1. **Right to Leave Property to Heirs: Sources of Law of Succession**
   1. convenience and first possession: Blackstone: “A man’s relations are usually about him on his death-bed, and become, therefore, generally the next immediate occupants” (SS: he is wrong; love); *Pierson v. Post* (Possession by first occupancy; take first because first on scene)
   2. biology, i.e. natural inclinations: it seems natural for people to give property to their descendents; Moore’s naturalistic fallacy: it is a fallacy (not true) to say that “what is good can be derived from what is natural”
   3. Hume’s is-ought distinction (is, is not ought): describing what is true about the natural world does not allow you to make any conclusions about what out to be
   4. **“rights” (SS):** a person has a right if that person can get a court to recognize and vindicate the right
2. **Right to Leave Property to Heirs** 
   1. ***Hodel v. Irving* (A fundamental attribute of property, an essential stick under the Just Compensation Clause, is the meta-right to pass rights in at least one of two ways: by devise or by intestacy)(Congress’ statute result in taking; government must pay)(total abrogation of this right constitutes a taking**; **can take away one of those things, but cannot take away both)**
   2. *Babbitt v. Youpee* **(Right to pass property to natural objects of your affection by will or intestacy)(When the government restricts a person’s ability to direct the descent of his land, the restriction amounts to an impermissible taking in violation of JCC)(extends *Hodel*)**
3. **Right to Leave Property to Heirs: Policy questions**
   1. reasons we allow dead people to transfer assets (instead of them escheating to nation)
      1. subjective (sentimental) value: grandpa’s pocket watch
      2. 100% escheat to overlord (state) is hard to enforce as a practical matter
   2. reasons not to impose estate tax of 100% above $10M
      1. reduces incentives to work: disincentive to save anything more than that; SS: incentive to work is diminished, but not wiped out; working is a good thing
      2. reduces incentives to preserve assets: don’t want people destroying assets
      3. reduce happiness of rich people: happiness of living counts
      4. reduces sense of responsibility in rich persons (maybe)
      5. undermines families (maybe): could also pull them apart
      6. unfair (just justice): support parents; relatives helped; genes earned it
      7. could interfere with capital formation, but sometimes consumption is needed more than capital
         1. government forms capital too (defense, investing in IU)
         2. other forms of taxation might interfere more; compare tax to other taxes, not just to no tax; compare taxes to deficit reduction: conservatives increase deficits when they vote for defense spending and for tax cuts; liberals increase it when they vote for social programs
   3. reasons to limit inheritance by taxing estates above $10M
      1. democracy: if dollars are speech, wealth influences elections; passing on money is passing on speech; unequal wealth is unequal political power
      2. improve national, social-political cohesion
         1. Repetti: wealth became more equal from 1930s through 1970s, then less equal in 1980s, then level in 1990s
         2. Krugman: partisan politics goes hand in hand with greater difference in wealth
      3. justice: luck doesn’t deserve that much reward
         1. Blum and Kalven’s race metaphor; SS: B. & K. are not right to exclude wealth; key to problem: providing universally good education
         2. applying Rawls: people behind the veil of ignorance would choose more equal distribution of assets
         3. applying Harris: justice is about maximizing the well-being of sentient beings
         4. Halbach: “After all, a society should be concerned with the total amount of happiness it can offer”
         5. three ways to increase happiness: 1) increase equality of wealth by equalizing downwards; 2) bigger middle class; 3) tax and throw away
   4. ways to use estate tax to increase happiness
      1. reduce wealth of rich to enhance equality
      2. redistribute wealth from rich to poor: this is distribution, NOT redistribution; it belongs to nation, not to individual
      3. pay for public goods in least harmful way (least painful to taxpayers and least inefficient to production)
         1. public good must be subsidized by the government to reach an efficient level of production; taxes are needed to pay for the public goods; there is an efficient level of taxation, and it is not zero
         2. two ways to tax transfer of wealth: 1) tax on estate of decedent (at varying marginal rates) or 2) tax recipient’s inheritance (at varying marginal rates)
4. **Postmortem Estate Augmentation**
   1. *Shaw Family Archives v. CMG Worldwide* **(A will that becomes effective before postmortem publicity existed does not pass on those rights. The probate law applies at time of death, so applies only to property at time of death; it is not ineluctable)(“Only property actually owned by a testator at the time of her death can be devised by will”)(T-shirt at Target case)**
   2. new CA statute: get new rights to control under his will
   3. **UPC 2-602: A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death.”**
   4. **bottom line: wills can give away rights not yet held by the decedent and not held by the decedent at the time of death.**
5. **Professional Responsibility: Duty to Beneficiary** 
   1. *Simpson v. Calivas* **(Lawyers, draftspersons, scriveners are liable to 1) only those with whom they are in privity under the common law 2) intended beneficiaries under the modern trend (and majority rule))**
6. **Professional Responsibility: Conflict of Interest**
   1. *A. v. B.* (NJ 1999) **(Lawyers advising couples need to be careful about potential conflicts of interest)**
7. **Intestate Succession**
   1. the rules of descent and distribution (the rules of intestate succession) are default rules: default rules: rules that apply when people don’t specify what they want; limiting rules: rules that apply all the time (ex: 55 mph speed limit or RAP)
8. **Intestate Succession: 5 basic Stages of Descent and Distribution (Under UPC)**
   1. look for a spouse (UPC 2-102)
   2. look for issue (descendants) (UPC 2-103 (a))
   3. look for ancestors (parents, etc.) and collaterals (descendents of ancestors who are not the decedent or decedent’s descendent) (UPC 2-103(a))
   4. look for stepchildren (UPC 2-103 (b))
   5. look for the state (escheat) (UPC 2-105)
9. **Intestate Succession, Stage 1: The Spouse**
   1. traditional rule: spouses get 1/3 to ½; mimics what rich people want; Prof. Fellows: difference between rich people (want only a portion to surviving spouse) and non-rich people (want all assets to go to surviving spouse)
   2. UPC 2-102:
      1. spouse get all if: 1) spouse’s issue and decedent’s issue are same, or; 2) decedent leaves no kids and no parents
      2. spouse gets first: 1) $300k and ¾ if decedent leaves no issue and a parent; 2) $225k + ½ of remaining estate if stepchildren are kids of surviving spouse; 3) $150k + ½ of remaining estate if stepchildren are kids of decedent
      3. note: if they are adopted, they are children of the decedent
   3. same-sex spouses
      1. same-sex marriage: CT, IA, ME, MA, NH, VM, and NY
      2. civil unions with spousal-like intestacy rights for domestic partners: DC, HI, OR, NE, WA
      3. UPC does NOT provide intestate share to same-sex spouses; rejected “committed partners” provision
   4. nearly simultaneous deaths
      1. Uniform Simultaneous Death Act: if insufficient evidence about who died first: assume the beneficiary predeceased the donor, so neither inherits from the other; problem: what is sufficient evidence?
      2. *Janus v. Tarasewicz* (IL 1985)**(Sufficient evidence wife died last)(cyanide poisoning case)(SS: law did actualize H’s intent: W then his mom, not W’s dad)**
      3. UPC: in order to take, need to survive decedent by 120 hours (5 days); if die before then, heir or devisee or life insurance beneficiary is deemed to have predeceased the decedent
         1. claimant must establish survivorship of 120 hours by clear and convincing evidence
         2. SS: reduces litigations by having a higher standard; better follows decedent’s intent
10. **Intestate Succession, Stage 2: Descendents (Children)**
    1. classic per stirpes (by all of the roots)
       1. start with children: gives one equal share to each of them, whether dead or alive and then pass down to the others after that
       2. younger generations represent, “stands in shoes of,” older generation
    2. 1969 UPC (modern per stirpes)(per capita with representation)
       1. start with nearest generation with descendents who survive the intestate
          1. if takers are same generation, take per capita (equal shares)
          2. but if takers are of different generations, share of younger generation is based on share that older generation descendant would have received had older generation descendant survived the intestate
    3. 1990 UPC (per capita at each generation)(“equally near, equally dear”)
       1. initial division of shares is made at level where one or more descendents are alive, but shares of deceased persons on this level are treated as one pot and are dropped down and divided equally among the representatives in next general level
    4. [see example in larger outline]
11. **Intestate Succession, Stage 3: Ancestors and Collaterals**
    1. first: look for first-line collaterals (parents and their descendents)
       1. UPC: parents and issue of the parents (i.e., brothers and sisters)
    2. then: look for second and more distant lines (grandparents and their descendents)
       1. UPC: ½ to each set of grandparents or their issue; parentelic
    3. if there are no first-line collaterals, states differ on who is next in line of succession
       1. parentelic system: intestate estate passes to grandparents and their descendants, and if none to great-grandparents and their descendants, and if none to great-great-grandparents and their descendents, and so on
       2. degree of relationship system: intestate estate passes to closest of kin, counting degrees of kinship
       3. example: first cousin twice removed vs. great uncle—FCTR wins in parentelic and GU wins in degree of relationship
    4. laughing heirs: can only prevent them by putting specific language in your will
12. **Intestate Succession, Stage 4: Stepchildren (Last Resort)**
    1. UPC: includes stepchildren who take as last resort if there are no surviving grandparents or descendents of grandparents or more closely related kin
13. **Transfers to Children**
    1. disinheritance
       1. common law: no disinheritance (i.e., “my son Jon shall receive none of my property” is not sufficient); to disinherit him, John’s father would have to devise entire estate to other people
       2. 1990 UPC: allows negative wills; barred heir is treated as though he disclaimed intestate share
    2. adoption (warning: cannot revoke later)
       1. 2008 UPC: is there a parent-child relationship?
       2. a parent-child relationship exists between an adopted child and the adoptive parent, but not between an adoptive child and the child’s genetic parents; exception: if the child is adopted by the spouse of a biological parent
       3. if such a relationship exists, “the parent is a parent of the child and the child is a child of the parent for purposes of intestate succession” by, from, or through the parent or the child
       4. *Hall v. Vallandingham* **(Earl’s children do not inherit from Uncle William because they have been adopted)**
       5. UPC 2-119 (stepchild adopted by stepparent): an adopted child may inherit from or through both natural parents as well as the adopting parent, whether the marriage of the natural parents was ended by divorce or death
       6. and children can inherit from their genetic relatives (aunts, uncles, etc.), but genetic relatives cannot inherit from them
       7. Court said: “What may not be done directly most assuredly may not be done indirectly.” SS: wrong; can do this in lots of area of law
    3. adult adoptions
       1. gay couples have tried to adopt each other: no one has standing to challenge it; partner will take under intestate succession, even if will gets knocked out
          1. *In re Robert Paul* (N.Y. 1984)**(cannot adopt lover)**
    4. adoption and interpretation of wills and trusts
       1. stranger-to-adoption rule (old rule): adopted child does not take under will or trust of person who is not the adopted parent
       2. majority rule: minor adopted child takes—is presumptively included in a gift by T to the “children,” “issue,” “descendants, or “heirs” of A
       3. *Minary v. Citizens Fidelity Bank* **(Adoption of an adult for the purpose of bringing that person under the provisions of a preexisting testamentary instrument when he clearly was not intended to be so covered should not be permitted)(Myra does not take under UPC)**
          1. UPC 2-705 (f): excludes a person adopted after reaching the age of 18 from a class gift to the adoptive parent’s children, issue, descendants, or heirs by someone other than the adoptive parents, unless the adoptive parent was the adoptee’s stepparent or foster parent, or the adoptive parent functioned as a parent before adoptee turned 18
          2. practice pointer: do NOT incorporate into a will provisions of statute
    5. equitable adoption
       1. failures to adopt can sometimes be rectified by equitable or virtual adoption
          1. was there a promise by decedent?
          2. should it be enforced in equity: would that be fair? would decedent have wanted child to inherit?
       2. can be used by child to inherit from (and sometimes through) parent who failed to adopt; but can not be used to allow inheritance from or through the child to the parent who failed to adopt
       3. *O’Neal v. Wilkes* **(“Because O’Neal’s relatives did not have the legal authority to enter into a contract for her adoption, their alleged ratification of the adoption contract was of no legal effect”)(refused to use equitable adoption)(SS: court messed up; child performed; this is a Court of Equity—law doesn’t matter!)**
    6. love children
       1. common law rule: children born out of wedlock (*filius nullius*) get nothing
       2. UPC 2-217: children are children of both genetic parents
       3. *Trimble* **(SC held unconstitutional, as denial of EPC, a statute denying a nonmarital child inheritance rights from father)**
    7. sperm and ovum banks
       1. *Woodward v. Commissioner of SS* (MA. 2002)**(Children in this case could NOT inherit—remanded to District Court)**
          1. *Woodward* test—child must establish: 1) decedent was genetic father; 2) decedent affirmatively consented to posthumous conception, and; 3) decedent affirmatively consented to the support of any resulting child
       2. 2008 UPC 2-120: 1) Father intended to be treated as parent of posthumously conceived child (clear and convincing evidence) and 2) in utero within 36 months or born within 45 months
          1. SS: time limit should have been made default rule
       3. H and W marry. H saves semen in sperm bank. H dies. W uses semen to conceive twins. Do children get social security benefits as child of deceased H?
          1. *Woodward* (yes—if pass test); *Vernoff* (no) (9th Cir.)
       4. *In re Martin B.* **(Kids of biotech take same as natural kids under wills and trusts, no matter when conceived)**
    8. advancements: a pre-payment of child’s intestate share
       1. common law: gift is an advancement
          1. advancement is valued as of time of gift or time of death
          2. applies only to complete intestacy
          3. when parent makes advancement and child dies before parent, amount of advancement is deducted from share of the child’s descendents
          4. in context of hotchpot: advancement is taken into account in determining share of recipient’s descendants
       2. most states (and UPC 2-109): gift is not an advancement
          1. in order to overcome presumption, need to have a writing by the decedent (giving it) or a writing by the heir to overcome it (got it)
          2. advancement is valued as of time of death or time of possession by recipient, whichever is earlier
          3. includes advancements to spouses, lineal descendants, and collaterals (such as nephews and nieces)
          4. applies to both partial intestacy and complete intestacy
          5. in context of hotchpot: advancement is not taken into account in determining share of recipient’s descendants
    9. hotchpot
       1. advancement can be brought into “hotchpot” if advancee wants to share in the estate
       2. two options: 1) person who gets advancement can reject remaining intestate share; 2) person who gets an advancement can take it into hotchpot
       3. [see example in larger outline]
    10. minors
        1. someone to watch over their property: 1) guardian of the property; 2) conservator of a protected person; 3) custodian, or; 4) trustee
14. **Bars to Succession: Murder and Adultery and Desertion**
    1. *In Re Estate of Mahoney* **(Slayer should not be permitted to improve his position by the killing, but should not be compelled to surrender property to which he would have been entitled if there had been no killing. The doctrine of constructive trust is involved to prevent the slayer from profiting from his crime, but not as an added criminal penalty)(This rule only applies to voluntary manslaughter)**
    2. UPC 2-803: presume that person who was killed died after the killer
       1. applies to those who kill feloniously and intentionally
       2. felonious killing conviction is conclusive
       3. if there is no conviction (or there is an acquittal), bar can still be applied if would have been found guilty under preponderance of evidence standard
       4. bar applies to recipients of probate and non-probate transfers (i.e., tenancy in common and joint tenancy)
          1. compare: in IN, slayer gets half (*Grund*)
          2. note: probate means the proving of the will; but, the process of probate or the name is used to refer to dealing with the decedent’s estate even if there is no will; non-probate transfers means passing outside the estate
    3. killer’s children inherit from victim
       1. SS: not sure what is best in this situation; decedent might want them to be taken care of, but bad incentives
15. **Bars to Succession: Bars Not Based on Misconduct** 
    1. transfers of an expectancy are generally not honored
    2. disclaimer
       1. UPC: pretend disclaimant died before decedent
          1. disclaimer must be made within 9 months of intestate’s death or within 9 months of when recipient turns 21
       2. [see example in larger outline]
       3. reasons for disclaiming interest: 1) reduce taxes; 2) avoid creditors’ claims—this is not fraud on creditors; but: if creditor is IRS, cannot disclaim inheritance (*Drye v. U.S.*)
       4. very difficult to rescind a disclaimer
16. **Requirements for Making a Valid Will: Mental Capacity**
    1. general capacity
       1. legal age
       2. mental capacity
          1. UPC 2-501: must have a sound mind
          2. Restatement 3rd 8.1 (b): testator must
             1. be an adult (age 18 or older)
             2. be capable of knowing and understanding in a general way: 1) the nature and extent of property; 2) natural objects of bounty; and 3) disposition making and capable of making of that property

fourth requirement (in some states): must relate these elements to one another and form an orderly desire regarding the disposition of property

* + 1. effect of general incapacity: will is blown up; denied probate
    2. *Estate of Washburn* (NH 1997)**(“Because the petitioner met her burden of producing evidence to demonstrate a potential failure of due execution, the trial court correctly found that the presumption of competency was rebutted and the respondent had to prove capacity by a preponderance of the evidence”)(case advances argument that the capacity requirement supports the family)**
    3. *cf.* *Wilson v. Lane* (GA 2005)**(No testimony was offered to establish that at the time the will was executed, Greer suffered from a form of dementia sufficient in form or extent to render her unable to form a decided and rational desire regarding the disposition of her assets)(eccentric habits and absurd beliefs are not enough to show lack of capacity)**
    4. ante-mortem probate (living probate): ability to probate while testator is still alive; reduces likelihood of will challenge
    5. reasons for requiring a sound mind: protect the decedent’s family: *In Re Strittmater:* cousins instead of NWP; *Estate of Washburn*:niece instead of caregiver; “tends to preserve the family as a unit for mutual support and so provides care and support for the aged person” (SS: weak incentive); protect crazy people from exploitation by others; enhance the legitimacy of the law; cost-benefit balancing
    6. SS: capacity requirement is a limiting rule; it should be a default rule
  1. specific capacity
     1. must have specific capacity with regards to person and things
     2. *In Re Strittmater* (N.J.)(1947)**(Because Strittmater was suffering from the insane delusion that she wanted to give her estate to the National Women’s Party, probate should be set aside)**
     3. effect of specific incapacity (different than general): deny probate only to those parts of the will that are affected by the lack of capacity; a will can be partially admitted to probate
     4. two-step analysis for specific capacity (if affirmative answer to both question, provision is removed):
        1. was there an insane delusion?
           1. insane delusion:requires a false belief that decedent held despite evidence to the contrary
        2. did it affect a provision of the will?
           1. two different “affect” tests:

“but for” test (majority): dispositive provision of will would not have been made, but for the insane delusion (or: the provision of the will must be the product of the delusion)

“minority might have been” test (minority and *Honigman*): dispositive provision of will might have been a product of the insane delusion

SS: disagrees with *Honigman* court; it was not an insane delusion

1. **Requirements for Making a Valid Will: No Undue Influence**
   1. undue influence: an influence that overcomes the testator’s free agency (or will)
      1. not control of testator’s mind, but control of testator’s actions
   2. RS 3d section 8.3(b): “A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor’s free will and caused the donor to make a donative transfer that the donor would not have otherwise made”
   3. presumptions and burden shifting
      1. burden of proof is on contestant to show that there is undue influence
      2. to trigger rebuttable presumption, contestant must establish a confidential relationship between influencer and the testator plus, in most jurisdictions, one or more other additional suspicious circumstances
      3. standards
         1. *Estate of Lakotosh*: 1) confidential relationship; 2) confidant received bulk of the estate; 3) D’s intellect was weak
         2. Restatement 3rd 8.3:confidential relationship + suspicious circumstances
            1. confidential relationship: fiduciary; reliant; dominant-subservient
            2. suspicious circumstances: procured the will; got bulk of estate; etc.
   4. bequests to caregivers
      1. CA statute: no good, unless get a certificate of review
   5. lawyer as scrivener and beneficiary
      1. traditional rule: no presumption of undue influence
      2. modern rule: presumption of undue influence when an *unrelated* lawyer writes himself into the will
         1. rebutting the presumption (two different standards): 1) requires independent legal advice (*In Re Will of Moses*); 2) or requires clear and convincing evidence that there was no undue influence
   6. lawyer as beneficiary but not scrivener
      1. majority: no presumption of undue influence
         1. but see: *In Re Will of Moses* (Lawyer-client relationship turned into sexual relationship; lawyer did not know about will; had independent counsel, but court found undue influence)
   7. no-contest clause
      1. apply to validity disputes (undue influence, fraud, etc.) and construction disputes (challenges relating to construction of will)
      2. UPC and majority: enforced unless there is *probable cause* for a contest
      3. minority: can only contest certain kinds
      4. IN and FL: not enforced
      5. SS: to prevent someone from contesting, give them just enough so they have something to lose
2. **Requirements for Making a Valid Will: Absence of Fraud**
   1. misrepresentation: originally a promise the promisor did not intend to keep
   2. elements of fraud (*Puckett*): misrepresentation (i.e., lying) and change of behavior (i.e., changing will)
      1. note: element 1 and element 2 must be connected—misrepresentation must be made with intent to deceive and purpose to influence (to get this change of behavior)
3. **Requirements for Making a Valid Will: Absence of Duress**
   1. duress: threats and pressure + physical compulsion (i.e., killing someone)
4. **Remedies**
   1. remedy for absence of capacity or intent: can refuse to admit will to probate (*In Re Will of Moses*)
   2. remedies for coercion, undue influence, duress, or fraud: a constructive trust
      1. definition: “A constructive trust is the formula through which the conscience of equity finds expression”
         1. constructive trustee must immediately turn funds over to constructive beneficiary
         2. a constructive trust can be imposed against a person who did not commit the fraud or undue influence
            1. *Pope v. Garnett* **(Court imposed constructive trust on people who did nothing wrong)**
         3. *Father Divine* **(Court imposes constructive trust under a will that was not executed (this is unique) because testator was killed)**
5. **Tortious Interference with an Expectancy (Alternative Remedy)**
   1. requires tortuous conduct (duress, fraud, undue influence, etc.)
   2. *Schilling v. Herrera* **(Brother did not found out sister had died until after probate)(Court found for him)**
   3. elements: 1) existence of expectancy (can either be previous existing will or intestate succession); 2) intentional interference with expectancy through tortuous conduct; 3) causation; 4) damages
   4. expecting relative can prevail even though tortfeaser owed her no duty
6. **Execution of Wills** 
   1. need both intent and formalities
      1. intent (animus testandi)
         1. subjective: decedent intended this document to be his will; document must show intent
         2. SS: instructions for what you want in a will is not the same thing as a will
   2. regarding intent, there are 2 types of errors:
      1. false negatives (deny genuine will): instrument intended by decedent to be will is denied admission to probate
         1. examples of false negatives in the reported cases (*In Re Groffman, Stevens v. Casdorph*)
      2. false positives (admit fake will): instrument not intended to be will is admitted to probate
   3. purpose of formalities: to prevent false positives
      1. formalities reflect a balancing of errors
   4. functions/benefits of formalities: clearly reduce false positive errors; reduce false negative errors; protect from later self; “channeling function”: formalities channel people to lawyers (lawyers can give good advice that warns people away from problems that might arise); better drafting and planning; reduce administrative costs (keeps a lot of cases out of the court; saves us expenses); protect trusting people
7. **Formalities for An Attested Will**
   1. formalities for an attested will are: 1) a writing; 2) signature by testator; and 3) attestation by witnesses
   2. signing
      1. presence requirement (not required by UPC)
         1. *Stephens v. Casdorph* **(Homer Miller signed his will at lobby desk, two other people signed his will, but witnesses did not actually witness him signing)**
         2. meaning of presence
            1. two types: a signatory S is in the presence of P if

line of sight: P *could have* seen S sign

conscious presence: P comprehends that S is signing

*In re Weber’s Estate* (KA 1963)**(Not good enough if bank teller was in conscious presence of testator, but, could not see will)**

* + 1. signed by testator
       1. UPC 2-502: testator must signandhis will must also be “signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will or the testator’s acknowledgment of that signature or acknowledgment of the will”
       2. UPC and *Taylor v. Holt*: electronic signature is ok
       3. only need one signature if it is by a notary (SS: this is dangerous)
    2. order of signing
       1. *In re Colling* **(Court refused probate because one of the witnesses did not witness him sign it first)(SS: order should not matter; example of formality taken too far)**
    3. time for signing: witness can sign after death of testator
    4. subscription
       1. some states: need to sign at end of document; if do not: court ignores everything below signature or throws out entire will
  1. attestation
     1. attestation clause (SS: I love these; malpractice not to use them): provision of a will that recites that the testator duly executed the will; creates rebuttable presumption; found after testator’s signature; allows it to be admitted to probate without any other witnesses
  2. witnesses
     1. two roles: 1) attesting; 2) proving execution of will in court at time of probate
     2. need witness at time of execution and at time of probate
     3. competency of a witness
        1. to be an attending witness, must be competent at time of execution (witnessing) and attestation; ok to be insane or dead later
        2. to be a witness in probate litigation, have to be a competent at time of execution and at time of probate
        3. not competent when: mentally incompetent or interested
           1. interested: takes a gift under a will
           2. not interested: a person who is going to take fee for being a trustee
        4. what if the witness is interested?
           1. common law and Statute of Frauds: strike the witness approach
           2. English: strike the gift approach

purging statute: purges out of the will the gift to the interested person

*Estate of Morea* (NY and IN)(strike the gift to the extent of the gain: only strike the part of the will that is the extra benefit of the will being admitting into probate)

* + - * 1. UPC: strike nothing
        2. CA: creates a presumption of undue influence, fraud, etc.; might strike the gift

SS: probably better than UPC; but, costs (more litigation)

1. **Mistakes in Execution and Inducement**
   1. mistake: misperception of reality; an inaccurate mapping of the world onto the client’s brain
   2. two general types of mistake
      1. mistake in the inducement (reasons for making the will); will is admitted to probate
      2. mistake in the execution (misperception about the content of the documents she is signing; did not intend for document to be will); will is not admitted to probate
         1. if mistakenly included clause, deny probate to that clause (there is no intent for it); if mistakenly omitted clause, may not add it
         2. document switch (special type of mistake)
            1. *In re Pavlinko’s Estate* (Penn. 1959)**(Because the testators switched signatures, the will is null)**
            2. *In re Snide* (NY 1981)**(Even though there was a switched wills error, the will should be probated)(SS: dissent is right—it did turn out to be an early step towards relaxation of formalities; UPC became more relaxed)**
   3. UPC 2-503 (dispensing power)**(Stake hates it and thinks it should be optional)**: court can relax formalities if document was intended to be will of decedent; clear and convincing evidence an instrument was intended to be a will
      1. does not require court to find that all purposes of formalities are satisfied; just need to find that intent formality was satisfied
      2. *In re Will of Ranney* (NJ 1991)**(“A careful practitioner will still observe the formalities surrounding the execution of wills. When formal defects occur, proponents should prove by clear and convincing evidence that the will substantially complies with statutory requirements”)**
      3. *In Re Estate of Hall* (MT 2002)**(Court upholds trial court finding of clear and convincing evidence that will was intended to be will of Jim Hall)**
2. **Notarized wills**
   1. SS: we should not trust notary as much as two witnesses
   2. one lawyer is not as reliable as two witnesses
3. **Holographic wills**
   1. ½ states: allow holographic wills
      1. holographic wills: a will written by testator’s hand and signed by the testator; attesting witnesses are not required
   2. requirements for a holographic will
      1. signature
      2. animus testandi
         1. traditional rule: hand written portion has to include testamentary intent ("Last Will Etc. or What? Of Homer Eugene Williams”)
         2. UPC 2-502 and *Estate of Gonzalez*: allows pre-printed portions of document (or extrinsic evidence) to show testamentary intent
         3. two parts of animus testandi:
            1. decedent intended the disposition to be effective at death

*Estate of Gonzalez*: "Last will"; *Kimmel's Estate*: "If enny thing happens"; *In re Estate of Kuralt*: "You inherit the rest of the place in MT if it comes to that" (SS: not missing testamentary intent, but missing intent that document be his will)

* + - * 1. intent that the writing be the operational document (intent has to be found on the document)
  1. in jurisdictions allowing holographic wills, what do courts do when part of an informal document is not in the hand of the decedent?
     1. some states: deny probate to the whole instrument
     2. UPC: whether portion is non-dispositive
        1. if non-dispositive, then admitted to probate
     3. change in UPC 2-502(b)
        1. old: "the material provisions" must be in testator's hand
        2. new: "material portions" must be in testator's hand

1. **Revocation** 
   1. a will is an ambulatory document (subject to modification or revocation by the testator during her lifetime)
   2. methods of revocation
      1. automatic revocation
         1. by law: UPC 2-804 says divorce revokes portions of a will that leave things to spouse or spouse's kin
      2. volitional revocation (by instrument or by physical act)
         1. need capacity and intent
         2. intent element can be undermined by coercion/fraud; can be done by testator or agent (at her direction)
   3. *Harrison v. Bird* **(Daisy Speer's lawyer's destruction of her will did not revoke it—has to be a volitional act in her presence**)**(same result under UPC 2-507)**
   4. partial revocation by physical act
      1. example 1: Paragraph 3 of will says "my ring to B."  Sometime after execution, T carefully crosses out all of paragraph 3, but none of the rest of the document
         1. UPC 2-507(a)(2): allows partial revocation by physical act; intent of testator is accomplished in this example
         2. some states (including IN): do not allow partial revocation by physical act
   5. defacing will
      1. *Thompson v. Royal* (Court held that "this will is null and void" is not a valid revocation by physical act)
      2. UPC 2-507: allow for a cancellation regardless of whether the cancellation touches any of the words on the will
      3. example: T’s instrument 1: when I die, everything goes to A; T’s instrument 2: when I die, my ring to B. Instrument 2 is traditionally a codicil and under the UPC, a will.
         1. under UPC 2-507 (a)(1), second instrument amends it; it does not wholly revoke it; rest of first instrument is good; revokes the partial inconsistency. A got gift, but ring goes to B
   6. partial revocation and revival
      1. example: T’s instrument 1: when I die, everything to A; T’s instrument 2: when I die, my ring to B; T rips up will 2, with intent to revoke it
         * 1. SS: 2nd will is revoked; tearing up with intent is enough
           2. under UPC 2-509(b), there is a presumption that the first will or all of it is revived—the portion that had been revoked by 2nd instrument (the codicil) is alive again; A would take everything (including the ring)
      2. example: same as above—but, T’s instrument 3: I revoke instrument 2
         1. SS: presume the opposite:the gift of the ring is not revived, unless there is evidence to the contrary; T’s heir will get the ring; gift to A is not revived without evidence to the contrary
         2. different result when revocation of second will is by instrument, rather than revocation by revocatory act
      3. example: T’s will 1: everything to A; T’s will 2: will 1 is revoked, everything to B; T revokes will 2; T dies; H is his heir. Is Will 1 revived?
         1. is it by revocatory act or by instrument?
         2. both presume no revival, unless evidence to contrary
         3. if will two is revoked by revocatory act, then intent to revive must appear in the circumstances of the act or testatory declaration or could come later(could be later comments by the testator; could say that will 1 wanted to be effective)
         4. if will two is revoked by will 3, then intent to revive will 1 has to be found on face of will 3—document that revoked will 2—in order for will 1 to be revived
   7. revocation by revocatory act, revival
      1. example: T’s will 1: everything to A. T tears will 1 into 2 pieces. T tapes will 1 back together, intending for it to be effective, but, does not republish it.Is that a revival? does it rework it?
         1. SS: no, it cannot be revived because it was torn apart
   8. revival of revoked will
      1. Princess Bride Clip: wills that are revoked by instrument are mostly dead—can be revived; wills that are revoked by revocatory act are all dead—can not be revived
   9. **revival under UPC**
      1. presumes revival if will 2 partially revokes will 1, and will 2 is revoked by a revocatory act
      2. does not presume revival if will 2 partially revokes will 1, and will 2 is revoked by a testamentary instrument
2. **DRR (Dependent Relative Revocation)**
   1. non-revocations, i.e., ineffective revocations; ignore a revocation (not reviving something that has been revoked)
   2. DRR applies only: 1) where T wrongly thinks one document will be her will and revokes another will by physical act; or 2) T revokes a will by another will and the revoking will recites a clear and important mistake
      1. exception to DRR (intent limitation): if intestacy comes closer to what they intended, might not allow DDR
      2. *La Croix v. Senecal* [see larger outline]
      3. *Estate of Alburn* **(Even though she shreds Kanakakee will, it is admitted to probate under DDR)**
3. **Components of a Will** 
   1. republication by codicil: 1) revival: brings will back to life; 2) updates: makes will effective as of date of codicil, the later date; 3) give birth (in some states): can bring to life a document that was inadmissible to probate because of lack of capacity or undue influence; 4) intent of decedent
      1. applies only to a prior validly executed will
      2. hypothetical: T executes “will of 1-1-95.” T executes “will of 1-1-96,” which expressly revokes 95 will and says “my ring to A.” T tears up 96 will with intent to revoke. Answer: will 2 totally revoked will 1; no evidence of intent to revive; T has no will at this time. Then: T executes instrument entitled “codicil of 1-1-97 to will of 1-1-95”. Answer: Codicil of 1997 republishes by codicil the will of 1995. It has not been revived; it has been republished. Then: T dies. Answer: codicil is admissible to probate
   2. incorporation by reference
      1. permits extrinsic evidence to identify the will beneficiaries or property passing under the will
      2. a document that is not part of the will can be given testamentary effect
      3. can incorporate into a will language or instruments that have never been validly executed
      4. requirements under UPC-510
         1. intent
         2. identification
         3. existence
            1. exception (UPC 2-513): even if they don’t exist at time of execution of will, subsequent signed writings can dispose of tangible personalty
            2. note: can incorporate by reference a document even though it does NOT exist anymore
      5. additional requirements (some states): document exists at time of death of decedent (IN); will refers to document as being in existence at time of execution (not in IN)
      6. a handwritten holographic will incorporates by reference, as long as it meets other requirements of incorporation by reference
      7. example: T’s will: “I give $6000 to be paid according to the existing letter to Simon” (letter doesn’t exist)*.* T’s later typewritten letter to Simon: “$4000 of the $6000 goes to Esther Cohn.” T dies. On just these facts, does Ester take? SS: NO—it did not exist at time will was executed. But, suppose T executes codicil after writing typewritten letter? SS: Republication by codicil republishes will to current date, so letter can be incorporated by reference.
   3. act of independent significance
      1. permits extrinsic evidence to identify the will beneficiaries or property passing under the will
         1. UPC 2-512: a will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator’s death. The execution or revocation of another’s will is such an event.
4. **Contracts Relating To a Will**
   1. contracts to make a will
      1. UPC 2-514: contract to make a will may be established only by
         1. provisions of a will stating material provisions of the contract
         2. an express reference in a will to a contract and extrinsic evidence proving its terms
         3. or a writing signed by decedent evidencing the contract
      2. note: do not write contracts having to do with wills
   2. contracts not to revoke a will
      1. *Via v. Putnam* **(holds for W2, over X)** (SS: X looks like a creditor and creditors take from the elective share before spouses; but, Stake thinks that, as a matter of policy, W2 should take because she has no other way to protect herself, but W1 can create a trust
         1. note: joint wills—never use them!
            1. could be malpractice
5. **Mistaken or Ambiguous Language in Wills**
   1. the traditional approach (majority rule): no extrinsic evidence, no reformation
      1. plain meaning or no extrinsic evidence rule: extrinsic evidence may be admitted to resolve some ambiguities, but the plain meaning of the words of the will cannot be disturbed by evidence that another meaning was intended
      2. **no** reformation rule: court will not reform document even though court knows it is a wrong as a matter of subjective intent
   2. SS: traditional approach embodies policy that don’t want to admit extrinsic evidence (has not satisfied writing requirements) to help us construe the will; if language accurately describes property or likely beneficiary of testator, then court will not admit evidence about what someone else was intending
   3. *Mahoney v. Grainger* (Mass 1933) )**(Plain meaning of “heirs” is her aunt; no reformation; aunt takes, cousins don’t)**
   4. two types of ambiguities
      1. latent: court will hear extrinsic evidence to resolve ambiguity
         1. it is latent when confusion does not arise until the will is applied to the real world
      2. patent: court will not hear extrinsic evidence of intent of testator to resolve ambiguity
   5. treat latent and patent different because we do not like extrinsic evidence: it is costly; reduces incentives for getting it right in the first place; wastes judicial resources
      1. latent ambiguity did not exist until courts started accepting extrinsic evidence (not true with patent ambiguity); the extrinsic evidence created the ambiguity—therefore, it can be used to resolve it (SS: doesn’t know if this is sufficient rationale)
   6. will not admit evidence to show that additional provisions (missing from the document) should be admitted to probate
      1. if mistake in execution of will, court may exclude words—but, will include words that were not properly executed
   7. *Arnheiter v. Arnheiter* **(304 Harrison case)(Court denied probate to 304)**
      1. problem can be cured by deleting words from document—court will delete, but will not add words
      2. deletion delete words and never adds them; reformation deletes words AND adds them
   8. *Erickson v. Erickson* (CT 1998)**(If a scrivener’s error has mislead the testator into executing a will on the belief that it will be valid notwithstanding the testator’s subsequent marriage, extrinsic evidence of that error is admissible to establish the intent of the testator that his or her will be valid notwithstanding the subsequent marriage)**
   9. UPC 2-805: court may reform a will to conform to a transferor’s intention if *clear and convincing* evidence show the will was affected by a mistake
      1. SS: does not know if this is a good rule; costs and benefits: could reach right result but could make mistakes; could correct non-mistakes; we should be allowed to opt out of UPC 2-805
   10. *Fleming v. Morrison* (Mass. 1904)**(Court denied probate on ground that will was not executed with animus testandi—he was faking it)**
6. **Death of Beneficiary Before Death of Testator**
   1. lapse (what happens when devises fail)
      1. three types of devises (assume X is dead)
         1. a specific devise: “my ring to X”
            1. passes to the residuary devisee
         2. a general devise: “$100 to X”
            1. passes to residuary devisee
         3. a residuary devise: “all my other stuff to X and Y”
            1. failed residuary devises

UPC 2-604 b: a failed residuary devise goes to another residuary devisee

common law rule (*Russell*)(minority rule): passes outside estate through intestate succession to the heirs or next of kin; “no residue of the residue”

* + 1. ways devises fail
       1. void: person dead at execution; animal
       2. lapse: happens when the devisee dies before the testator dies—but, after the testator has written the will
    2. “anti-lapse” (or “lapse”) statutes: substitute other beneficiaries (usually descendants) for the dead beneficiary if certain requirements are met
       1. presumed intent: theory behind anti-lapse statute—testator would prefer a substitute gift to the devisee’s descendents rather than for the gift to lapse
       2. scope: an anti-lapse statute applies to a lapsed devise only if the devisee bears the particular relationship to the testator specified in the statute
       3. UPC 2-605**: look at *testator’s* grandparents and determine whether the devisee is a descendent of the grandparents of the testator** 
          1. **find substitute taker for that gift—the substitute taker is issue of original intended devisee**
       4. SS: anti-lapse statutes create default rules; testator can override the statute by expressing the intent that the devisee must survive for gift to survive
       5. how to override statute: need words of survivorship (“if he survives me”; “to my surviving children”)
          1. majority view: words above are sufficient to survive application of anti-lapse statute
          2. UPC 2-603 (b)(3): these words are not enough to avoid application of it
          3. *Ruotolo v. Tietjen* (CT 2006)**(The words of survivorship, “if she survives me,” are not enough to prevent application of CT’s anti-lapse statutes)(SS: not right as matter of intent; does not look like he wanted a substitute gift to go to her daughter; on facts of case, Kathleen should not have taken)**
       6. SS: we need a different, more complicated default rule
          1. the words “if she survives me” might have different intent depending on the facts—yet, UPC does not divide them into the situations where she should and should not take—making a subdivision makes law more complicated
       7. language to use to avoid application of lapse statute:

this definitely avoids lapse: “to A if A survives me, but if A does not survive me, to B if B survives me, and if both A and B do not survive me, to be added to the residue of my estate”

this probably avoids lapse: “to X or her heirs”

this does not avoid lapse: “to X and her heirs and assigns”

* + - 1. lapse of class gifts
         1. example: T has a nephew, A; A has 2 children, B and C; C has one child, D; C dies; T dies, bequeathing “$10K to be divided among the children of A.” Children of A is a class. What does B take?

common law (before anti-lapse statutes): give all to B because class gift rule says to give to remaining members of class; SS: is similar to residue of residue

UPC and most states: B and D would share—each would take $5,000 under the statute; B takes substitute gift under the statute

* + - 1. what is a class?
         1. a class gift: “to my children”
         2. NOT a class gift: “B and C” (where B and C are only children of T)
         3. key question: was testator “group-minded”?
         4. *Dawson v. Yucus* **(Example of Court finding no class gift where devisees were named separately; therefore, there was a lapse, and gift passed through residuary class of will)**
      2. void gifts
         1. example: T’s will says “$5000 each to B and C”; C died *before* execution of will

this is not a lapsed gift—this is a void gift

SS: however, the anti-lapse statutes have been extended to apply to this situation—can still make a substitute gift to C’s child if relationships are right relationships

many anti-lapse statutes would include this; UPC likes to make substitute gifts

1. **Changes in Property After Execution of Will**
   1. a specific devise is a disposition of a specific item of the testator’s property—“my three-carat diamond ring given to me by my Aunt Jane”
   2. ademption does not apply to general, demonstrative, or residuary devises: a devise is general when the testator intends to confer a general benefit and not give a particular asset; a demonstrative devise is a hybrid: a general devise, yet payable from a specific source
   3. two forms of ademption: ademption by extinction and ademption by satisfaction
   4. ademption by extinction (applies only to specific devises)
      1. example: Claire’s will: I give all bank deposits to my grandchildren; Claire withdraw all $30K from her bank, closes the account, and buys bonds with money; Claire dies, leaving only bonds. Do the grandkids get the $30K?
         1. common law: a specific bequest of bank deposits was adeemed by extinction—the gift is gone—therefore, the gift is not made, and grandchildren do not get anything
            1. uses the traditional identity theory of ademption: if a specifically devised item is not in the testator’s estate, the gift is extinguished
            2. note: specific gifts come off estate before residuary clause applies
         2. UPC 2-606(a)(1-5)[review in book]
            1. uses the newer intent theory of ademption: if the specifically devised gift is not in the testator’s estate, the beneficiary may nonetheless be entitled to the replacement for, or cash vale of, the original item, depending on whether the beneficiary can show that this is *what the testator* *would have wanted*
      2. *In re Estate of Anton* (IA 2007)**(Under what the court has called the “modified intention theory,” the identity rule will not be applied to cases where specifically devised property is removed from the estate through an act that is *involuntary* as to the testator. This includes cases where the property is sold by a guardian, or conservator, or is destroyed contemporaneously with the death of the testator)(sold duplex to support her mom)**
         1. modified intention approach: Court said the gift of the duplex is only adeemed if that is what testator would have wanted, and this is not what he would have wanted, and therefore it is not adeemed
         2. the test: the testator wanted to adeem the devise if he:
            1. has knowledge of a transaction involving a specific devise
            2. realizes the effect of the transaction on his or her estate plane
            3. and has an opportunity to revise the will
   5. stock splits and problem of increase
      1. example: T executes will: “5 shares of AT&T to Bill”; AT&T splits 2 for 1; T dies. Should Bill get 5 shares or 10 shares of AT&T?
         1. this is a general devise
         2. traditional common law (majority): Bill gets 5 shares
            1. if do not have it, buy it; deals with fungible goods
         3. UPC and modern trend: presume that Bill gets 10 shares
         4. SS: goal of testator is best served by giving 5 shares (traditional view is right; UPC is wrong; but, will never know his true intent)
   6. satisfaction of general pecuniary bequests
      1. doctrine of satisfaction (sometimes known as ademption by satisfaction): applies when the testator makes a transfer to devisee after executing the will
      2. rule: if testator is *parent* of beneficiary and sometime after executing the will transfer to the beneficiary property of a similar nature to that devised by the will, there is a rebuttable presumption that the gift is in satisfaction of the devise made by the will
      3. example: T executes a will devising $20,000 to A; T sends checks to A and A’s husband for $10,000 each with a letter saying that the gifts are in lieu of the devise to A; T dies. What does A take under UPC?
         1. this partially adeems by satisfaction the gift of $20,000 in the will
         2. at most, A will take 10K
         3. how about other half of it? is it adeemed by gift to A’s husband?
            1. 1990 UPC 2-609: “Property a testator gave in his or her lifetime to a person is treated as a satisfaction of a devise in whole or in part only if i) the will provides for the deduction of the gift, ii) the testator declared in a contemporaneous writing , iii) the devisee acknowledged it is adeemed

SS: gift to A can be adeemed by gifts to other people

UPC has broadened potential of ademption for satisfaction

* 1. exoneration
     1. practice point: if write will that might transfer realty make sure specify clearly who should pay mortgage on that property
  2. abatement
     1. order of priority: if two conflicting claims, which one wins?
     2. example: Claire’s will: I give $30K to my friend and all bank deposits to my grandchildren. Claire dies: her only remaining asset is a $30K bank deposit. Who takes? Her grandchildren
        1. priority (who takes first): 1) specific 2) general 3) residuary
        2. $30 K to my friend is a general devise—can be satisfied from any part of estate; bank deposit is specific (like a painting)
  3. ademption occurs before abatement
     1. first: decide who is supposed to get what
        1. use rules of ademption
     2. then, consider who will get what

1. **Will Substitutes (Ways of Avoiding Default Rules of Intestate Succession)**
   1. ordinary inter vivos gifts
   2. irrevocable inter vivos trust
   3. joint tenancy (avoid bank accounts; try convenience account—keeps separate)
   4. revocable: 1) life insurance beneficiary designation; 2) pension account beneficiary designation; 3) pay on death (POD) accounts—bank accounts, i.e. mutual fund and brokerages—other than true joint tenancy and convenience accounts
   5. POD contracts
      1. old view (*In re Estate of Atkinson*): POD designations are testamentary in nature and therefore not valid unless executed in compliance with the will formalities
      2. modern view (*Estate of Hillowitz*): POD designations are testamentary in nature and therefore valid even though not executed with testamentary formalities
   6. transfer on death (TOD) deeds (real estate; do not use)
   7. revocable trusts (best will substitute)
      1. passes assets at death; can put anything into a trust; can be changed during life; subsidiary rules from wills (ademption and abatement) are sometimes applied to it
      2. *Farkas v. Williams* (IL 1955)**(Trust declarations executed by Farkas constituted valid inter vivos trusts and were not attempted testamentary dispositions)**
         1. **a trust can act just like a will, even though it does NOT have to follow wills formalities or have interest for beneficiary**
      3. *Linthicum v. Rudi* **(Because beneficiary’s interest in a revocable trust is contingent at most, beneficiaries do NOT have standing to contest settlor’s lifetime amendments)**
      4. power to revoke and power to amend
         1. *In Re Estate and Trust and Pilafas* **(No writing, no revocation—trust is still good)(SS: probably not what he wanted)**
      5. creditors’ rights
         1. *State Street* **(If settlor can get to assets in trust while alive, creditors can get to them when he is dead)**
   8. life insurance
      1. ambulatory; testamentary; not executed in compliance with Wills Act formalities; 1st exception to statutory formalities
      2. *Cook v. Equitable Life Assurance Society* (IN 1981)**(Life insurance beneficiary designations (and other POD designations) can not be changed by a will)**
         1. costs: injustice; complicates estate planning; slightly increases litigation; benefits: reduces litigation; saved social cost
   9. pensions
      1. killing the decedent does not revoke a beneficiary designation in a pension covered by ERISA
      2. state laws automatically revoke *will* provisions in favor of divorced spouse and his or her family
      3. UPC: *pension* designations are automatically revoked upon divorce
      4. *Egelhoff v. Egelhoff* (2001)**(ERISA preempts state law to the extent it applies to ERISA plans)**
      5. defined benefit pension (old school pensions): employer promises to pay an annuity on retirement (less decision-making anxiety; there is equal treatment; less risk of making mistakes; might generate more happiness
      6. defined contribution: employee and employer both make contributions
         1. three tax advantages (according to Langbein): 1) contributions are tax deferred; 2) earnings are tax deferred; 3) lower tax bracket at tax time (SS: not necessarily a benefit)
   10. pour-over wills
       1. revocable trust has eclipsed will not only because it avoids probate, but also because it allows the settlor to consolidate under one instrument the dispositive plan for all her property, probate and nonprobate
       2. how it works: O sets up a revocable inter vivos trust naming X as trustee; O then executes a will devising the residue of his estate to X, as trustee, to hold under the terms of the trust
       3. pour-over by will of probate assets into an inter vivos trust allows O to establish an inter vivos trust that can serve as a single receptacle for all the settlor’s probate and nonprobate property
       4. *Clymer v. Mayo* **(Bequest to the inter vivos trust was valid even though the trust was unfunded)(The testamentary trust revoked the will provisions providing for the former spouse; SS: this is judicial activism; writing the rules)**
          1. a will can: fund a trust; create a testamentary trust; pour into an inter vivos trust
          2. UTATA, UPC 2-511 (a): **permits a pour-over to a trust that is created *after* the will is executed**
          3. unfunded life insurance trust: where a settlor names the trustee of her inter vivos trust as the beneficiary of her life insurance policy but does not add any other funds or assets to the trust; the res is the trustee’s contingent right to receive proceeds of the policy
          4. fund inter vivos trust: where the settlor adds other assets to the inter vivos trust
             1. SS: the trust existed before; it is not part of the will
       5. advantages of trusts: can choose jurisdiction; can set up criteria for incompetence; it is not a public record
       6. downsides to trusts: trusts are not protected from claims of creditors (under a will, the creditors of the decedent have 6 months to show up and make claims)
2. **Planning for Incapacity**
   1. financial planning
      1. an attorney-in-fact is a person authorized to act for the principal; power ends when principal lacks capacity, unless agent has durable power of attorney
      2. requirements for durable power of attorney: 1) writing; 2) notarized; 3) witnessed; 4) fiduciary duties to principal: a) loyalty; b) care; c) obedience
      3. *In re Estate of Kurrelmeyer* **(She had the power to create a revocable trust, but she did NOT have power to do it by executing a new will; SS: can do indirectly what she can not do directly—FORM IS SUBSTANCE)**
   2. health care advance directives
      1. *Cruzan v. Mo. Dept. of Health* (1990)**(Supreme Court held that each person has a constitutional right to make health care decisions for herself, including the right to refuse medical treatment)**
      2. three types of advanced directives: 1) *instructional or medical directives*, such as a living will, which specify by way of hypos how one wants to be treated; 2) *proxy directives*, such as health care proxy or durable power of attorney for health care, which designate an agent to make decisions (held to substituted judgment standard—must do what you would have done); 3) hybrid or combined directives
3. **Protection for Spouses**
   1. federal protections apply only to opposite sex couples; state law protections can apply to both
   2. federal survivors’ rights: private pension plans, governed by ERISA; social security
4. **Right of Surviving Spouse to Support (applies to both separate and community property states)(support received before creditors can claim)**
   1. total support: approximately $65,000
   2. no former spouses
   3. spouses can waive this support
   4. not charged against share of surviving spouse or minor children
   5. homestead right
      1. traditional: right to live in the house
      2. UPC 2-402: $22,500
      3. if no spouse, minor children get this
   6. exempt property
      1. tangible personal property
      2. UPC 2-403: $15,000 maximum
   7. family allowance
      1. UPC 2-404: executor can give to surviving spouse or surviving children up to $27,000 for one year; can only be used to support the children
   8. tenancies by the entirety (1/2 states, including IN)
      1. decedent’s creditors can not reach any of the assets in the tenancies by the entirety
5. **Additional Sharing of Decedent’s Assets: Community v. Separate Property**
   1. community property (Western states, Wisconsin, and Alaska allow opt-in)
      1. shared equally by the community—each own 50% of it; can devise that 50% to anyone
      2. separate assets will remain separate, unless declared community property
      3. since sharing during life, no sharing rules at death
      4. ERISA, which attempts to protect surviving spouses, supersedes community property law and pensions are not included in community property
         1. *Boggs v. Boggs* **(Supreme Court held that husband’s pension benefits must be used to support his second wife, rather than to be paid to the sons as named beneficiaries)**
   2. separate property system (common law property system)
      1. no automatic sharing
      2. possibility that the earner and owner will leave all his property to someone else and . . . the law does not like this—separate property states give a spouse an elective or forced share
   3. separate property system: elective share, generally
      1. typical elective share: 1/3 of all of decedent’s probate property plus certain nonprobate transfers
      2. override the decedent’s will of any individual (limiting rule); couple can waive elective share together (default rule)
      3. applies when will provides for different amount than spouse gets under intestate share
      4. partnership theory: share income from partnership
      5. **support theory**: need to support surviving spouses
         1. UPC: uses this
         2. note: deceased spouse’s representative cannot renounce living spouse’s will and take elective share because after spouse dies she has no need for support; so, money should not go to her heirs
      6. incompetent living survivors can, via their representatives, make the election
         1. substituted judgment standard (majority): guardian takes into account preservation of the decedent’s estate plan and whether surviving spouse would have wanted to abide by her dead spouse’s will
            1. *In re Estate of Cross* **(Probate court made decision for surviving spouse)**
         2. best interest standard (minority): guardian should elect to take against the will if it is to the surviving spouse’s economic benefit, calculated mathematically
      7. health insurance is a special product (not like broccoli)
      8. abandonment and election
         1. minority view: deny elective share to individuals who abandoned or refused to support deceased spouse
            1. partnership theory: assets generated before abandonment should be accessible
            2. support theory: SS not quite as clear, but surviving spouse needs support
            3. proving abandonment is tricky and not efficient
   4. separate property system: assets subject to the election
      1. originally applied only to probate estate; but, question arose whether it should be extended to nonprobate property
         1. became a problem: *Sullivan v. Burkin* (MA 1984)**(Upholds the trust and wife does not get anything in the trust)**
      2. judicial responses:
         1. illusory transfer test: “illusory” revocable trust is a valid trust, but it counts as part of the decedent’s assets subject to the elective share; trustee may have to contribute some of the trust assets to make up elective share
            1. note: not applied to insurance; courts have applied either subjective or objective standard; most widely adopted of judicial tests for subjective nonprobate property to elective share; SS: this represents a triumph of substance over form
         2. *Bongaards v. Millen* (MA 2003)**(If someone else creates trust for decedent, it is not part of assets of which surviving spouse can take an elective share)**
      3. statutory schemes
         1. these statutes reject the judicially crafted illusory transfer and other similar tests, favoring instead a list of specified nonprobate transfers that are added to the probate estate to constitute an augmented estate against which the surviving spouse’s elective share is applied
      4. stautory scheme: 1969 UPC “Augmented estates” (1/3 share)
         1. augmented estate (the probate estate augmented with certain nonprobate transfers)
         2. augmented estate includes the probate estate and the following nonprobate and inter vivos transfers made without consideration at any time *during the marriage* if decedent:
            1. retains right to possession or income
            2. can revoke transfer or can invade the principle for his benefit
            3. created a joint tenancy
            4. transferred more than $3000 (now $13,000) within 2 years before death, or
            5. transferred to surviving spouse one way or another

example: H owns $900K. H gives $300K to W before dying. Probate estate is $600K, which H’s will leaves to his daughter. SS: she can take $300K she already has or she can take $300K + 600K + /.33, and get 300K

* + - 1. does NOT include life insurance policies owned by the decedent; any separate assets
      2. under 1969 UPC, surviving spouse gets 1/3; under most state laws, spouse’s share under intestate succession was ½; resembles laws of dower
    1. statutory scheme: 1990 UPC “Augmented Estate”
       1. add in all property of both spouses and split it according to a percentage based on the length of the marriage
       2. includes life insurance and assets held by the survivor (if survivor already has a lot of those assets, do not need to add more)
       3. minimum support obligation of $50,000 in form of supplemental elective-share amount (indirect benefit to children)
    2. statutory scheme: 2008 UPC “Sliding Scale”
       1. provides for an equal split of marital property, but the proportion of each spouse’s property that is deemed marital, includible in the augmented estate subject to division, is phased in based on length of marriage
       2. spouse will take 50% and might get more
       3. two steps: 1) determine value of augmented estate; 2) multiply augmented estate by percentages based on length of marriage to get the marital-property portion)
    3. must surviving spouse accept a life estate?
       1. example: H’s will leaves W a life estate in a trust fund of 100K. She renounces that interest. Is it charged against her elective share?
          1. under 1969 UPC: no
          2. under 1990 UPC: yes
  1. waiver of the elective share
     1. prototypical waive occurs in a premarital agreement
     2. UPC 2-213: a surviving spouse’s waiver is not enforceable if the surviving spouses that:
        1. he or she did not execute waiver voluntarily or
        2. waiver was unconscionable when it was executed and, before execution of the waiver, he [or she]:
           1. was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;
           2. did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and
           3. did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent
     3. *Reece v. Elliot* (TN 2006)**(Court enforced waiver of elective share when husband had disclosed stock, but its value; wife had a lawyer; she could have looked into it)**
     4. *State of Davis* **(Court found no proof of full disclosure of value when list of assets could not be found)**
        1. note: list of assets do not have to includes values to be full and fair disclosure
  2. interstate migration
     1. moving from one state to another does not automatically change character of property (from community to separate, vice versa), unless couple transmutes it (change it)
     2. how to reduce future federal capital gains taxes: buy property; move from community property state (CA) to separate property state (IN); property increases in value; property is still community property; husband devises property to W; he dies; under federal estate tax, ½ of community property is subject to tax at H’s death (but it qualifies for marital deduction if devised to W; sell property and no taxes
     3. some community property states allow community property with right of survivorship: decedent spouse cannot dispose of his share of the community by will; it passes under a right of survivorship to surviving spouse
        1. SS: might not be treated like community property by the IRS for income tax purposes
     4. how to circumvent elective share statute: move from separate community state to community property state; do not transmute it; acquire community property (but, if retired, few assets will come); when he dies, she gets ½ of community property (almost nothing); cannot elect under elective share statute because it does not exist in community property states
        1. solution in CA:: husband’s assets that would have been community property in CA become quasi-community property and wife gets half of those
           1. note: if she dies first, she does not get it and cannot devise it
  3. spouses omitted from premarital will
     1. protects a surviving spouse from unintentional disinheritance through premarital will
     2. common law: premarital will was revoked on marriage or on marriage followed by birth of issue
     3. UPC 2-301: entitled to receive no less than intestate share unless (there is evidence that the decedent spouse did not mistakenly omit surviving spouse in premarital will): 1) will was made in contemplation of the testator’s marriage to surviving spouse; 2) will expressed intention that it is to be effective notwithstanding any subsequent marriage; or 3) testator provided for spouse by transfer outside the will and intent that the transfer be in lieu of testamentary provision is shown by testator’s statements or evidence
     4. practical advice: do not allow these default rules to apply if your client gets married
     5. *In re Estate of Prestie* (NV 2006)**(Amendment to an inter vivos trust cannot serve to rebut the presumption that a will is revoked as to an unintentionally omitted spouse)**
        1. Court did not consider husband’s intent, partial revocation applied (because no intent to provide for or omit found in marriage contract), and the spouse took the pretermitted share, in addition to the trust (SS: if look at husband’s intent, not what he wanted)

1. **Rights of Descendants Omitted from the Will (these rules do not apply to trusts)**
   1. protection from intentional omission (NONE)
      1. all states (except LA): child or other descendant has no statutory protection against intentional disinheritance
      2. Australians love kids and protect them: *Lambeff v. Farmers Co-Operative Executors and Trustees Ltd.* **(“Adequate provision for proper maintenance, education, and advancement in life”)**
      3. costs: increase in litigation; reduces incentives to write a will; gives judges a lot of discretion; benefits: protect disfavored kids
   2. protection from unintentional omission (SOME)
      1. no child alive at time of will execution
         1. UPC 2-302: omitted child takes a share unless the will transfers substantially all the decedent’s estate to the child’s other parents or the testator indicated otherwise and indicated that in the will or by some other transfer to the child
      2. one or more children alive at time of will execution
         1. child gets share of testator’s estate that child would have gotten if testator included all his children and had given each an equal share unless it appears from will that omission was intentional
2. **Background**
   1. cases heard in Westminster Hall: *Court of the King’s Bench* (court of law)(located to steps at far end of hall) and *Court of Chancery* (court of equity)(located to right of steps at end of hall)
   2. O conveys Greenacre to “T for the benefit of B.”
      1. King’s Bench says T is the owner; Court of Chancery says B is the owner
      2. origin of the trust: one person is an owner in equity and one is owner in law
   3. types of trusts
      1. involuntary (constructive trusts)
      2. voluntary: testamentary (created by a will at death) and inter vivos (revocable or irrevocable)
      3. business trust
3. **Creation of Voluntary Trusts**
   1. trusts usually involve at least three parties: settlor, trustor, or grantor (person who creates trust), trustee (can be settlor or 3rd party), and one or more beneficiaries; but, three different persons are not necessary for a trust: one person can wear two hats or sometimes even three
   2. trustee
      1. a trust does not fail for want of a trustee, but court will almost always appoint one
      2. must have active duties to perform
         1. if no active duties, have passive or dry trust
      3. fiduciary duty
         1. duty of loyalty: must act for sole benefit of beneficiary
            1. *Jimenez v. Lee* **(Because the father was trustee of daughter’s educational trust, he breached fiduciary duty when, instead of using his own money, he used trust funds to pay for his daughter’s school book fees)**
         2. duty to keep and render account (strict duty): if cannot prove that spent assets as directed by trust, trustee is liable as if she pocketed the money; showing canceled checks is not sufficient; must keep records
4. **Creation of a Trust**
   1. intent
      1. no magic words required: not even “trust” or “trustee”
      2. sole question: whether the grantor manifested an intention to create a trust relationship; focus is on function rather than form
         1. examples: “Any real estate . . . shall be *maintained* for the benefit of said grandchildren and shall not be sold until the youngest . . . has reached twenty-one” (*Lux v. Lux*); “for the use and benefit”
         2. but, note: intent to make a gift is not enough to establish the intent to create a trust
            1. *Hebrew University Association v. Nye* **(Court found a gift, but did not find a trust)**
   2. necessity of trust property
      1. trust cannot exist without trust property, often called the *res* 
         1. one exception: pour-over wills
      2. *Unthank v. Rippstein* (TX 1964)**(The most that Craft did was to express an intention to make monthly gifts to Mrs. Rippstein accompanied by an ineffectual attempt to bind his estate in future; the writing was no more than a promise to make similar gifts in the future and as such is unenforceable)**
      3. *res* can be: one dollar, on cent, interest in property to be transferred, a debt, an existing assignable asset, a separately recognizable legal interest, etc.
      4. res cannot be profits to be made from trading certain stocks in the future
         1. *Brainard v. Commissioner* **(Trust did not arise until after the profits were credited on Brainard’s books on the grounds that there was no res at the time of declaration of trust. Because the trust did not exist, the profits could not come into the trust, and therefore the profits did not come in as their profits, they came in as his, and he had to pay taxes)**
      5. res cannot be a mere expectancy
   3. necessity of trust beneficiaries
      1. trust must have one or more ascertainable beneficiaries; there must be someone to whom the trustee owes fiduciary duties, someone who can call the trustee to account
      2. beneficiary must be definite (exception: charitable trusts)
         1. *Clark v. Campbell* **(“Friends” is not definite enough)**
   4. necessity of a written instrument
      1. standing alone, a trust does not require a writing to create a valid trust
      2. do not need a writing: inter vivos trust of personalty
      3. need a writing: a testamentary trust (i.e., trust created a by a will) and inter vivos trust of land
      4. oral trusts are allowed in most states and under UPC if there is clear and convincing evidence that they were intended to be created
         1. SS: this rule is bound to create litigation
5. **Rights of the Beneficiary to Distributions**
   1. mandatory trust: a trustee of a mandatory trust has no discretion as to who takes and what they take
      1. can be contingent: if X happens A takes, and if Y happens B takes
      2. relatively easy for beneficiary to ask for an accounting to see whether he or she is getting her share from the trustee
   2. discretionary trust: a trustee has discretion as to either who takes or how much they take, or both
      1. makes it harder for a beneficiary to make a claim
      2. a discretionary trustee has a duty to inquire as to needs of beneficiary
         1. *Marsman v. Nasca* (MA. 1991) **(Trustee of discretionary trust has a duty to inquire into the financial needs of the beneficiary in determining whether to make a distribution and how much to make)**
6. **Rights of the Beneficiary’s Creditors**
   1. mandatory trust
      1. example: S transfers $100K to T to pay income to A for life, then to A’s children; A harms C with his car and C obtains judgment against A. Can C force T to pay some principal to C to pay the judgment? **NO**, income is there for A, but not the principal; principal is not A’s money
      2. can creditor force the trustee to pay A’s income to C instead of to A? **YES**
         1. traditional rule: creditor can reach whatever assets the beneficiary can reach; in a mandatory trust, the beneficiary can force assets out of hands of trustee
   2. pure discretionary trust (trustee has absolute, sole, or uncontrolled discretion over distributions)
      1. example: same facts, except T has “complete discretion” as to whether to pay income or principal to A. Can C reach the trust assets to satisfy the judgment? **NO**, because A cannot, C cannot too
   3. discretionary trust (alimony)
      1. example: same facts, except C is former spouse who wins a $10K annual alimony judgment against A.
         1. common law: former spouse cannot reach this (*Shelly v. Shelley*)
         2. UTC: spouse can reach this
   4. discretionary trust (child support)
      1. example: same facts, except C is child of A who wins $10K in child support
         1. rule: child can get money
   5. discretionary trust (necessities)
      1. same facts, except C is creditor who provided necessities to A (food, groceries, housing, etc.)
         1. common law: creditor wins; point of trust was to support A—going to pay people who are supporting A
         2. UTC: creditor loses, unless creditor is government
   6. discretionary trust with support standard (trustee must make distributions as necessary beneficiary’s needs)
      1. same facts except that T is to “apply the income for the support of A.” Can C force T to pay income to C to satisfy the judgment? **NO**,because any payments that would be made to C would not be made for support of A, unless there is enough money to pay off creditor and to keep making payments
   7. protective trust (spendthrift trusts)
      1. can be mandatory or discretionary; can be either spendthrift or not spendthrift
      2. creating a spendthrift trust: S devises to T, “income for the benefit of A, but A cannot alienate A’s interest and A’s creditors cannot reach it”
         1. no voluntary or involuntary alienation by A
      3. English rule: creditor can reach payments; do not recognize spendthrift trust
      4. American rule (all jurisdictions): creditor cannot reach the assets in the trust to satisfy the debts from the debtor-beneficiary to the creditor
         1. SS: this allows a settlor to fetter alienability of interest
            1. note: not ok to have restraints on alienation of legal interest; ok to have restraints on equitable interest (the beneficial interest in this situation)
      5. S devised to T, “income for the benefit of A, but A cannot alienate A’s interest and A’s creditors cannot reach it.” A molested C, a minor. C obtained judgment for $551K. Can C reach the payments T makes to A from the trust? *Scheffel v. Krueger* and UPC: **No**, child cannot reach the assets in the spendthrift trust)
      6. exceptions to general rule of spendthrift trusts (limiting rules)(UPC and majority of states)
         1. child support
         2. alimony or maintenance
   8. self-settled asset protection trust (APT)
      1. example: S settles trust with T, “income and principal for the benefit of S as determined by T in T’s complete discretion, and S cannot alienate S’s interest and S’s creditor cannot reach it.” S commits a tort against C. Can S’s creditor C reach the distributions T declares to S from the trust?
         1. common law: creditors can reach it
            1. note: if already have the creditor, then transfer into trust—that is a fraudulent transfer
         2. number of states: creditors cannot reach it
            1. can protect yourself from future creditors by creating an APT
            2. SS: states get trust fund by allowing this; race to the bottom
      2. example: same facts, except assets are placed in trust after the tort and Federal Trade Commission wants to each these assets on behalf of victims of Ponzi scheme. Can these be reached? *FTC v. Affordable Media, LCC* **(Yes, FTC can reach the assets);** SS: trust is viewed poorly designed APT because did not give up complete control
      3. warning: transferring assets to avoid creditors is a fraud and is unethical for lawyer to do; but, it might be malpractice to fail to tell client how to protect her assets
   9. trusts for the state-supported
      1. self-settled trust generally prevent qualification for Medicaid
      2. supplemental needs trusts: used by settlors who want to provide only benefits that the state is unable or unwilling to provide
7. **Modification and Termination of Trusts**
   1. deviation and changed circumstances
      1. need to modify or terminate trust because of an unanticipated change in circumstances
      2. two kinds of equitable deviations
         1. administrative deviation: changing the management of the assets that is inconsistent with instructions in the trust
            1. it is allowed when ALL beneficiaries will benefit AND following previous instruction would interfere with distributive purposes
         2. distributive deviations: changes in who beneficiary is or what she takes or when
            1. if a beneficiary disagrees, distributive deviation cannot be made
            2. all beneficiaries agree, but settlor disagrees

traditional common law rule (majority)(*In re Trust of Stuchell*): allow deviation only if trust purpose cannot be accomplished without making a change

modern trend (minority): allow modifications to further interests of trust

*In re Riddell* **(Court grants equitable deviation in form of supplemental needs trust because that is what settlor would have wanted)**

* 1. termination of trusts
     1. automatic termination
        1. “Trust shall last until Earl’s youngest child is 30 years old.” Earl is dead and his youngest child is 30 years old. Does the trust terminate? **YES**
     2. beneficiaries and settlor agree to terminate, trustee disagrees
        1. objection of trustee is no hurdle when ALL beneficiaries and settlor agree to terminate the trust
     3. beneficiaries agree, settlor is dead, and trustee disagrees (fights for continuation of trustee and his trustee fees)
        1. *Claiflin* doctrine (*In Re Estate of Brown*): if continuance of the trust without modification or termination is necessary to carry out a material purpose of the settlor, the beneficiaries cannot compel modification or termination
        2. note: discretionary trusts, spendthrift trusts, and support trusts almost always qualify as having a material purpose and will not be modified or terminated; protection lasts only as long as RaP allows
        3. no *Claflin doctrine* in England
        4. *Claflin* doctrine is under attack in U.S.
           1. Restatement 3rd section 65: Court should weigh reasons for termination against material purpose
           2. UTC section 411 (b): “may be terminated if continuance of the trust is not necessary to achieve any material purpose of the trust”

example: To “T for the professional education of A’s 2 children, and after they are all educated to be distributed among them.” Suppose they come in and say they want the money and they are 18. Settlor is dead.

under *Claiflin*: will protect trust; purpose can still be accomplished

under UTC: keeping the trust open is NOT necessary for them to get an education

* 1. trustee removal (default rules)
     1. common law: beneficiaries cannot change trustee, unless a specific fiduciary duty is violated
     2. UTC 706 (b): can remove trustee if (among other things):
        1. trustee has committed serious breach of trust
        2. substantial change in circumstances or removal is requested by all of qualified beneficiaries, the court finds that removal of trustee serves best interests of beneficiaries and is not inconsistent with material purpose of trust, and new trustee is available
     3. *Davis v. U.S. Bank National Association* **(All qualified beneficiaries can get trustee removed if it is in the best interest of the trust)**
        1. best interest: lower trustee fees and trustee has to show that it is inconsistent material purpose of trust—but, could not do it
        2. another ground for changing trustee: there is a change of circumstances, all beneficiaries would benefit, and no harm
        3. these are default rules—if want another rule about removing trustees, write that into the trust
  2. trust protectors
     1. trust protector can be given power to: change trustees; approve equitable deviations without going to court to get distributive deviation; make changes to save taxes or Medicare reimbursements; and terminate the trust

1. **Powers of Appointment**
   1. often used in context of trust
   2. power of appointment: right to designate the new owner of the property
   3. can sever power of appointment from the ownership of the property itself
   4. when this happens, the following relationships are created
      1. owner of property (person who is severing) is the donor of the appointment
      2. person with power to appoint the property is the donee
      3. prospective new owners are the objects of the powers
      4. when the donee actually exercises property, the new owners are called appointees
   5. special v. general power
      1. general power: can be exercised by donee of the power in favor of only these things: the donee herself; the donee’s creditors; the donee’s estate; or the donee’s estate’s creditors
         1. **example: “to whomever Daughter appoints by will”**
            1. **she can appoint to her estate; to her creditors; to her estate’s creditors, etc.**
            2. **this is a general power**
      2. special power: if not general power, it is a special power
         1. also called: non-general power or limited power
      3. two dimensions
         1. general or special?
         2. how is it exercised?
            1. by deed—during
            2. by will—is a testament
            3. or both
      4. tax consequences
         1. lot of potential for malpractice here
         2. for tax purposes, when power is general, the donee of the power is treated as the owner of the property
            1. she can appoint to herself—and that makes it essentially her stuff, her assets
         3. if special power of appointment, she cannot do this, so it is not her assets, and it is not taxed to her
   6. can have both a testamentary and inter vivos power
   7. release and partial release
      1. “I release my right to appoint to anyone but my children.”
         1. *Beals v. State Street Bank and Trust* 
            1. Isabella did this in order to save taxes
            2. default rules vary across the states regarding whether a residuary clause in a will—“I hereby give all other assets I have to X”—exercises the power of appointment in favor of residuary devisees
         2. example: Elsa held a special testamentary power to appoint among her “kindred.” She made a deal to appoint $250K to her cousin Paul if he would agree to give 100K to her husband Foster [who was not a permissible appointee”
            1. problem: her kindred does not include her husband—he is not a permissible appointee, and he is going to end up with some of her property, which is contrary to what donor intended
            2. SS: Court will hold this to an appointment in defraud of a special power**;** a special power has limited permissible appointees—if try to get around that limit, it is a fraud on a special power; Paul gets nothing
   8. failure to exercise, if no takers in default, default rules:
      1. special power—goes to permissible appointees (objects)
         1. example: Father transfers $10K “to bank to pay the interest for the benefit of daughter for life, then pay the corpus to whichever of my grandchildren Daughter appoints by will, and in default of appointment to my cousin.” Daughter dies, and her will makes no appointment. Answer: she has failed to appoint and the cousin takes; cousin has a vested interest subject to being divested by the power of appointment; since this a special power, we give the appointive property to the permissible appointees (the people who could have taken an appointment of the property, i.e., the grandchildren), not because they are named but because this is a special power
      2. general power—goes to estate of donor, unless capture (donee attempted to assume control for all purposes), then goes to estate of donee
         1. example: “I hereby appoint in favor of X, Y, and Z.” They are all dead.
            1. the capture exception (default rule): when donee tries to exercise power of appointment but fails, court gives property to donee and NOT the donor

trying to interpret what the donor would have wanted: by giving general power donor is saying property belongs to donee

* + - 1. example: Donee appoints by will but all appointees die before Donee. Assets pass back to estate of donee.
         1. default rule can be overcome by donor saying that if donee ineffectively exercises her power it should not go back into her estate

1. **Present Interests**
   1. freeholds: fee simple and fee tail
   2. nonfreeholds: life estate and estate *pur autre vie*
   3. two ways to make it defeasible: 1) by special limitation, by durational language: “during,” “while,” “as long as,” “for long as,” or “until”; 2) by condition subsequent, by conditional language: “if,” “but if,” “provided,” “or on the condition that”
2. **Future Interests**
   1. future interests are rights that exist today to take possession (maybe) in the future
   2. **future interests retained by transferor** (reversionary interests)
      1. reversion: O creates a reversion if O does not transfer a vested estate of at least the same quantum as she had to start
         1. example: O transfers to “T for the benefit of A for life”
      2. possibility of reverter (durational limit)
         1. O transfers same quantum
         2. example: O transfer “to T for the benefit of A until A divorces B, then for the benefit of O”
      3. right of entry (conditional limit)
         1. can be created either: 1) if O transfers estate of same quantum (like possibility of reverter); 2) or if O transfers an estate of a lesser quantum
         2. example: O transfer “to T for the benefit of A for life, but if A divorces B then for the benefit of O”
   3. **future interests in transferees**
      1. remainder (only one that could exist before 1536)
         1. vested remainder if both:
            1. a taker is ascertainable/a remainder person is ascertainable and
            2. there is no unsatisfied condition precedent (pra-cee-dent), except the natural termination of the preceding estates and survival of a remainderperson for life
         2. preference for vested interests
         3. categories of vested remainders: 1) indefeasibly vested; 2) subject to open; 3) subject to complete divestment; 4) subject to open and complete divestment; 5) with enjoyment postponed
         4. common law: contingent remainder in land is destructible
            1. could be destroyed if it failed to vest in interest in time to vest in possession

example: O transfers Blackacre to “A for life, then to B if B has reached 21” A dies while B is 18.

applies to legal interest in land and personalty

* + - * 1. could be destroyed by merger of surrounding vested interest

example: O transfers Greenacre “to A for life, then to B for life if B buys Blackacre, then to C.” C sells C’s interest to A, before B buys Blackacre. A holds life estate and holds vested remainder in fee simple: two are merged into fee simple and contingent remainder sitting between them is “squeezed out”

exceptions:

under many state statutes, contingent remainders are now supposedly not destructible (SS: they are still destructible if they do not vest in time)

* + 1. executory interest
       1. follows vested fee simple or cuts off a vested estate
       2. two types of executory interests
          1. springing: takes from grantor or grantor’s heir
          2. shifting: takes from a grantee

example: O transfers “to T for the benefit of A for life, but if A sells Blackacre then to B for A’s life.”

1. **Future Interest Examples**
   1. example 1: O transfers to “A for life, then to A’s first son who shall reach 21.”
      1. Answer: if A’s son reached 21 before A dies, A’s son has a remainder. If A’s son does not reach 21 before A dies, A’s son has a springing executory interest (life estate will go back to O; he has to take it from O)
      2. note: in this example, where it can be either a remainder or executory interest, it will be a remainder because remainders are destructible
   2. example 2: O conveys “to T for the benefit of A for life, then to B if B survives A, and if B does not survive A then to C.”
      1. Answer: A has a life estate. B has a contingent remainder in fee simple. C has an alternate contingent remainder in fee simple. O has kept a reversion.
   3. example 3: O conveys “to T for the benefit of A for life, then to B, but if B does not survive A then to C instead.”
      1. Answer: B has a vested remainder in fee simple subject to divestment by an executory interest in C. C has a shifting executory interest in fee simple.
   4. example 4: O devises “to T for the benefit of A for life, then to B, however if C survives D then to C.” While A lives, B disclaims. Assume the UPC disclaimer rule is in effect.
      1. Answer: Pretend B died before the interest was created. Interest goes back to O. C must divest O. C has a springing executory interest from O
   5. example 5: O transfers money “to T for the benefit of A for life, then to A’s children, but if at A’s death, A is not survived by any children, then to B.” A has no children.
      1. Answer: A has an equitable life estate. A’s children have a contingent remainder in fee simple. B has an alternative contingent remainder. O has a reversion.
   6. example 6: O transfers money “to T for the benefit of A for life, then to A’s children, but if at A’s death A is not survived by any children, then to B.” A has child C, and C has a child D. C dies devising all to D. A dies.
      1. Answer: A has a life estate. C has a vested remainder in fee simple subject to open. B has a shifting executory interest in fee simple. B would have to divest C. B’s interest has changed from contingent remainder to an executory interest by birth of C.
      2. now, same facts, and C dies devises all to D. A is still alive.
         1. Answer: C’s interest passes to D under D’s will; it is a devisable interest.
      3. now, same fact, except A dies.
         1. Answer: A has died leaving no children to survive him. B’s executory interest divests C, so B takes. D gets wiped out.
2. **Federal Estate Tax and Valuation of Future Interests**
   1. federal estate tax turns on whether the interest is “transmissible”
      1. an interest is transmissible if it does not disappear at death
      2. SS: key is not to create transmissible interest
      3. example: T’s will devises property in trust “for A for life, then to B, but if B does not survive A then to C.”
         1. Answer: A has life estate. B has vested remainder. C has a shifting executory interest. B dies during A’s lifetime.
         2. Is the value of B’s future interest includable in B’s taxable gross estate under the federal estate tax?
            1. Answer: no, it is not transmissible, so it is not taxable. B’s interest gets wiped out, even though he had a vested remainder. It is not transmissible, so it is not taxable.
         3. C dies before A and B. Is the value of C’s future interest includable in C’s gross estate?
            1. yes, C’s interest is not wiped out by dying; C’s interest passes
   2. valuation of future interest and present estate
      1. test: take amount that supposed to be received, figure out when it will vest, figure what value will be, then discount it back to present by interest rate; character of the corpus of the trust will be important in determining the value in the future
3. **Construction of Trust Instruments**
   1. fertility: a person can conceive children until death; a person cannot conceive children after death
   2. merger doctrine: if one person holds a vested legal life estate (or term of years) in land followed by a legal vested estate (remainder or reversion) in fee simple, they merge together unless they are separated by a vested remainder, an indestructible contingent remainder (statute made it this way), or an executory interest
      1. exception: if they are created with destructible contingent interest between them, they do not merge at the moment of creation; but, can merge later
   3. an executory interest vests in interest when it vests in possession
   4. naming defeasible interests (applies both to present and future interests)
      1. an interest “is” determinable if it might terminate early (i.e., before a life estate runs out) and
         1. it has a special limitation that operates in favor of the transferor or
         2. it is followed by a remainder
      2. an interest is “subject to a condition subsequent” (not automatic) if an interest is followed by a right of entry
         1. note: if the described condition occurs, the interest does not terminate automatically; O has to come in and exercise right of termination
      3. an interest is “subject to an executory interest” if the interest that might terminate early is followed by an executory interest
   5. survival as an implied condition precedent
      1. common law and *First National Bank*: do not have to survive
         1. the recipient does not have to survive until time of distribution—survival is not an implied condition read into future interest
            1. if recipient dies, his interest is passed to his heir(s)
      2. **UPC 2-707**: has to survive, sometimes
         1. for beneficial interests in trusts, the future interest in trust is subject to contingent on survival until time of distribution
            1. recipient must survive to take possession or distribution
            2. UPC creates an anti-lapse statute for this lapse-like situation: substitute new takers of the interest that have been destroyed by UPC 2-707
            3. SS: not subject to estate taxes; though, might be subject to generation skipping transfer tax
            4. SS: 2-707 is controversial and revolutionary; it is dangerous because it is complicated

it is a default rule—settlors can avoid it (“I do not want 2-707 to apply”)

* 1. condition of survivorship
     1. *Cloberrie*’s case: “to be paid at 21”
        1. two rules still used today: 1) a gift of the entire income to a person (or a class), with principal to be paid at a designated age, indicates that survival to time of possession is not required; 2) a gift “payable” or “to be paid” at a designated age indicates that survival to time of possession is not required
        2. “to be paid at age 21”—does not create survivorship
  2. class gift of income
     1. common law (default rule): goes to surviving members
  3. “children”: do not have to survive until date of distribution
  4. “issue” and “descendants”: must survive until date of distribution
  5. “heirs”
     1. orthodox construction: determine heirs of B at death of B
        1. SS: do not use “heirs”
     2. doctrine of worthier title: O conveys “to A for life, then to heirs of O” (O’s heirs become O)
        1. purpose of this rule: to pass property to descendants by descent rather than by inheritance and to avoid taxes
           1. SS: at common law, was a limiting rule and form of tax evasion; but, because of Cardozo, it has become a (default) rule of construction in most of jurisdictions where it still exists
           2. UPC has abolished it
     3. rule in Shelley’s case: O devises Blackacre to “A for life, remainder to A’s heirs” (A’s heirs become A)
        1. common law: if land was conveyed to grantee for life, then to the grantee’s heirs, the attempted creation of a contingent remainder in the heirs was not recognized
        2. SS: prevents avoidance of future incidents and increases alienability (someone can buy land from A; could not otherwise)
        3. “I intend that Rule in Shelley’s case shall not apply”
           1. SS: malpractice—this is not a default rule; it is a limiting rule

rule applies when one instrument creates a life estate in A and a remainder in A’s heirs and both are legal interests or both are equitable interests: can avoid the by creating one as a legal interest and one as an equitable interest

* 1. **UPC 2-711:** if use the words, “heirs,” “heirs at law,” “next of kin,” and “relatives,” the property passes to them even if they have not survived to take in possession
     1. more expansive than 2-707 (includes statutes or governing instruments)
     2. reduces estate taxes—SS: not sure why court is doing it but it might be because it is not their job to enforce them anymore
     3. Stake’s cynical view of rule: might have been changed to prevent malpractice
     4. Stake’s less cynical view of rule: gives benefits to less rich that rich have
  2. class-closing rule (rule of convenience): a class will close whenever any member of the class is entitled to possession and enjoyment of his share
     1. if not alive when class closes, cannot take; if alive when class closes, but not yet satisfied the condition precedent, can take once it is satisfied
     2. example: T bequeaths $15,000 in trust "to the children of B when all reach 21." At T's death, B has two children, C (age 25) and D (age 20). A year later, D reaches 21. Can the trust be distributed or must the trustee wait until B is dead?
        1. *Lux v. Lux* **(Court says they think they meant to say that when all living children of B have reached 21 the distribution can be made)**

1. **Limits on testamentary disposition: The Problem of Dead Hand**
   1. *Shapira v. Union National Bank*
      1. restraints on first marriage
         1. total restraints on marriage are contrary to public policy (will not be upheld): “pay income to my nephew until he marries”
            1. exception: Court has upheld these when purpose of trust was to support someone until they married, at which point they longer needed supported
         2. partial restraints (this is what is at issue here)(majority rule)
            1. can marry some people, but not all people
            2. governed by a reasonableness test

if and only if reasonable

can never have validity without reasonableness and vice versa

* + - * 1. definition of reasonableness from Restatement 2nd, Section 6.2 comment a

unreasonable if “a marriage permitted by the restraint is not likely to occur”

another factor: unreasonable if no time for thoughtful compliance

another factor (some states, not all): unreasonable, in some states, if constrains religious beliefs and practices

* 1. Carnegie Conjecture and affluenza
     1. give people too much money, they do not do anything with their lives
     2. SS: incentive trusts are being set up to make the kids do something

1. **Rules Against Perpetuities (A Terrifying Exercise in Fantasy)**
   1. John Chipman Gray’s classic formulation: 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
   2. Stake’s formulation: An interest is void if it might vest too late
      1. “an interest”: options to purchase land; contingent remainders; executory interests; powers of appointment and interest created by it
         1. not subject to RAP: reversionary interests (reversion, right of entry, etc.); charities
      2. “is void”: right from the beginning; an interest is void, not a document
      3. “might”: might as of time period starts to run
         1. common law “what-might-happen” approach: if can come up with any set of events in which interest vests too late, it is void
            1. we do not consider facts that have become resolved after it has become effective
            2. for RAP, do not consider possibilities that have become possibilities because of modern medical possibilities (someone giving birth 50 years after dead)
      4. “vest”: vest in interest, not possession
         1. for a remainder, it means two things: 1) identify a taker and; 2) need to resolve all conditions precedent
         2. same definition applies for executory interest—need to know two things above, and need to have vesting in possession
      5. “too late”: more than 21 years + periods of gestation after the deaths of all persons alive when the perpetuities period starts to run
         1. wills: start to run at death
         2. inter vivos transfer: effective at delivery
         3. revocable trusts: start period of running when trust become irrevocable
   3. how to run RAP: 1) start at creation of interest; look at who is alive; follow those people until they die; when they die, start the 21 period + period of gestation; at the end of that period, if there is still an interest that has not vested, but might vest, that interest is void; span the gap with a life in being plus 21 years plus a period of gestation—if can do this it is good, if not, it is not
   4. extension of the RAP
      1. class gift rule (i.e., all-or-nothing rule): if an interest might vest in any member of the class too late, the class gift is void for all members of the class
         1. bad as to one, bad as to all
         2. SS: do not look at it as a class rule if can break them up into gifts to subclasses
            1. test: if can determine who takes it and how much they take, then it is separate; and if it does not depend on whether some other members take it; may be separated out for purposes of RAP
      2. infectious invalidity: court can delete more than the void interest to serve the intent of the settlor or testator
         1. it so messes up plan that may need to delete other ones too
   5. general approach
      1. construe instrument first (what was intended; what are the interests), then apply the Rule remorselessly
      2. and, unlike in statutory construction, we do not construe it in light of what might happen under the RAP
      3. then, just guess: if the interest is void, look for the invalidating scenario; if the interest is valid, look for validating life
      4. example 1: T bequeaths a fund in trust "for A for life, then to the first child of A to be admitted to the bar."
         1. interest in A is valid—vested in interest and possession; have a condition remainder
         2. SS: start scenarios at point where interest in created (just need one example). T dies. Creates interest. After T dies, A has a child. While child is very young, A dies. A goes to college. A graduates college at 23 or 24. It is more than 21 years after life of A and T. Interest is void
      5. example 2: T bequests Blackacre to “A for life, then to B if B walks on Mars”
         1. A has life estate; O has reversion; B has contingent remainder in fee simple
         2. B’s interest is valid because B is a life at being at creation of interest. Interest will vest when he walks. B is the validating life for interest in B. The proof: he is the validating life. Interest will vest, if it ever vests, when B walks on Mars. If he does walk on it, that is when it will vest. He will walk on Mars in his lifetime—what we mean by walks. He will be alive at the moment of vesting
      6. example 3: O transfers Blackacre to A for life, then to B if a person walks on Mars. Is B’s interest void or valid?
         1. contingent remainders are indestructible (it is void)
            1. proof: O makes transfer, period starts to run. Now, going to need someone who is going to walk on Mars who was not alive at time of transfer. So, going to need have some people be born. Let X be born. Need to kill B. So, X is born. And have war. Everyone is killed off except for X. X was not a life in being at time of transfer. X builds a spaceship 25 years later. B’s interest vests in him once X goes into space. Devisee of B takes it. We allowed B’s interest to be good after B died, therefore, after A dies, possession goes back to O and then when person walked on Mars, seisen sprang to B’s heir in futuro.
      7. example 4: T devises Blackacre "to A for life, then for life to A's eldest child who survives A, then to the eldest child of that child for life, then to B." "Eldest child who survives A" is construed to mean the eldest of the children living at the death of A. A, B, and A's first child S survive T.
         1. “then for life to A’s eldest child who survives A” (valid)
            1. proof: The remainder is good—it will vest or not at end of A’s life. Know who it is at death of A; this is a valid remainder in eldest child. A serves as validating life bridging the gap from when T dies to when A’s eldest child’s interest vests. All we need to do is survive A—both of those will happen within A’s life.
         2. “then to the eldest child of that child for life” (void)
            1. proof: after T dies, X is born to A. Now have a child born to A after the interest is created. We need Y to be born to some other family. Now, we get a war. Everyone is dead, except for X and Y. Thirty years later they have a child. When they have a child, 30 years later, when that child is born, that interest vests. It vests at birth. But, that is thirty years after lives of being are all dead.
         3. “then to B” (valid)
            1. interest in B is vested in B
   6. fertile octogenarian
      1. example: T devises “To A for life, then to the children of A for life, then to the grandchildren of A then living.” A is 99 years old.
         1. proof: Interest in grandchildren is void. A might have X or Y. Everyone else dies. As soon as that child is born, that interest might vest.
   7. unborn widow
      1. example: T devises in trust “to A for life, then to A’s widow for life, then to the issue then living of A.
         1. proof: Transfer occurs. T dies. Then W is born. And then she grows up. Marries to A. And then A dies. And a long time later A’s widow dies. Much too late. Need to kill everyone else off. The interest is void. Might vest too late
   8. slothful executor
      1. do not assume they will wrap up estates in a few years—might take long past lives in being
2. **Powers of Appointment and the RAP**
   1. two questions: 1) is the power good?; 2) are the interest created by the power good?
   2. general power that is exercisable during life is like ownership—key is just determining when it going to take effect
   3. general powers of appointment
      1. a general inter vivos power of appointment is void if it might (become exercisable) too late
         1. example: T devises property in trust “to A for life, then to A’s eldest child living at A’s death, with a general power in such child to appoint his or her share of the corpus at age 25”
            1. proof: After this interest is created, T devises it. After that, A has a child, and 1 year later, everyone in the world dies. A grows up and reaches age of 25. But, that was 24 years after everyone died. death of all people who were alive when it was created.
      2. interest (created by exercise of GIVP/A) is void if it might vest too late
         1. “too late” is measured from the time the GIVP/A is exercised
         2. power is exercised
            1. creates new interest
            2. look to see if it will vest [insert RAP test]
         3. example: T devises property in trust “to A for life, then to A’s eldest child living at A’s death, with a general power in such child to appoint his or her share of the corpus at age 18.” A gives birth to B. A dies. B gives birth to C. B exercises at age 50, appointing to “C for life, then C’s eldest child then living.”
            1. first: look at power—is it valid?

power was created when T devised to them

this person has to reach 18 within 21 years—therefore, the power is good

* + - * 1. second: exercise of power

we will know C’s eldest child at death of C

power and exercise of power are good, even though this interest in C’s eldest child is WAY after perpetuities period has run on initial devise by T

run it from time of exercise—not time of creation of power

* 1. other powers of appointment
     1. an other power of appoint is void if it might (be exercised) too late
        1. SS: this is a less forgiving standard; a little bit different rule
        2. it is when donee uses that control to pass on appointed property
     2. interests created by exercise of other powers of appointment
        1. two special sub-rules under this section:
        2. “too late” is measured from time the power was created
        3. second look doctrine: “might” means might as of time of exercise
           1. an interest is good, even though it might not have been good under all the possible scenarios; take into account facts we know at time power was exercised; we still measure from original time it was created, and look at time of vesting of exercise of power

1. **Malpractice and savings clauses**
   1. you do not want to blow it on RAP; save it by putting in a saving clause—page 898
   2. SS: problem with this is that it will cut off some interests early, so they won’t vest too late; if jurisdictions cuts off RAP, then you are losing some
2. **Ways to End the Rule’s “Reign of Terror”: Possible Reforms**
   1. *cy pres*: allowed in some jurisdictions; French for “you see, you pray”; changes document
      1. goal: achieve as much of donor’s intent as possible
      2. benefits: interest won’t violate RaP
      3. costs: expends judicial resources and it might preserve some rights that impede alienability
   2. wait-and-see for the common law period
      1. replace “might” with “does” AND
      2. interest is void if it “does” vest
      3. replace “lives in being” with “measuring lives,” generally lives in being who can affect vesting (not same as validating lives)
      4. costs: administrative (need to follow lives); uncertainty (might not vest for 90 years)
   3. wait-and-see for a fixed period (USRAP): interest good if vests or terminates in 90 years or good under common law rule
      1. Stake does not like it
      2. benefits: saves interests
      3. problems: get uncertainty of wait-and-see plus difficulties of applying RAP
      4. USRAP tax tap: trust can lose grandfathering from generation skipping transfer (GST) tax
      5. to avoid un-grandfathering a pre-1986 trust, donee of a special power should
         1. turn the trust into a 90 year trust
         2. make sure not to violate the common law RaP
   4. abolition of the rule (only as applied to trusts of personality): close to 20 states done this; makes up tons of trusts; SS: in some states, this change is an optional change—he doesn’t know what to think about that
3. **Perpetuities Policy**
   1. benefits of RAP (Stake loves it)
      1. social benefits from striking an interest
      2. facilitates efficient transfer of resources
         1. example 1: O devises Blackacre “To A for life, then to A’s grandchildren”. X can only buy life estate. RAP wipes out interest in grandchildren—so have interest in A and a reversion in O. So, X can buy from O’s heirs. This is why reform of abolition does not apply to legal interests in land
      3. reduces dead hand control of behavior of the living
      4. reduces uncertainty
         1. example 3: O devises in trust "to T to manage the assets and pay the income to A and his heirs, but if IU ever wins another NCAA basketball championship, then to B and his heirs." Each year IU gets off to a good start, A starts to worry. If eliminate this contingency (it would be struck down), A and A’s heirs would be comfortable
      5. adds enjoyment from ownership of future interest
         1. example 4: A is 10. O dies. H is heir. O devises in trust “to T for A for life, then to A's grandchildren.“ In the jurisdiction, contingent remainders are indestructible. H is not happy. RAP wipes out interest in grandchildren, and now H can hold that interest and enjoy it. He can enjoy it more than grandchildren because they are not alive; SS: compares this to a lottery ticket
      6. avoids the problem of first generation monopoly
      7. increases efficiency
         1. reduces the problem of accumulates
            1. O devises: “$1M in trust to accumulate for 500 years and then to distribute the corpus among my descendents then alive and under the age of 16. If the trust grows at 5.5% and inflation is 3.5%, the amount given each of 16,000 would be close to same in real terms as $1M today”

this would be good for them—hurts us, though

* + - 1. avoids the problem of multiplication of beneficiaries
         1. now need to keep track of all these people; this is a costly administrative enterprise
  1. costs of RAP
     1. there is injustice when the transferor’s intent is not accomplished
     2. some desired transfers are impossible and some testators feel the pinch of the RAP’s constraint
        1. SS: according to some trusts and estates lawyers, most wishes of testators and settlors can be accomplished
     3. upsets some grantees to lose their gifts
        1. does not happen very often; most of these reallocations happen right at the start, then scratch it; often, we are taking interests away from people who do not exist yet—they are not upset
     4. testators are disappointed when results do not conform to expectations
        1. dead people cannot feel unhappy about this sort of thing
        2. Homer Simpson was unhappy in Heaven because his family was in Hell. Maybe he was missing the point of Heaven?
        3. redistribution from people who are in Heaven to people who are in earth; but, could be burning in Hell—what is marginal cost when you are burning in Hell, and you look at find that your will was not fulfilled?
        4. zero marginal cost—you are already in Hell
  2. why RAP is so great: facilitates efficient transfers; relaxes grip of dead hand; decreases uncertainty; spreads the giving around; reduces accumulations; all without major costs to transferors
  3. could the legislative process every yield a rule as beautiful as the RAP? Can you imagine the discussion the legislature?
     1. Gone: Atlantic Gray Whale, Passenger Pigeon, Dodo; Going: Polar Bears, Tigers, Gorillas, RAP
     2. SS: if they couldn’t pass a rule like this, maybe shouldn’t destroy a rule like this
        1. it is like an endangered species—don’t wipe this out; the Courts can amend the common law Rule on their own
  4. final thoughts: do the job right and be an agent of the light