Laura

Facts: T executed a will expressly disinheritance his grandsons. 1 died leaving two kids. Can they inherit?
Held: T who names a descendant in an effort to disinherit him, and thus disinherited the descendants of the name descendants too.

ii. Case: Estate of Treloar

Facts: T said "my son-in-law" is executor of my will. But never mentioned grandchildren Andrew and Peter. (Daughter died earlier)
Held: indirectly referencing Evelyn was insufficient to preclude application of the pretermitted heir statute to Andrew and Peter

iii. Case: Boucher v. Lizotte:

Facts: T bequeathed to "Marianna, wife of my son Alphonse"

Held: this reference to Alphonse was sufficient to preclude application of the pretermitted heir statute to Alphonse's children.

iv. Case: Estate of Robbins:

Facts: Blanket disinheritance clause: "Except as otherwise expressly provided by this will, I intentionally make no provisions for the benefit of any other heir of mine."
Held: this language did not disinherit a natural and adopted child.

v. Case: Anna Nicole Smith

Facts: She wrote a will saying "I have one child Daniel Wayne Smith" and left her entire estate "in trust for my child." Also had a blanket disinheritance clause. Then she gives birth to Dannielynn. 3 days later, her son dies. 5 months later, she dies.
Held: Dannielynn could inherit under CA statute. Also T used words like "my children" and "their accustomed manner of living." Testimony of drafting attorney was admitted to show this was about her mother not inheriting

f. How to Avoid Pretermission Statutes:

i. In most states, pretermission statutes can be avoided by provided for contingent shares to your descendants with representation.
ii. Thus, none of your descendants would be pretermitted if you devise the residue of your estate "to my husband H," if he survives me by 90 days, or if not, to such of my descendants as survive me by 90 days, per stirpes."
iii. You need not mention your descendants by name, you simply make them contingent takers *if* their parents should predecease you.

2. UPC: Omitted Children

UPC § 2-302 (only protects those born after will execution)

(a) Except as provided in subsection (b), if a testator fails to provide in his (or her) will for any of his (or her) children born or adopted **after** the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

- (1) If the testator had no child living when he (or she) executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.
- (2) If the testator had one or more children living when he (or she) executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:
  - (i) The portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then-living children under the will.
  - (ii) The omitted after-born or after-adopted child is entitled to

receive the share of the testator's estate, as limited in subparagraph (i), that the child would have received ha the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.
    - (iii) To the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be of the same character whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.
    - (iv) In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator:

(b) Neither subsection (a)(1) nor subsection (a)(2) applies if
- (1) It appears from the will that the omission was intentional or
- (2) The testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence

(c) If at the time of execution of the will the testator fails to provide in his (or her) will for a living child solely because he (or she) believes the child to be child, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child
(d) In satisfying a share provided by subsection (a)(1), devises made by the will abate under Section 3-902.

a. UPC doesn't correct problems in Gray:
    i. Doesn't cover when T doesn't give to his other children.
    ii. Taking proportionally from other siblings—abate ratably.

3. CA and Omitted Children

CA § 21620

If a decedent fails to provide in a testamentary instrument for a child of the decedent born or adopted after the execution of all the decedent's testamentary instruments, the omitted child shall receive a share in the decedent's estate equal in value to that which the child would have received if the decedent had died without having executed any testamentary instrument.

CA § 21621

A child shall not receive a share of the estate if the decedent's failure to provide for the child in the decedent's testamentary instruments was intentional and that the intention appears from the testamentary instruments.

4. Applicability of Pretermitted Heir Statutes and Non-Probate Transfers
    a. Case: Kidwell v. Rhew
        Facts:
        Held: A pretermitted heir is a "child or spouse who has been omitted from a will." Wills and trusts are two different things. Cannot take from the inter vivos trust.

b. CA approach:

CA § 21620-21621
Uses the term "testamentary instrument instead of will" to include the decedent's will or revocable trust and "Estate" to include property held in a revocable trust that becomes irrevocable on the death of the decedent.

c. Restatement approach:

Restatement §34.2
(a) If the donative transfer is under a substitute for a will, or under a transfer revocable by the donor at the time of the donor's death, an issue of the donor would would take a share of the donor's property on the donor's death intestate is omitted as a beneficiary, in the absence of a statute in the controlling state, the policy of the statute in the controlling state applicable to an omitted issue in a will should be applied by analogy to the omitted issue in the substitute for a will, or in the transfer revocable by the donor at the time of the donor's death

VI. Trusts: Introduction and Creation

a. Introduction

i. Background

1. Definition:
    a. A trust is, functionally speaking, an arrangement whereby a *trustee* manages property as a *fiduciary* for one or more *beneficiaries*.
    b. Trustee holds *legal title* to the trust property, and in the usual trust, can sell the property and replace it with property the trustee thinks is more desirable
    c. The beneficiaries hold an *equitable title,* and in the usual trust, are entitled to payments from the trust income and sometimes from the trust corpus as well

2. Trust Purposes:
    a. The purposes for trust span a wide range—i.e. business trusts v. private trusts
        i. I.e. simple estate plan to provide for surviving spouse and children v. commercial enterprises such as mutual funds, pensions, and various structured finance transactions.
            1. Private trusts: are gratuitously made for the benefit of individual beneficiaries.

    b. 5 common uses of gratuitous wealth transfer in trusts:
        (1) Revocable trusts (avoids delays, costs and publicity of probate)
        (2) Testamentary marital trusts (tax deduction for property given to surviving spouse)
        (3) Trusts for incompetent persons (mental or physically impaired family member and unable to manage his property)
        (4) Trusts for minors (tax-free gift of $13,000 per year per donee)
        (5) Discretionary trusts (trust agreement gives X absolute discretion to pay any amount of income or principal to A or for A's benefit)

3. Statistics
    a. Roughly $760 Billion is held in roughly 1.25 million private and charitable trusts by 2006.

4. Sources of Law:
    a. CA: various provisions of the Restatements
    b. Scott treatise
    c. Uniform Law Commission—Uniform Trustee Powers Act modernized the law of trustee's powers by providing statutory validation of the expansion of trustees' powers by providing statutory validation of the expansion of trustee's powers commonly found in well-drafted trust instruments.
        i. UTC: most of the UTC's provision state default rules may be overridden by the terms of the trust instrument.
        ii. Only exceptions: mandatory rules scheduled in UTC § 105(b)
            1. Such as the overriding duty to follow the terms of the trust and to act in good faith.

5. Foreign Trust Law
    a. The trust is not unique a creature of Anglo-American common law. Today there is trust law in China and Japan, including some that follow the civil law tradition

ii. Parties to a trust

1. Generally
    a. A trust ordinarily involves three parties: settlor, trustee, and one or more beneficiaries.
    b. But three different people are not necessary for a trust.
    c. To have a valid trust, the trustee must owe equitable duties to someone other than herself.

2. Settlor
    a. The person who creates the trust is the settlor, or trustor, or grantor
    b. Trust may be created during the settlor's life: inter vivos trust
        i. Inter vivos trust may be created by a **declaration of trust** in which the settlor declares that he holds certain property in trust or
        ii. Inter vivos trust may be created by a **deed of trust** in which the settlor transfers property to another person as trustee.
    c. Or it may be created by will: testamentary trust

3. The trustee
    a. Generally:
        i. A trust may have one trustee or several trustees.
        ii. A trustee may be an individual or a corporation, third party, settlor, or beneficiary.

    b. Failure to name a trustee
        i. If settlor creates trust but fails to name a trustee, court will appoint one
        ii. If a will names someone as trustee but the named person refuses the appointment or dies while serving as trustee, and the will does not make provision for a successor trustee, the court will appoint a successor trustee.
            1. This rule is sometimes stated: A trust will not fail for want of a trustee.

    c. Duties of Trustee
        i. In order to have a trust, the trustee must have some active duties to perform.
        ii. If the trustee has no duties at all, the trust is said to be "passive" or "dry" and the trust fails and the beneficiaries acquire legal title to the trust property

    d. Trustee and Bifurcation
        i. The central feature is bifurcation: the trustee holds legal title to the trust property, but the beneficiaries have the equitable, or beneficial, interests.
        ii. Two categories of issues arise from this splitting of legal and equitable ownership of property:
            1. (1) The resulting effect on the rights of third parties w/ respect to the trust property and
            2. (2) The rights of the beneficiary w/ respect to the trust property and against the trustee.

e. Creditors and recourse

i. Generally

1. The trustee sues, is sued, and transacts in his capacity as such
    a) The trust is not a freestanding legal entity w/ the power to sue, be sued and transact in its own name.
2. A personal creditor of the trustee has no recourse against the trust property
3. A creditor of the trustee as trustee – *which is to say a person who transacts with the trustee in regard to the trust property*—has recourse against the trust property, but not against the trustee's personal property.

ii. Restatement §244, 261

Restatement 244, 261
Older authorities such as the Restatement provide that the trustee is personally liable for the debts and other obligations arising from the management of trust property, but offset that liability with a corresponding right of the trustee to indemnification from the trust fund.

f. Trustee Duties to Beneficiaries

i. Generally:

1. By splitting legal and equitable ownership, the trust puts managerial authority in the hands of the trustee, but it is the beneficiaries, not the trustee, who bear the consequences of the trustee's good or bad decisions
2. To safeguard the beneficiary against mismanagement or misappropriation by the trustee, the trustee is held to a *fiduciary* standard of conduct

ii. Duty of Loyalty

1. The trustee must administer the trust solely in the interest of the beneficiaries

iii. Duty of Prudence

1. The trustee is held to an objective standard of care in managing the trust property.

iv. Subsidiary Rules

1. Duty of impartiality bw classes of beneficiaries, such as income beneficiaries who want high yields and remainderpersons who want appreciation in values
2. Duty not to comingle: the trust property with trustee's own property
3. Duty to inform and account to the beneficiaries

g. Individual v. Corporate Trustees

i. Individual Trustee:

1. Typically agrees to serve out of a sense of friendship or moral obligation, not to receive trustee's fees.
2. Lower trustee fees—but may suck at portfolio management

a) But may know settlor's values and beneficiaries circumstances—so good at the distribution function

ii. Corporate Trustee:
1. The settlor names a corporate trustee—such as a bank or trust company—with trust departments that are experienced in trust administration and portfolio management.
2. Higher trustee fees

iii. Fragmenting Trusteeship
1. This is a recent method of fragmenting trusteeship and to name a *trust protector* who is given specific powers, such as to order distributions, replace the trustee, or modify the trust in light of changed circumstances
a) In a *directed trust*, the trustee, perhaps serving at a reduced commission, is responsible for administration but otherwise must follow the directions of a third party, such a named investment advisor or distribution committee.

iv. Modern Rule: Trustee Compensation
1. Entitles the trustee to "Reasonable compensation

v. Older Rule: Trustee Compensation
1. Award the trustee an annual commission set by a statutory formula.

4. The Beneficiaries
a. Generally:
i. Trust beneficiaries hold equitable interests.
ii. Generally speaking this means that the beneficiaries have rights that originated in chancery and have different characteristics from legal interests.
iii. Beneficiaries have a breach of trust claim against trustee personally
1. But it has no higher priority than the trustee's other creditors.
iv. If the trustee wrongfully disposes of trust property, the beneficiaries can recover the property unless it has come into the hands of a bona fide purchaser for value.
1. If the trustee disposes of trust property and acquires other property with the proceeds of sale, the beneficiaries can enforce the trust on the newly acquired property.
v. Private trusts almost always create successive beneficial interests.

b. Life estates and trusts
i. Today, most life estates and future interests are equitable rather than legal interests; they are created in trusts
ii. Legal life estates and future interests in tangible or intangible personal property are rare and almost always unwise.

c. Trust compared with Legal Life Estate

i. A person who wants to give another a life estate may give the donee either a legal life estate or create a trust with the donee as life beneficiary.

ii. A legal life tenant has no power to sell a fee simple unless such a power is granted in the instrument creating the life estate.

iii. Otherwise, to sell a fee simple all the remainderpersons must agree other sale or the life tenant must obtain judicial approval.

b. Creating a Trust

i. Introduction

1. Requirements: (1) intent, (2) ascertainable beneficiaries, and (3) a trust res

ii. Intent to Create a Trust

1. Generally:
   a. All that we need to know to see if trust was created: whether the grantor manifested an **intention** to create a trust relationship.
   b. No particular form of words is necessary to create a trust

2. Case: Lux v. Lux (1972)

   Facts: Gma's (T) will says: "any real estate included in said residue shall be maintained for the benefit of my grandkids and shall not be sold until the youngest reaches 21."
   Held: No fixed formula for creating a trust through testamentary disposition. Here, she intended that someone would hold and manage the property until they were of sufficient age to do so themselves.

3. Case: Jimenez v. Lee (1976)

   Facts: Several gifts were made to daughter for her educational purposes. Donors did not expressly hold that her dad hold the matter of the gift in trust but this isn't necessary to create a trust relationship. He uses the money to purchase commercial bank stock. Daughter sues.
   Held: All that was required to create a trust relationship: If the transfer of the property is made with the intent to vest the beneficial ownership in a third person. Also, there's a breach of fiduciary duty—he did not administer the trust solely in the interest of beneficiary (his daughter). So because father held the property in trust, he is subject for breach of fiduciary duties
   i. Case: Wilson v. Wilson:
      1. Held: upheld an award of punitive damages for father's breach of fiduciary duties in holding property for children.

4. Precatory Language:
   a. Generally:
      i. If language in a will indicates precatory language—i.e. a "wish," a "hope," or "recommendation" then it's a mere unenforceable moral obligation and an unenforceable disposition.
         1. No fiduciary duty is attached
      ii. The result: to fathom the testator's intent the language of the governing document must be construed in light of all the circumstances.

b. Case: Colton v. Colton

Facts: T devised his estate to his wife and said "I recommend to her case and protection of my mother and sister and request her to make such gift for them as in her judgment will be best."
Held: court looked to context in which will was drafted and said T intended to create an enforceable trust

5. Creating an Equitable Charge and NOT a trust:
    a. If a testator devises property to a person, subject tot the payment of a certain sum of money to a third person, T creates an equitable charge, NOT a trust
    b. An equitable trust creates an security interest in the transferred property
        i. There is NO fiduciary relationship
        ii. The relationship between charge and beneficiary is more in the nature of a debtor and secured creditor

iii. Necessity of Trust Property

1. Generally:
    a. Under traditional law, a trust cannot exist without trust property, called the **res**
    b. The **res**, however, need not be a hefty chunk of money
        i. It can be one dollar or one cent
        ii. Just any interest in property that can be transferred.

2. Case: Unthank v. Rippstein (1964)

Facts: 3 days before his death, T penned a lengthy personal letter to Mrs. R. He spoke of his plans to go to the Mayo Clinic at a later date and said he would give her $200 cash for the next five years, provided he live that long. Then he wrote a note saying he had strick "provided he live that long." Mrs. T tried to make it a codicil. Then she says it's a trust.
Held: The language lacks sufficient certainty to create a trust. T did not expressly declare hat all of his property or any specific portion of the assets would constitute the res of a trust. The promise to give is not a trust.

3. Trusts v. Debts
    a. Crucial factor:
        i. The crucial factor indistinguishing between a trust relationship and an ordinary debt is whether the recipient of the assets is entitled to use them as his own and commingle them with his own assets.
            1. Money deposited in a bank ordinarily creates a debt—the money is not segregated from the bank's general funds

    b. Debt
        i. A debt involves a personal obligation to pay a sum of money to another

    c. Trustee:
        i. A trustee is a fiduciary who holds specifically identified property for the benefit of another.
        ii. The trust property must be kept separate from the trustee's own funds

4. **Resulting trusts:**
    a. A resulting trust is an *equitable reversionary interest* that arises by operation of law in two situations, the first f which was at issue in the case:
        i. (1) Where an express trust fails or makes an incomplete disposition or
        ii. (2) Where one person pays the purchase price for property and causes title to the property to be taken in the name of another person who is not a natural object of the bounty of the purchaser.

5. **Cases:**
    a. Case: Brainard v. Commissioner
        Facts: H orally declared he was creating a trust in front of his mom and wife for his mom wife and two kids. If income he said would go to the trust in the future was part of *res* then not taxable, if the income he said would go to the trust in the future was not part of the *res* then its taxable.
        Held: here future profits do not constitute res bc of tax fraud

    b. Case: Speelman v. Pascal
        Facts: Pascal (T) a theatrical playwright writes his secretary a letter telling her that he's giving her his future royalties from the production.
        Held: future profits constitute the res here.

    c. Reconcile both cases: Brainard and Speelman—about lack of res
        i. Brainard: court policy concern for tax fraud (but not a trust concern) but otherwise indistinguishable. As Speelman holds, future profits are sufficient to constitute the res. Of a trust. Brainard would have benefited from notarized writing.
        ii. "Mere expectancy is not enough" DOESN'T Answer the question—you have to dig deeper and ask why it matters
        iii. At bottom it's a question of trust law policy: WHAT DOES IT Mater? Why does trust law care?

iv. Necessity of Trust Beneficiaries

1. Introduction:
    a. General Principle:
        i. A trust must have one or more **ascertainable beneficiaries**—i.e. there must be someone to whom the trustee owes fiduciary duties, someone who can cal the trustee to account.
            1. POLICY: Underpinning the beneficiary principle is the policy that a private trust must be for the benefit of the beneficiaries
        ii. Beneficiaries hold equitable title to the property
        iii. This language can create problems when people try leave something for pets, for instance.

    b. EXCEPTIONS:
        i. *Charitable trust*: A charitable trust unlike a private trust need not have an ascertainable beneficiary to be valid
        ii. The beneficiaries of a private trust may be unborn or unascertained when trust is created.

1. On the other hand, if at the time the trust becomes effective the beneficiaries are too indefinite, the attempted trust will fail for want of ascertainable beneficiaries

c. Case: Clark v. Campbell

Facts: T's will bequests all of his property for the benefit of his friends. Πs are residual legatees (who would receive bulk of trust if its not going to be exercised). Proponents: this is a trust and an ascertainable group of people, or it's a gift in the alternative—so it's a power that is discretionary and if it isn't exercised then it can go to residuary legatees.
Held: With private trusts—cannot have a valid bequest to an indefinite person. Here because it bestows duty upon trustees the duty to dispose of the selected articles among T's friends—a private trust has been created. However there is no ascertainable class of beneficiaries bc there's no statutory or controlling limitations on the word "Friends." We don't have a body of law built up to tell us what "friends" means. So court creates a "resulting trust"—holding property for the next taker—residual legatees

1. This is contrary to testator's intent.
2. Some states—like UTC, would authorize the court that trustee has discretion to delegate—I.e .power of appointment to distribute.

3. <u>CA §15205 p. 171</u>

CA § 15205

(a) A trust, other than a charitable trust, is created only if there is a beneficiary.
(b) The requirement of subdivision (a) is satisfied if the trust instrument provides for either of the following:

- (1) A beneficiary or class of beneficiaries that is ascertainable with reasonable certainty or that is sufficiently described so it can be determined that some person meets the description or is within the class
- (2) A grant of power to the trustee or some other person to select the beneficiaries based on a standard or in the discretion of the trustee or another person

(Finding trusts in these situation bc we want to give effect to testator's intent to greatest extent possible)

d. Marilyn Monroe will

i. <u>Language</u>:

1. "I give all of my personal effects and clothing to Lee Strasberg, or if he should predecease me, then to my executor hereinafter named, it being my desire that he distribute these, in his sole discretion, among my friends, colleagues, and those to whom I am devoted."

ii. Problems:
1. Did she intend to create a trust? (No language to create a trust)
2. And there are indefinite, unascertainable beneficiaries,

iii. Hypo:
1. I ask Lee Strasberg to give my personal clothing effects to the friend who is with me at my death
a) A trust is created
b) And ascertainable beneficiary if the extrinsic evidence clearly establishes the beneficiaries identity

2. Valid Power of Appointment
a. Analysis to Determine If "Valid Power of Appointment"
i. (1) **Is the class of beneficiaries described such that some person might reasonable be said to answer the description**?
1. If yes→ the power is valid
a) I.e. "my descendants"
2. If no→ the power of appointment is invalid
a) I.e. "any except my the donee or her creditors or her estate"

b. Introduction:
i. Generally
1. In trusts today, beneficiaries are often given powers of appointment, that is, a power to distribute the trust property
2. The power of appointment is discretionary, it is a nonfiduciary power

ii. Case: Clark v. Campbell:
Held: T did not create a power of appointment bc the power was given to *trustees* whose powers over the property are held in a fiduciary capacity.

3. Honorary Trusts
a. Case: In re Searight's Estate:
Facts: T's will stated that $1000 should be set aside to care for his dog for whoever takes care of him.
Held: "honorary trust" was created for the dog

4. Trusts for Pets and Other Non-charitable Purposes
a. **Generally**:
i. Cant have trusts for pets bc they're not ascertainable beneficiaries and their care is not a charitable purpose.
ii. Two solutions to the problem of a trust for a non-charitable purpose have evolved: (A) the common law honorary trust and (b) the statutory purpose trust
iii. Worried about how pets cannot enforce a trust when pet is the only beneficiary
iv. If a trust for "animals" plural—charitable trust
v. But if a trust for a particular animal—then honorary trust

b. Common Law Honorary Trust

i. Many courts allow a donor to create what has come to be known as the honorary trust.

ii. The transferee is not under a legal obligation to carry out the settlor's stated purpose, but if the transferee declines, she is said to hold the property upon a resulting trust and the property reverts to the settlor or the settlor's successors

1. Honorary trust—a trustee is on her honor/conscience to carry out the settlor's wishes—bc no real beneficiary thus no legal obligation to carry out settlor's wishes

iii. In drafting an honorary trust, care must be taken not to offend the Rule Against Perpetuities.

iv. Courts have allowed honorary trusts for any real purpose i.e. care for a monument, care for a grave.

1. Courts want to accept these honorary trusts bc wish of the settlor/testator
2. CA goes one step further and has a statute. (next section)

c. Statutory Purpose Trust

i. <u>Generally</u>

1. Today most states have enacted statutes that permit a trust for a pet animal or other non-charitable purpose for a given amount of time and for the perpetual care of a grave site

ii. UPC and Statutory Purpose Trusts § 2-907

1. Under the UPC, the court is authorized to reduce the amount of the trust property if the court determines that it exceeds the amount required for the intended use.
2. To resolve the problems of enforcement that arise when the trustee does not owe duties to a person who can call the trustee to account, the UPC follows the lead of trusts for the benefit of minors and other incompetents and provide for enforcement by a person appointment by he settlor or the court.

iii. <u>CA and Statutory Purpose Trusts § 15212</u>

1. The CA pet trust statute is significant because a trust for the benefit of a pet animal alive at the settlor's death is valid for the life of the animal.
2. The trust is enforceable not only by a person designated in the trust instrument or by the court, but also by "any person interested in the welfare of the anima or any nonprofit charitable organization that has as its principal activity the care of animals."
    a) In CA interested parties can intervene—goes further

VII. Rights to Distributors From the Trust Fund

a. **Introduction**

i. Talking about the rights of a beneficiary, or a creditor of the beneficiary, to a distribution from the trust fund.
ii. Even if a beneficiary is insolvent and entitled to a distribution, often a creditor of the beneficiary cannot compel the trustee to distribute trust assets to satisfy the beneficiary's debt
iii. The easier it is for a beneficiary to obtain a modification or termination of the trust, the more the trust property looks like the beneficiary's own property, and the stronger is the case for enforcing the claims of the beneficiary's creditors against the beneficiary's interest in the trust.

b. Rights of the Beneficiary to Distributors

i. Mandatory v. Discretionary Trusts

1. Mandatory Trusts:
    a. In a mandatory trust, the trustee must make specified distributions to an identified beneficiary. Trustee must distribute the income to designated beneficiaries.
        i. Thus, O transfers property to X in trust to distribute all the income to A. This is a mandatory trust. The trustee has no discretion to choose either the person who will receive the distribution or the amount to be distributed.
        ii. Problem: even if A's creditor takes everything that he receives, and B needs money more, he has to give out the money to A no matter what- has no discretion—also cannot reinvest that income either

2. Discretionary trust
    a. **Generally**:
        i. In a discretionary trust, the trustee has discretion over distributions.
            1. Trustee has discretion over income, principal, etc to pay and to which beneficiaries
        ii. They may be drafted in a limitless variety.
        iii. Through a discretionary trust, the settlor can *postpone* and *delegate* to the trustee the decisions of to whom to make distributions, in what amounts and when.

    b. Spray Trust/Pure Discretionary Trust
        i. So now trustee can give little to A if he thinks A's creditors are going to take it, and he can reinvest

3. Support Trust
    a. **Generally**
        i. "Necessary for trustees support to the way he's accustomed"
        ii. Support standard limits trustee's discretion
        iii. Even the settlor who creates a discretionary trust should still place limits on testator's discretion—so can create an ascertainable standard of support so that trustee can use as a guide in determining how much to pay out to beneficiaries.

b. Simple v. Absolute/Uncontrolled Discretion Analysis

(1) **Did he breach duty to investigate**?

1. Yes—ok trustee is liable
2. No—next question
    a) Has a duty to investigate to the extent of the settlor's intent

(2) **Did he breach discretion to distribute**?

1. "Uncontrolled/absolute discretion"—trustee acting reasonably is irrelevant—but looking if they acted arbitrarily, capriciously, or not in good faith
    b) "Sole uncontrolled discretion"
2. Simple discretion—looking for if trustee acting reasonably.

(3) **While exercising discretion to distribute**:

3. **What is comfortable support and maintenance**?
    a) Standard is one of living this person enjoyed before they became beneficiary of the trust.
    b) Nothing court should worry about bc settlor knew about this standard when they devised this money to them.

1. **If trust instrument silent**?
    c) Does trustee look to beneficiaries other sources of income to exercise his discretion to distribute?
    d) There's a split on this issue
    e) We're saying necessarily we're going beyond support—so look to other sources of income as an indicator to consider.

(4) **Is there an exculpatory clause? Yes? Is it enforceable**?

1. So long as no evidence of overreaching or breach of fiduciary relationship and even if trustee drafted the will and has discussed it with the testator—exculpatory clause is valid
    f) This is to encourage trustees to do this job
    g) Generally courts accept exculpatory clauses unless the trustee acted in bad faith
    h) Minority jx: Burden of persuasion is on trustee
    i) Evidence they'll put forward to not have personal liability—separate signed document by testator, could require settlor to get independent advice, exculpatory clause itself isn't going too far, prior relationship in the past.

ii. Case: Marsman v. Nasca

Facts: T dies, C is her husband—she set up a trust to provide for him, trustee was her lawyer: F. F is authorized to distribute money in sole discretion for "his reasonable maintenance, comfort, and support after my death." She put 1/3 of estate in trust – income to C for life, remainder to her daughter S. C also gets the house. C remarries after T dies. C writes new will

and gives house to new wife the house. C loses his job, he's unable to pay for the house. Along the way, he asked F for more money and F sends him a check for $300 and asks C to explain why he needs more support in writing. C doesn't do that, instead he retains a LE in the house and sells the remainder to his step-daughter S. Then C goes to a nursing home, dies. His new wife is kicked out by S's husband bc S dies too.

a) F argument:
    i. Argues that he provided an accounting—and C never challenged it—Court says C didn't really understand these things and court approval is the only thing that says this accounting is finished
    ii. F may not have done this bc it costs money to go to the court

Held: F is thinking about his fiduciary duty to remaindermen, also about how C is squandering money away. But court holds there was a duty of inquiry/to investigate C's needs and to disburse the money pursuant to the terms of the trust. Court thinks he F did not investigate. Court put assets in constructive trust—holding money to figure out how much F should have paid to C over the years.

b) Major themes:
    i. Duty to Investigate
    ii. Discretion to Distribute
c) If F had already distributed to S's beneficiaries per terms of Trust— and will has exculpatory trust
    i. C's wife goes after trustee to hold him personally liable:
    ii. Clause

c. Rights of the Beneficiary's Creditors

i. Introduction:

1. Generally:
    a. About seeking ways to secure property to one's children or grandchildren so that it remains safe from the accidents of fortune and bad management (i.e. creditors).
    b. Looking at creditors other than beneficiaries trying to get at the trusts.
    c. This section: about examining the rights of beneficiary's creditors to trust property in
        i. (1) Discretionary Trusts,
        ii. (2) Spendthrift Trusts
        iii. (3) Self-Settled Asset Protection Trusts

ii. Discretionary Trust

1. Generally:
    a. 3 forms of Discretionary trusts (first two are formally recognized, the third is a permutation that was at issue in *Marsman*).

(1) Pure Discretionary Trust

a. Generally:

i. Here, a creditor of a beneficiary of a pure discretionary trust has no recourse against the beneficiary's interest in the trust.

b. What Creditor Can and Cannot Do

ii. Generally:

1. The creditor cannot, by judicial order, compel the trustee to pay him.
    a) POLICY behind this: bc the beneficiary has no right to compel a distribution, neither does the beneficiary's creditors
2. However, the creditor can be entitled to a court order directing the trustee to pay the creditor before making any further distributions to the beneficiary
    a) "Cutting off income procedure"
    b) A creditor can deprive the beneficiary of trust distributions even though the creditor will not necessarily be paid

iii. Example

1. Settler puts $1 million to Trustee X in trust for 3 Children A, B, C, for life as Trustee deems proper. A has credit card bills and credit card company wants to come in and get the trust
    a) Traditional rule: (still in force in many states)
        i. The credit card company cannot come in and get anything from the trust because distribution is at trustee's discretion and since A doesn't have a right to distribution, neither does creditor of A.
        ii. However credit card company can come in and get a court order to make sure trustee pay creditor before making any further distributions to the beneficiary—"cutting off income procedure"
        iii. We can expect trustee will not make a distribution to A, so why is this good for creditor? It will put pressure on A to make some payments

c. Case: Hamilton v. Drogo

iv. Facts: involved a discretionary trust established by the will of T to provide her spendthrift son freedoms from travails of penury.

(2) Support Trust

b. **Generally**:

i. The beneficiary of a support trust cannot alienate her interest.

ii. Neither can creditors of the beneficiary reach the beneficiary's interest, except suppliers of necessaries, who may recover through the beneficiary's right to support

c. **Example**:
    i. What if support trust beneficiary who is in default to creditor and terms require him to pay money to A in an amount necessary for support?
        1. General rule at common law: The only creditors that can get at this money—are the ones that supply the support items—necessities--i.e. the groceries, the electricity, daily rent.
            a) So standard of distribution is discretion

(3) Discretionary Support Trust

d. **Generally**:
    i. Although a discretionary support trust is arguably a variant on the support trust theme, for the purpose of creditor rights the courts have tended to treat it like a pure discretionary trust, foreclosing claims by the beneficiary's creditors.

e. **Restatement and UTC**:
    i. Generally:
        1. Both of them collapse the distinction bw discretionary trusts and support trusts, unifying the rules regarding creditors' rights for all trusts in which the trustee has any discretion is uncontrolled or subject to a standard of both.
        2. The two of them still state different substantive rules
        3. Both will not distinguish between discretionary and support trust—and instead lays out a joint mélange approach.
        4. UTC is both more and less protective than common law rules:
            a) Generally:
                i. UTC is not distinguishing between creditors compelling distribution for necessities (support), cutting off income procedure (discretionary), etc.
                ii. UTC is collapsing distinction between support and discretionary trusts.

            b) More protective:
                i. UTC says creditors cannot force trustees paying them even for necessities.

            c) Less protective:
                i. UTC is less protective because you can force payment for child support or spousal support that applies.

    ii. Restatement § 60:

Restatement § 60
If the terms of a trust provide for a beneficiary to receive distributions in a trustee's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion.

Sounds like creditor of beneficiary will have some control if the trustee is abusing its discretion

iii. UTC §504

UTC §504

(b) Except as otherwise provided in (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion even if

- (1) The discretion is expressed in the form of a standard of distribution or
- (2) The trustee has abused the discretion

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

- (1) A distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse, +
- (2) The court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion (with the exception of abuse or child support)
- (d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution
- (e) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the benficary not acting as trustee or cotrustee.

iii. Spendthrift Trusts

1. UTC and Spendthrift Provision and Exceptions

UTC § 503 Spendthrift Provision

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a spendthrift trust, or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of a beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

UTC § 504 Exceptions to Spendthrift Provision

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State

(b) A spendthrift provision is unenforceable against:

- (1) A beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance;
- (2) A judgment creditor who has provided services for the protection of a

beneficiary's interest in the trust; and
- (3) A claim of this State or the United States to the extent a statute of this State or federal law so provides/IRS

(c) A claimant against which a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.

2. Introduction:
    a. **Generally RULE**:
        i. Spendthrift trusts are accepted in most jurisdictions
            1. A beneficiary of a spendthrift trust cannot voluntarily alienate her interest.
                a) Nor can her creditors reach her interest in the trust
                b) This is true even if the trust provides for mandatory payments to the beneficiary.
                c) So what happens? If you have a spendthrift provision set up for A—i.e. trustee is mandated to pay out $100/month to A, what will happen?
                    i. Creditor will have to get the money they're owed from A and not from the trust.
                    ii. I.e. when A gets his $100 and goes across the street and buys something, MUCH harder for them to get the money from A bc its already spent.
                    iii. We haven't even changed terms of the trust (unlike protective trust—see below), A gets his money but creditor STILL doesn't have access through the trust, must come find the money from A.

            2. A spendthrift trust is created by imposing a disabling restrained upon the beneficiaries and their creditors.
                a) I.e. a clause that provides that A may not transfer her interest in the trust and that it may not be reached by A's creditors

            3. Most jxs: A trust is not spendthrift unless the settlor expressly inserts a spendthrift clause.
                a) Today: Spendthrift clauses are wifely recognized throughout the US
                    i. The main issue: whether to make exceptions for certain classes of creditors, such as tort victims, spouses, or children
                    ii. Issue in *Scheffel*

    b. Arguments in Favor of Spendthrift Clauses:
        i. It puts Y in the same position as X allowing both to protect their children from improvidence.
        ii. To ensure that settlor's wishes are being carried forward

c. Arguments Against Spendthrift Clauses:

i. It forms a privileged class, who would indulge in every speculation, could practice every fraud, and provided they kept on the safe side of the criminal law, could yet roll in wealth.

ii. Encourages irresponsible behavior, if you're the beneficiary you can indulge in your whims without suffering the consequences.

3. Exception: Tort Victims?

a. **Introduction**:

i. Generally:

1. Tort Creditors: usually inadvertent creditors—not like a credit card company
2. Most states make no exceptions for tort creditors

ii. UTC §503

1. Does not recognize an exception for tort creditors, and the official comment makes clear that this omission was deliberate.

iii. Restatement §59

1. Comment says that they're contemplating an evolving policy that might justify recognition of other exceptions.

iv. Furnishing necessary support

1. Traditional rule:

a) A person who has furnished the beneficiary with necessary services or support can reach the beneficiary's interest in a spendthrift trust.
b) This exception is carried forward in the Restatement but is rejected by UTC § 503.

2. Related Exception

a) Is for persons who provide services necessary to protect the beneficiary's interest in the trust.
   i. It allows a beneficiary of modest means to overcome obstacles preventing the beneficiary's obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust

b. Case: Scheffel v. Krueger

Facts: π files suit against K for molesting her child. She wins in court: $550,000 in damages. K has a trust fund that doesn't come in to play for another 15 years (when he's 50). The trust has a spendthrift clause. Π tries to access the
Held: The spendthrift clause is valid and can protect K while he's incarcerated. The spendthrift clause is effective against tort creditor

c. Case: Jackson v. Fidelity

Held: Court refused to create an exception for debts arising from breach of fiduciary duty.

d. Case: Sligh v. Sligh:

Held: A tort creditor could enforce a judgment against the tortfeasor's interest in a spendthrift trust or in a discretionary trust, but the very next year the state legislature enacted the statute that reversed *Sligh*.

4. Exception: Spouses and Former Children??

a. Case: Shelley v. Shelley

Facts: This trust: Spendthrift trust with the following provisions: Discretionary provision (corpus/principal), mandatory provision as to the income, and a support provision. T's will left residue of estate in trust for son G. He married and divorced twice and both divorce decrees called for alimony payments. G disappeared.
Issue 1: Is spendthrift provision enforceable? (income)
Held 1: Public Policy: leads us to the direction of saying that he needs to support his children and wives. Duty of husband to support his former wide should override restricted by spendthrift clause
Issue 2: Corpus?
Held 2: Trust principal/corpus: because G's interest is discretionary and not in beneficiary's hands, former wives cannot reach it, kids cannot get in here.

1. Bc of support provision (kind of issue 3): Here, kids maybe can reach trust principal bc trust held they could reach it if emergency

b. Minority View:

i. In a substantial minority of states, however, a spouse or child or both cannot reach a spendthrift trust to satisfy a judgment for support.

5. Protective Trusts:
   a. Very popular in England—where there are no spendthrift clauses.
   b. In jxs that don't recognize spendthrift trusts, the settlor should consider a mandatory trust subject to a protective provision
   c. In such protective trust, the trustee is directed to pay income to A, but if A's creditors attach A's interest, A's mandatory income interest is automatically changed to a discretionary interest.
      i. The trustee then has discretion to apply the income for A's benefit, and the creditors of A cannot demand any part of it.
   d. Basically: The trustee in a protective trust is directed to pay creditors of child A but if they attach creditor interests, then A's mandatory income from whatever portion of the trust ceases
      i. If these creditors ever come, then it changes from a mandatory trust to a discretionary trust and trustee doesn't have to abide by terms and stops making payments

iv. Self-Settled Asset Protection Trusts

1. Introduction
   a. For the protection of the settlor

b. These have begun to be accepted whereas historically we never really expected this
    i. I.e. CA is of this mindset and is against this
c. Other side: shouldn't give people an ability to protect their money?

2. Traditionally
    a. **Generally**:
        i. The settlor cannot shield assets from creditors by placing them in a trust for the settlor's own benefit.
        ii. Even if the trust is discretionary, spendthrift, or both, the settlor's creditors can reach the maximum amount that under any circumstances the trustee could pay to the settlor or apply for the settlor's benefit.

    b. Traditional rule is exemplified in:
        i. Traditional Rule in Restatement § 58
        ii. Traditional Rule in UTC § 505

d. Modification and Termination of Trusts

i. **Generally**:
1. Asking when you can modify or terminate a trust

ii. If beneficiaries and settlor agree:
1. You can modify or terminate a trust

iii. If settlor is dead
(1) Upon changed circumstances and equitable deviation
    a. **Generally**:
        i. When you are actually going to be able to change or modify a trust when things have changed
        ii. Equitable Deviation: Courts permit a trustee to deviate from administrative terms of the trust when compliance with the terms would defeat the actual purposes of the trust

    b. Traditionally:
        i. Generally:
            1. Deviation based on changed circumstances used to be okay for administrative terms not distribution terms

        ii. Case: In re Pulitzer
            Held: Changed circumstances such that it would not be in furtherance of the trust—so court said they CAN alter because this was administrative terms versus distribution terms

    c. Second Restatement Approach:
        i. Restatement Second of Trusts § 167

RST § 167
Provides that the court may permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

ii. Case: In re Trust of Stutchell

Facts: T creates a testamentary trust for his family. This chick was one of 2 living beneficiaries. Once the 2 beneficiaries die, the trust goes to her four children. One of her kids is mentally retarded. She moved to modify the trust so that her son wont be cut off from public assistance bc of the trust money.

a) Petitioners argument: court should allow modification: everyone agrees and trust was meant to supplement the income beneficiaries would have already received if it was given to him directly—it would be against T's intent

Held: Second Restatement Approach (about Distribution Terms): court refuses the modification bc purpose of the trust is to give money to beneficiaries and to go along with the modification—it would be more beneficial to the other beneficiaries.

b) POLICY: concern re: Medicaid versus state's ability to get at funds

d. Third Restatement Approach

i. Generally:

1. CA follows Third Restatement approach
2. Allows modification when unforeseen circumstances by testator occur
3. Applies to both administrative and distribution terms—same law applies to both, no distinction between them.

ii. Restatement: Equitable Deviation

RST § 66

(1) The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.
(2) If a trustee knows or should know of circumstances that justify judicial action under Section (1) with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust

iii. CA and Modification and Termination of Trusts

CA § 15409

Authorizes the court to modify the administrative or *dispositive* (distribution) provisions of the trust or terminate the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust.

e. Uniform Trust Code Approach

i. Generally:

1. Goes further than Third Restatement
2. Permits modification if compliance with existing terms would be wasteful
    a) I.e. can modify terms of trust when stock is tanking

ii. Statute

UTC § 412
(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention (b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration (c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of this trust.

iii. Case: In re Riddell

Facts: Trustee with 2 trusts and the same beneficiaries—created a special needs trust for his daughter who suffers from schizophrenia. Trustee wants to modify the trust to keep it in trust so public funds continue to pay for her medical needs. Doesn't want state to take assets in the trust.
Held: (UTC standard—wasteful)—circumstances not anticipated by the settlor and modification would further needs of the trust. Same issue as Stutchell but applying different law.

(2) Other Modification Termination

a. **Generally**:

iv. Settlor is still dead and so no agreement bw settlor and beneficiaries

1. When settlors get modification if no equitable deviation

b. Under Clafflin doctrine (common law)

(1) Must have beneficiaries in agreement at common law
(2) Continuance of the trust without modification or termination must not be necessary to carry material purpose of the settlor or of the trust

2. Is this going to undermine a material purpose of the settlor or of the trust

c. **Traditionally**

v. Generally

1. Understood beneficiaries could not terminate: because they were material purposes under Clafflin doctrine
    a) Spendthrift Trust
    b) Discretionary Trust, or
    c) Support Trust

vi. Courts go even further than that

1. Case: In re Estate of Brown

Facts: Dude created a trust and named his son the trustee. The trust was to provide for the education of trustee's kids and once the last kid ha received his education, the trustee can decide if the purpose has been accomplished. If trustee has decided so, he is to provide care, maintenance and welfare for the beneficiaries during the remainder of their lives.

i. All agree to terminate trust and court accepts that class of beneficiaries are closed its just Wilson and his wife.

Held: Court refuses to terminate trust—could undermine material purpose of the trust—providing lifelong income—and this would undermine the purpose of the trust.

vii. Restatement 3rd: Termination/Modification by Beneficiaries' Consent

1. **Statute**

Restatement §65
(1) Except as stated in subsection (2), if all of the beneficiaries of an irrevocable trust consent, they can compel the termination or modification of the trust. (2) If termination or modification of the trust under subsection (1) would be inconsistent with a material purpose of the trust, the beneficiaries cannot compel its termination or modification except with the consent of the settlor or, after the settlor's death, with authorization of the court if it determines that the reason(s) for termination or modification outweigh the material purpose

2. **Generally**:

a) Starts with Clafflin Doctrine

b) Position of Restatement Third: allows termination if the reasons for termination outweigh the material purpose

i. Court can allow termination or modification if settlor is dead and court determines that the reasons for termination or modification outweigh the material purpose

c) Does Restatement go too far?

i. You maybe wouldn't want to create a trust if possibility that it can be changed

viii. UTC: Modification/Termination of Noncharitable Irrevocable Trust by Consent

1. **Statute**

UTC § 411
(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. (c) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust (d) Upon termination of a trust under subsection (b), the trustee shall distribute the trust property as agreed by the beneficiaries (e) If not all the beneficiaries consent to a proposed modification or termination of the trust under subsection (b), the modification or termination may be approved by the court if the court is satisfid that ▪ (1) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section, and ▪ (2) The interests of a beneficiary who does not consent will be adequately protected

2. **Generally—changes part of Clafflin**
    a) All beneficiaries must agree
        i. But exceptions here (unlike Clafflin)
        ii. More flexible than Clafflin
    b) Material Purpose (Clafflin
        i. Here it is adopting Clafflin

ix. Reconciling Restatement and UTC

1. **Reversing "Spendthrift Clauses"**
    a) Bc they've become boilerplate language and so we don't think that testator necessarily wanted to adhere to rigid no modification terms.

d. Revocable Trusts: If Settlor Revokes or Terminates?

i. Most states:

2. Presumption: There is a presumption that unless there is a clause in there that directs revocation—then its irrevocable

ii. Minority (UTC 602(c)(2)(A) and CA)

3. Presumption: There is a presumption that unless there is a clause saying its not revocable, then it is revocable
4. Drafters thinking about: efficiency, not as much litigation, presumption based on language inside the trust.