**I. Introduction to the Probate Process**

1. Who Takes the Decedent’s Property?
   1. Probate
      1. Testate (valid will)
      2. Intestate (no will)
   2. Non-probate
      1. Joint tenancy
      2. Life insurance/payable-on-death k’s
      3. Legal life estates and remainders
      4. Inter vivos trusts
2. Probate is the default
   1. Probate property must pass through the probate system
   2. Non-probate passes under the terms of the instrument in question to the transferees identified in the instrument w/o the probate process
3. Why is probate important?
   1. Provides for orderly transfer of title for the decedent’s property
   2. Ensures that creditors receive notice, an opportunity to present claims, and payment
   3. Extinguishes claims of creditors who do not present their claims to probate court
   4. Ensures that the decedent’s property is distributed to those who are supposed to get it
4. Probate Process
   1. **Opening Probate**: Probate court in the county where the decedent resided at the time of death has primary (domiciliary) jurisdiction over that probate estate
      1. Court has jurisdiction over decedent’s personal property and real property within that jurisdiction
      2. Probate is opened by presenting the decedent’s death certificate to the probate court, who they appoints a **personal representative** to oversee the process
         1. Executor –decedent dies testate and the will names the representative
         2. Administrator – decedent dies testate and the will *does* *not* name the rep
   2. **Ancillary Jurisdiction**: If the defendant owned real property located in a different jurisdiction from his or her residence, ancillary jurisdiction allows
      1. Local creditors in the jurisdiction where the real property is located receive notice and an opportunity to present their claims; and
      2. There is compliance with that jurisdictions’ recording system
5. Personal Representative’s Duties
   1. Inventory decedent’s assets
      1. Take control of probate property, and inventory to probate court
   2. Give notice to and pay creditors
      1. Give notice of the opening of probate requiring decedent’s creditors to file claims
      2. Must repay creditors who present valid claims w/in prescribed period
      3. Creditors that fail to present their claim in time are forever barred
   3. Distribute decedent’s probate property
      1. Whatever is left over after dealing w/ creditors, distribute to those who are entitled to received under the decedent’s last will/testament or state’s statute of descent
      2. Depends on whether the decedent died testate or intestate (or both)

**II. Intestacy: Estate Plan by Operation of Law**

*Introduction*

1. Timeline for Intestate Distribution
   1. Any property not disposed of by non-probate means falls to probate
   2. Any probate property not disposed of by will falls to intestacy
   3. Intestate property distributed to the decedent’s heirs
2. How to qualify as an **heir** (intestate taker)
   1. To be an **heir**, you must outlive the decedent
   2. Person who is alive currently has no heir, only heirs apparent
3. Expectancies in property by heirs apparent
   1. Expectancies are not a property interest, as decedents can defeat the expectancy thru inter vivos transfer or devising property to others
4. Descent and distribution statute
   1. Under intestacy, a decedent’s personal property is distributed according to the descent and distribution statute of the state where the decedent resided at the time of death
   2. Decedent’s real property is distributed according to the law of the state where the real property is located
5. UPC vs. State Intestacy Schemes
   1. UPC favor surviving spouse with larger share of deceased spouse’s intestate estate
   2. UPC favors state as the decedent’s property escheats to the sate much sooner than it would under most state statutes

*Surviving Spouse*

1. UPC Intestacy Scheme (§§2-102 thru 2-105)
   1. Initially look to surviving spouse
      1. §2-102(1): 100% of decedent’s intestate property to surviving spouse if
         1. No issue or parents; or
         2. All of decedent’s issue are also issue of surviving spouse and surviving spouse has no other issue
            1. Rationale: Rather give it to the surviving spouse to choose how to best benefit the surviving issue rather than give them outright shares
      2. §2-102(2): $300,000 + 75% of decedent’s remaining intestate property
         1. No issue, but there is a surviving parent
      3. §2-102(3): $225,000 + 50% of decedent’s remaining intestate property
         1. Surviving spouse has own issue besides issue shared w/ decedent
         2. Remaining 50% is distributed equally among deceased spouse’s issue
      4. §2-102(4): $150,000 + 50% of rest
         1. Not all of decedent’s issue are issue of the surviving spouse as well
         2. Remaining 50% is distribute equally among the deceased spouse’s issue
   2. Any property **not passing to a surviving spouse** passes as follows:
      1. Issue – Equally
      2. Parents – Equally or all to the survivor
      3. Issue of parents – Equally
      4. Grandparents/issue
         1. 50% to paternal grandparents or survivor; otherwise to their issue equally
         2. 50% to maternal grandparent or survivor; otherwise to their issue equally
         3. If no surviving grandparents or issue on one side, all to the other side
      5. Anything left over escheats to the state 100%
2. Who qualifies as a SS: Marriage Requirement
   1. Generally, the term **spouse** requires that a valid marriage ceremony has taken place
      1. No inheritance rights unless marriage recognized by the jurisdiction
   2. Co-habitants, non-married couples who live together, do not qualify as spouses
      1. If jurisdiction recognizes a common law marriage, then cohabitants that meet requirements have inheritance rights of a married couple
      2. CL marriage is where a couple lives together for a requisite period time and make themselves out as a married couple
      3. Same-sex couples are a state by state analysis
   3. Putative spouses generally qualify as spouse
      1. Couple goes through what at least one of the parties believes is a valid marriage ceremony, but for some reason the marriage is either void or voidable
      2. As long as one party believes in marriage, in good faith, putative spouses are treated as spouses for most intestate schemes
   4. Married but separated still qualify as spouses
      1. Even if they have filed for divorce, they remain legally married until final judgment or decree of dissolution of marriage
3. Who qualifies as a SS: Survival requirement
   1. Modern day
      1. To be eligible to receive property from a decedent, must survive the decedent
      2. How long the taker must survive, and the burden of proof take has to satisfy varies from jurisdiction to jurisdiction
   2. Common law
      1. To qualify as an heir, the party had to prove by a preponderance of the evidence that he or she survived the decedent by a millisecond
   3. Some state have instituted a clear and convincing evidence standard to prove claimant survived the decedent
4. Uniform Simultaneous Death Act (USDA)
   1. USDA codified common law rule
      1. If both spouses die intestate with no children, all of the couple’s probate property ends up on the second-to-die spouse’s side of the family
      2. If both spouses die together, must determine who died afterward, and the later decedent’s family receives the couple’s property
   2. *Janus v. Tarasewicz*
      1. Couple collapses simultaneously, and despite conflicting medical evidence, husband’s vital signs disappeared before his wife’s
      2. Wife is beneficiary of husband’s insurance, with husband’s mother as contingent beneficiary, so the mother sues the wife’s family arguing that the wife did not survive the husband, but mother lost
   3. UPC §2-104 and 2-702: 120 hour approach
      1. The taker must prove by clear and convincing evidence that he or she survived the decedent by 120 hours (5 days)
      2. Codified in most recent version of the USDA
5. UPC approach: Analyze spouses in the order of their actual deaths
   1. Two questions:
      1. Did claimant actually survive the decedent
      2. Did claimant legally survive the decedent
   2. If a spouse does not legally survive the decedent, the first spouse to die’s probate property passes to the contingent beneficiary
      1. Second spouse outlived first spouse, but not for the requisite period of time after the first spouse died
      2. Second spouse treated as pre-deceasing the first spouse for survival purposes
   3. The second spouse to die is then treated as having pre-deceased her spouse, so probate property passes to the contingent beneficiary
      1. Spouse did not actually survive the second spouse anyways
6. Failure to meet survival requirement
   1. If claimant actually outlives the decedent, but does not legally survive the decedent by the statutory minimum period of time, the claimant is treated as pre-deceased

*Descendents (Issue)*

1. Understanding “Property to descendants/issue”
   1. If there is no surviving spouse, or there is a surviving spouse but he or she does not take all oft he decedent’s property, it is given to the decedent’s issue equally
   2. **Issue** refers to all of one’s offspring (**descendants**)
      1. One’s children, their children, and so on
         1. One’s children are one’s immediate offspring, 1st generation of issue
2. Analytical steps to calculating shares
   1. “Taking Equally”
      1. If a decedent’s issue take under intestacy, they take equally
      2. Ex. If all of the decedent’s children survive the decedent (A, B, C), then the decedent’s property is divided up 1/3 to each
         1. Question is more complicated if children have children of their own
   2. Determining which issue take
      1. Issue of predeceased children take in their place
         1. If the decedent had a child who died before the decedent, but had issue of their own, the child’s surviving issue share in distribution of the property
         2. Ex. if A predeceased the decedent, but had two children, A’s two children would split the 1/3 share owed to A
      2. If a person takes, his or her issue do not
         1. Ex. If B survives the decedent, B would receive a share, but B’s issue (B’s own children) would not receive a share of the decedent’s estate
      3. Absent adoption, only blood relatives qualify as heirs
         1. Generally, stepchildren do not qualify as eligible takers under intestate distribution schemes
         2. Ex. C dies before decedent and is survived by his wife and her children from a prior marriage
         3. Neither C’s surviving wife nor her issue from the prior relationship are entitled to a share of the decedent’s **intestate** property
   3. How to “take equally” where issue have varying degrees of relation to decedent
      1. Which generation should the decedent’s property be divided first?
         1. First generation, even if there are no live takers? or
         2. First generation where there is a live taker?
      2. Whichever generation the estate is divided first, how many shares should the estate be divided into?
         1. Always, one share for each descendant who is alive at this generation; and
         2. One share for each descendant at that generation who is dead but survived by issue (dropping shares)
      3. The “dropping shares” can be distributed 3 ways
         1. Per stripes; Per capita; Per capita at each generation approach

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Per Stirpes** | **Per Capita** | **Per Capita at Each Generation** |
| Where is the estate divided first | First generation always | First generation with a live taker | First generation with a live taker |
| How many shares is the estate divided into at that generation? | One share to each party alive & one share to each party dead but survived by issue | One share to each party alive & one share to each party dead but survived by issue | One share to each party alive & one share to each party dead but survived by issue |
| How to treat dropping shares? | Drop by bloodline | Drop by bloodline | Drop by pooling |

1. Per Stirpes (Old English) Approach
   1. Always make the first division of the decedent’s property at the first generation of descendents, whether there are live takers or not; then drop share by bloodline
      1. Each share drops only to the issue of the predeceased party
      2. If a 1st generation descendant is dead, the individual share from what was equally divided among the first generation of descendants is split equally among the dead descendant’s issue
2. Per Capita Approach
   1. Make the first division of the decedent’s property at the first generation where there is a live taker; then drop share by bloodline
      1. One share is given to each party who is alive, and to each party who is dead but survived by issue
      2. Then drop share to issue of any pre-deceased descendants, and that specific share will be split equally amongst that pre-deceased’s issue
3. Per Capita at Each Generation
   1. Make the first division of the decedent’s property at the first generation where there is a live taker; drop shares by pooling
      1. Pooling is combining all dropped shares and distributing them equally among the eligible takers at the next generation
   2. Pool the dropping share all together
      1. If there are two pre-deceased descendants, combine their shares to distribute evenly amongst their combined issue (1/5 + 1/5 = 2/5 shares divided among eligible taker)
      2. Ex. Assume E and F are pre-deceased and combined have 5 issue, there 2/5 share is divided by 5, so each issue of pre-deceased descendant gets 2/25 share
4. Miscellaneous Rules
   1. UPC §2-106 adopts the per capita at each generation approach
   2. Most jurisdictions split between per stirpes and per capita

*Who Qualifies as an Issue/Descendant?*

1. Qualification requires a parent-child relationship
   1. Relationship establishes inheritance rights in both directions
      1. Children born to married couples are presumed to be the child of that couple
   2. Generally, the child can inherit from and through either natural parent, and either natural parent can inherit from and through the child
      1. Child can inherit **from** a parent if the parent dies intestate and parent can inherit **from** a child if the child dies intestate
      2. If a child’s parent dies and the parent’s mother dies intestate (grandparent), the child can inherit **through** the deceased parent
   3. UPC §2-114(a)(2): Genetic parents can inherit from and through the child **unless**
      1. The child died before reaching age 18; and
      2. There is clear and convincing evidence that immediately before the child’s death the parental rights of the parent could have been terminated based upon inaction of parent toward the child
   4. Posthumously born child
      1. Child conceived while the natural father is alive, but born after he dies
      2. As long as the wife gives birth within 280 days of husband’s death, rebuttable presumption that child is a natural child of the predeceased husband
      3. If born 280 days after husband’s death, burden is on child to establish the link
2. Adoption Generally
   1. If a child is adopted, the adopting parents usually step into the shoes of the natural parents
      1. P-C relationship established with the adopted child and adopted parents
         1. Child inherits from and through the adopting parents, and vice versa
      2. §2-118: Adoption severs the P-C relationship between natural parents and child
         1. Can no longer inherit from and through the natural parents
         2. Natural parents can no longer inherit from and through the child
   2. §2-119(b): Where adoption is by a stepparent (spouse of natural parent)
      1. Does not affect the P-C relationship between adopted child and natural parent married to the adopting spouse
      2. Establishes a P-C relationship between adopting stepparent and the child, with full inheritance rights in both directions
      3. The other natural parent loses his or her right to inherit from and through the child, but child retains right to inherit from and through the other natural parent
   3. §2-119(c): Adoption by relative of parent
      1. Where a child is adopted by a relative of either natural parent, or the spouse or surviving spouse of such a relative, the child retains the right to inherit from and through *both* natural parents
   4. §2-119(d): Post-death adoption
      1. When a child is adopted after death of both natural parents, child retains right to inherit through both natural parents
   5. §2-113: Adoption and two lines of inheritance (LOOK UP IN BOOK 102)
      1. An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share
   6. Adult Adoptions
      1. Generally, adopted adults are treated the same as adopted children for inheritance purposes
3. Equitable Adoption
   1. Applies where the natural parents transfer custody of their child to a couple (or individual) who promises to adopt the child but fails to complete the paperwork to make it official
      1. Equity treats the child as a child of the adoptive parent for purposes of distributing the adoptive parent’s intestate property
   2. If requirements are established, child is entitled to receive their share of the adoptive parent’s probate estate
      1. Agreement between natural parents and adoptive parents to adopt the child
         1. Need not be in writing, can be oral or implied
      2. Natural parents fully perform by giving up custody of the child
      3. Child fully performs by moving in and living with adoptive parents
      4. Adoptive parents partially perform by taking child in and raising it as their own
      5. Adoptive parents die intestate
   3. Different P-C relationship under equitable adoption
      1. Child can inherit from, but not through the adoptive parent
      2. Adoptive parent cannot inherit from or through the child
      3. Does not affect child’s relationship or inheritance rights with natural parents
4. Children Born out of Wedlock
   1. Common law approach
      1. Child born out of wedlock considered illegitimate, a child of no one
      2. Child could not inherit from or through either natural parent
      3. Neither natural parent could inherit from or through the child
   2. UPC approach §2-117
      1. Child has a P-C relationship with both natural parents regardless of marital status
      2. Not treated the same as a child born to a married couple
         1. Automatically has a P-C relationship with the natural mother and can inherit from and through the natural mom
         2. Inheritance from and through natural father requires paternity test
   3. Uniform Parentage Act
      1. Automatically establishes a P-C relationship between child and natural mother, with child being entitled to inherit from and through her
         1. Requires proof of paternity between a child and natural father before entitled to inherit from and through him
      2. Presumption of paternity arises if the father acknowledges the child by taking the child into his home while the child is a minor and holding the child out as his own, or acknowledges paternity in writing and appropriately files it
         1. Presumption: Child can establish paternity/inheritance rights at any time
         2. No presumption: Action to establish paternity must be brought within 3 years of the child reaching the age of majority, or else it is barred
   4. UPC §2-114(a)(2): For parent to inherit from and through an out of wedlock child…
      1. Child died before reaching age 18; and
      2. Clear and convincing evidence that immediately before the child’s death, parental rights could have been terminated based on inaction of parent
5. Half-blood
   1. Relatives who share only one common parent, as opposed to traditional relationship where siblings share both parents
      1. Common law: only whole-blooded relatives are entitled to inherit
      2. UPC §2-107: Treat half-bloods the same as whole bloods
   2. Ex. H & W have two children A and B
      1. W divorces H and marries H2, they have a child C
      2. H, W, and W(2) all die, and then A dies intestate without surviving spouse or issue
      3. B and C split A’s intestate estate under the UPC
      4. B gets A’s entire intestate estate under common law
6. Nontraditional P-C Relationships
   1. UPC §2-120: Posthumously conceived children (invitro fertilization, etc…)
      1. Posthumously conceived child inherits from a deceased parent if…
         1. While the parent was alive he or she authorized the posthumous use of the genetic material in a signed writing
            1. Or there is clear and convincing evidence of such consent
         2. The child is in utero within 36 months of, or born within 45 months of, the parent’s death
      2. Expressly provide that a posthumously conceived child is included in a class gift in a trust or will of a 3rd party (someone other than the predeceased donor parent) if
         1. The predeceased parent authorized the posthumous use of genetic material in a signed writing, or clear and convincing evidence of consent
         2. Child is living on the distribution date or is in utero within 36 months of or is born within 45 months of the distribution date
7. Surrogacy
   1. Occurs where a married couple contracts with a woman to bear a child for them, and woman agrees the child will be the couple’s
   2. UPC §2-121: Surrogate mother has no rights in the child unless the surrogate mother is the genetic mother and no one else has a P-C relationship with the child

*Shares of Ancestors and Remote Collaterals*

1. Introduction
   1. When a decedent dies intestate, their property is distributed first to their **immediate family**
      1. The decedent, the decedent’s spouse, and the decedent’s issue
   2. If there is *no surviving spouse or issue*, the property flows “up” to the decedent’s ancestors and **collateral relatives** (all of the decedent’s other relatives)
      1. 1st line collateral: Decedent’s parents and their other issue (brothers and sisters)
      2. 2nd line collateral: Decedent’s grandparents and their other issue (other than decedent’s own parents – uncles, aunts, etc…)
      3. Continues so on and so forth for 3rd, 4th, 5th line collaterals
   3. There are 3 approaches to “flow up” to ancestors and remote collaterals
2. Parantelic Approach
   1. Intestate (no will) scheme that starts with the descendant’s immediate family and them moves out along collateral lines
      1. Starts with the closer lines and then moves to the more remote
   2. Keeps going out by collateral lines until there is a line in which there is a live taker
      1. Property is then distributed to the decedent’s relatives in that parentelic line
      2. In distributing property, per stirpes, per capita, or per capita at each generation approaches apply, depending on jurisdiction
3. Degree of Relationship Approach
   1. Focuses on the degree of relationship between the decedent and claiming relative, regardless of which parentelic line the taker is in
      1. Simply count the degrees of relationship between the decedent and the relative
      2. Those relatives of the closest degree can take the decedent’s property, and those with a more remote relationship are excluded
   2. To determine degree of relationship count from the decedent up to the closest common ancestor (head of a parentelic line – grandparent, great-grand parent, and son on), and then down to the live relative
4. Degree of Relationship with a Parentelic Tiebreaker Approach
   1. First step is to determine the degree of relationship of the possible takers
      1. Those of a closer degree take to the exclusion of those of a more remote degree
   2. If there are multiple takers sharing the lowest degree of relationship, those in the closer parentelic/collateral lines can take a stake in decedent’s intestate property
      1. Those in the more remote collateral lines are excluded
      2. Ex. If A and B are separated by 5 degrees, but A is in the GGP’s line and B is in the GGGP’s line, A gets share and B is excluded

*Reasons Size of Intestate Share May Change*

1. Advancements
   1. Common law:
      1. If a parent makes an inter vivos gift to a child, a rebuttable presumption arises that the gift constitutes an advancement that count’s *against* the child’s share of the parent’s intestate estate
         1. On paper, the intervivos gifts are added pack into the parent’s probate estate, to create a hotchpot
         2. The hotchpot is divided equally among decedent’s heirs, and any advancement is counted against the child’s share of the hotchpot
      2. If inter vivos transfers to a child exceed size of the share, child does not have to give anything back to probate estate, but does not get an additional share
      3. If a child pre-deceases the parent, and the child received an inter vivos gift, advancement still applies to share of parent’s estate going to deceased child’s issue
   2. UPC Approach: §2-109
      1. Scope §2-109(a)
         1. UPC expands on the common law doctrine by providing that it may apply to any heir, not just a child
      2. Writing Requirement §2-109(a)
         1. Inter vivos gifts do **not** constitute an advancement unless a writing indicates that the donor intended the gift to constitute an advancement
         2. If the donor creates the writing, the writing must be made contemporaneously with the inter vivos gift
         3. If the donee creates the writing, the writing may be made at any time
      3. Valuation §2-109(b)
         1. If it meets the writing requirement, advancement is valued as of the time the donee receives possession or enjoyment of the property, whatever was first
      4. Pre-deceased donee §2-109(c)
         1. Where the donee predeceases the donor, and the inter vivos gift to the donee qualifies as an advancement
         2. Advancement does not count against the share of the donor’s estate going to the predeceased donee’s issue *unless the writing expressly provides so*
2. How to Manage Property Transfers to Minors
   1. Guardianship (Typical default)
      1. Guardian preserve the ward’s property until minor reaches age of capacity
         1. Inefficient and administratively expensive, bc guardianship requires trips to court for authorization to deal with the property
      2. Modern Trend: Transforms it into a conservatorship, where conservator takes title as trustee for the minor and has all the power a trustee would have (UPC Article V)
         1. Conservator still has to account to the court, but minimally
   2. Uniform Transfers to Minors Act
      1. Custodian has discretionary power to use the property for the benefit of the minor, as the custodian seems appropriate, without court approval (UPC § 2-109(a))
         1. Requires written instrument expressly opting for the trust
         2. Most appropriate for small to moderate sized gifts
      2. When minor turns 21, custodian must disburse any remaining property to the minor
         1. No duty to account to court, only to the minor turning 21
   3. Trusts
      1. Terms of the trust control the scope of the trustee’s powers over the property, ability to use principal for benefit of the child, etc…
         1. Requires written instrument expressly opting for the trust
      2. Most flexible way to hold and manage property for a minor, but has higher up-front and administrative costs
         1. Most appropriate for large sized gifts
3. Killing of Decedent (Slayer Statutes)
   1. UPC §2-803: Killer shall not be able to take a share from his or her victim
      1. Where killer would typically receive a share of decedent’s intestate probate estate, killer is not allowed to profit from own wrong doing (*In re Estate of Mahoney*)
         1. Remedy – Killer then treated as having pre-deceased the victim
      2. Applies to all types of property – nonprobate, probate testate, and probate intestate
         1. If the victim and killer held property in joint tenancy, the joint tenancy is converted into a tenancy in common
         2. Killer keeps individual interest, and victim’s interest is distributed as if killer predeceased the victim
   2. Statute requires “intentional and felonious killing”
      1. Barred from taking a share of decedent’s estate
         1. Voluntary manslaughter
         2. Mercy killing/assisted suicide is technically intentional and felonious
      2. Not Barred from a share of decedent’s estate
         1. Involuntary manslaughter is not intentional
         2. Self-defense may be intentional, but not felonious
   3. Burden of proof is a civil issue
      1. Criminal conviction of the intentional/felonious murder has res judicata effect upon the civil issue of whether a killer can take their share from the victim
      2. If defendant is acquitted on homicide but civilly found liable for the decedent’s intentional/felonious wrongful death, killer is barred from participating in the distribution of the victim’s estate
   4. Killer’s issue
      1. UPC treats the killer as if they disclaimed the property
      2. Arguably allows the killer’s issue to take the killer’s share under anti-lapse and the per stirpes/per capita doctrines if they would otherwise qualify
4. Other Forms of Adult Misconduct – Abandonment or Abuse
   1. UPC §2-114(a)(2): Parent is barred from inheriting from or through their child if…
      1. The child died before reaching age 18; and
      2. There is clear and convincing evidence that immediately before the child’s death the parental rights of the parent could have been terminated based upon inaction of parent toward the child
         1. Includes failure to support child, abuse, abandonment, etc…
5. Disclaimers
   1. Occurs where someone expresses their intent to decline a testamentary gift
      1. If a party disclaims, generally the party disclaiming is treated as if they predeceased the decedent
      2. Property in question is then distributed as if the party who disclaimed predeceased the decedent
      3. Property is distributed to the next eligible taker
6. Negative Wills; UPC §2-101(b)
   1. When one does not want a particular her to take any of the decedent’s intestate property, decedent can disinherit by properly executing a will that expresses such an intent
      1. Complete disinheritence even if some or all of the decedent’s property through intestacy and the heir otherwise would have qualified for some property
      2. Heir is treated as if they predeceased the decedent, and if the heir is survived by issue, they take by representation unless the will expressly disinherits them too
   2. Under common law, decedent must execute a valid will that disposes all property so nothing passes through intestacy
      1. If the decedent’s will express an intent to disinherit, but some of the property is distributed through intestacy, heir qualifies to receive a share of intestate property

**III. Wills – Execution**

*Formal Wills: The Mechanics*

1. Statutory Requirements
   1. Every jurisdiction has a statute that sets for the requirements that an individual must comply with to execute a valid will
      1. Referred to as Wills Act formalities
   2. These formalities depend upon whether the will is a traditional attested will (writing that is signed and *witnessed*) or holographic will
2. Common Law Judicial Approach to Attested Wills
   1. Attested will is a will whose signing is witnessed
      1. All states permit attested wills as valid wills
      2. At a minimum, it includes a writing that is signed and witnessed, though jurisdictions have their own ancillary requirements that vary from jurisdiction
   2. Common law approach requires absolute strict compliance with each Wills Act requirement, no matter how clear the testator’s intent that the document be the last will
      1. If there is any deficiency in the execution, document is not a valid will
   3. Competency of Witnesses (and Purging)
      1. Requires that the witness be “disinterested,” not taking under the will
         1. Historically, if witness has a financial interest, either entire will is invalidated, or interested witness’s gift is voided
      2. Purging approach adopts the argument that a witness has a conflict of interest only to the extent they stand to take more under the will than he or she would otherwise, and purges the interested witness only of his or her excess interest under the will
         1. Calculate first, how much witness would take if will were **not valid** and how much the witness stands to take under the will
         2. If the latter amount is greater, purge the witness of the excess interest
      3. UPC §2-505 abolishes purging doctrine
         1. If one suspects an interested witness is shady, can still challenge gift under doctrines such as fraud or undue influence
3. Modern Trend/ UPC Approach to Attested Wills
   1. Differences from Common Law
      1. Modern trend reduces number of requirements in the Wills Act
      2. Also encourages courts not to require strict compliance, rather apply substantial compliance or harmless error test for compliance with Wills Act formalities
   2. UPC Requirements under §2-502.
      1. Testator does not have to sign at the foot of the will
      2. Where another signs for the testator, in the testator’s presence and at their direction, only need to meet conscious presence test (a)(2)
         1. Party can tell from general awareness that required act is being performed
      3. Testator may acknowledge their own signature or the will itself
         1. At common law must acknowledge signature, can trip up careless testator
      4. Does not require witnesses to be present at the same time for any reason, even when the testator signs or acknowledges (a)(3)
         1. Witnesses not required to sign the will in either the testator’s presence or presence of each other (a)(3)
         2. Witnesses do not need to sign in the presence of the testator, only within a reasonable time after witnessing the testator sign or acknowledge (a)(3)
4. Curative Documents
   1. UPC encourages the courts not to insist on strict compliance with Wills Act formalities
      1. Applies a substantial compliance approach, or even a harmless error/dispensing power approach if it fails to meet those formalities
   2. Substantial compliance: UPC §2-503
      1. Even if a will is not executed in strict compliance with the jurisdictions formalities, court is empowered to probate will if:
         1. Clear and convincing evidence of testator’s intent to make the document their last will and testament; and
         2. Clear and convincing evidence shows substantial compliance w/ formalities
   3. Self-proving Wills: UPC §2-504
      1. Combined attestation clause and self-proving affidavit that requires the testator and witnesses to sign their names only once
      2. Avoids the issue of testator signing a self-proving affidavit but forgetting to sign the actual will itself
   4. Dispensing power/harmless error: UPC §2-503
      1. Court is empowered to probate the will if clear and convincing evidence shows that the decedent intended the document to constitute their last will and testament
      2. Applies to validate a writing as long as there is clear and convincing evidence the decedent intended the writing to constitute
         1. The decedent’s will;
         2. Partial or complete revocation of the will;
         3. Addition or an alteration of the will; or
         4. Partial/complete revival of their revoked will or a formerly revoked portion
5. Notarized Wills: UPC §2-502(a)(3)
   1. Will is valid if signed by two witnesses or a notary
      1. Single notary can serve the functions underlying Wills Act Formalities
      2. Under harmless error doctrine, such a will would still be valid w/o notarization

*Holographic and Conditional Wills*

1. Holographic Wills
   1. Do not require that the will be witnessed
      1. To offset lack of witness, number of other requirements are added
      2. Will must be in the testators handwriting
      3. UPC §2-502(b) recognizes holographic wills
   2. Additional Requirements
      1. Like attested wills, holographic wills must be in writing
      2. Like attested wills, holographic wills must be signed
         1. Anything testator intends to be their signature is valid and qualifies
         2. Unlike attested wills, only the testator can sign the holographic will
         3. UPC does not require it to be dated
      3. Must be in the testator’s own handwriting
         1. UPC §2-503(b) requires only that the material provisions, not the entire instrument be in the testator’s handwriting
         2. Material provisions include the “who gets what,” administrative provisions, and testamentary intent (that this is the last will and testament)
2. Holographic (Conditional) Wills – *In Kimmel’s estate*
   1. Conditional wills contain an express clause conditioning their being given effect upon some event occurring
      1. Ex. Letter that talked about family matters, and an ambiguous note about finances at the end qualified as a holographic will, as person died shortly after mailing it
   2. Valid and permitted, but often unclear whether the clause was an express condition precedent to an effective will, or merely an explanation
3. Testamentary Intent of a Holographic Will
   1. Intent that the document constitutes the person’s last will and testament
      1. Intent that this document be probated as decedent’s will
   2. Ensures that only writing the decedent intended to serve as a will is probated
      1. Key is to use words to indicate that the document is to have significance following the person’s death
   3. UPC §2-502(c) states that testamentary intent can be derived from the handwritten material, non-handwritten provisions, or other extrinsic evidence
4. New Will vs. Codicil: *In re Estate of Kuralt* 
   1. 1989: Kuralt executes a valid holographic will leaving MT property to his mistress
   2. 1994: Executes an attested will that left all his property to his wife and kids
   3. 1997: He began an inter vivos transfer of the Montana property to Pat, but died before the process was completed
      1. While in the hospital he handwrote and signed a document for Pat, discussing illness and ensuring the mistress would **inherit** the rest of the place in MT
      2. Mistress offered this letter into probate after his death
      3. Estate argued that the letter expressed only future intent to make a will
   4. Probate court determined sufficient evidence to conclude the document was a holographic codicil to his will (codicil is a will that amends an existing will)
      1. Court emphasized testator intent
      2. To the court, “inherit” indicated intent to make a testamentary transfer of property

**IV. Components of a Will**

1. Integration: What is required to constitute the pages of a will
   1. Pieces of paper that are physically present at the time of execution; and
   2. The testator intended those papers to be part of the will
2. Republication by codicil
   1. Executing a codicil to a will “re-executes” and “republishes” the underlying will
      1. Codicil is a will that amends an existing will
   2. Generally, a codicil automatically re-dates the underlying will
      1. Codicil can either expressly re-date the underlying will (via an express clause expressing that intent) or implicitly (court presumes testators intent to re-date)
   3. Classifying a will as a codicil implicitly presumes a preexisting valid will
      1. If the underlying will is not valid, the codicil is actually its own freestanding will
         1. It is still a will even if it does not dispose of testator’s property
      2. As a will, it does not automatically re-execute and republish the invalid will,
         1. It may still be possible to use the valid will to give effect to testamentary wishes expressed in the invalid will through incorporation by reference
   4. Potential problems with the original will execution ceremony that do not affect its validity in whole (ex. interested witness, undue influence) can be solved by republication by codicil
      1. As long as the problem is not present when the codicil is executed, the codicil re-executes and republishes the underlying will, curing the problem in the will
3. UPC §2-510: Incorporation by Reference
   1. Valid will can incorporate by reference a document that was not executed with Wills Act formalities, giving effect to the desires expressed in the incorporated document, if…
      1. The will expresses the intent to incorporate/makes reference to the document;
      2. The will describes the document with reasonable certainty; and
      3. The document being incorporated was in existence when the will was executed
         1. Plaintiff bears burden by preponderance of the evidence
         2. If document changes over time, only the document as it existed at the time will was executed is incorporated by reference
         3. But if a will is reexectued under republication by codicil, and the will is redated to a date after the document, it can meet this requirement
4. UPC §2-513: Separate Writing
   1. Permits a testator to give away his or her tangible personal property via a list not executed with Wills Act formalities, even if the list is created after the will is executed
      1. However, the will must expressly state such an intent
   2. Doctrine modifies incorporation by reference by waiving the requirement that the document be in existence at time of will execution as long as the document **only** disposes of testator’s *tangible personal property*
5. UPC §2-512: Acts of Independent Significance
   1. Will may dispose of property by reference to acts outside of the will as long as the referenced act has significance independent of its effect upon the testator’s probate estate
      1. The reference act can control either who takes or how much a beneficiary takes
         1. Though act may affect either who takes or how much a beneficiary takes, the act has its own significance independent of its effect upon the will
      2. Essentially permits a testator to change the provisions of his or her will w/o having to execute a codicil
   2. Writing as independent act
      1. Creation of a writing, even a testamentary writing, qualifies as an act of independent significant as long as the reference writing has its own independent significance apart from its effect on the will
   3. Ex. A leaves $10k to everyone lifted as beneficiaries in B’s will. Thereafter B creates a will. Each beneficiary in B’s will qualifies to take $10k under A’s will under acts of independent significance.
      1. Referenced act is creation of B’s will
      2. B created his will to dispose of his probate property
      3. B’s will has its own significance (dispose of B’s property upon death), independent of its effect upon sister’s will (identifying who gets $10k)

**V. Revocation of Wills**

1. Revocation Generally
   1. Wills are execute inter vivos but are not effective until death
   2. The testator can revoke, replace, or amend the will at any time

*Revocation by Physical Act*

1. UPC §2-507(a)(2): Total Physical Revocation
   1. Will may be revoked by a **physical** act as long as the act is destructive in nature and is performed with the intent to revoke
      1. Ex of destructive: Burning, tearing, etc…
   2. Act may be performed by the testator or by another, but if revoked by another…
      1. Must be performed in the testator’s presence; and
      2. Must be performed at testator’s discretion
2. Partial Physical Revocation
   1. Two main concerns with partial revocation:
      1. Increase potential for fraud
      2. Intrinsically partially revoked will becomes a new gift, the revoked part has to go somewhere and if it goes anywhere else in the will it needs to be executed with Wills Act formalities bc it is a new gift
   2. UPC §2-507
      1. The will should be given effect as it reads with the partial revocation by act regardless of where that means the revoked gift goes

*Revocation by Writing*

1. UPC §2-507(a)(1): Revocation by Subsequent Instrument (writing)
   1. Will may be revoked by a subsequent writing expressing the intent to revoke, but only if the subsequent writing qualifies as a valid will
      1. Subsequent writing must be executed with Wills Act formalities
      2. Must qualify as an attested will or a holographic will
      3. Subsequent will can revoke a prior will expressly or implicitly by inconsistency
   2. Express Revocation
      1. Clear and express statement of intent to revoke the prior will
         1. Ex. I hereby revoke my prior will
      2. Properly executed instrument that solely expresses intent to revoke a prior will is a valid will itself
   3. Revocation by Inconsistency: UPC §2-507(a)(1)
      1. Subsequent will disposes of the decedent’s property in a way that is inconsistent with the prior will
      2. The later expression of the testator’s intent controls the prior expression of intent, and the prior will is deemed revoked to the extent of any inconsistencies
   4. Will vs. Codicil
      1. If a subsequent will completely revokes the prior will, either expressly or via inconsistency, subsequent will becomes the testator’s sole will
         1. If the subsequent will only partially revokes or amends the prior will, either expressly or via inconsistency, subsequent will is a codicil
         2. The prior will stands and is valid to the extent it’s not revoked by the codicil
      2. Codicil is a will that merely amends a n existing will rather than replacing it and must be executed with the requisite formalities; §2-507(b)-(d)
         1. Handwritten amendment to a holographic will constitute a valid holographic codicil, even if the handwritten amendment don’t qualify as a valid holographic will in their own right
         2. Holographic codicils to attested wills are valid, and attested codicils to holographic wills are valid
         3. Revocation of a codicil does not revoke the underlying will; revocation of a will revokes all codicils thereto
   5. Writing as Revocation by Act
      1. Act of writing VOID across the will does qualify as a destructive act
         1. Intent to revoke is implicit in the nature of the act, and that act of writing VOID does qualify as revocation by act
      2. Where a testator takes out her type attested will and writes VOID across the first page, but does not sign the document after writing VOID, it is not revoked
         1. Act of writing VOID does not qualify as a valid revocation by writing bc it **does** **not** qualify as a valid will; neither attested or holographic bc unsigned

*Arguments for “Undoing” a Revocation*

1. Dependent Relative Revocation
   1. Tendencies for DRR
      1. Where the revocation is by act, the mistake is a mistake of law
         1. Testator attempted a new will or codicil that is invalid
      2. Where revocation is by writing, mistake is mistake of fact
         1. Mistake must be set forth in the valid revoking instrument
   2. Revocation by Act scenario
      1. Testator revokes a gift by act (valid revocation), on the belief that a new will or codicil is valid, but the new will or codicil is not valid (mistake of law)
         1. Intended beneficiary stands to take nothing bc the original gift was validly revoked and the new gift fails due to the mistake of law
      2. DRR reasons it is better to save the original gift than eliminating the entire will completely if…
         1. The testator would have preferred the original gift over nothing if he had known (hypothetically) that the new will or codicil was invalid
   3. Ex. Revocation by Act
      1. A has a valid typed will giving $10k to B, but draws a line through $10k and write $20k instead
         1. Drawing the line through $10k validly revoke gift by act
         2. The $20k was an attempt at a holographic codicil, but it fails bc it does not meet requirements…B stands to take nothing
      2. B should invoke DRR
         1. Valid revocation (line through the $10k)
         2. Based upon mistake (belief holographic codicil was valid)
         3. Testator would not have revoked but for mistake (tried to increase gift, so would clearly prefer some gift to none)
      3. Mistake of Law: The mistake is the failed alternative testamentary scheme; a failed attempt at a new will or codicil
   4. Revocation by Writing
      1. Intrinsically there cannot be a failed alternative testamentary scheme bc the new will or codicil had to be valid for there to be a successful revocation by writing
         1. Mistake is typically a mistake of fact
         2. Less common then revocation by act
      2. For DRR to apply, the mistake must be:
         1. Set forth in the writing; and
         2. The mistake is beyond the testator’s knowledge
   5. Ex. Revocation by Writing
      1. A has a valid typed will that gives $10k to B. Afterwards A properly executes a codicil that says he revokes gift to B in light of her marriage to C. However, B never actually married C
         1. Mistake of Fact: Valid revocation of original gift via codicil, and the alleged mistake is that A thought B married C
      2. When revocation is in writing, mistake of fact must be set forth in the revoking writing and be beyond testator’s knowledge
         1. Codicil expressly states reason for revocation was belief of B + C marriage
         2. Mistake is set forth explicitly in writing, and there was no reason that A should have known B and C were married (beyond testator knowledge)
   6. Possible to have Revocation by Writing via Mistake of Law: *LaCroix v. Senecal*
      1. Testator executed valid will leaving the residual of her estate; half to her nephew and half to her friend Senecal
         1. Afterwards, testator executed a codicil revoking the residuary clause and submitted an almost identical clause referring to her nephew by both his formal name and nickname
         2. Codicil was witnessed by Senecal’s husband, which voided gift to Senecal due to interested witness statute
      2. Court applied DRR
         1. Valid revocation (codicil) based on mistake (belief gift to S in codicil valid)
         2. Testator would not have revoked but for the mistake
         3. Bc the revocation is by writing, mistake must be set for in the writing (gift to Senecal as set forth in the codicil – mistaken belief that the gift in the codicil was valid)
2. Revival
   1. What to do when a testator validly executes will #1, thereafter validly executes will #2 that expressly or implicitly revokes will #1, and thereafter validly revokes will #2, wanting to revive will #1 as the controlling document
      1. Moment the testator properly executes will #2, will #1 is void
      2. When testator revokes will #2, it does not automatically give effect to #1
      3. Testator must do something to revive will #1
   2. Minority Approach
      1. Testator required to re-execute will #1 to revive it by going through the Wills Act Formalities again
   3. UPC §2-509: Majority Approach
      1. All the testator has to do to revive will #1 is intend to revive will #1
         1. Going through Wills Act formalities again is considered to burdensome
         2. States can limit what evidence the courts can take of the testator’s intent to revive depending on how testator revoked will #2
      2. Key to proving **intent to revive** is examining how the testator revoked will #2
         1. §2-509(a): Revoking will #2 by **act** – Courts take almost any evidence of testator’s intent to revive will #1, even testator’s own alleged statements
         2. §2-509(c): Revoking will #2 by **writing** (will #3) – intent to revive will #1 must be set forth in the new will (will #3)
   4. UPC §2-509(b): When Will #2 acts as a Codicil
      1. Where will #2 wholly revokes will #1, UPC follows majority approach
         1. Must prove intent to revive
      2. Where will #2 only partially revokes will #1 (#2 as a codicil)
         1. Part of will #1 that was revoked by will #2 is presumed to be automatically revived
         2. Burden of proof is on the party trying to prove the testator did not intend to revive the revoke provisions of will #1

*Revocation by Operation of Law*

1. UPC §2-804: Majority Approach to Divorce
   1. Divorce automatically and irrebuttably revokes all provision in a testator’s will in favor of the ex-spouse, unless the will expressly provides otherwise
2. Traditional Scope
   1. Applies the revocation by operation of law doctrine only to wills
   2. Will substitutes are not affected - life insurance, joint tenancy, pension plans, and other non-probate arrangement
3. UPC/Modern Scope
   1. UPC applies the revocation by operation of law doctrine not only to will but to all the will substitutes
   2. Also revokes provisions in favor not only of the ex-spouse, but revokes provisions in favor of the ex-spouse’s relatives (§2-804(b)(1))

**VI. Defenses to Formation of Wills and Will Contests**

1. Mental Capacity
   1. The 1st requirement for a valid will is that the testator have the **requisite mental capacity**
      1. Traditional way to opt out of intestate distribution schemes is by executing a will
      2. Every jurisdiction requires mental capacity to execute a valid will
      3. Lawyer has an ethical duty to asses someone’s capacity before drafting his will
   2. Application
      1. Testator must have the requisite capacity at the time he or she performs a testamentary act; executing or revoking a will
      2. **Lucid intervals**: If a person who usually lacks mental capacity executes a will during a lucid moment, the will *is valid* even if the testator lacked capacity for some period before and/or after executing the will
         1. Note the testator’s condition *immediately* before and/or after executing the will is relevant to the issue of capacity at moment of execution
   3. To execute/revoke a will, testator must be **at least** **18 years old and of sound mind**
      1. **Sound Mind**: Requires that the testator have the ability to know…
         1. The nature and extent of his or her property;
         2. The natural objects of his or her bounty;
         3. The nature of the testamentary act they are performing; and
         4. How all of these relate together to constitute an orderly plan of disposing of his or her property
      2. Testator only needs the ability to know (comprehend) the information covered by requirements, not actually know the information
         1. Test for sound mind is low, presumption of testamentary capacity
      3. Majority approach is that once someone offers a PFC that a will was validly executed, there is a rebuttable presumption the testator had testamentary capacity
         1. Burden is on the contestant to prove lack of testamentary capacity
         2. Standing to contest the will only if part will financially benefit from a successful challenge
   4. Even if a person has general mental/testamentary capacity, a person may suffer from a defect in capacity that may invalidate part or all of the will
      1. (1) Insane delusion; (2) Undue influence; (3) Fraud; (4) Duress
      2. If testator suffers from a defect that causes him to dispose of property in a way they otherwise would not have, courts generally will strike will as matter of defect
2. Ante-Mortem Probate
   1. Statutes in AK, ND, and OH permit probate of a will during testator’s life authorize a person to institute during life, an adversary proceeding to…
      1. Declare the validity of a will; and
      2. The testamentary capacity and freedom from undue influence of the person executing the will
   2. All beneficiaries named in the will and all the testators heirs apparent must be made parties to the action
3. Insane Delusion
   1. False sense of reality in which a person lives, despite evidence to the contrary
      1. Delusion is a false perception of reality, basically a mistake
      2. Extremely fact sensitive; More preposterous, more likely an insane delusion
      3. Courts generally reluctant to apply doctrine to religious/spiritual beliefs
   2. Majority Approach: Rational Person Test
      1. If a rational person in the testator’s situation **could not** have reached the same conclusion, the belief is an insane delusion (not *would not* have reached)
   3. Minority Approach: Any Factual Basis to Support Test
      1. If there is any factual basis to support testator’s belief, not an insane delusion
      2. More protective of testator’s intent, no room for jury to substitute their own beliefs
   4. Causation: Effects of Testator’s Insane Delusion
      1. “But for” Causation (Majority): **But for** the insane delusion, the testator would not have disposed of property as they did
         1. Some jurisdictions soften the standard, requiring only that delusion materially affect the will’s provisions (compromise between maj/min)
         2. More protective of testator’s intent
      2. Minority Approach: Insane delusion **might have** affected the disposition of the testator’s property
         1. Standard is so low, it is almost always satisfied
   5. Traumatic Effect Doctrine
      1. Case law indicates that, if the person contesting the will proves that some trauma suffered by the testator altered their views, easier to establish an insane delusion
4. Undue Influence
   1. Substituted intent – when one influence the testator to the extent that the will expresses the influencer’s intent, not the testator’s intent (e.g. mental coercion)
      1. Rarely any direct evidence of undue influence, purely circumstantial
   2. Traditional doctrine for Undue Influence
      1. Susceptibility: Was testator susceptible to undue influence?
      2. Opportunity: Did defendant have opportunity to exert undue influence?
      3. Motive: Did the defendant have a motive for exerting undue influence?
      4. Causation: Did the undue influence cause the testator to dispose of his property in a way the testator would not have otherwise
   3. Burden-shifting Approach: Meet elements; Rebuttable presumption of undue influence
      1. Step-by-step Analysis
         1. There was a **confidential relationship** btwn the defendant and testator;
            1. No bright line rule; Minimum, testator must confide in other party
         2. The defendant **receives the bulk of the testator’s estate**; **and**
         3. The testator was of **weakened intellect**
      2. Where the plaintiff can prove the three elements **by this particular evidence,** then a presumption of causation arises, and the burden shifts to the defendant to prove there was no undue influence
   4. R3d of Property, Donative Transfers
      1. Confidential relationship is not enough to raise a suspicion of undue influence
         1. Confidential relationship + suspicious circumstances are sufficient to raise an inference of abuse of confidential relationship
      2. All relevant facts may be taken into account to consider what is a suspicious circumstance
5. Fraud
   1. Occurs where someone intentionally misrepresents something to the testator, with:
      1. Intent of influencing the testator’s testamentary scheme; and
         1. Person must intentionally misrepresent (know it to be false) when making the misrepresentation to the testator
      2. The misrepresentation causes them to dispose of their property in a way that they would not have otherwise
   2. Fraud in the Inducement
      1. Occurs when a person misrepresents a fact to the testator for the purpose of inducing the testator to execute a will with certain provision, or for purpose of inducing testator to revoke a will
         1. Misrepresentation does not go to the terms of the will per se
         2. Concerns a fact that is important to the testator and may induce them to dispose property differently in light of that misrepresentation
   3. Fraud in the Execution
      1. Occurs when a person misrepresents the nature of a document the testator is signing
         1. Tricks someone into signing a document that purports to be the signer’s will, but the signer does not realize it; **or**
         2. When the testator realizes he or she is signing their own will, but person misrepresents some of its contents
   4. Elements - Mens Rea
      1. Misrepresentation must be made **knowingly** **and** **for the purpose of influencing** the testator’s testamentary scheme
      2. If misrepresentation is a practical joke, and the testator chances testament based on that joke, technically, fraud does not apply
   5. Elements - Causation
      1. Fraud must cause the testator to dispose of his or her property in a way that he or she would not have otherwise
   6. Elements - Remedies
      1. Fraudulent Provisions
         1. Strike as much of the will as affected by the fraud, and if necessary all of it
      2. Fraudulent Failure to Revoke
         1. Strike the will (or clause) that the testator would have revoked, but for the misconduct
      3. Fraudulent Failure to Execute
         1. If fraud causes the decedent not to execute a will that he or she otherwise would have, court can impose a constructive trust on parties who take the decedent’s property
         2. Trust orders the property to be distributed to the parties who would have taken the property had the decedent executed the original will
         3. Gives effect to the will that the decedent did not execute, an unjust enrichment must result from some party’s misconduct to qualify for this rare remedy
6. Tortious Interference with an Expectancy
   1. Where a 3rd party has intentionally committed tortious conduct in the testamentary process (undue influence, fraud, etc…), those who would have taken but for the misconduct can also sue the 3rd party for tortious interference with expectancy if they can prove…
      1. Existence of an expectancy;
      2. Reasonable certainty that the expectancy would have been realized but for interference;
      3. Intentional interference with the expectancy;
      4. Tortious conduct involved w/ the interference (fraud, duress, undue influence); and
      5. Damages
   2. Advantages for tort action vs. suit in probate for fraud or undue influence
      1. Not a will contest, by suing in tort, even if P were to lose, they could still take under the will as a beneficiary despite a no-contest clause
         1. If suing under fraud/undue influence and a no-contest clause exists in the will, they would lose their share
      2. Punitive damages available in tort claims, remedy for fraud/undue influence is simply to strike those parts of the will
      3. Longer statute of limitations, tort statute does not run until party discovers or should have discovered the misconduct

**VII. Special Precautions against Will Contests**

1. No Contest Clause
   1. Clause that says if a beneficiary under the instrument sues to contest the instrument (or a provision), the beneficiary loses whatever he or she is taking under the instrument
      1. Generally, no contest clauses are valid but are construed narrowly and are not enforceable in certain situations
      2. An action to construe a will generally is not considered a will contest
   2. Majority Approach to Enforceability: UPC §§2-517; 3-905
      1. Refuse to enforce a no contest clause if there is probable cause to support the will contest, whatever the nature of the contest
      2. If there is probable cause, risk that the no contest clause is being used to shield wrongful conduct is too great to ignore
   3. Minority Approach
      1. No contest clause is unenforceable, regardless of amount of evidence, if the claim is one of forgery, revocation, or misconduct by one in procurement or execution of the will (more protective, narrower exception)
2. Precautionary Measures against Will Contests
   1. Explanatory Statement
      1. Including a statement w/ the will explaining why the testator did what they did
         1. Hopefully deters a will contest or convince a jury that the provision in the will are truly the testator’s intent
      2. Should not be included in the will, which becomes a public document
         1. Handwrite a letter to the attorney setting forth testator’s scheme, and lawyer should then write the client noting its effect upon family members, and then the client should write attorney again explaining the unnatural disposition
      3. Lawyer can disclose these letters during probate to those who need explanation, reducing chances anyone will sue to clear one’s name
   2. Extra Precautions Generally
      1. Lawyer may wish to have the testator’s capacity assessed by a medical expert;
      2. Have a 3rd witness at the will execution ceremony; and/or
      3. Include a no-contest clause
   3. Intervivos Trust
      1. Use intervivos trust instead of a will because it increases the chances the testamentary scheme will survive a challenge
      2. Advantage is intervivos trusts’ temporal nature (as opposed to a will)
         1. Inter vivos transactions completed with 3rd parties during settlor’s lifetime are harder to strike down
      3. If a will is challenged and held invalid, no transfers have taken place yet
         1. Inter vivos trust that is challenged could lead to potentially having to try to undo years worth of intervivos, completed transactions
         2. Courts less likely to hold inter vivos trusts to be invalid years after its creation, than they would be to hold a will invalid before its given effect

**VIII. Construing Wills**

*Construction Generally*

1. Plain Meaning Rule
   1. In construing and giving effect to a will, the words used in the will should be given their plain meaning
   2. Generally, Extrinsic Evidence (EE) is not admissible to show that the testator used the words to mean something other than their plain meaning
   3. EE is admissible to help construe a word or phrase if ambiguous
2. Personal Usage Exception
   1. If testator has always referred to a person by something other than their true name (nickname), and the testator uses that name in the will, courts use EE to show the testator always called the person by that name
   2. In doing so, court uses EE to show the person called by nickname is the person who is supposed to take the gift, not the person whose true name actually matches the name used in the will (assuming someone else has that name too)

*Latent and Patent Ambiguities*

1. At common law, courts admit extrinsic evidence to help construe a latent ambiguity, but not to help construe a patent ambiguity
   1. **Patent ambiguity** is an ambiguity that is *apparent* from the face of the will
      1. No extrinsic evidence necessary to realize there is an ambiguity
      2. At CL, EE not admissible to construe patent ambiguity
   2. **Latent ambiguity** is an ambiguity that is *not apparent* from the face of the will
      1. Latent ambiguity usually does not become apparent until the court attempts to give effect to the decedent’s will and determine who gets what
      2. At CL, EE admitted to establish/construe a latent ambiguity
   3. As long as the extrinsic evidence clarifies the express language in the will, the EE is admissible and the court uses it to help construe the ambiguity
      1. If the EE is inconsistent with the language in the will or requires the court to add words to the will or rewrite the will, court does not admit the EE
      2. If the ambiguity cannot be resolved, the gift fails
2. Latent Ambiguity Doctrine
   1. **Equivocation** is where the wills terms fits more than one object or person equally
      1. Court uses EE to determine which object/person was intended
   2. Ex. I leave $1,000 to my favorite research assistant Mr. Brown
      1. If there were two research assistants by that name, use extrinsic evidence to determine which one was intended beneficiary
      2. Does not require court to add any words to will, only construe ambiguous identification expressed in the will
   3. **Misdescription** arises where the description of a person in the will appears fine on its face, but when court tries to apply it, no one matches the description exactly, but someone almost matches it
      1. Courts take EE to establish the misdirection and to determine which words in the will to strike, but courts do not insert any words in the will to correct the description
      2. Court strikes the misdesrcription and then looks to see if the remaining words adequately describe the person so that the clause in the will can be given effect
   4. Ex. Typographical error, I give my house at 432 Beet Dr. to Lisa
      1. Decedent doesn’t own a house at 432 Beet Dr., but owns one at 234 Beet Dr
      2. Court uses EE to establish misdirection and strikes 432 from will
      3. If EE establishes decedent only owned one house on Beet Dr. any ambiguity is resolved, and adequate description for court to give the gift

*Reformation*

1. Modern trend is much more open to discover and give effect to testator’s intent, and repudiates many CL doctrines
   1. No Plain Meaning Rule: Considers EE of the circumstances surrounding the testator at the time he executed the will in analyzing the testator’s intent at that time and whether there is any ambiguity
   2. No Patent v. Latent Distinction: Admits EE anytime there is an ambiguity
      1. Increasingly allow EE to not only resolve ambiguity, but correct mistakes in light of testator’s true intent to reform the will
2. Scrivener’s Error Doctrine
   1. Where there is clear and convincing evidence (CCE) of scrivener’s error; and
   2. CCE of the error’s effect upon testator’s intent; then
   3. Extrinsic Evidence is admissible to establish and correct the mistake
3. Probable Intent Doctrine
   1. If an unforeseen change in circumstances occurs after a will is executed that is not provided for in the will, and the unforeseen change materially frustrates the testator’s intent as expressed in the will, the court takes EE of the circumstances surrounding the testator, with particular attention to family considerations
   2. Court puts itself in the testator’s situation and decides what it think the testator probably would have done under the circumstances

*Death of Beneficiary before Death of Testator; Anti-Lapse Statutes*

1. Death of Beneficiary before Death of Testator
   1. Survival Requirement: Anyone taking from a decedent must survive the decedent
      1. UPC/Modern approach: Beneficiary under a will or trust must prove by CCE that they survived the decedent by at least a millisecond
         1. Common law only had a standard by a preponderance of the evidence
      2. Transferor’s Intent: If the will expressly imposes a longer survival requirement than the default of the jurisdiction, beneficiary must prove they meet the survival requirement imposed by express terms of the will
   2. Lapse: If a beneficiary does not survive the testator, the gift lapses and fails
      1. Gift is void if the beneficiary is dead when the will is executed
      2. Gift lapses if a beneficiary is alive when it is executed, but dies before the testator
      3. Void gift is treated the same as a lapsed gift for most purposes
   3. Failed/void gifts and their default takers
      1. Specific gifts – falls to the residuary clause (RC), if no RC then to intestacy
         1. Testator intends for a specific item, and only that item, to satisfy the gift
         2. Look for keyword “my”
      2. General gifts – falls to the RC, if no RC then to intestacy
         1. Gift of pecuniary value satisfied by using any item that fits the description of the gift (ex. $1,000 – bills, check, bonds, any form)
      3. Residuary gift – if it fails completely, falls to intestacy
         1. Gift that gives way all of the testator’s property that has not otherwise been given away (ex. rest of my estate)
      4. Part of residuary – if there are multiple takers in the residuary clause, and the gift fails as to one or more, but not to all of them, the part that fails is distributed among the other beneficiaries in the residuary clause
         1. UPC §2-604(b): If testator included a residuary clause, intent was for all of the testator’s property to pass via the will and nothing through intestacy, as long as any part of the residuary clause is valid, that part catches whichever part of the residuary clause fails
2. Anti Laps Statute (UPC §2-605): The lapsed gift goes to the issue of the predeceased beneficiary
   1. Where there is a **lapse**;
      1. Applies the doctrine to any qualifying beneficiary who predeceases the testator regardless of whether the beneficiary dies before or after execution of the will
      2. Common law applied to lapsed gifts only, not to void gifts
      3. UPC approach is that anti-lapse does not apply to spouses, only issue
   2. The predeceased beneficiary meets the **statutory degree of relationship** to the testator;
      1. Predeceased beneficiary required to be a grand parent or a lineal descendant of a grandparent to qualify for the anti-lapse doctrine
      2. Amendment expands scope of predeceased beneficiaries to include stepchildren
   3. The predeceased beneficiary has **issue who survive the testator**; and
      1. Predeceased beneficiary must have issue who survive not only the predeceased beneficiary, but also the testator
      2. UPC requires that the issue survive the testator by 120 hours
   4. The will does *not*express a **contrary intent**
      1. If the beneficiary is related closely enough to the testator and is survived by issue, the testator is presumed to have preferred that the gift go to the issue of the predeceased beneficiary rather than fail
      2. This is a rebuttable presumption, but generally, any **contrary intent must be expressed in the will**
         1. Any express words of survival; or
            1. UPC provides that mere worlds of survival (if he survives me, or my surviving issue), w/o more, is not sufficient to constitute an express intent barring application of anti lapse (2-603(b)(3))
         2. Any express gift-over in the will to another beneficiary in the event of the first beneficiary’s death constitutes a sufficient “express contrary intent” to bar application of the anti-lapse doctrine

*Problems in Will Construction – Changes in Property After Execution of Will*

1. Common Law Ademption (Identity Approach)
   1. When the testator makes a specific gift in their will, and thereafter the item in question is transferred to someone else, what does the beneficiary take?
      1. If the will makes a specific gift, the executor goes through the testator’s probate estate to see if they can identify that item in the estate
      2. If they can, beneficiary takes the item
      3. If they cannot find the item, gift is adeemed (revoked)
   2. Does not matter why the property that was the specific gift is no longer in the testator’s probate estate
      1. Where the testator voluntarily transfers the item, knowing it is subject of a specific gift in a will, presumed that testator meant to revoke the gift
      2. Even if item was involuntarily transferred, stolen or destroyed accidentally, the absent gift is still treated as revoked
   3. Incomplete disposal – If any part of the specific gift remains in the testator’s estate when the testator dies, the beneficiary is entitled to receive whatever is left of the specific gift
2. UPC §2-606: Ademption by Extinction
   1. Accepts extrinsic evidence on what the testator intended, or would have intended, as to the specific gift in question
      1. Greatly limits the scope of the Ademption doctrine to the point it is arguably more likely the specific gift will not be adeemed even where it cannot be found in the testator’s estate at time of death
   2. Replacement property exception
      1. Where a testator owns property at death that was acquired to replace property that was a specific gift in his or her will, beneficiary of the specific gift gets the replacement property (a)(5)
   3. Outstanding Balance Doctrine
      1. Whether the property is transferred voluntarily or involuntarily, if the testator is owed money at time of death as a result of the transfer of the property subject to the specific gift, the outstanding balance is given to the beneficiary of the specific gift (a)(1)-(3)
   4. Testator’s intent approach
      1. If neither the replacement property doctrine nor the outstanding balance doctrine apply, UPC provides that the beneficiary of the specific gift is entitle to money equal to the value of the specifically devised property as of the date of its disposition if the beneficiary can establish (a)(6)
         1. Ademption would be inconsistent with the testator’s plan of distribution; or
         2. The testator did not intend for Ademption to apply
   5. Conservatorship Exception
      1. If the property subject to the specific gift was transferred during conservatorship or by an agent acting under a durable power of attorney for an incapacitated principal, Ademption doctrine does not apply
3. UPC §2-609: Ademption by Satisfaction
   1. After executing a will, if the testator makes an inter vivos gift to a beneficiary under the will, issue is whether the inter vivos transfer should count against the beneficiary’s testamentary share of the estate
      1. At CL, if the beneficiary is a child of the testator and the property transferred inter vivos were like kind to that divided under the will…
      2. Rebuttable presumption that the testator wanted the inter vivos gift to count against child’s share under the will
   2. UPC Approach
      1. Inter vivos gifts to any beneficiaries under a will are presumed not to be in satisfaction, absent a writing expressing such an intent
      2. Writing can be the will making the testamentary gift, a writing by testator at the time of the inter vivos gift, or a writing created by the donee anytime
   3. Satisfaction only applies to general gifts
      1. If the gift is a specific gift, where the testator gave the specific gift inter vivos to the beneficiary under the will, Ademption applies
4. UPC §2-607: Exoneration of Liens
   1. Where a will devises property that is burdened by debt (mortgage), issue is whether
      1. The beneficiary should take the devised property free and clear of the debt, reducing residuary gift; or
      2. Whether beneficiary should take gift subject to death
   2. If the will fails to indicate testator’s intent on the issue, default rule is…
      1. CL: Presumption is that the beneficiary is to take the devised property free and clear of the debt
      2. UPC: Presumption is that the testator intended the beneficiary to take the property subject to the accompanying debt
         1. General clause in a will to pay all the testator’s just debts is not enough to overcome this presumption
         2. Express reference the debt in question is required
5. UPC §3-902: Abatement
   1. If the testator gives away more in his or her will than they have to give, abatement provides for which gifts are reduced first
      1. Based upon testator’s presumed intent, residuary clause is reduced first, then general gifts, and specific gifts last
      2. More precise the nature of the gift, more important it must have been
   2. Minority approach adopts UPC approach, but also includes a provision giving courts flexibility to alter order of abatement if it seems inconsistent with overall testamentary wishes

*Problems in Will Construction – Class Gifts*

1. Class Gift Defined
   1. Gift to a group of individuals with a built-in right of survivorship (membership in the class is not fixed)
   2. Gift to multiple individuals is a class gift if the transferor so intends, and where the intent is not clear, typically the courts look at several variables
2. Gifts to “Surviving Children”
   1. If instrument fails to expressly provide what is to happen upon the death of one of the children before distributing the property…
      1. The gift is expressly limited to the transferor’s surviving children
      2. Surviving issue of any deceased children do not take
   2. Use of the term “children” or “issue” does not include stepchildren unless expressed so
3. Gifts to “Issue/Descendents”
   1. Indicates the intent that if an issue dies and is survived by issue, his share can be taken by his surviving issue
      1. CL presumes non-marital children are not included, but rebuttable
      2. Modern trend presumes that both marital and nonmarital children are included in the term “issue/descendent”
4. Gifts to Adopted Children as “Child or Issue” under a Written Instrument
   1. UPC provides that adopted children and bastard children are included in gifts in written instruments to the same extent they would be if the gift were distributed through intestacy
      1. Terms that do not distinguish between whole and half bloods are construed as including both
      2. Terms that do not differentiate relatives by blood from relatives by affinity (aunts, uncles, nieces, etc…) are construed as excluding relatives by affinity
5. Gifts to “A for Life, Remainder to A’s Heirs” – Rule in Shelley’s Case
   1. Where real estate is conveyed by a single written instrument (will, trust, or deed) and the instrument purports to create a contingent remainder in the heirs of a life tenant, give the remainder to the life tenant, vesting the remainder
      1. If there is no other vested interest between the life estate and the remainder, the interests will merge
   2. RISC is a rule of law, the rule applies regardless of the clarity of the transferor’s intent to create a remainder in the heirs of the life tenant
6. Gifts to “A and Her/His Children” – Rule in *Wild’s* Case
   1. “To A and her children” contains an inherent ambiguity as to who takes what interest
      1. CL established in Wild’s case is that A and her children take as tenants in common
      2. Under modern trend, some courts construe this type of gift as convening a life estate to A, remainder to the children
7. Class Closing Rules
   1. A class, by definition, is a generic description of a group of individuals who share a common characteristic
      1. Ex. Gift to A’s children (but A may have future children)
      2. Description of the common characteristic is such that other people holding that characteristic may enter the class
   2. CL Rule of Convenience
      1. As soon as one member of the class legally has the right to receives, posses, and/or enjoy his or her share of the property, class legally closes
         1. Based upon the transferor’s presumed intent, and not rule of law
      2. Closing a class under this rule does not mean that all of those who are included in the class will necessarily receive a share of the property
         1. Class may close, but the class may still be contingent as to some members of the class and if any one of them does not satisfy the express condition precedent, they do not share in the property
   3. Direct/Immediate Gifts
      1. When a written instrument (typically a will) provides for an outright gift to a class of beneficiaries, the class closes upon the death of the transferor/testator
         1. Exception – where no member of the class was born before the transferor’s death, it is presumed that the transferor knew the is and still made the gift
            1. Here, the rule of convenience does not apply and the class is held open until it closes naturally, the death of the designated party who controls access to the class
   4. Future interests/Postponed Gifts
      1. Where the written instrument creates a future interest in a class, first ask
         1. Is the gift of (1) income or (2) principal
      2. Gifts of Income: Where gift is a periodic payment of income, the class closes upon each periodic date for distribution of the income
         1. Bc no beneficiary is entitled to distribution of any income until the designated date for distribution, the class cannot be closed until then
         2. Class auto reopens for the duration for the next payment period
      3. Gifts of Principal: Where a gift is a one-time disbursement of principal, earliest the class will close is at the end of the preceding estate if at least one member of the class is entitled to distribution – one interest has vested
         1. Even if that member is dead, if the interest is transmissible or pass via anti-lapse to his issue, future interest has technically vested
         2. If the gift is to the children of a designated person who had not had any children yet, the rule appears to be that the exception that applies to outright gifts applies to future interests
      4. Where a trust fails to provide for how the income is to be treated, default is against holding and accumulating the income
         1. Income is distributable to beneficiaries on a regular basis as income accrues
      5. Where a written instrument provides for an outright gift of a specific amount to each class member, the class closes absolutely and completely at the time for distribution
         1. No exception applies, even if no member of the class has been born yet

*Problems in Will Construction – Miscellaneous*

1. Omission of Issue – Pretermitted Children
   1. Applies where a testator executes a will, thereafter has a child, and dies without revising or revoking his will
      1. Rebuttable Presumption: Presumed that the testator meant to amend his or her will to provide for his new child, but died before getting around to it
      2. How to Rebut the Presumption: Can rebut only by showing that
         1. The failure to provide for the new child was intentional and intent appears in the will;
         2. Testator provided for the child outside of the will and the intent to transfer outside of the will instead of the child taking under the will is established by any evidence, including amount of the transfer; or
         3. Testator had one or more children when the will was executed, and devised substantially all of his or her estate to the other parent of the omitted child
      3. Omitted Child’s Share: If presumption that the failure to provide for the new child was not intentional is not rebutted, omitted child receives their intestate share of the testator’s probate estate
   2. UPC §2-302: Tracks the basic provisions of the traditional pretermitted child doctrine, but has a few revisions…
      1. Adopted Children: UPC expressly provides that doctrine applies co children born **or** adopted after execution of the will
      2. Other Children: Revokes rebut option #3 from traditional approach
         1. Evidence of testator having one or more children when the will is executed, and devising substantially all of his estate to the other parent of the omitted child, does not defeat a child’s claim
      3. Omitted Child’s Share: Depends on whether the testator has other children living at the time he or she executes the will
         1. **No children**: If testator had no children when executing the will, omitted child receives his intestate share,
            1. If the testator devised all or substantially all of his or her estate to the other parent of the omitted child and the other parent survives the testator and is entitled to take, OC gets nothing
         2. **One or More Children**: If testator has one or more children at the time he executes the will, and the will devised property to one or more of then living children, the omitted child’s share…
            1. Is taken out of the portion of the testator’s estate being devised to then living children; and
            2. Should equal the share the children are receiving, had the testator included all omitted children originally in the will
         3. **Overlooked Children**: Children overlooked bc the testator thought the child was dead when executing will are treated as another pretermitted child
            1. If left out bc testator did not know the child existed, overlooked child **does not** get a share
2. Gifts of Principal or Interest at Certain Ages (Clobberie’s Case)
   1. Established three rules of construction concerning gifts to be paid upon a beneficiary reaching a specific age
      1. Exact working of the gift is critical to determine which rule applies
      2. 2/3 of the rules are in favor of vested interests and the CL preference against a survival requirement, but one implies a survival requirement resulting in a contingent interest
   2. **Rule 1**: Where one conveys (by will or trust), “all the **income** to a beneficiary, with principal **to be paid** **when** she reaches a specific age upon marriage” and the beneficiary dies before reaching that age or marrying, the beneficiary’s interest in the principle is transmissible (donee could devise to anyone)
      1. Gift is complete upon execution of the instrument, and only possession is to be delayed until the requirement (age/marriage) is met
      2. Upon the death of the beneficiary, however, there is no need to delay distribution of the principal, and principal is paid to beneficiary’s estate upon their death
   3. **Rule 2**: Where one conveys a sum of money “to a beneficiary **at**” a specific age, if the beneficiary dies before reaching that age, the gift fails
      1. “At a specific age” is an express condition precedent that the beneficiary must reach the stated age
      2. This wording does not indicate a completed gift that has just been delayed until an age is reached, instead, the whole gift is contingent upon reaching that age
   4. **Rule 3**: When one conveys a sum of money “to a beneficiary, to be paid when the beneficiary reaches” a specific age and the party dies before reaching that age, the beneficiary’s interest is transmissible
      1. Comparable to the rationale for the first rule
      2. Language of the gift indicates a completed gift, with possession delayed until a specific age, as supported by the location of the coma
   5. UPC §2-707: Advocates a lapse/anti-lapse type approach to all future interests in trust (irrevocable or revocable), unless the instrument expressly provides otherwise
      1. Implied Survival Requirement: Requires holders of future interests to survive to the time of distribution
         1. If a remainderman does not survive to the time for distribution, the UPC provides for a gift-over to remainderman’s issue
         2. If remainderman has no issue, the gift fails and is returned to the grantor’s estate unless there is an express default who is to take if the gift fails

**IX. Restrictions on the Power of Disposition – Protecting the Surviving Spouse**

*Overview of Surviving Spouse’s Right to Support*

1. Two different types of spousal protection
   1. Support for the rest of the surviving souse’s life; or
   2. An outright share of the marital property, regardless of who acquired the marital property
2. Support – In virtually every state a surviving spouse has rights for support under
   1. Social security system
      1. Only a SS can receive the worker’s survivor’s benefit
      2. Worker spouse cannot transfer benefit to anyone else
   2. ERISA of 1974
      1. SS must have survivorship rights in the worker spouse’s retirement benefits
      2. SS can waive their own rights in the worker spouse’s private pension plan
   3. Homestead exemption
      1. Ensures that a surviving spouse has somewhere to live
      2. UPC recommends lump sum payment of $22,500 to provide housing
   4. Personal Property Set-aside
      1. SS is entitled to claim certain tangible personal property items regardless of the deceased spouse’s attempts to devise them
   5. Family Allowance
      1. SS has a right to receive a family allowance out of the estate during the probate process (but not for life)
      2. Majority of jurisdictions are in favor of elective share for the SS in this process
3. Share of Marital Property – Majority follow the separate property approach
   1. Separate Property: Any property acquired by either spouse, including his or her earnings, are that spouse’s separate property
      1. Spouse has no rights in the other spouse’s separate property absent divorce or death
   2. Community Property: While property acquired before marriage and gifts acquired during marriage by either spouse are their separate property, all earnings acquired during the marriage by either spouse are community property
      1. Each spouse has an undivided ½ interest in each community property asset
      2. Upon one spouse’s death, each community property asset is divided in half
      3. The surviving spouse’s ½ is theirs immediately and outright, and the deceased spouse’s share goes into probate to devise as he wishes

*The Elective Share*

1. Elective Share Doctrine
   1. The “at the time of death” spousal protection adopted by the separate property system
      1. During the marriage, each spouse owns all of his or her earnings as his or her separate property
      2. SPS assumes that the spouses will care for e/o and treat each other properly, and intervenes only when the marriage is terminated at divorce or death
   2. The elective share typically gives the SS the right to claim 1/3 of the deceased spouse’s probate property
      1. ESD applies only if the deceased spouse did not leave the surviving spouse at least that 1/3 amount in their last will
      2. Elective share applies regardless of the length of the marriage
2. UPC Approach – Personal Right
   1. Only the surviving spouse can claim the elective share
      1. If the SS dies before asserting the claim, the SS’s estate, heirs, and creditors have no standing to claim the share even if the time to assert the claim has not expired
      2. Elective share has to be “claimed,” and only the SS can claim it, so the elective share looks like support, more so than sharing of marital property
      3. No court has extended elective share doctrine to same-sex couples living in a spousal-like relationship
   2. Incompetent Spouse: If the surviving spouse lacks the capacity to decide whether to exercise the elective share, a guardian can decide in the best interest of the SS
      1. UPC provides that if the elective share is exercised for an incompetent spouse, share of the elective share that exceeds the share the spouse was taking under the deceased spouse’s will is placed in a custodial trust
      2. The SS has a life estate, and a remainder in the devisees under the will, minimizing the effect upon the deceased spouse’s estate plan
3. UPC Marital Property Approach – “Augmented Estate” and the Elective Share
   1. The Augmented Estate combines the property of both spouses and gives the SS a share of the combined augmented estate that depends on the duration of the marriage
      1. UPC §2-203 abandons the fixed 1/3 elective share and provides a gradually increasing share depending on the length of the marriage
      2. SS starts out entitled to 3% of the couple’s marital property, and the share increase approximately 3% points a year until the S is entitled to 50% of the couple’s marital property after 15 years of marriage
   2. Under the UPC, the augmented estate no longer focuses on the deceased spouse’s property, but includes both spouse’s property
      1. If neither couple had any separate property when they married, this approach mirrors the community property approach
      2. Includes transfers made before marriage if the deceased spouse retained substantial control over the property
      3. Expressly includes life insurance proceeds paid to someone other than the surviving spouse into the augmented estate
   3. UPC augmented estate is broader than the community property notion of marital property

*Special Case of Community Property*

1. Concept of Community Property
   1. All marital property is owned by the community the moment it is acquired
      1. Marital property is any property acquired during marriage as a result of the time, energy, or labor of either spouse
   2. Practically, community property is any earnings acquired by either spouse during the marriage (and any property purchased w/ community property earnings)
      1. Property acquired by gift, devise, or inheritance during marriage or by either spouse before marriage is separate property
   3. Upon death of one spouse, each community property asset is divided 50/50
      1. SS holds his share outright and the deceased spouse’s share goes to probate
      2. Deceased spouse can devise their share as they wish
2. Putting a Spouse to an Election
   1. Community Property jurisdictions do not recognize an elective share, but do permit a deceased spouse to put a SS to an election
   2. Deceased spouse conditions a devise to the SS on the SS agreeing to the decease spouse being permitted to give away some of the SS’s property
   3. Must have clear intent to put SS to an election

**X. Will Substitutes: Avoidance of Probate**

*Overview to Will Substitutes*

1. Historically, four types of legal arrangements, for all practical purposes passed property ate time of death but were not subject to Wills Act formalities
   1. Life insurance contracts
   2. Joint tenancies
   3. Certain possessory estate and future interests (legal life estates and remainders)
   4. Inter vivos trusts
2. Common Law
   1. Inasmuch as these will substitutes are subsets of other areas of law, the rules and doctrines of those other areas of law control
      1. Ex. If the beneficiary of an insurance k dies before the insured, k law would apply and the beneficiary would not have to survive the testator to claim his interest under the k
   2. At CL, if the written instrument does not qualify as one of the four above types of property arrangements, the written instrument has to qualify as a valid will
      1. If it does not qualify as a valid will either, the written instrument is an invalid attempt to transfer property at time of death without complying with the Wills Act formalities, no matter how clear the intent in the instrument
3. Modern trend
   1. Will substitutes are subjected to the wills-related construction doctrines
   2. Modern trend is to recognize a whole plethora of will substitutes

*Contracts Relating to Wills*

1. Introduction
   1. Under probate administration, creditors take first before beneficiaries under a will or heirs under intestacy
      1. Creditors have previously extended valuable consideration to decedent and are entitled to recover before beneficiaries or heirs, who are only donees
   2. K’s relating to wills must meet k requirements of offer, acceptance, and consideration
2. Remedy – Constructive Trust
   1. If a K concerning a will is established and the testator breaches the agreement by executing a different will, the probate court still probates the will the testator executed
      1. However, a constructive trust based on the k typically is imposed on the testator’s probate property
   2. The devisees or heirs, are ordered to give the property to the k beneficiary
3. Writing Requirement
   1. CL Equitable Estoppel – Oral agreements btwn parties that one will leave property to the other upon the former’s death do not have to be in writing
   2. UPC §2-514 – Reduces potential for fraudulent claims by requiring that k concerning wills must be evidence by some writing signed by the decedent
4. Contracts not to Revoke a Will
   1. Situation arises when a party agrees not to revoke a will or a provision in a will
      1. Joint Wills: Single will properly executed by 2 parties that serves as the last will and testament for each of the two parties (husband and wife)
         1. Upon the death of the first party, all of his or her property goes to the surviving party to the joint will
         2. Upon the death of the surviving party, all that property of the second-to-die goes to agreed upon beneficiaries
      2. Mutual (Mirror) Wills: Similar to joint wills, except there are two will, each having the same testamentary distribution scheme
         1. Each spouse has his or her own separate will that typically provides that upon the spouse’s death, all property goes to the surviving spouse, if one, and otherwise to their children (or agreed upon beneficiary)
      3. UPC §2-514 (Modern Approach)
         1. Executing a joint will or mutual wills **does not** create a presumption of a k not to revoke
         2. Surviving party is free to dispose of all of his or her property, including the property received by due to first party’s death, as the surviving party sees fit
   2. Contract Rights v. Spousal Protection Rights
      1. Where there is a k not to revoke and the parties to the contract are husband and wife, if after the first spouse’s death the SS remarries, the k not to revoke comes into conflict
         1. **Pretermitted spouse doctrine** states that where a will is executed pre-marriage and the testator marries and dies w/o changing it to provide for the new spouse
            1. The statute presumes the testator wanted to provide for the new spouse but failed to do it before dying
            2. Gives new spouse their intestate share before any other beneficiaries take under the will
         2. **Elective Share doctrine** permits a SS to claim a share of the deceased spouse’s estate regardless of the terms of the will and before ay beneficiaries take under will
      2. Majority Approach to K not to Revoke
         1. Where the SS remarries and the new spouse’s claims constitute a breach of the k not to revoke majority of jurisdiction enforce the terms of the K and let the k beneficiaries take before the new spouse (who married the SS)
         2. The new spouse of the SS does not get a typical share where a K not to revoke previously existed with the original decedent spouse
   3. Property Affected
      1. Scope of the property subject to the k not to revoke should be addressed in the k, but w/o clear drafting, the courts tend to hold that the standard k not to revoke applies to
         1. Property the surviving party received from the deceased party; and
         2. The surviving party’s property
      2. Essentially applies to both the property the surviving party held at the time of death of the first party and the property subsequently acquired by the surviving party
         1. The SS has a life estate in the property subject to the K not to revoke, with the right to use and consume such property reasonably
      3. Under general K doctrine, beneficiary to a K does not have to survive the other party to the k to claim their benefits under the K
         1. Applied to beneficiaries of the K not to revoke, courts hold that the beneficiaries claim in their capacity as will beneficiaries unless and until there is a breach of the K not to revoke
         2. If there **is a breach**, at that moment their status changes to creditors claiming under the K; If there is **no breach**, the beneficiaries must survive decedent to take

*Contracts w/ Payable-on-Death Clauses*

1. Life Insurance
   1. Classic example of a k with a payable-on-death (POD) clause
   2. Agreement effectively transfers property from the insured to a designated beneficiary upon the insured’s death, but the written agreement need not be created with Wills Act formality
2. Common Law
   1. Only life insurance k’s are exempt form the wills act formalities
   2. If the k is any other type of k with a P.O.D. clause
      1. Regardless of the party’s intent that the property in question should be transferred to the identified beneficiary upon the party’s death
      2. If the written instrument does not qualify as a will
      3. **It is an invalid attempt to transfer property at time of death**
3. UPC §6-101 – P.O.D. Clauses
   1. Expands the historical will substitute exemption for life insurance k’s and applies it to any and all contracts and instruments with P.O.D. clauses
      1. Employment k’s, promissory notes, deposit agreements, pension plans, etc…
   2. Beneficiaries of a P.O.D. clause do not receive an irrevocable property interest inter vivos
      1. The transferor who creates the P.O.D. clause is presumed to have the right to cancel or change the P.O.D. clause (absent consideration)
   3. UPC approach generally applies the will-related rules to the will substitutes, including life insurance policies
      1. The wills-related rules are primarily those rules of construction that arise out of changes that can occur between when the instrument is created and when the transferor/testator dies
4. Example: *Cook v. Equitable Life Assurance Society* 
   1. Cook purchase a life insurance policy and designated his then wife, Doris, as beneficiary
      1. He and Doris divorced, and he married Margaret
      2. Insurance policy expressly provided that the owner of the policy may change the beneficiary by written notice to the company, but he never did so
      3. Instead, Douglas executed a holographic will after marrying Margaret that expressly state he was giving the insurance policy to his wife Margaret and his son
   2. Court held that the divorce did not revoke the contractual provisions in favor of Douglas’ ex-spouse and awarded the life insurance proceeds to Doris as the k beneficiary designation controlled
      1. This is the CL, revocation by operation of law (divorce) approach that applies to wills only
   3. Under the UPC, revocation by operation of law applies to all will substitutes, including life insurance policies and Doris’ status as beneficiary of his policy would have revoke upon divorce
      1. Absent a substitute beneficiary, proceeds would have defaulted to his probate estate where his will provision in favor of Margaret would have been given effect
5. Transfer on death (TOD) Deeds
   1. Key characteristics of TOD Deeds are…
      1. Deed must be executed and recorded intervivos, but it does not become effective until the death of the grantor
         1. Absolutely no interest is transferred to the grantee until the grantor dies
      2. The deed is revocable during the grantor’s life (but typically only by recording another deed that revokes the initial deed); and
      3. The transfer is effective immediately upon the grantor’s death and avoids probate
   2. About 12 states have a TODD as another non-probate option
6. Superwill
   1. If a will is permitted to change the terms of a will substitute, such a will is known as a superwill
      1. Ex. Individual might have several items (insurance, pension, bank account), all with POD clauses identifying a particular beneficiary to take after death
      2. Inasmuch as these written instruments constitute will substitutes, issue is whether a subsequently executed will should have power to revise these instruments
   2. UPC §6-101
      1. UPC adopts the superwill doctrine **only** if the k permits the beneficiary of the policy to be changed by a subsequently executed will
      2. UPC is silent as to what the rule should be if the K does not address the issue
7. Pension Plans
   1. Involve creating a property right in a fund of money to be used by the individual upon retirement
      1. If benefits are not completely exhausted when the party dies, the party typically has a right to designate a 3rd party beneficiary to receive what’s left
   2. Defined Benefit Plan: Typically funded by the ER, there is no individual account, and the EE receives a fixed benefit (ex. % of highest annual salary) for the remainder of his life – an annuity
      1. *Annuities* – Stream of income for the remainder of one’s lifetime, paid monthly at a fixed amount; can be purchased separates or are an option as to how one can receive benefits from a pension plan
      2. *Joint and Survivor Annuity* – Many couples choose this bc it guarantees fixed payments not only for the life of the EE, but also for the life of his or her spouse
   3. Defined Contribution Plan: Level of “back end” benefits is not fixed, rather, the “front end” contributions are fixed
      1. Typically, each month the ER and the EE will contribute a fixed % of the EE’s salary to an individual account set up for the individual
      2. Upon retirement, the individual has rights to the funds in his or her account

*Multiple Party Accounts*

1. UPC §§6-201 to 6-215: MPAs can take many forms – bank accounts, brokerage accounts, etc…
   1. UPC provides that, inter vivos, it is presumed that the parties to a MPA own in proportion to their contributions and that upon death of any party, it is presumed that there is a right of survivorship
      1. The presumptions control the distribution of the money in the account unless clear and convincing evidence of a contrary intent exists
   2. UPC §6-212: Survival Requirement
      1. Imposes an express survival requirement for parties to a MPA
      2. No express survival requirement for other k’s with POD accounts
   3. The UPC permits POD multiple party accounts
      1. If the acct is a POD account, the UPC applies the will-related doctrines of lapse and anti-lapse to the beneficiary
      2. In addition, if the account is a POD, beneficiary cannot be changed by will §6-213(b)
2. Totten Trusts
   1. Very similar to POD accounts, and are rationalized as a form of inter vivos trusts (though not subject to the general trust rules)
      1. Depositor sets up a totten account by depositing money in the account in the name of the depositor for the benefit of the beneficiary
      2. Legal title is in the name of the depositor, but equitable title is in the name of the beneficiary
      3. The bifurcation of the legal and equitable title constitutes an intent to create a trust
   2. The totten trust is deemed revocable so that depositor withdrawals are permitted w/o constituting a breach of trust
      1. Though general trust law holds a trust is irrevocable unless an express clause states that it is revocable
   3. An express clause in a will changing the beneficiary is permitted
      1. Though generally will cannot change the terms of a will substitute
   4. Most jurisdictions require the beneficiary of a totten trust account to survive the depositor
      1. Though generally at common law there is no survival requirement for beneficiaries claiming under trusts or other will substitutes

*Joint Tenancies in Real Property*

1. Joint tenancy is a form of concurrent ownership
   1. Occurs where multiple parties own property in question both in whole and in shares
      1. Under right of survivorship, upon the death of one party, his or her share is extinguished and the shares of the surviving joint tenants are recalculated
   2. In the case of a joint tenancy w/ more than two parties, this process of recalculating shares continues until only one party is surviving
      1. At that time, the concurrent ownership ends and the party owns it outright w/ no right of survivorship
   3. When only one party remains, the property is no longer non-probate property,
      1. Upon that party’s death, it falls into his probate estate, unless he took the appropriate steps to create a new non-probate arrangement
2. Probate Avoidance
   1. If a joint tenant (or tenant in the entirety) dies, his or her share is extinguished
      1. His or her share was tantamount to a life estate
   2. The deceased tenant has no interest in the property that an fall to probate
      1. No interest passes when a joint tenant (or txe) dies
      2. The tenants owned in whole from the outset
   3. The surviving tenant(s)’ shares are simply recalculated
3. Devisability
   1. Although a joint tenancy can be severed inter vivos and converted into a tenancy in common (w/ inheritable and devisable shares), the execution of a will does not sever a joint tenancy (or txe)
   2. Even if the will makes express reference to the deceased tenant’s interest in the property, execution of the will does not sever the joint tenancy
   3. The right of survivorship extinguishes the joint tenant’s interest before a will has any effect upon the property
4. Creditor’s Claims
   1. Nothing is left for creditors after joint tenant dies – interest in property extinguishes upon death
      1. Each joint tenants interest is tantamount to a life estate, and when the life estate is extinguished, party has no remaining interest in the party for creditors to reach
   2. Creditors of a joint tenant must assert claims while the joint tenant is alive

**XI. An Overview of Trusts**

1. Trust is a Bifurcated Gift
   1. One party (the settlor) gives property to a second party (the trustee) to hold and manage for the benefit of a third party (the beneficiary)
      1. The trustee holds legal title to the trust property and manages the trust property
      2. Beneficiaries hold equitable tile
   2. The trustee owes a fiduciary duty to the beneficiaries to mange the trust party in their best interest
      1. The same party can be settlor, trustee, and beneficiary as long as there is another co-trustee *or* beneficiary
      2. Trust is created at the moment it is actually funded
      3. Generally, a trust will not fail for want of a trustee – courts will appoint a trustee if needed
2. Trust is an On-going Gift
   1. Trust property is bifurcated between the income and principal; and
      1. Trust principal – property the settlor transferred to the trust
      2. Trust income – money generated by the trust principal while the trustee is holding and managing the trust
      3. Beneficiary’s interest can be in the trust income and/or the trust principal
   2. The equitable interest is typically bifurcated between a beneficiary who holds the possessory estate (typically a life estate) and the beneficiaries who hold the future interests (typically a remainder)
      1. Beneficiary who currently holds the right to benefit from the trust right now holds the possessory equitable interest
      2. Party who currently holds the right to benefit from the trust in the future holds the future equitable interest
3. Ex. of Gift vs. Trust
   1. Classic Intervivos Gift – A gives B $1,000
      1. B can do whatever she wants with the gift
   2. Classic Trust – A gives B $1,000 to use for the benefit of C during her life time, and upon her death, any remaining principal is given to D
      1. B cannot use the property for her own benefit, only to the benefit of C and A
      2. C has a life estate interest, and D has the remainder interest

*Requirements to Create a Valid Trust*

1. Requirements to have a valid trust…
   1. The settlor must have the intent to create a trust
   2. The trust must be funded
   3. The thrust must have ascertainable beneficiaries
   4. The terms of the trust *may* have to be in writing
2. Requirement (1): Intent to Create a Trust
   1. Intent to create a trust arises when a party transfers prop to a 2nd party for the benefit of a 3rd party
      1. Use of any pertinent term – *trustee*, *trust*, or *in trust* – generally used to express intent
   2. Precatory Trust: Where a donor makes a gift to a donee with the “wish” or “hope” that the donee will use the property for the benefit of another
      1. Precatory trust **is not a trust**
      2. There is no legal obligation to use the property for the benefit of the other party, only a moral obligation exists
   3. Gifts that Fail for Want of Delivery: Where a party makes a gratuitous promise to make a gift in the future but dies before properly transferring the property…
      1. Generally, the failed gift (for failure of delivery) cannot be saved by converting the intent
      2. The intent to make a gift in the future cannot be made into a present declaration of an intent to create a trust with the declarant as a trustee
3. Requirement (2): Funding for the Trust
   1. Trust is funded when a property is transferred to the trust/trustee
      1. Virtually any property interests *except* for future profits and expectancies qualify as an adequate property interest
   2. UTC §401: Declaration of Trust
      1. Where the settlor is the trustee, if the trust property is **personal property**, generally the settlor’s expression of intent also transfers the property to the trust
         1. No separate act is necessary to fund the trust
      2. If the property being transferred to the trust is **real property**, as long as the declaration of trust is in writing and adequately references the real property, the property is considered as transferred to the trust
         1. No additional writing is required
   3. Deed of Trust: Where a 3rd party is the trustee, focus on how the deed of trust was expressed
      1. If oral, there must be physical or symbolic delivery of the property to the trustee
      2. If written, and the writing expressly references the property subject to the trust, jurisdictions are split…
         1. Does this also transfer the property in question to the trustee? or
         2. Must there be a separate act of delivery?
4. Requirement (3): Ascertainable Beneficiaries
   1. Beneficiaries are ascertainable if they are identified by name or if there is an objective method of identifying the beneficiaries
      1. Only exception to the requirement that the beneficiaries must be ascertainable is where a trust is created for unborn children
      2. In that case of unborn children, the courts will monitor the trustee’s actions
   2. UTC §408: Honorary Trusts
      1. Where a private trust would otherwise fail for want of ascertainable beneficiaries, but…
         1. The purpose of the trust is such that it is impossible to have an ascertainable beneficiary (ex. care of a gravesite), *and*
         2. The purpose is *specific* and *honorable*, and not capricious or illegal…then
         3. **The honorary trust doctrine permits the trust to continue as long as the “trustee” agrees to honor the term of the trust**
   3. UTC §409: RaP Wait-and-See Approach
      1. Technically, such trusts are subject to the RaP and teat may cause it to fail, but under the modern RaP courts usually find a way around it, at least for 21 years
         1. The rule is not tested in the abstract, courts let the time period run to see if the administration of the trust actually continues for longer than the max period
         2. Honorary trust is allowed to continue for at lest 21 years
5. Requirement (4): When the Trust must be in Writing
   1. Terms of the trust *must be in writing* if…
      1. The trust is an inter vivos trust that includes real property; or
      2. The trust is a testamentary trust
   2. Remedy – Failed Inter Vivos Trust
      1. Trust fails for want of writing, where…
         1. Settlor executes a deed transferring real property to a trustee; and
         2. The settlor and trustee orally agree on the terms of the inter vivos trust but the deed is silent about the existence of the trust
      2. Remedy is to impose a constructive trust on the trustee to prevent unjust enrichment and the trustee will be ordered to transfer the property to the intended beneficiaries
         1. Look for UE particularly where the trustee procured the transfer as a result of fraud or undue influence or stood in a confidential relationship with the donor
   3. UTC §407: Remedy – Failed Testamentary Trust
      1. Testamentary trust fails for want of writing, where…
         1. Beneficiary under a will agrees to hold the property in question as a trustee for the benefit of others, **but**
         2. The terms of the testamentary trust are not in the will (or incorporated by ref)
      2. Remedy is to impose a constructive trust – property is ordered to be distributed to the intended beneficiaries – on both a secret trust or a semi-secret trust,
         1. *Secret trust* is where the face of the will makes no reference to the testator’s intent that the beneficiary identified in the will was to take in a fiduciary capacity as a trustee, and not as an ordinary beneficiary
         2. *Semi-secret trust* is where the will hints at or expresses the testator’s intent that the beneficiary is to take for the benefit of others, but the identity of the trust beneficiaries and/or the terms of the trust are not set forth in a writing that can be given effect
   4. Remedial Trusts
      1. Constructive trusts and resulting trusts are remedial trusts that arise by operation of law as a matter of equity
         1. Not subject to the traditional trust requirements
      2. Constructive trusts typically arise and are imposed by courts to prevent unjust enrichment
         1. Court will order the party currently holding title to the property to transfer the property to the party that the court concludes, as a matter of equity, is entitled to it
      3. Resulting trusts arise whenever a trust fails in whole or in part
         1. Court will order the property transferred back to the settlor (or the settlor’s estate if the settlor himself is dead)

*Revocable Trusts*

1. Inter Vivos Revocable Trusts
   1. Widely recognized as valid will substitutes that do not have to comply with Wills Act formalities, even where the settlor is also the trustee and life beneficiary
      1. Way to transfer trust on death that is non-probate and outside the will
      2. Can adjust its terms any time up until death
2. UTC §603 Approach to Revocable Inter Vivos Trusts
   1. The UTC provides that while a trust is revocable, the rights of the beneficiaries are subject to the control of the settlor and the duties of the trustee are owed *exclusively* to the settlor
   2. Beneficiaries under a revocable trust have no standing to contest amendments to the trust bc a beneficiary’s interest is, at best, contingent and unenforceable during the settlor’s lifetime
3. UTC §602(a): Revocability of Inter Vivos Trusts
   1. UTC reverses the CL rule and provides that a settlor may revoke or amend an inter vivos trust unless the trust expressly states it is irrevocable – presumes revocability
      1. CL: Inter vivos trusts are presumed to be irrevocable unless the terms of the trust expressly state that the trust is revocable
4. Revocation – Particular Method Expressed
   1. UTC §602(c): Where the trust sets forth a particular method of revocation, it should not be construed as the exclusive method unless the provision expressly makes it exclusive
      1. Substantial compliance w/ the particular method of revocation is sufficient
      2. Will executed after the trust, which specifically refers to the trust of the power to revoke, can revoke a revocable trust if the trust terms do not specify an exclusive method of revocation and if the will is not thereafter revoked
   2. Traditional Doctrine: Where a trust sets forth an express, particular method of revocation, **only** that method of revocation is valid – settlor’s intent controls
5. Revocation – No Particular Method Expressed
   1. If the trust is revocable, but silent as to method of revocation, the power may be exercised in any manner that adequately expresses the intent to revoke
   2. Trust can be revoked by writing, by presumption, and even orally (unless real property involved)
6. Rights of Creditors of the Settlor
   1. Generally, one should not be able to shield one’s assets from one’s creditors
      1. If one has a property interest in a trust, one’s creditors should be able to reach that interest
   2. Under the modern trend, where the settlor is the life beneficiary of a revocable trust, creditors of the settlor can reach the property in the trust, even after settlor’s death

*Pro and Con of Inter Vivos Revocable Trusts in Estate Planning*

1. Benefits of inter vivos trust to hold and manage one’s assets while alive
   1. Professional Management: While a settlor can appoint himself as trustee to hold and administer the trust party, a settlor may appoint a trustee in situations where…
      1. The settlor anticipates impending incapacity
      2. The settlor wants to transfer property to minors who lack capacity to hold title
         1. However, pro management leads to increased costs (trustee’s fees) and administrative expenses in dealing w/ the assets
   2. Segregating Assets: Trusts are a good way of segregating to ensure that assets are not comingled
      1. Particularly attractive to spouses or partners who want to make sure their assets are not mixed with other assets
   3. Taxes: As long as the settlor retains the power to revoke the trust, for tax purposes the trust property is legally treated as if it were still the settlor’s property, regardless of the trust’s terms
2. Time of death for a revocable inter vivos trust avoids probate
   1. Principal benefit of using a revocable, inter vivos trust is that the property transferred to the inter vivos avoids probate, raising an umber of different considerations…
      1. Avoiding probate saves court costs, and other fees, but those future savings are offset by the fees inherent in having the trust drafted and administered
      2. Avoiding probate bypasses any of the hassles and delays associated with probating an estate, however, trusts increase administrative difficulties of dealing w/ a property
      3. Probate requires creditors to bring their claims during a short window, where as creditors get the full SOL for trusts
      4. Revocable inter vivos trust avoids ancillary probate, even if decedent owned real property in a jurisdiction other than where probate is opened
      5. No federal estate tax benefits to using an inter vivos revocable trust

*Testamentary Trusts: Pour-Over Wills and Inter Vivos Trusts*

1. Introduction
   1. Where a will has a pour-over clause giving probate property to the trustee of the testator’s separate trust, the pour-over clause must be validated under…
      1. Incorporation by Reference;
      2. Acts of independent significance; or
      3. Uniform Testamentary Additions to Trusts Act (UTATA)
   2. Pour-over will and trust combination is the most common estate planning combo today, though the property being poured over to the trust under the terms of the will does not avoid probate
2. Acts of Independent Significance
   1. Under acts of independent significance, the trust must have its own significance independent of its effect upon the decedent’s probate property
      1. The trust must be funded inter vivos and have property in it when the testator dies
      2. Subsequent amendments to the trust can be given effect regardless of when they are created
3. Incorporation by Reference
   1. Under incorporation by ref, the trust *instrument* is being incorporated by reference into the will
   2. Critical requirement is that the trust instrument must be in existence when the will is executed
      1. Trust need not be funded intervivos, but the trust that is created is a testamentary trust subject to probate court supervision for the duration of its life
      2. Subsequent amendments to the trust are not valid absent a subsequent codicil to the will
4. Uniform Testamentary Additions to Trusts Act
   1. Under the most widely adopted version of UTATA, the pour-over clause is valid as long as…
      1. The will refers to the trust
      2. The trust terms are set forth in a separate writing other than the will; and
      3. The settlor signed the trust instrument prior to or concurrently w/ the execution of the will
         1. Most recent version indicates the trust instrument need only be signed before the settlor/testator dies, not before or concurrently with the will
   2. Trust need not be funded inter vivos, but will be subject to probate ct supervision after it is created

*Durable Power of Attorney – Relation to Trusts*

1. Power of Attorney Generally
   1. Authorizes one party to act for another
      1. Creates a principal-agent relationship
      2. The terms of the power dictate the scope of the agent’s power to act for the principal
      3. Must typically be created in writing to suit a principal’s wishes
   2. Durable power of attorney continues despite the *incapacity* of the principal party
      1. Standard power of attorney auto terminates upon *incapacity* of the principal
2. Differences from a Trust
   1. Unlike a trustee, an agent’s power under a durable power of attorney automatically terminates upon the principal’s death
      1. Property subject to the durable power of attorney does not avoid probate
   2. An agent does not have legal title to the property subject to the power, making many 3rd parties reluctant in dealing w/ the agent

**XII. Practice Concerns**

*Health Care Directives and Disposition of the Body*

1. No Living Will or Durable Power
   1. In the absence of either document, most jurisdictions authorize an incompetent persons’ immediate family to make health care decisions for them
2. Living Wills
   1. Document that directs that no extraordinary medical treatment be undertaken when there is no reasonable expectation of recovery
      1. Also known as an advance directive, an instructional directive, or medical directive
   2. Disadvantage is that they must anticipate possible scenarios and provide in advance what an individual would want done in a certain situation – lack of flexibility
3. Durable Power of Attorney for Health Care Decisions
   1. Appoints an agent to make health care decisions for one after one becomes incapacitated
      1. Instrument can give general directives to the agent that must be followed, but the power for health care decisions has the benefit of flexibility
   2. By giving the power to an agent, the agent can take the principal’s wishes and all of the circumstances into consideration before making a decision as to what the principal would have wanted under the particular circumstances
4. Disposition of One’s Body
   1. Uniform Anatomical Gift Act – permits one to give one’s body, or any part thereof, to any authorized health care provider for research or transplantation

*Life of Trust – Creditor’s Rights*

1. Creditors of Beneficiary (Who is not the Settlor)
   1. Creditor of a beneficiary steps into the beneficiary’s shoes and acquires the exact same rights the beneficiary has, no more or no less
      1. If beneficiary’s interest in mandatory, creditors have the same right to receive the property
      2. If the beneficiary’s interest is discretionary, the creditors cannot force the trustee to exercise his discretion
2. Discretionary Trusts and Support Trusts
   1. Discretionary trust – Beneficiary’s right to receive a distribution is subject to trustee’s discretion
      1. Trustee’s discretion is based on the terms of the trust – the settlor’s intent
   2. UTC: Creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, regardless of the presence or absence of a spendthrift clause, even if there is a standard limiting the discretion or an abuse of discretion, unless…
      1. Trustee has not complied with a standard of distribution; or
      2. Distribution is ordered to satisfy a judgment or court order against the beneficiary for (former) spousal or child support
   3. Support Trust – Trust that requires the trustee to pay as much income as necessary for the beneficiary’s support and education
      1. UTC abolishes distinction between pure discretionary trusts and support trusts
      2. Gives creditors the same rights over all trusts where the trustee’s power to make distribution is discretionary regardless of the extent of the discretion
3. Spendthrift Trust
   1. If the settlor includes a spendthrift clause in trust, the general rule is that the beneficiary’s creditors cannot step into the beneficiary’s shoes
      1. Spendthrift clause – Prohibits beneficiaries from transferring their interest
      2. Effect is that creditors cannot reach the beneficiary’s interest in trust
   2. UTC limits the exceptions to a spendthrift clause to…
      1. Children entitled to child support pursuant to judgment/court order
      2. Spouses/Ex-souses entitled to spousal support
      3. Claim by federal or state government
      4. Judgment creditor who provided services to protect a beneficiary’s interest in trust
4. Self-Settled Asset Protection Trusts (Settlor as Beneficiary)
   1. Creditors of a beneficiary who is also the settlor can reach the beneficiary’s interest in the trust to the full extent that the trustee could use the trust property for the benefit of the beneficiary/settlor
      1. Creditors can reach the property whether the beneficiary/settlor’s interest is mandatory or discretionary
      2. Spendthrift clauses in favor of a beneficiary who is also the settlor are null and void
   2. Modern Trend: Some jurisdictions recognize self-settled asset protection trusts in favor of a beneficiary who is also a settlor if…
      1. Trust is irrevocable;
      2. The trust interest is discretionary; and
      3. Trust was not created in fraud of creditors
5. Trusts for the State Supported
   1. Applicant Created Trusts
      1. If the applicant created or contributed to the creation of the trust, property is usually included among the applicant’s resources for determining the applicant’s eligibility for state-sponsored health programs
   2. Third-Party created Trusts
      1. If the applicant had no role in the creation of the trust, beneficiary’s interest in the trust is considered part of the applicant’s resources only to the extent the beneficiary could compel the trustee to make a payment of income or principal

*Charitable Trusts*

1. UTF §405: Charitable Purpose
   1. Charitable trust is one that has a charitable purpose, which includes…
      1. Relief of poverty
      2. Advancement of education
      3. Advancement of religion
      4. Promotion of health
      5. Government or municipal purposes
      6. Any other purpose to benefit the community at large
   2. Benefits of a charitable trust include…
      1. Not subject to the RaP; and
      2. No requirement that the trust have ascertainable beneficiaries
2. UTF §413: Cy Pres (Modification of Charitable Trusts)
   1. Where a trust with a general charitable purpose expresses a particular charitable purpose, and it becomes impossible, impractical or illegal to carry out the particular charitable purpose…
      1. Do **not** impose the resulting trust, instead
      2. Modify the particular trust purpose to another particular charitable purpose w/in the trust’s general charitable purpose
   2. UTC authorizes application of cy pres if the particular charitable purpose has becomes wasteful
      1. Situation where the available funds so exceed the needs of the particular purpose that continued use for just that purpose would be wasteful
   3. If accomplishing the trust purpose becomes impossible/impractical for administrative reasons, courts can apply administrative deviation to modify the settlor’s intent under cy pres

**XIII. Power of Appointment**

1. Introduction
   1. Power of appointment gives the donee the power to override the distributive terms of the trust and to direct the trustee to distribute some or all of the trust res outright to the appointees
      1. Power is discretionary and imposes no fiduciary duty on the party who holds
      2. Adds flexibility, in that, if circumstances change the party holding the power has the discretion to change the distributive provisions of the trsut by overriding the original terms
   2. General Power
      1. Power is a general power of appt if the group of appointees in whose favor the power can be exercise (that is, property can be appointed to), **includes** either the donee, the donee’s estate, the donee’s creditors, or creditors of the donee’s estate
   3. Special Power
      1. Power is a special power of appt if the group of appointees in whose favor the power can be exercise **excludes** the donee, the donee’s estate, the donee’s creditors, **and** creditors of the donee’s estate
2. Creating a Power of Appointment
   1. If one party intends to give another party a discretionary power to appoint property, the first party has created a power of appt – no technical words necessary to create a power
      1. Typically given in a will (testamentary)
   2. If a beneficiary is given a life estate and a power to consume, the power to consume is deemed a general power of appt unless it is limited to an ascertainable standard relating to health, education, support, or maintenance of the holder of the power to consume
3. Releasing a Power of Appointment
   1. Donee may release a power of appt, in whole or in part (either in whose favor the property may be appointed or when the power may be exercised)
4. Exercising a Power of Appointment
   1. Power of appt is exercised anytime the donee intends to exercise the power
      1. Instrument creating the power may stipulate how express the donee must be to exercise it
   2. Testamentary Powers and Residuary Clauses
      1. Where a testator holds a testamentary power of appt and his residuary clause makes no express reference to a power of appt (standard residuary clause)…
         1. Majority rule is that a standard residuary clause does not exercise either a general or special testamentary power of appt
      2. UPC states that a standard residuary clause expresses intent to exercise a power of appt the testator held, only if…
         1. The power is a general power of appt and the creating instrument does not contain an express gift over in the event the power is not exercised; or
         2. The testator’s will manifests an intent to include the property subject to the power

**XIV. Rule Against Perpetuities**

*No interest is good unless it must vest, if at all, not later than 21 years*

*after some life in being at the creation of the interest*

1. Initial Steps Pre-RaP
   1. The rule considers the remoteness of vesting of certain *property* interests, requiring…
      1. Property interest (i.e. not a contract)
      2. An interest created in the *transferee* (i.e. either a *remainder* or an *executory interest*)
         1. Excludes a reversion, possibility of reverter, or right of entry
      3. An interest subject to a contingency (i.e. not yet vested)
   2. If all those elements are in plan, must ask whether any *contingent* interest violates the Rule
      1. Contingency need *not* happen, but it must be resolved – know *whether or not* it will happen
      2. Once contingency is resolved, interests and beneficiaries are determined
   3. Validity of the interest is judged only at the moment of creation, not later
      1. Only what *could* happen looking *forward* from the *start* of the period matters
      2. What *actually* happens after the effective date is irrelevant
   4. If contingency will be resolved during period it is valid, if there is some possibility (however remote) that the contingency won’t be resolved – invalid and void
      1. If both parties are charities, RaP does not apply
      2. If one party is a charity, interest over is invalid
2. Type of Instrument
   1. Look at the type of instrument involved, it will determine the *effective date* of the instrument
      1. Legal clock for the rule starts ticking on the effective date
      2. Effective date is based on when the interest becomes irrevocable, not when the instrument creating it was executed
      3. If an instrument is revocable, effective date is set when the interest becomes irrevocable
   2. Under RaP, effective date depends on the type of instrument involved
      1. Effective date for wills, testamentary trust, or revocable inter vivos trust is when the testator dies, bc until then these instrument can be revoked
      2. As for irrevocable inter vivos trust or deed, effective date is when the instrument is executed, bc that is when both are effective
      3. Note the person making the contingency in an irrevocable trust or deed is still alive, unlike a will or revocable trust – essentially making themselves the 1st generation of two
3. Perpetuity Period
   1. Lives in being plus 21 years; essentially means 2 generations
      1. **Validating Life**: 1st generation is someone alive on the effective date of the instrument
         1. **Validating life**, **measuring life**, **life in being** all mean the same thing
      2. The 2nd generation is the “21 years”
   2. The 21 years period must come *after* the measuring lives die off, not before
4. Who Can be a “Measuring Life” and How do I know
   1. Must be a person *alive* (or in gestation) on the *effective date* of the instrument
      1. Must be a real person, not a corporation or an animal
      2. May actually be measuring *lives,* thus the life in being ends w/ the death of the last survivor
   2. Measuring life (the person you need to find) does not have to be named in the instrument
      1. Contingency will be stated in the instrument, but the measuring life could be (or not at all)
   3. When looking for a measuring life, start at the contingency
      1. First ask, “If the interest is to vest, what must happen”
      2. Then ask, “Who could affect this”
         1. If a validating life is to be found, it will be found among the people alive on the effective date of the instrument and *always* affects the contingency
5. How are these Contingencies Resolved
   1. After you set the effective date, look at the contingency
      1. What must be done?
      2. Who must do it? – Some are limited to a named person, other use an *open* term
   2. People Doing Certain Acts
      1. Specific Person: Contingency is linked to a particular person, and are resolved when that identified person dies; if the person is alive on the effective date interest is valid
      2. Open Terms: Once changed to “any person,” the contingency must be resolved w/in 21 years of everyone alive at creation of interest, often it is invalid
   3. People Being Born
      1. Whether a person is *born* is resolved by the death of all potential parents
      2. Children: Whether children will be born is resolved by death of the parents
         1. On the effective date of a will, a person no longer can be a parent (they’re dead)
      3. Grandchildren in a Will: Whether grandchildren will be born is resolved by the death of parent *and* grandparents (testator and already dead)
         1. Contingency is resolved by the death of the parents (the children of the testator)
      4. Grandchildren of Person Now Alive: Resolved by the death of *that* person still alive as well as his or her children – adds a generation and is a red flag
   4. People Living to a Certain Age
      1. Whether a named person will reach a given age will be resolved w/in that person’s life time
      2. Whether a person will reach a certain age (whether a grandchild reaches 21), will be resolved within the same amount of time after the death of that person’s parents
6. Which Side to Choose
   1. In every RaP case, one of two things *must* happen
      1. Either a “validating life” can be named; or
      2. An invalidating story can be told
   2. Rules of Thumb
      1. How many generations are involved – if more than two, you can tell an invalidating story
      2. Does the contingency fall into a classic trap?
7. Proving the Validating Side
   1. To prove the validating side, you must point to person (or persons) alive on the effective date of the instrument, and say w/ certainty that the contingency will be resolved w/in their lifetime + 21 years
      1. Not whether it will happen, whether we will know, one way or the other
   2. Ex. Contingency is whether I will have grandchildren reach 21
      1. On the effective date of the instrument (my death), the only people who can affect the contingency is my children (have grandchildren)
      2. My children may or may not produce grandchildren who reach age of 21, but we do know for certain issue will be resolved one way or the other w/in 21 years after my children die
8. Proving the Invalidating Side
   1. Step 1: Assume someone who can affect the contingency (typically a child) is born after the effective date of the instrument
      1. Bc born after the effective date cannot be a validating life
      2. If this step can be met, invalidity follow
   2. Step 2: Assume that everyone else who was alive on the effective date of the instrument and who can affect the contingency (typically parents or other children) is killed off
      1. This eliminates anyone else born on effective date that could affect the contingency
   3. Step 3: Assess whether the contingency must happen or not w/in 21 years
      1. Typically it cannot
      2. All potential measuring lives are killed off and the person born after the effective date cannot be a measuring life so we are left w/ a 21-year period
   4. Special Assumptions for Telling an Invalidating Story
      1. Any person alive on the effective date, regardless of age, can have children
      2. Any group of persons alive on the effective date can die together at anytime
9. Classic Trap: Age contingencies in excess of 21 years
   1. Provision in A’s will, “To my children, then to my grandchildren who reach age 25”
      1. Grandchild C born after effective date, other grandchild is killed less than four years after C is born (killing off the other grandkid that could affect the contingency)
      2. Cannot be determined whether C will reach age 25 w/in 21 years of his parent’s death
   2. To avoid this problem, name grandchild by name in the will, making them the validating life
10. Classic Trap: Gifts to Grandchildren of a person now living
    1. Gift in the testator’s will to “the children of A for their lifetimes, then to the grandchildren of A who reach the age of 21” and A is alive on the effective date
       1. Tries to control 3 generations, A to A’s grandchildren
       2. If A is dead on the effective date it is valid, only 2 generations controlled and A’s children become the validating lives and we will know whether they have kids
    2. Assume a child, C, is born to A after the effective date, and then assume A dies
       1. Any other children besides C who were alive on the effective date die as well
    3. Finally, assume C has a child (the grandchild of A) more than 21 years later
       1. Avoid by naming grandchildren specifically by name
11. Classic Trap: Irrevocable Trust vs. Will or Revocable Trust
    1. Provision in an irrevocable inter vivos trust that gives “life estate in A, then to the children of A, then to the grandchildren of A who reach 21” and assume the settlor of the trust is A
       1. Tries to control 3 generations, and another example of a gift to grandchildren of a person who is still alive
    2. Assume at effective date of instrument A has two children (B and C), and after the effective date, another child (D) is born [move 1]; Then assume A, B, and C are killed [move 2]
    3. Then, whether, D will have any children and whether any of them will live to the age of 21 cannot be determined within 21 years of death of other parties [move 3]
       1. For example, D could have a kid 25 years later
12. Classic Trap: Fertile Octogenarian
    1. Irrevocable inter vivos trust that gives “life estate in A, then to the children of A, then to the grandchildren of A who reach the age of 21”
       1. Variant of the 3-generation problem
    2. Now assume that A is a woman over 80 years old (or sterile dude), and the critical first move is to show A could have children after the effective date – RaP assumes *anyone* can have children
       1. Same as issue above, just with a fact against conventional wisdom (80 yr old having kids)
       2. Classic case bc the rule is based on a fact of life known to be false
13. Classic Trap: Unborn Widow/Widower
    1. Bequest in trust to pay income “to my daughter for life, then to my daughter’s widower for life, then to IU” – three generation issue
       1. Assumption here is that widower or widow may be someone who was not alive on the effective date of the instrument; “widow(er)” is an open term
       2. Avoid this by naming widow(er) specifically by name
    2. Daughter marries a person born after effective date of instrument
       1. Widower cannot be measuring life
       2. Contingency here is when the widower will die
       3. We cannot know whether this will happen within 21 years
    3. Invalid interest is the remainder to IU, not the interest of the widow
       1. Interest of the unborn widow is valid bc it must vest within the life of her spouse, a life in being on the effective date of the instrument
       2. But bc the widow might die more than 21 years after effective date (and everyone else alive on the effective date) next estate might vest beyond the perpetuity period
14. Classic Trap: Administrative Contingency or Period in Gross
    1. Gift in will “to A, when IU wins its next basketball game” or “upon the distribution of my estate” or “when X corp is formed” or “until gravel pits are exhausted” or “upon probate of this will”
       1. Administrative contingency is a contingency not tied to birth, death, or age of person
    2. Under the RaP, would be possible the administrative event would not happen until 21 years after the death of everyone alive on the effective date
       1. To avoid, use definite dates or years
       2. Fixed date may also violate if its longer than 21 years
       3. Merely listing a period in gross “testamentary trust to continue for 30 years” could violate

**XV. Primer on Investing**

*Introduction*

1. Costs Matter
   1. Low cost is the single best predictor of superior fund performance
      1. Low cost funds have a built in advantage, as high-cost funds (say, 2%) must beat the market by a large margin to get the same result as a low-cost fund (say, 0.2%)
      2. This small 1.2% savings in expense ratio can save hundreds of thousands over the years
   2. Never pay a load, 12b-1 fee, or a high fee, especially for bond funds
      1. “Loads” are commissions paid to brokers or financial advisors who sell you funds
      2. “12b-1” fees is just the mutual fund charging you to cover its own advertising
   3. Other unnecessary charges to look for…
      1. Transaction costs – High turnover means high transactions costs, and less for you
      2. Soft dollars – mutual fund has an outside broker do its research, and they charge you
   4. Acceptable low-cost funds include: Van-Guard; TIAA-CREF; Dodge & Cox
2. Modern Portfolio Theory (MPT)
   1. Determine Appropriate Level of Risk
      1. Level of risk is based on your goals, time horizon, and personal risk tolerance
      2. If the risk you need is higher than what you can tolerate, save more
      3. If the risk you need is lower, be happy
   2. Asset Allocation
      1. Construct an appropriate portfolio based on the level of risk
         1. Higher risk, higher reward
      2. Use several (two or more) asset classes
         1. Stocks *and* bonds are better than *only* stocks or *only* bonds
         2. Each asset class has different returns, risks, and cycles
      3. Use low-coast and broadly diversified funds, typically index funds
         1. Goal is to maximize risk for a given level of return; or
         2. Maximize return for a given level of risk
   3. Buy and Hold
      1. Add to your portfolio on a regular basis (dollar-cost averaging) – rebalance if necessary
      2. Pay no attention to short-term market swings – leave it alone
3. MPT – Uniform Prudent Investor Act
   1. Trustees *must* use MPT rather than earlier traditional standards when investing trust assets for beneficiaries – adopted as law in many states
   2. Trustees who ignore MPT risk malpractice
4. Other General Investment Tips
   1. Putting something away matters the most, the earlier the better
      1. Start early, follow MPT and asset allocation = $$$
   2. Saving more in your 20s guarantees a higher yield than then high return on a smaller investment
      1. In our early years, how much you save matter much more than any return
   3. Stay emotionally stable
      1. Have a plan to deal with greed and fear, and stick w/ MPT, despite what others say

*The Importance of Taxes*

1. Roth IRA
   1. Fund the account with after-tax dollars, but when you retire, w/drawls are free of fed income tax
      1. Eligibility depends on how much money you make
      2. Paying taxes upfront lock in the present rate, rather than future rate
      3. No minimum age for a Roth – child can open one if it has earned any income
   2. Can open a Roth on your own, even if you have a 401k at work
      1. Relatively low limit/year on contributions ($5,000/yr)
      2. You choose the mutual fund and investments
   3. When you retire, you are not required to withdraw the money (not subject to RMD)
      1. Can continue to make contributions during retirement, if eligible
      2. Can let the acct grow through your retirement and then gift it to a beneficiary at death
      3. Beneficiary must follow the RMD rules, but w/drawls are still free from tax
2. 401(k) Accounts
   1. Fund company is picked by the ER, and then EEs contribute to and manage the listed funds
      1. Allow pre-tax contributions and deferral of taxes until retirements (good)
      2. However, all withdrawals for retirements are taxed as ordinary income (bad)
      3. With a 401(k), you lock in future tax rates – hope they are lower then the present
   2. In theory, should contribute as much as possible to your 401(k) acct, however, if you have a high fee, that turns capital gains into ordinary income, it is a hard call
3. 403(b) and 457(b) Accounts for Government Employees (and Others)
   1. Accounts that work like 401(k)
      1. 403(b): EEs of schools and certain non-profits
      2. 457(b): EEs of state or local government
   2. Federal EEs and military personnel have access to the Thrift Savings Plan
      1. Uses just a few low-cost index funds, and is MPT in action
4. Rollovers for 401(k), 403(b), and 457(b)
   1. As you change jobs, look to consolidate accounts into low-cost funds
   2. With these accts, you can take it with you
5. 529 Accounts – Saving for Education
   1. Basic plan gives federal tax breaks to investments made in complying state plans
      1. Small number of mutual fund options and investments for education
      2. Invest after-tax dollars, but w/drawls are free of fed income tax when used for education
         1. Use only needs to be related to education – room and board works
      3. High contribution limits and can be used by anyone, regardless of income
   2. Independent 529 Plan
      1. Guarantees the tuition units you buy today can be redeemed at future tuition prices
      2. Risk of any future tuition increase is thus borne by schools, not the investor
      3. Only covers tuition, not room and board
6. After Tax Investing
   1. Most mutual funds are managed fore return, not return after taxes
      1. Funds with low turnover (total market index funds) have lower taxes
      2. Low turnover ratio means lower transaction costs and lower taxes
   2. For bonds, use tax-exempt bonds for taxable accounts
   3. For equity funds, use total market index funds, and tax managed equity funds
7. Retirement Accounts vs. After Tax Investing
   1. Retirement accts have more flexibility than regular after-tax accounts
      1. You can rebalance, change, or rollover funds w/o paying taxes w/ retirement accts
      2. If you did the same thing with a taxable acct, it would be a taxable event
   2. All withdrawals from a retirement acct are taxed as ordinary income
      1. In contrast, withdrawals from a taxable acct might qualify for long-term capital gains instead, typically for stock funds
      2. More restrictions for retirement accts