Trusts & Estates

Table of Contents

[Introductory Matters 1](#_Toc449810453)

[Freedom of Disposition 1](#_Toc449810454)

[Principle 1](#_Toc449810455)

[Invalid Conditions – Contrary to Public Policy 2](#_Toc449810456)

[The Mechanics of Succession 2](#_Toc449810457)

[Probate Property 3](#_Toc449810458)

[Nonprobate Property 4](#_Toc449810459)

[Professional Responsibility 4](#_Toc449810460)

[Duty to Intended Beneficiaries 4](#_Toc449810461)

[Conflicts of Interest 5](#_Toc449810462)

[Intestate Succession 5](#_Toc449810463)

[Introduction 5](#_Toc449810464)

[The Basic Structure 6](#_Toc449810465)

[Summary of UPC Intestacy Provisions 6](#_Toc449810466)

[The Surviving Spouse 6](#_Toc449810467)

[Descendants 7](#_Toc449810468)

[Ancestors, Collaterals, and Others 8](#_Toc449810469)

[Disinheritance by Negative Will 10](#_Toc449810470)

[Transfers to Children 10](#_Toc449810471)

[Adopted Children 10](#_Toc449810472)

[Posthumous Children 12](#_Toc449810473)

[Nonmarital Children 12](#_Toc449810474)

[Reproductive Technology and New Forms of Parentage 13](#_Toc449810475)

[Advancements and Hotchpot 15](#_Toc449810476)

[Guardians and Conservators of Minors 16](#_Toc449810477)

[Bars to Succession 17](#_Toc449810478)

[The Slayer Rule 17](#_Toc449810479)

[Unworthy Heirs 18](#_Toc449810480)

[Disclaimer 18](#_Toc449810481)

[Wills 19](#_Toc449810482)

[Formalities and Forms (Authenticity) 19](#_Toc449810483)

[Execution of Wills 19](#_Toc449810484)

[Revocation of Wills 26](#_Toc449810485)

[Components/Scope of a Will 30](#_Toc449810486)

[Contracts Relating to Will 32](#_Toc449810487)

[Capacity and Contests (Voluntariness) 33](#_Toc449810488)

[Capacity to Make a Will – Testamentary Capacity and Insane Delusions 34](#_Toc449810489)

[Undue Influence 36](#_Toc449810490)

[Duress 39](#_Toc449810491)

[Fraud 39](#_Toc449810492)

[Tortious Interference with Inheritance or Gift 40](#_Toc449810493)

[Construction (Meaning) 41](#_Toc449810494)

[Ambiguous or Mistaken Language in Wills 41](#_Toc449810495)

[Death of Beneficiary Before Death of Testator 44](#_Toc449810496)

[Changes in Property After Execution of Will 47](#_Toc449810497)

[Trusts: Characteristics and Creation 49](#_Toc449810498)

[The Trust in American Law 49](#_Toc449810499)

[Sources of Law 49](#_Toc449810500)

[Vocabulary, Typology, and Illustrative Uses 49](#_Toc449810501)

[Bifurcation of Ownership 50](#_Toc449810502)

[Creation of a Trust 51](#_Toc449810503)

[Intent to Create a Trust 51](#_Toc449810504)

[Trust Property (“Res”) 54](#_Toc449810505)

[Ascertainable Beneficiaries 55](#_Toc449810506)

[A Written Instrument? 56](#_Toc449810507)

[Nonprobate Transfers and Planning for Incapacity 58](#_Toc449810508)

[Revocable Inter Vivos Trusts 58](#_Toc449810509)

[The Wills Act and a Present Interest in the Beneficiary 58](#_Toc449810510)

[Abandoning the Present Interest Fiction 59](#_Toc449810511)

[Revoking or Amending a Revocable Trust 59](#_Toc449810512)

[The Subsidiary Law of Wills 61](#_Toc449810513)

[Revocable Trusts in Contemporary Practice 63](#_Toc449810514)

[The Other Will Substitutes 64](#_Toc449810515)

[Life Insurance 64](#_Toc449810516)

[Pension and Retirement Plans 65](#_Toc449810517)

[Pay-on-Death (POD) and Transfer-on Death (TOD) Contracts 67](#_Toc449810518)

[Nonprobate Transfer of Real Property 68](#_Toc449810519)

[Planning for Incapacity 69](#_Toc449810520)

[Property Management 69](#_Toc449810521)

[Health Care 70](#_Toc449810522)

[Disposition of the Body 71](#_Toc449810523)

[Limits on Freedom of Disposition 71](#_Toc449810524)

[Protection of the Surviving Spouse 71](#_Toc449810525)

[The Elective Share of a Separate Property Surviving Spouse 72](#_Toc449810526)

[Premarital and Marital Agreements 73](#_Toc449810527)

[Community Property 75](#_Toc449810528)

[Miscellaneous Additional Rights 75](#_Toc449810529)

[Intentional Omission of a Child 76](#_Toc449810530)

[American Law 76](#_Toc449810531)

[The Family Maintenance System of the English Commonwealth 76](#_Toc449810532)

[Protection Against Unintentional Omission 76](#_Toc449810533)

[Pretermitted Spouse 76](#_Toc449810534)

[Pretermitted Children 77](#_Toc449810535)

[Trusts 79](#_Toc449810536)

[Fiduciary Administration 79](#_Toc449810537)

[From Limited Powers to Fiduciary Administration 79](#_Toc449810538)

[The Duty of Loyalty 80](#_Toc449810539)

[The Duty of Prudence 82](#_Toc449810540)

[Impartiality and the Principal and Income Problem 88](#_Toc449810541)

[The Duty to Inform and Account 90](#_Toc449810542)

[Alienation and Modification 93](#_Toc449810543)

[Alienation of the Beneficial Interest 93](#_Toc449810544)

[Modification and Termination 96](#_Toc449810545)

[Trustee Removal 100](#_Toc449810546)

[Powers of Appointment 101](#_Toc449810547)

[Purposes, Terminology, and Types of Powers 101](#_Toc449810548)

[Creditor Rights 102](#_Toc449810549)

[Exercise of a Power 103](#_Toc449810550)

[Failure to Exercise a Power of Appointment 107](#_Toc449810551)

[Charitable Trusts 107](#_Toc449810552)

[Charitable Purposes 108](#_Toc449810553)

[Cy Pres and Deviation 108](#_Toc449810554)

[Supervision/Enforcement 109](#_Toc449810555)

[Trust Duration and Perpetuities 111](#_Toc449810556)

[The Common Law Rule 111](#_Toc449810557)

[Perpetuities Reform 113](#_Toc449810558)

[Other Durational Limits 114](#_Toc449810559)

# Introductory Matters

## Freedom of Disposition

### Principle

* Definitions
	+ Dead Hand Control – arises where a decedent conditions a gift to a beneficiary upon a beneficiary behaving in a certain way.
	+ Freedom of Disposition – “The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please. American Law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor’s decisions about how to allocate his or her property. The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor’s intention.” R3d Property: Wills and Other Donative Transfers § 10.1 cmt. c
* Freedom of Disposition and its Alternatives
	+ Forced Succession – Most Countries
	+ Freedom of Disposition – American Law
	+ Confiscation by the State – Failed Soviet Experiment
* Justifications
	+ Consistent with system of private property
	+ Incentive for donor to work hard
	+ Is consistent with and promote family ties – encourages beneficiaries to provide care and comfort to testator
	+ Difficult to Curtail – testators would find other, less efficient ways to direct the distribution of wealth
	+ “Father Knows Best” – permits more intelligent estate planning
	+ Political Preferences – strong desire to dispose of property by will
	+ Inter vivos investments in human capital – heath –education, culture, and connections – arguably account more for disparity in opportunities an wealth than inherited wealth.
* Arguments Against
	+ Perpetuates economic disparity and discrimination
		- Including concentration of human capital
	+ Unearned windfall – creates powers and privileges that are undeserved and denies equal opportunity to all children.
	+ Lifetime v. Testamentary Conditions – if testator was alive, there may be circumstances in which testator is willing to be more flexible so enforcement should reflect this.
	+ Public Policy – some conditions are so contrary to fundamental rights or generally accepted as contrary to public policy that they should be considered invalid conditions.
* Modern Trend? R3d Trusts § 29 is controversial and urges more interventionist position that in reckoning what is contrary to public policy, courts should balance the donor’s freedom of disposition “[a]gainst other social values and the effects of deadhand control on the subsequent conduct or personal freedoms of others.”
* If “a provision is unnecessarily punitive or unreasonably intrusive into significant personal decisions or interests…the provision may be invalid.” Says *Shapira* was unfortunate case.

### Invalid Conditions – Contrary to Public Policy

* Require or Encourage Committing a Crime or a Tortious Act
* Religion Requirement – gifts that require a beneficiary to remain faithful to a particular religion generally are held to violate public policy concerning religious freedom and are invalid. ***See Shapira***.
* Property Destruction Directive – although individuals generally are free to destroy property while they are alive, individuals generally are not free to destroy property upon their death, and such directives are invalid.
* Promoting Family Strife
	+ *Holmes v. Connecticut Trust & Safe Deposit Co.* (Conn. 1918) Synopsis: Trust provision for the testator’s granddaughters required that they and their husbands refrain from using tobacco or drinking alcohol. Court upheld condition as applied to the granddaughters but not as to the husbands, because the granddaughters could not control the behavior of their husbands and thus this could disrupt marital harmony.
* Encouraging Separation and/or Divorce
* Absolute Restraints on Marriage – gifts conditioned on the beneficiary not marrying anyone – at least as to first marriages – generally are considered to violate the fundamental right to marry (14th Amendment) and are void.
	+ Exception – Partial Restraint
		- Prevailing Rule – “restraint unreasonably limits the transferee’s opportunity to marry if a marriage permitted by the restraint is unlikely to occur. The likelihood of marriage is a factual question, to be answered from the circumstances of the particular case.”
		- Temporal/Religion Requirement: ***Shapira v. Union National Bank*** (Ohio Com. Pl. 1974)
			* Synopsis: Testator’s will provides that two sons should receive share of bequest only if they marry a Jewish girl whose both parents are Jewish within 7 years of father’s death. Court held that conditions are reasonable restrictions and thus constitutional and that public policy does not preclude them.
			* Tool:
				+ **Constitutionality:** Provisions of a will conditioning bequests based upon marrying a Jewish girl with Jewish parents is not unconstitutional under the 14th Amendment. Note: The court is not being asked to enforce any restriction upon a person’s constitutional right to marry, but to enforce the testator’s restriction upon his son’s inheritance. By enforcing will, court not bringing to bear the coercive power of the state. See *Shelley v. Kraemer*. Enforcing the conditions did not constitute sufficient state action to offend the Constitution.
				+ **Public Policy – Reasonableness Test on Marriage:**

A **partial restraint** of marriage which imposes only **reasonable restrictions** is valid, and not contrary to public policy. Gifts conditioned upon the beneficiary’s marrying within a particular religious class or faith are reasonable. Covenants to restrain freedom of religious practice may be unreasonable.

Geographic aspect – okay because there are enough jews in area.

Time aspect – seven years once in college is enough to marry

A **general or total restraint**, allowing no marriage at least for a first marriage, would be held to be contrary to public policy and void. In the case that you have to marry a type of person but the number of people that fit that description are very few, this may amount to a general restraint.

Sitkoff: Don’t force this into other situations like race conditions because it will unravel quickly

## The Mechanics of Succession

### Probate Property

* Core Functions:
	+ Provides evidence of transfer of title, making the property marketable again
	+ Protects creditors by providing a procedure for payment of the decedent’s debts
	+ Distributes decedent’s property to those intended after the decedent’s creditors are paid.
* Terminology
	+ Testate – decedent dies with a valid last will and testament
	+ Testator/Testatrix – person who executes a valid will
	+ Devise – gift of real property under a will
	+ Devisee – beneficiary receiving real property under a will
	+ Bequest – gift of personal property under a will
	+ Legacy – gift of money under a will
	+ Legatee – beneficiary receiving money under a will
	+ Personal Representative – person appointed by the probate court to oversee the administrative process of wrapping up and probating the decedent’s affairs.
		- Executor –if the decedent dies testate and the will names the personal representative
		- Administrator – if the decedent dies intestate or testate but the will fails to name a personal representative
* Probate Process
	+ Choice of Law
		- Real Property: Where property is located
		- Personal Property: Where decedent is domiciled at death
	+ Opening Probate
		- Primary or Domiciliary Jurisdiction – the will should first be probated, or letters of administration should first be sought, in the jurisdiction where the decedent was domiciled at death.
		- Ancillary Probate – if the probate estate includes real property that is located in another jurisdiction, ancillary probate in that jurisdiction is required. To avoid the costs and delay of an ancillary probate proceeding, lawyers commonly advise clients with real estate in another jurisdiction to put the property in an inter vivos trust. Because the trustee holds title to the trust property, there is no need to change title by probate administration upon the death of the settlor.
	+ Will contests – if a party wishes to file acclaim challenging the validity of a will offered for probate, most jurisdictions have a statute requiring that the contest be brought in a timely manner or the claim is barred.
	+ Supervised and Unsupervised Administration – jurisdictions split
* Personal Representative Duties
	+ Inventory the decedent’s assets
	+ Give notice to and pay creditors
	+ Distribute the decedent’s probate property
* Is Probate Necessary?
	+ Probate can be avoided provided the client during life arranges to transfer all of his property by way of nonprobate modes of transfer.
	+ Even for probate property, probate administration is not always necessary, if amount of property involved is small (ranges from $25,000 - $100,000), including vehicles.

### Nonprobate Property

* Joint Tenancy – Decedent’s interest vanishes at death. The survivor owns the whole property free of the decedent’s participation.
* Pay-on-Death (POD) and Transfer-on-Death (TOD) Contracts – life insurance, bank, brokerage, pension, and retirement accounts commonly allow for a POD or TOD beneficiary designation under which the account custodian distributes the property at the decedent’s death to the named beneficiary.
* Inter Vivos Trust – property put in trust during the decedent’s life.

## Professional Responsibility

### Duty to Intended Beneficiaries

* Common Law
	+ **Tort – no duty:** attorney owes duty of reasonable care only to the client – the testator – but not to any intended beneficiaries. Only the testator, while alive, or the personal representative, after the testator’s death, has standing to sue the drafting attorney for negligence.
	+ **Contract – no privity:** attorney is in privity of contract only with the other party to the contract – the testator.
* Majority Approach – ***Simpson v. Calivas*** (N.H. 1994)
	+ Synopsis: Robert Sr. executed a will that had been drafted by lawyer, Christopher Calivas (D). The will left all real estate to Robert Jr. (P) except for a life estate in “our homestead located at Piscataqua Road…” which was left to P’s stepmother, Roberta. P and stepmother filed petition in probate court seeking a determination of whether the term “homestead” referred to all the decedent’s real property on Piscataqua Road or only to the house. Lawyer had taken notes Robert Sr. intended to leave just house to stepmother. Probate court found notes were inadmissible (purpose of probate court is just to find out expressed intent – what the will means – as opposed to actual intent) and ruled in favor of stepmother. P brought malpractice action against D and on appeal argued that a drafting attorney owed a duty to an intended beneficiary and that the finding of probate court on testator intent do not collaterally estop P from bringing malpractice suit. Court reversed and remanded finding that drafting attorney does owe duty to intended beneficiaries and that probate court finding of expressed intent does not collaterally estop question of actual intent.
	+ Tool: See Modern Approach above.
		- **Tort – duty:** Attorney who drafts a testator’s will owes a duty of reasonable care to intended beneficiaries of a will based on the reasonable foreseeability of injury to the intended beneficiaries if the attorney fails to exercise due care.
		- **Contract – privity:** The general rule that a nonparty to a contract has no remedy for breach of contract is subject to an exception for third-party beneficiaries. Third-party beneficiary status necessary to trigger this exception exists where the contract is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promise as one of the motivating causes of his making the contract.
		- **Expressed v. Actual Intent:** The task of a probate court is limited to determining the intent of the testator as expressed in the language of the will (expressed intent). A finding of actual intent is not necessary to that judgment and thus cannot be the basis for collateral estopped even if an explicit finding of actual intent is made by a probate court.
* Modern Trends
	+ Fall of Privity – Overwhelming number of states have abrogated privity defense
	+ Since privity defense has fallen, now see that probate courts addressing actual intent of lawyer
	+ Third party beneficiary status to trigger exception to privity defense only applies to beneficiaries identified in the testator’s estate planning instruments

### Conflicts of Interest

* Duty to inform clients of materials facts v. Duty of confidentiality: ***A. v. B.*** **(NJ 1999)**
	+ Synopsis: Law firm wishes to disclose confidential information of one co-client to another co-client. Law firm previously represented mother in paternity action and currently represents the father and his wife in planning their estates. Law firm wants to tell wife about father’s illegitimate child since her will creates the possibility that her property will ultimately pass to the father’s children, including illegitimate children. Court reversed and remanded to the Family Part in favor of law firm disclosing information to wife, because: (1) the law firm learned about the illegitimate child through the mother and thus the father’s expectation of nondisclosure of the information may be less than if he communicated it himself; and (2) the husband and wife signed letters acknowledging that information provided by one client could become available to the other although it stops short of explicitly authorizing the firm to disclose confidential information obtained from other sources.
	+ Tool: In the absence of an agreement to share confidential information with co-clients (standard of care), the lawyer, after consideration of all relevant circumstances, has the discretion to inform the affected co-client of the specific communication if, in the lawyer’s reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy.

# Intestate Succession

## Introduction

* Intestacy is the default. Also provides default rules of construction for wills and nonprobate instruments.
* Terminology:
	+ Intestacy – decedent leaves no will. The probate estate passes by intestacy.
	+ Partial Intestacy – decedent leaves a will that disposes of only part of the probate estate; the part of the estate not disposed of by the will passes by intestacy.
	+ If there are no surviving relations within the degree of kinship specified by the intestacy statute, the decedent’s property escheats to the state.
	+ Statute of descent and distribution – if a decedent dies intestate, such property will be distributed under the state’s statute of descent and distribution.
	+ Heirs – at common law if a decedent died intestate, the decedent’s real property was said to descend to the decedent’s heirs (no living person has heirs but heirs apparent)
	+ Next of kin – at common law, if a decedent died intestate, the decedent’s personal property was distributed to the decedent’s next of kin

## The Basic Structure

### Summary of UPC Intestacy Provisions

|  |  |  |
| --- | --- | --- |
| **Facts** | **UPC Authority** | **Disposition** |
| **S**; no **D**; no **P** | §2-102(1)(A) | All to **S** |
| **S**; **D** | §2-102(1)(B) | All to **S** if all **D** are also **S**’s and **S** has no other surviving descendants |
| §2-102(3) | $225,000 plus half of the rest to **S** if **D** are also **S**’s and **S** has other descendants; other half to **D**  |
| §2-102(4) | $150,000 plus half of the rest to **S** if one or more **D** is not **S**’s; other half to **D** |
| **S**; no **D**; **P** | §2-102(2) | $300,000 plus three-fourths of the rest to **S**; other one-fourth to **P** |
| no **S**; **D** | §2-103(a)(1) | All to **D** (per capita at each generation) |
| No **S**; no **D**; **P** | §2-103(a)(2) | All to **P** |
| No **S**; no **D**; no **P**; **BorS** | §2-103(a)(3) | All to **BorS** (per capita at each generation) |
| No **S**; no **D**; no **P**; no **BorS**; **G** or **GD** | §2-103(a)(4) | If both paternal and maternal **G** or **GD**, 1/2 to paternal **G** or **GD** and 1/2 to maternal **G** or **GD** (all to **G** or, if non, per capita at each **GD** generation); or |
| §2-103(a)(5) | If survivors on one side only, all to **G** or **GD** on that side (all to **G** or, if none, per capita at each **GD** generation) |
| No **S**; no **D**; no **P**; no **BorS**; no **G** or **GD** | §2-103(b) | Stepchildren or, if none, then |
| §2-105 | Escheat to state; therefore, no “laughing heirs”; note: no great grandparents |

*S – surviving spouse; D = surviving descendant(s) of decedent; P = surviving parent(s) of decedent; BorS = surviving sibling(s) of decedent; surviving descendant(s) of decedent’s parents; G = surviving grandparent(s) of decedent; GD = surviving descendant(s) of grandparents*

### The Surviving Spouse

Summary of UPC Intestacy Provisions

|  |  |  |
| --- | --- | --- |
| **Facts** | **UPC Authority** | **Disposition** |
| **S**; no **D**; no **P** | §2-102(1)(A) | All to **S** |
| **S**; **D** | §2-102(1)(B) | All to **S** if all **D** are also **S**’s and **S** has no other surviving descendants |
| §2-102(3) | $225,000 plus half of the rest to **S** if **D** are also **S**’s and **S** has other descendants; other half to **D**  |
| §2-102(4) | $150,000 plus half of the rest to **S** if one or more **D** is not **S**’s; other half to **D** |
| **S**; no **D**; **P** | §2-102(2) | $300,000 plus three-fourths of the rest to **S**; other one-fourth to **P** |

#### Spouse’s Share

* In most states, the surviving spouse receives at least a one-half share of the decedent’s estate.
* Community Property – if the jurisdiction recognizes community property, the most common approach to intestacy is, upon the first spouse’s death, to divide the community property immediately: 50% to the surviving spouse outright and 50% to the deceased spouse. The deceased spouse’s 50% goes into probate. If however, the deceased spouse dies intestate, the deceased spouse’s portion of the community property goes to the surviving spouse. The deceased spouse’s separate property is distributed pursuant the intestate distribution scheme.

#### Who Qualifies

* Marriage requirement – term “spouse” assumes married
* Cohabitating partners – in flux
* Spousal abandonment – in some states, if one spouse abandons the other, the abandoning spouse may be disqualified from inheriting from the other spouse.

#### Survival Requirement

* To be eligible to receive property from decedent, a taker must survive the decedent.
* If the claimant fails to meet the survival requirement, the claimant is treated as if he or she predeceased the decedent.
* Old Sufficient Evidence Test – If there is no “sufficient evidence” of survivorship, the beneficiary is deemed to have predeceased the donor. Original USDA (1940, rev. 1953)
	+ ***Janus v. Taraseqicz*** (Ill. App. 1985)
		- Synopsis: Stanley and Theresa Janus died after ingesting Tylenol laced with cyanide. Stanley was pronounced dead shortly after he was admitted to the hospital. Theresa was placed on life support for almost two days before being pronounced dead. Claiming that there was no sufficient evidence that Theresa survived her husband, Stanley’s mother (P) brought action for the proceeds of Stanley’s life insurance policy which named Theresa as the primary beneficiary and plaintiff as the contingent beneficiary. Defendant Metropolitan Life insurance paid the proceeds to defendant Theresa’s father and the administrator of her estate. Trial court found sufficient evidence that Theresa survived Stanley. Court held that finding that Theresa surviving Stanley was not against the manifest weight of the evidence and that there was sufficient evidence to support this finding. It was not necessary to determine the exact moment at which Theresa died or by how long she survived him.
		- Tool: Survivorship is a fact which must be proven by a **preponderance of the evidence** by the party whose claim depends on survivorship. Note: Sufficient evidence = preponderance of the evidence.
* Current 120-Hour Survivorship Rule – claimant must establish survivorship by 120 hours (5 days) by **clear and convincing evidence** **(higher burden)** or is deemed to have predeceased the decedent. Amended USDA §§ 2-5 (1991) and UPC §§ 2-104 and 2-702

### Descendants

Summary of UPC Intestacy Provisions

|  |  |  |
| --- | --- | --- |
| **Facts** | **UPC Authority** | **Disposition** |
| **S**; **D** | §2-102(1)(B) | All to **S** if all **D** are also **S**’s and **S** has no other surviving descendants |
| §2-102(3) | $225,000 plus half of the rest to **S** if **D** are also **S**’s and **S** has other descendants; other half to **D**  |
| §2-102(4) | $150,000 plus half of the rest to **S** if one or more **D** is not **S**’s; other half to **D** |
| no **S**; **D** | §2-103(a)(1) | All to **D** (per capita at each generation) (all states) |

* Property to descendants/issue – both the typical intestate scheme and the UPC give the property to the decedent’s issue equally.
* Determining which issue take
	+ Issue of predeceased child take in his or her place
	+ If a person takes, his or her issue do not
	+ In-laws do not qualify as heirs (in most states)
	+ “Children” means only the immediate offspring. The assumption is that the use of the single-generational term was deliberate. Some courts, on the basis of other language in the governing instrument or extrinsic circumstances, have held that a settlor who said children meant descendants. See R3d Property: Wills and Other Donative Transfers §14.1 cmt. g
	+ Adoption – Today, almost all states presumptively include adopted children and children born out of wedlock in such gifts, but problems still arise with adult adoptions and with instruments drafted before the presumption of equal treatment for adopted children took hold
* Taking equally where issue of unequal degree
	+ English/Strict Per Stirpes **–** Each line of descent treated equally (vertical equality)

|  |
| --- |
| A (dead) |
| B (1/2) (dead) | C (1/2) (dead) |
| D (1/2) | E (1/4) | F (1/4) |

* + Modern Per Stirpes/Per Capita/Per Capita with Representation – Each line of descent treated equally beginning at first generation with a living taker (vertical equality with horizontal equality at the closest living generation)

|  |
| --- |
| A (dead) |
| B (dead) | C (dead) |
| D (1/3) | E (1/3) | F (1/3) |

|  |
| --- |
| A (dead) |
| B (dead) | C (dead) |
| D (1/3) | E (1/3) | F(1/3) (dead) |
|  |  | G (1/6) | H (1/6) |

* + Per Capita at Each Generation (1990 UPC)
		- UPC §2-106(b) (descendants)/ §2-106(c) (collaterals) – the initial division of shares is made at the closest generation in which one or more descendants are alive (as under modern per stirpes), but the shares of deceased persons on that level are treated as one pot and are dropped down and divided equally among the representatives in the next generation.
		- Horizontal Equality (and Vertical Inequality) – “Equally near, equally dear” – each taker at each generation treated equally

|  |
| --- |
| A (dead) |
| B (dead) | C (dead) | D (1/3) |
| E (2/9) | F (2/9) | G (2/9) |

### Ancestors, Collaterals, and Others

|  |  |  |
| --- | --- | --- |
| **Facts** | **UPC Authority** | **Disposition** |
| **S**; no **D**; **P** | §2-102(2) | $300,000 plus three-fourths of the rest to **S**; other one-fourth to **P** |
| No **S**; no **D**; no **P**; **BorS** | §2-103(a)(3) | All to **BorS** (per capita at each generation) |
| No **S**; no **D**; no **P**; no **BorS**; **G** or **GD** | §2-103(a)(4) | If both paternal and maternal **G** or **GD**, 1/2 to paternal **G** or **GD** and 1/2 to maternal **G** or **GD** (all to **G** or, if non, per capita at each **GD** generation); or |
| §2-103(a)(5) | If survivors on one side only, all to **G** or **GD** on that side (all to **G** or, if none, per capita at each **GD** generation) |
| No **S**; no **D**; no **P**; no **BorS**; no **G** or **GD** | §2-103(b) | Stepchildren or, if none, then |
| §2-105 | Escheat to state; therefore, no “laughing heirs”; note: no great grandparents |

*S – surviving spouse; D = surviving descendant(s) of decedent; P = surviving parent(s) of decedent; BorS = surviving sibling(s) of decedent; surviving descendant(s) of decedent’s parents; G = surviving grandparent(s) of decedent; GD = surviving descendant(s) of grandparents*

* Parents
	+ If an intestate decedent is survived by a descendant, the decedent’s ancestors and collaterals do not take
	+ If no decedent but living spouse:
		- In about half of states, after deducting the spouse’s share, the rest of the intestate’s property is distributed to the decedent’s parents as under UPC §2-102 (2).
		- In other states, spouse takes to the exclusion of the decedent’s parents.
* Other Ancestors and Collaterals
	+ Collateral kindred – all persons who are related by blood to the decedent but who are not descendants or ancestors
		- First-line collateral – descendants of the decedent’s parents, other than the decedent and the decedent’s descendants
		- Descendants of the decedent’s grandparents, other than the decedent’s parents and their descendants
	+ If the decedent is not survived by a spouse, descendant, or parent, in all jurisdictions intestate property passes to brothers and sisters and their descendants (first-line collateral).
	+ If there are no first-line collaterals, the states differ on who is next in line of succession.
		- 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 descendants, and so on down each line (parentela) descended from an ancestor until an heir is found.
		- Degree-of-Relationship System – intestate estate passes to the closest of kin, counting degrees of kinship. To ascertain the degree of relationship of the decedent to the claimant you count the steps (counting one for each generation) up from the decedent to the nearest common ancestor, and then you count the steps down to the claimant from the common ancestor. See **Table of Consanguinity** **on p. 86.**



* + - Degree of relationship with parentelic tie breaker - MA
	+ Laughing heirs
		- Definition – distant relatives that are so far removed from the decedent that they likely didn’t know him and suffer no sense of bereavement upon learning of his death.
		- A bit more than half the states have abolished laughing heirs, typically drawing the line at grandparents and their descendants, such as under UPC §2-103(a).
* Step-children and In-Laws
	+ About a third of the states and the UPC recognize stepchildren as potential heirs. See UPC §2-103(b).
	+ California goes further also extending intestate succession to certain in-laws (mothers-, fathers-, brothers-, and sisters-in-law)
* Half-bloods
	+ In a large majority of states, under UPC §2-107, a relative of the half-blood is treated the same as a relative of the whole-blood.
	+ In a few states, a half-blood is given one-half share
	+ In a few other states, a half-blood takes only when there are no whole-blood relatives of the same degree.
	+ In OK, half-bloods are excluded when there are whole-blood kindred in the same degree, the inheritance came to the decedent by an ancestor, and the half-blood is not a descendant of the ancestor.
* Escheat – if an intestate decedent leaves no survivors entitled to take under the intestacy statute, her probate property escheats to the state as under UPC §2-105.

### Disinheritance by Negative Will

* Common Law – disinheritance is not possible by a declaration in a will but that decedent must devise his entire estate to other persons.
* **Modern Trend/UPC §2-101(b)** changes this rule and authorizes a negative will by way of an express disinheritance provision. The barred heir is treated as if he disclaimed his intestate share, which means he is treated as having predeceased the decedent (so disinherited’s descendants may still inherit)

## Transfers to Children

* UPC §§2-115 – 2-122, 2-705
	+ UPC §2-116 – If a parent-child relationship exists, the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.
	+ UPC §2-117 – with exceptions, a parent-child relationship exists despite parents’ marital status.

### Adopted Children

#### Formal Adoption

* Adopted child inherits only from adoptive parents and their relatives.
	+ ***Hall v. Vallandingham*** (MD 1988)
		- Synopsis: Earl Vallandingham died and was survived by wife Elizabeth and their four children. Elizabeth later married Jim Killgore, who adopted the children. After the adoption, Earl’s brother, William, died intestate. His sole heirs were his surviving brothers and sisters and the children of brothers and sisters. Earl’s four natural children alleged they were entitled to the distributive share of their natural uncle’s estate that their natural father would have received had he survived William. Tribunal determined that children, because of their adoption, were not entitled to inherit from William. Court affirmed.
		- Tool: Dual inheritance is disallowed – the adopted child shall lose all rights of inheritance from its parents and from their natural collateral or lineal relatives. Once a child is adopted, the rights of both the natural parents and relatives are terminated.
* Adopted child inherits from both adoptive parents and genetic parents and their relatives
* Adopted child inherits from adoptive relatives and also from genetic relatives if the child is adopted by a stepparent. Note that genetic relatives cannot inherit from the children.
* UPC
	+ § 2-118(a) – a parent-child relationship exists between an adoptee and the adoptive parents
	+ § 2-119
		- (a) General Rule – a parent-child relationship does not exist between an adopted child and the child’s genetic parents.
		- (b) Stepparent Exception – When a stepparent adopts his or her stepchild:
			* (1) the parent-child relationship continues between the child and the child’s genetic parent married to the stepparent; and
			* (2) the parent-child relationship continues between the child and the other genetic parent (noncustodial genetic parent) but only for the purpose of the child to inherit from that genetic parent but not the genetic parent or his/her relatives to inherit from the children.
		- (c) – Relative of Genetic Parent – a child who is adopted by a relative of either genetic parent, or by the spouse or surviving spouse of such a relative, remains a child of both genetic parents for the purpose of the child to inherit from the genetic parent but not the genetic parent or his/her relatives to inherit from the children.
		- (d) Adoption after Death of Both Genetic Parents – parent-child relationship continues with both genetic parents and exists with adoptive parents. Relationship with genetic parents is for the purpose of the child to inherit from the genetic parent but not the genetic parent or his/her relatives to inherit from the children.
		- (e) Child of Assisted Reproduction or Gestations Child Who is Subsequently Adopted – adopting parents treated as genetic parents.

#### Adult Adoption

* Most intestacy statutes draw no distinction between the adoption of a minor and the adoption of an adult.
* In some states, the adoption of one’s lover is not permitted.
* UPC §2-705(e) – (f)

(e) [Transferor Not Genetic Parent.] In construing a dispositive provision of a transferor who is not the genetic parent, a child of a genetic parent is not considered the child of that genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached [18] years of age.

(f) [Transferor Not Adoptive Parent.] In construing a dispositive provision of a transferor who is not the adoptive parent, an adoptee is not considered the child of the adoptive parent unless:

(1) the adoption took place **before the adoptee reached [18] years of age**;

(2) the adoptive parent was the adoptee’s **stepparent or foster parent**; or

(3) the adoptive parent **functioned as a parent** of the adoptee before the adoptee reached [18] years of age.

#### Adoption and Wills and Trusts

* Stranger-to-the-adoption
	+ Old rule: the adopted child is presumptively barred, if the donor was not the adoptive parent. Can be overcome by evidence that the donor did intend to include persons adopted by others.
	+ Stranger-to-the adoption rule mostly rejected today unless there is contrary expression of intent by the donor.
* Strategic Adult Adoption
	+ Cases are split on whether an adult adoptee is included in a class gift made by someone other than the adoptive parent.
	+ ***Minary v. Citizens Fidelity Bank & Trust Co.*** (Ky. 1967)
		- Synopsis: Amelia left a will devising her residuary estate in trust to pay the income to her husband and three sons, James, Thomas, and Alfred for their respective lives. The trust was to terminate upon the death of the last surviving beneficiary and then was to be distributed to decedent’s “surviving heirs according to the laws of descent and distribution” in Kentucky. James died with no descendants, Thomas died with two children. Alfred married Myra and then adopted her as his child and died. KY statute provides that adopted children are considered for purposes of inheritance and succession, the natural and legitimate child of the adopting parents. However, courts finds that this statute thwarts intent of deceased testators and that it must give way to freedom of disposition. Court finds that Myra’s adoption was for the purpose of allowing her to inherit Amelia’s estate and therefore declares that Myra is not an heir of Amelia.
		- Tool: “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 and we do not view this as doing any great violence to the intent and purpose of our adoption laws.”
	+ ***In re Trust of Duke*** (NJ Super. 1995) Doris Duke, the tobacco heiress, was the life beneficiary of two trusts created by her father. After Doris’ death, the income from the two trusts was to be payable to Doris’s children. Doris just had an adopted daughter, Chandi, whom Doris adopted when Chandi was 35. Doris had a falling out with Chandi and Doris’ will provided that Chandi should not be deemed her child for purposes of disposing of property under the will. Chandi sued the trustees of Doris’ trust. Trial court ruled against Chandi holding that an adult adoptee is not a child of the adoptive parent for purposes of a trust created by someone other than the adoptive parent. Case later settled.
* Children “Adopted Out” – does adoption remove an adopted person from a class gift to the descendants of the person’s genetic parents?
	+ *See Hall v. Vallandingham*.
	+ UPC§ 2-705(b) - a class gift that uses a term of relationship to identify the takers includes a child of assisted reproduction and a gestational child, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships.

### Posthumous Children

* Posthumous child – conceived before, but born after father’s death.
* Common Law – a rebuttable presumption that a child born to a woman within 280 days after the death of her husband is a child of that husband.
* Uniform Parentage Act § 204(2000, rev. 2002) – establishes a rebuttable presumption that a child born to a woman within 300 days after the death of her husband is a child of that husband.

### Nonmarital Children

* Old rule – nonmarital child starts new family tree. Inherits from nobody.
* Modern Trend/UPC – all states now permit inheritance by a nonmarital child from the child’s mother.
* The rules respecting inheritance from the father, however, still vary.
	+ ***Trimble v. Gordon*** (1977) SCOTUS held unconstitutional as a denial of equal protection an IL statute denying a nonmarital child inheritance from the father. Court held that state discrimination against nonmarital children, though not a suspect classification subject to strict scrutiny, must have a substantial justification as serving an important state interest. The valid state interest recognized by the Court was obtaining reliable proof of paternity. The Court ruled that total statutory disinheritance from the father was not rationally related to this objective.
	+ ***Lalli v. Lalli*** (1978) SCOTUS upheld a NY statute permitting inheritance by a nonmarital child from the child’s father only if the father had married the mother or had been formally adjudicated the father by the court during the father’s lifetime.
	+ UPC § 2-117 – parent-child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status.
* Establishing Paternity
	+ Most states permit paternity to be established by:
		- Subsequent marriage of the parents
		- Acknowledgement of the father (typically by taking the child into his home and holding the child out as his own)
		- Adjudication during the life of the father based on preponderance of the evidence
		- Clear and convincing proof after his death – e.g. DNA testing
	+ Rise of DNA Testing
		- Trend is toward allowing posthumous proof of paternity by DNA evidence.
		- Should a man who has acknowledged paternity and formed a relationship with the child later be allowed to repudiate the acknowledgement if subsequent DNA testing shows he is not the father? *Shondel J. v. Mark D.* (NY 2006) court held in the negative. It reasoned that the best interests of the child who relied on the man’s earlier acknowledgement estopped the man from later denying paternity.

### Reproductive Technology and New Forms of Parentage

* UPC §2-120

(b) [Third-Party Donor.] A parent-child relationship does not exist between a child of assisted reproduction and a third-party donor.

(c) [Parent-Child Relationship with Birth Mother.] A parent-child relationship exists between a child of assisted reproduction and the child’s birth mother.

(d) [Parent-Child Relationship with Husband Whose Sperm Were Used During His Lifetime by His Wife for Assisted Reproduction.] Except in cases of divorce or withdrawal of consent, a parent-child relationship exists between a child of assisted reproduction and the husband of the child’s birth mother if the husband provided the sperm that the birth mother used during his lifetime for assisted reproduction.

(e) [Birth Certificate: Presumptive Effect.] A birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction presumptively established a parent-child relationship between the child and that individual.

(f) [Parent-Child Relationship with Another.] A parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual:

(1) before or after the child’s birth, signed a record that, considering all the facts and circumstances, evidences the individual’s consent; or

(2) in the absence of assigned record under paragraph (1):

(A) functioned as a parent of the child no later than two years after the child’s birth;

(B) intended to function as a parent of the child no later than two years after the child’s birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or

(C) intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.

(k) [When Posthumously Conceived Child Treated as in Gestation.] If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual’s death, the child is treated as in gestation at the individual’s death for purposes of Section 2-104(a)(2) if the child is:

(1) in utero not later than 36 months after the individual’s death; or

(2) born not later than 45 months after the individual’s death.

#### Posthumously Conceived Children

* Posthumously-conceived child – child both born and conceived after the death of one or both of the child’s genetic parents. Because marriage terminates at death, a posthumously-conceived child is necessarily a nonmarital child.
* There is divergent state law on whether a posthumously conceived child is an heir of the predeceased parent.
	+ MA – See ***Woodward v. Commission of Social Security***
	+ NY – no
	+ CA – Cal. Prob. Code §249.5 – “a child of the decedent conceived after the death of the decedent shall be deemed to have been born in the lifetime of the decedent” if there is clear and convincing evidence that (a) the decedent consented in a signed and dated writing; (b) within four months of the decedent’s death, notice of the possibility of posthumous conception is served upon “a person who has the power to control the distribution” of the decedent’s property; and (c) the child “was in utero within two years of the” decedent’s death and the child is not a clone of the decedent.
	+ UPC §2-120 (f), (k) – a posthumously conceived child inherits from the deceased parent if (1) during life the parent consented to posthumous conception in a signed writing or consent is otherwise provide by clear and convincing evidence (under (f)(1)), AND (2) the child is in utero not later than 36 months or is born not later than 45 months after the parent’s death (k).
* Social Security Benefits and State Inheritance Laws
	+ *Astrue v. Capato* (2012) SCOTUS held that a posthumously conceived child is eligible for Social Security survivor’s benefits only if the child would inherit from the predeceased parent under state law.
	+ ***Woodward v. Commissioner of Social Security*** (Mass. 2002)
		- Synopsis: Lauren and Warren Woodward arranged for the husband’s semen to be withdrawn and preserved. Warren died and his wife Lauren was appointed adminstratrix of his estate. Lauren gave birth to twin girls conceived through artificial insemination using the husband’s preserved semen. SS Act says absorbs local intestacy law. Lauren applied for SS survivor benefits: “child’s” benefits…and “mother’s” benefits. SSA rejected Lauren’s claims on the ground that she had not established that the twins were the husband’s “children” within the meaning of the Act because they are not entitled to inherit from the husband under the MA intestacy and paternity laws. Certified to MA Supreme Court. Court balanced three state interests: the best interest of children; the State’s interest in the orderly administration of estates (want certainty of title); and the reproductive rights of the genetic parents and came up with rule below. Court found that Lauren needed to show evidence that Warren had given consent to posthumously conceive children and support such children.
		- Tool: In order for posthumously conceived children to enjoy the inheritance rights of “issue” under MA intestacy laws, the surviving parent or the child’s other legal representative must: (1) demonstrate a genetic relationship between the child and the decedent; and (2) establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child. Even then, time limitations may preclude commencing a claim for succession rights.

#### Posthumously Conceived Children and Wills and Trust

* ***In re Martin B.*** (NY Sur. 2008)
	+ Synopsis: Martin (Grantor) died and was predeceased by his son James. James deposited a sample of semen to be held subject to the directions of his wife Nancy. At his death, James had no children but Nancy underwent in vitro fertilization with his semen and gave birth to two boys three and five years later. Trustees brought proceeding because under Martin’s trust agreements, they are authorized to sprinkle principal to decedent’s “issue” and “descendants” and thus need to know whether James’s children qualify as members of such classes. In NY, the two children do not inherit from James. But this is question about Martin’s intent, not James’ intent. Court found that it was not necessary to find “specific intent” by the grantor. “Unless the language or circumstances indicate that the transferor had a different intention, a child of assisted reproduction be treated for class-gift purposes as a child of a person who consented to function as a parent to the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity.” R3d Property Will and Other Donative Transfers §14.8 Tentative Draft 2004. Court found that a “**sympathetic reading**” warrants that the two boys are “issue” and “descendants” for all purposes of these trusts. Court finds that there is different policy concern. NY law not allowing James’ posthumous children to inherit is issue of efficient administration. But when judging at time of distribution, if grandchildren born, no administrative implications.
	+ Tool: Post-conceived infants should be treated as part of their father’s family for all purposes. Where a governing instrument is silent, children born of this new biotechnology with the consent of their parent are entitled to the same rights “for all purposes as those of a natural child.”
* UPC 2008 – a posthumously conceived child is included in a class gift in a trust or will of a third party as long as (1) the predeceased parent authorized the posthumous use of the genetic material in a signed writing or there is clear and convincing evidence of such consent (§§2-705(b) and 2-120(f)), and (2)(a) if the distribution date is the predeceased parent’s death, the child is living on the distribution date or is in utero within 36 months of or is born within 45 months of the distribution date (§ 2-705(g)(2)), or (b), if the distribution date is other than the predeceased parent’s death, the normal class closing gifts apply, and the child takes if at that date the child is alive or is in utero and then born alive (§2-705(g)(1)).

#### Surrogacy and Married Couples

* Laws of states vary widely on who the parent of a child born to a surrogate is.
* UPC §2-121

(b) a parent-child relationship is conclusively established by a court order designating the parent or parents of a gestational child.

(c) a parent-child relationship between a gestational child and the child’s gestational carrier [(surrogate mother)] does not exist unless the gestational carrier is designated as a parent of the child by court order or no one else has a parent-child relationship with the child.

(d) a parent-child relationship exists between a gestational child and an intended parent who:

(1) functioned as a parent of the child no later than two years after the child’s birth; or

(2) died while the gestational carrier was pregnant if:

(A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child’s birth;

(B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child’s birth; or

(C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child’s birth.

(e) a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual’s death or incapacity to conceive a child under a gestational agreement entered into after the individual’s death or incapacity if the individual intended to be treated as the parent of the child. The individual’s intent may be shown by:

(1) a record signed by the individual which considering all the facts and circumstances evidences the individual’s intent; or

(2) other facts and circumstances establishing the individual’s intent by clear and convincing evidence.

(f) an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of (e)(2) if:

(1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child;

(2) when the individual deposited the sperm or eggs, the individualwas married and no divorce proceeding was pending; and

(3) the individual’s spouse or surviving spouse functioned as a parent of the child no later than two years after the child’s birth.

(h) if under this section, an individual is a parent of a gestational child who is conceived after the individual’s death, the child inherits at the individual’s death if the child is (1) in utero not later than 36 months after the individual’s death; or (2) born not later than 45 months after the individual’s death.

### Advancements and Hotchpot

#### Advancements at Common Law

* Advancement – a lifetime gift by the decedent to a child is presumed to be an advancement – in effect, a prepayment – of the child’s intestate share.
* Child Predeceases – When a parent makes an advancement to a child and the child predeceases the parent, the amount of the advancement is deducted from the shares of the child’s descendants if other children of the parent survive.

#### Hotchpot

* All inter vivos gifts to the child are added back (on paper, the child is not forced to give the gift back) into the parent’s probate intestate estate to create the “hotchpot.” Then the hotchpot is divided equally among the decedent’s heirs. Any advancement received by a child is counted against the child’s share of the hotchpot. The child actually receives from the parent’s intestate estate only their share of the hotchpot minus any advancement the child has received.
* Advancement Exceeds Share – if a child receives an inter vivos gift that exceeds what he or she is entitled to receive from the hotchpot, the child does not have to give any of the inter vivos gift back to the parent’s probate estate – but the child will not be permitted to share in the distribution of the parent’s estate..
* E.g. The decedent, O, leaves no spouse, three children, A, B, and C, and an estate worth $50,000. One daughter, A, received an advancement of $10,000. To calculate the shares for A, B, and C, the $10,000 gift is added to the $50,000 estate, and the total $60,000 hotchpot is divided by three, resulting in a $20,000 share per child. But because A has already received a $10,000 advancement on her share, she receives only $10,000 from the estate. Her siblings each take $20,000. If instead A had been given property worth $40,000 as an advancement, A would not have to give back a portion of this amount (we know that O wanted A to have at least $40,000). A will stay out of hotchpot, and the decedent’s $50,000 will be equally divided between the other two children.

#### Advancements in Modern Law

* Many states – lifetime gift is presumed not to be an advancement unless it is shown to have been intended as such.
* Writing Requirement (UPC §2-109(a)) – require that intention to make an advancement be declared in a **writing** signed by the parent or child. Practically, all but eliminates advancements.
* Child Predeceases (UPC §2-109(c)) – the advancement is not taken into account in determining the share of the child’s descendants.
* Valuation (UPC §2-109(b)) – property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent’s death, whichever first occurs.
* Scope (UPC §2-109(a)) – expands doctrine by providing that doctrine applies to any heir, not just to a child.

### Guardians and Conservators of Minors

* Transfer to minors – if a decedent dies intestate and is survived by issues, there is a good chance that some of the property may be distributed to a minor. Minors lack the legal capacity to hold property (no problem if one parent alive). The law has devised a number of options for managing property for a minor.
* Guardianship
	+ Guard and preserve the ward’s property. Permitted to use only the income generated from the property, not the property itself, absent court approval.
	+ Appointment by court.
	+ Strict court supervision
	+ Costly
* Conservatorship
	+ A guardian of property with investment powers similar to those of trustees, more flexible than guardianship.
	+ Appointment by court.
	+ Only one trip to the courthouse annually for an accounting may be necessary.
* Custodianship
	+ Has discretionary power to hold and use the property for the benefit of the minor, as the custodian deems appropriate, without court approval without regard to (i) the duty or ability of the custodian personally or any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose. UTMA §14(a)
	+ UTMA § 6 – if no power to transfer assets to a custodian is given in a will or trust, the fiduciary may make payments to a custodian nonetheless.
	+ UTMA §9 – executed via certificated security
	+ UTMA §12(b) – the custodian is a fiduciary and is subject to “the standard of care that would be observed by a prudent person dealing with property of another.”
	+ UTMA §12(e) – the custodian is not under the supervision of a court as is a guardian or conservator – and no accounting to the court annually or at the end of the custodianship is necessary, but an interested party may require one if he wishes.
* Trusteeship – Depends on terms of the trust so very flexible.

## Bars to Succession

* Two bars to succession: (1) the rule that prohibits a slayer from inheriting from his victim, and (2) voluntary disclaimer.
* Pertain to intestate succession, but also to gifts under wills, trusts, and other modes of nonprobate transfer.

### The Slayer Rule

* Three approaches in states that have no statute preventing a slayer from taking by descent or distribution from the estate of his victim (***In re Estates of Mahoney***):
	+ Legal title passes to the slayer and may be retained by him in spite of his crime. The reasoning is that devolution of the property of a decedent is controlled entirely by the statutes of descent and distribution; further, that denial of the inheritance to the slayer because of his crime would be imposing an additional punishment for his crime not provided by statute, and would violate the constitutional provision against corruption of blood.
	+ Legal title will not pass to the slayer because of the equitable principle that no one should be permitted to profit by his own fraud, or take advantage and profit as a result of his own wrong or crime. Decisions so holding have been criticized as judicially engrafting an exception on the statute of descent and distribution and being unwarranted judicial legislation.
	+ Legal title passes to the slayer but equity (restitution 🡪 unjust enrichment) holds him to be a constructive trustee for the heirs or next of kin of the decedent. This disposition of the question presented avoids a judicial engrafting on the statutory laws of descent and distribution, for title passes to the slayer.
* ***In re Estates of Mahoney*** (Vt. 1966)
	+ Synopsis: Howard Mahoney died intestate. His wife, Charlotte, was convicted of murdering Howard. Howard left no issue. Probate Court entered judgment decreeing the residue of the estate to Howard’s mother and father. Charlotte appealed. Court approved of doctrine that legal title passes to the slayer but equity holds him to be a constructive trustee for the heirs or next of kin of decedent. However, the probate court was without jurisdiction to impose a constructive trust and do not have powers to establish purely equitable rights and claims. The probate court was bound to follow the statutes of descent and distribution. Court reversed and remanded with directions to stay the proceedings to give the administrator of the estate, Howard’s father, an opportunity to apply to the Franklin Court of Chancery for relief. If application is not made, the probate court shall assign Charlotte the right and interest in and to the estate.
	+ Tool:
		- Legal title passes to the slayer but equity holds him to be a constructive trustee for the heirs or next of kin of decedent.
		- The principle that one should not profit by his own wrong must not be extended to every case where a killer acquires property from his victim as a result of the killing. One who has killed while insane is not chargeable as a constructive trustee, or if the slayer had a vested interest in the property, it is property to which he would have been entitled if no slaying had occurred.
		- The principle to be applied is that the slayer should not be permitted to improve his position by the killing, but should not be compelled to surrender his 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.
		- Constructive trust doctrine applies in cases of voluntary manslaughter but not involuntary manslaughter.
* State Statutes
	+ Can a donor opt out of the slayer rules? Varies by state.
	+ Apply to probate and non-probate property?
		- Many slayer statutes in probate code of the state. In these cases, restitution/unjust enrichment (constructive trust) typically applied for nonprobate.
		- UPC §2-803 provides that a slayer statute should bar the killer from succeeding to probate and nonprobate property.
	+ Is the killer barred from taking, who takes?
		- Prevailing view is that the killer is treated as having predeceased the victim.
		- UPC §2-803(b) provides that the killer is treated as having disclaimed the property. Arguably permits the killer’s issue to take the killer’s share under anti-lapse
			* UPC §2-1106 provides that a disclaimant is treated as having “died immediately before” the victim.
		- Killer’s issue – jurisdictions split over whether applies to killer’s issue
	+ Is a criminal conviction required?
		- UPC §2-803(g) and most states provide that a final criminal conviction of a felonious and intentional killing is conclusive.
		- Acquittal, however, is not dispositive of the acquitted individual’s status as a slayer. In the absence of a conviction the court must determine whether, under the civil standard of a preponderance of the evidence rather than the criminal standard of beyond a reasonable doubt, the individual would be found criminally accountable for the killing. If so, the individual is barred. UPC §2-803(g).

### Unworthy Heirs

* Unworthy heirs, whose conduct bars inheritance, are usually limited to killers.
* In some states, other exceptions for unworthy heirs are developing:
	+ A spouse who abandons the decedent.
	+ Parents nonsupport, abandonment, abuse, or neglect of child. UPC §2-114 (requires clear and convincing evidence)
	+ Abuse by the heir of children or elderly relatives.

### Disclaimer

* Terminology
	+ Disclaimant – the person to whom a disclaimed interest or power would have passed had the disclaimer not been made. UPC §2-1102(1).
	+ Disclaimed interest – the interest that would have passed to the disclaimant had the disclaimer not been made. UPC §2-1102(2)
	+ Disclaimer – the refusal to accept an interest in or power over property. UPC §2-1102(3).
* Scope – statute may apply only to probate property (traditional approach) or also nonprobate property (modern approach)
* Time Period
	+ Most states– disclaimer must be made within 9 months of the creation of the interest being disclaimed.
	+ UPC §§2-1101 to 2-1117 (Uniform Disclaimer of Property Interest Act (UDPIA)), adopted by 1/3 of the states, does not specify a limit.

#### From Common Law to Statutory Law

* Common Law
	+ Intestate – successor could not prevent title from passing to him. If the heir refused to accept the inheritance, title passed to the heir and then from the heir to the next intestate successor (taxed).
	+ Testate – devisee could refuse to accept the devise, thereby preventing title from passing to the devisee (no tax). A gift, whether inter vivos or by will, requires acceptance by the donee.
* Modern Trend/UPC §§2-1105 and 2-1106)
	+ Legislation treats the disclaimant as having died before the decedent or before the time of distribution (§2-1106(b)(1)). Property is distributed to the next eligible taker under the various rules governing who takes.
	+ Only the disclaimed interest passes to the descendants of a disclaimant who take by representation. UPC §2-1106(b)(3).

#### Avoiding Taxes

* Transfer to child taxed and then from child to grandchildren taxed. By child disclaiming, only taxed once.

#### Avoiding Creditors

* Most disclaimer statutes provide that a disclaimer relates back for all purposes to the date of the decedent’s death. UPC §2-1106(b)(1)
* Ordinary Creditors
	+ Most cases have held that ordinary creditors cannot reach the disclaimed property.
	+ So long as the disclaimer was made prior to the filing of a bankruptcy petition, the federal courts will respect the state law relation-back doctrine for claims against a bankrupt debtor.
* Federal Tax Lien – The IRS can reach disclaimed property for federal tax liens. *Drye v. United States* (1999).

#### Disclaimers to Qualify for Medicaid

* Troy v. Hart (Md. App. 1997) – court held that Lettich was required to report his inheritance to state Medicaid authorities, whether he disclaimed it or not. Although the court held the disclaimer valid, it suggested that the amounts passing to the sisters could be subject to a claim by the state for reimbursement of Lettich’s Medicaid expenses.

# Wills

* How does the law deal with the worst evidence problem (best witness is dead) in discerning the (1) authenticity, (2) voluntariness, and (3) the meaning of a will?

## Formalities and Forms (Authenticity)

### Execution of Wills

* Every state probate code includes a provision, known as the Wills Act, which prescribes rules for making a valid well.
* Comparison of Statutory Formalities for Formal Wills

|  |  |  |  |
| --- | --- | --- | --- |
| **Statute of Frauds (Land) (1677)** | **Wills Act (1837)** | **Uniform Probate Code (1990)** | **Uniform Probate Code (1990, rev. 2008)** |
| Writing | Writing | Writing | Writing |
| Signature | Subscription | Signature | Signature |
| Attestations and subscription by 3 witnesses | Attestation and subscription by 2 witnesses | Attestations and signature by 2 witnesses | Attestation and signature by 2 witnesses or notarization |

#### Attested Wills

* Formalities
	+ The Core Formalities – Writing, Signature, and Attestation: UPC §2-502(a)

Except as otherwise provided…a will must be:

(1) **in writing**;

(2) **signed by the testator** or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and

(3) either:

(A) **signed by at least two individuals**, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in paragraph (2) or the testator’s acknowledgment of that signature or acknowledgement of the will; or

(B) **acknowledged by the testator before a notary public** or other individual authorized by law to take acknowledgements.

* + The Functions of Formalities
		- Evidentiary function – supply satisfactory evidence to the court
		- Ritual function (cautionary function) – The performance of some ceremony for the purpose of impressing upon a testator the significance of his statements
		- Protective function – protect a testator from imposition. Prophylactic purpose of safeguarding the testator
		- Channeling function – incentive to seek attorney and standardization of form simplifies administration
	+ Attestation Clause (not Attestation)
		- Not required but gives rise to a rebuttable presumption of due execution.
		- Recites that the will was duly executed in accordance with the particulars of the applicable Wills Act and approved by witnesses so gives ammunition for a vigorous cross-examination in which the witness may be impeached with the text of the clause.
		- Located after testator’s signature.
* Strict Compliance (MAJORITY OF STATES)
	+ Traditional law – requires strict compliance with formalities
		- Guards against false positive – guards against a spurious finding of authenticity, false positive.
		- Leads to many false negatives – denies probate even if the defect is innocuous and there is overwhelming evidence of authenticity, a false negative.
* The Meaning of “Writing”
	+ All that is required is a reasonably permanent record of the markings that make up the will.
	+ Video wills – In re Estate of Reed (Wyo. 1983) held that DVD does not comply with requirement that the will be a signed writing.
	+ Electronic wills – may be allowed under substantial compliance doctrine or the harmless error rule? Nevada enacted statute authorizing electronic wills, subject to rather strict requirements, including a single original and some way of determining if the original has been altered.
* Meaning of “Presence”
	+ Line of Sight (strict compliance) – the testator does not actually have to see the witnesses sign but must be able to see them were the testator to look.
		- ***In re Groffman*** (1969)
			* Synopsis: Charles Groffman’s will provided that his second wife would share the estate with her daughter and step-daughter. The widow contested the will. English Wills Act of 1837 requires that testator sign will “in the presence of two or more witnesses present at the same time…” Charles had already signed the will when he asked both witnesses to witness his will. He acknowledged his signature to them separately, one after the other, but not together. Court found that although they believed the document was intended by the deceased to be executed as his will, the court refused to admit the will to probate because it did not follow the formalities exactly – the testator did not make or acknowledge his signature in the presence of the witnesses at the same time even though temporal gap was minimal.
			* Tool: Strict compliance rule – witnesses present at the same time when testator signs or acknowledges signature formality.
		- ***Stevens v. Casdorph*** (W. Va. 1998)
			* Synopsis: The Casdorph’s took Homer Miller to the bank to execute his will. Miller asked a bank employee, Debra Pauley and public notary, to witness the execution of the will. Pauley took the will to two other bank employees to sign the will but they did not see Miller sign the will and Miller did not accompany Pauley to the separate work areas of the two employees (both in small bank lobby area). Will left the bulk of the estate to the Casdorphs. Miller’s nieces, the Stevenson’s, who would share in Miller’s intestate estate, filed an action to set aside the will arguing that it was not properly executed according to state statute. W. Va. State statute requires that a testator sign their will or acknowledge such will in the presence of two witnesses at the same time, and such witnesses must sign the will in the presence of the testator and each other. Court reverses in favor of nieces because the statute was not strictly followed – the witnesses did not sign in the presence of the testator or each other, and the testator did not sign in the presence of the witnesses. Does not fall into exception in state statute that allows for a witness to sign separately and then later acknowledge signature in front of other witness and testator.
			* Tool: Majority – Strict compliance. Dissent – majority takes technocratic approach that worships form over substance. This creates a harsh and inequitable result contrary to the indisputable intent of Miller and against the spirit and intent of the law related to wills (freedom of disposition?)
	+ Conscious Presence – the witness is in the presence of the testator if the testator, through sight, hearing, or general consciousness of events, comprehends that the witness is in the act of signing. The test is one of mental apprehension. UPC §2-502. Witnesses don’t need to be present at same time. UPC 2-502(a)(3).
* The **“Signature”** Requirement
	+ Type of Mark
		- Name in full
		- A cross (X), abbreviation, or nickname?
		- Electronically printed name in full (cursive font)? Composing will on computer and in the presence of two witnesses, typing signature in a cursive font and then printing the document is sufficient. The two witnesses signed by hand and document was notarized. Taylor v. Holt (Tenn. App. 2003).
		- Initials and date?
		- Mark made by someone else at the direction of T and in their presence. UPC 2-502(a)(2)
		- Usually more flexible if testator is not well physically enough to do a full signature. See In re Estate of McCabe (Cal. App. 1990).
	+ Writing Below Signature
		- Subscribe Requirement (signed at the end) and Writing Added After Signed
			* Original will valid, writing below signature is null a void (assuming not valid codicil)
		- Subscribe Requirement and Writing Added Before Signed
			* Under strict compliance, whole will invalid because not subscribed
		- No Subscribe Requirement and Writing Added After Signed
			* Writing is not considered part of the will unless valid codicil
		- No Subscribe Requirement and Writing Added Before Signed
			* Whole will is valid
	+ Order of Signing
		- Additions to will made after “signing” may be invalid
		- Traditional – Testator must sign or acknowledge the will before the witnesses attest.
		- Modern Trend – If all sign as part of a single (or continuous) transaction, the exact order of signing is not critical. R3d of Property: Wills and Other Donative Transfers §3.1 cmt. m.
	+ Timing of Attestation
		- Within a reasonable time. UPC §2-502(a)(3)(A)
		- Within 30 Days - NY
		- After T’s death? UPC §2-502(a)(3)(A) cmt. says may be reasonable
* Interested Witnesses
	+ Need at least two disinterested witnesses
		- ***Estate of Morea*** (Sur. 1996)
			* Synopsis: Testator’s friend was granted a bequest under testator’s will and he was also an attesting witness. Testator’s son was an attesting witness and also a beneficiary who took a smaller testate portion than his intestate portion would have been. Third witness does not take anything under the will. NY law provides that an attesting witness to a will to whom a beneficial disposition is made is a competent witness and can be compelled to testify with respect to the execution of the will but that the disposition to the attesting witness is void unless there are, at the time of execution and attestation, at least two other witnesses to the will who receive no beneficial disposition or appointment thereunder. Court held that bequest to friend is not void, because the object of the statute is to have two attesting witnesses with nothing to gain by the admission of the will to probate. This is fulfilled since there is one disinterested party and since T’s son is actually adversely affected by the will.
			* Tool: Object of law requiring at least two other witnesses to the will who receive no beneficial disposition or appointment thereunder is that the two witnesses have nothing to gain relative to intestate as opposed to no absolute gain from testate.
	+ If do not have two disinterested witnesses, two options:
		- Void interested witnesses gift – by voiding the interested witness’ gift, no longer conflict of interest and will can be probated.
		- Purging Statutes (few states)
			* Purge only the benefit the witness would receive under the will that is in excess of what the witness would have received in intestacy (or, under some statutes, under an earlier will). Thus, no longer any conflict of interest and will can be probated.
			* Supernumerary – only applies to a witness who is necessary for the will’s validity.
	+ Abolish Doctrine – UPC
		- Minority of states follow UPC and do not require any witnesses be disinterested.
		- UPC §2-505(b) – a will is valid even if witnessed by an interested person and without purging the interested witness of his devise.
* Due Execution
	+ Choice of Law
		- Almost all states have a statute, such as UPC §2-506, that recognizes as valid a will executed with the formalities required either by the state where the testator was domiciled at death, by the state where the will was executed, or by the state where the testator was domiciled when the will was executed.
		- But not all states have this and the laws are not uniform. If the procedure on p. 168-169 is followed, the instrument will be valid in all states no matter where the testator is domiciled at the time of execution or at death or where the testator’s property is located.
	+ The Self-Proving Affidavit
		- In cases were the witnesses are dead or can’t be located, a self-proving affidavit reciting that all requirements of due execution have been complied with permits the will to be probated expeditiously.
		- Recognized by almost all states.
		- UPC §2-504 recognizes two kinds of self-proving affidavits:
			* (a) One-step self-proving affidavit – a combined attestation clause and self-proving affidavit, so that the testator and the witnesses sign their names only once
			* (b) Separate self-proving affidavit to be affixed to a will already signed and attested. The affidavit must be signed by the testator and witnesses in front of a notary after the testator and witnesses have signed the will.
	+ Safeguarding a Will
		- Lawyers often safeguard wills.
		- Some state courts have found it unethical but generally accepted.
* Switched Wills
	+ Strict Compliance ***– In re Pavlinko’s Estate*** (Pa. 1959)
		- Synopsis: Vasil and Hellen Pavlinko had mirror wills drafted for them. Each will left all of the testator’s estate first to the surviving spouse, if there was one, and otherwise to Hellen’s brother, Elias Martin. The Pavlinkos’ wills were written in English, but their native language was Ukranian. Vasil and Hellen executed each other’s wills instead of their own. Hellen died and then Vasil died and the error was discovered. Even though the facts show that the husband signed his wife’s will by mistake and both the spouse and the husband intended to leave their property to each other, the will cannot be probated because it does not meet the requirements. The will he signed does not have testamentary intent.
		- Tool: A will is not valid if the will specifically purports to be the will of one person but is signed by his or her spouse even though it is evident that it was likely a mistake.
		- Dissent: The intent of the testator must be determined by looking at the four corners of the will signed. Because the couple both left their residuary estate to the same person, the will should be admitted for probate.
	+ Modern Trend ***– In re Snide*** (NY 1981)
		- Synopsis: Harvey and Rose Snide intended to execute mutual wills at a will execution ceremony. Both mistakenly signed each other’s will. The wills were identical except as to the names of the donors and beneficiaries on the wills. Harvey dies leaving his wife and three children. Rose is a proponent of the will which would pass entire estate to Rose. One of the children is a minor and represented by a guardian ad litem… and the guardian refuses to sign the waiver because only through intestacy would child receive a share of the estate. Guardian’s argument is that Harvey lacked the required testamentary intent because he never intended to execute the document he actually signed. Court held that one of two mutual wills that are simultaneously executed according to statutory formality may be admitted to probate even though both parties mistakenly signed the other’s will. Though the will did not have the testator’s own signature, he intended to execute the will as if it were his own. Because the two wills were identical and had the same witnesses, there is no risk of fraud or undue influence. The testator’s intent is present along with his awareness of the seriousness of the event. Therefore the will should be admitted to probate by reforming it by changing the words of the will signed.
		- Tool:
			* Where identical mutual wills are simultaneously executed with statutory finality, one of them may be admitted to probate even though both parties mistakenly signed the others will.
			* Decline formalistic view that testamentary intent attaches to the document prepared rather than the testamentary scheme it reflects.
			* Reformation – conform instrument to actual intent at time of restitution.
		- Dissent: In most cases, relief has been denied in cases involving mutual wills that are mistakenly signed by the wrong testator.
* Substantial Compliance Doctrine
	+ Rule (Langbein) – even if a will is not executed in strict compliance with the jurisdictions Wills Act formalities, the court is empowered to probate the will if (1) clear and convincing evidence shows that the testator intended the document to constitute his or her last will and testament, and (2) clear and convincing evidence shows that the will substantially complies with the statutory Wills Act formalities (purpose of formalities is served). UPC 2-503 (**1990**).
	+ Some states interpreted the doctrine to apply narrowly. E.g. *In re Will of Ferree* (NJ Ch. 2003) No two witnesses but had writing and signature and notary but court said not substantial compliance.
* The Harmless Error Rule
	+ Adopted in ten states - MINORITY
	+ Clear and Convincing Evidence Standard (lower than beyond a reasonable doubt and preponderance of evidence)
	+ UPC §2-503 (**1997**). Harmless Error

*Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute*

1. *The decedent’s will,*
2. *A partial or complete revocation of the will,*
3. *An addition to or an alteration of the will, or*
4. *A partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.*
	* R3d of Property prioritizes the core formalities
		+ Requirement of a writing cannot be excused
		+ Lack of signature is hard to excuse. Good example of where it can be excused is a switched wills case
		+ Defects in attestation are more easily excused.
	* ***In re Estate of Hall*** (Mont. 2002) Synopsis: The testator and his wife (the Halls) went to their attorney’s office and drafted a joint will (previously testator had his own will), and then signed it on the advice of their attorney that it would constitute a valid will until they signed the final version. The Halls executed the modified draft, the attorney notarized it (there was no one else in the office at that time), and then the Halls returned home where they destroyed their original wills. The testator died before executing the final version. One of his two daughters from a previous marriage requested formal probate. Montana had adopted the **harmless error doctrine**, and the court applied it to validate the will on the ground that there was clear and convincing evidence that the testator intended the document to be his will – wife testified that Jim’s and her intent was that the draft would stand as a will until their lawyer provided a clean, final version. The daughter’s only argument was that this was not their intent because it still had scribbles on it.
	* ***In re Probate of Will and Codicil of Macool*** (NJ App. Div. 2010)
		+ Synopsis: Louise and Elmer Macool were married. Although they did not have any children together, she raised Elmer’s seven children as her own. Her first will left all her property to Elmer, with her stepchildren as contingent beneficiaries. After Elmer died, she went to see her attorney and gave him written instructions to draft a new will for her that would give her two nieces the same share as her stepchildren. Her attorney dictated the will while she was there and his secretary later typed it up and labeled it “rough,” but before she had a chance to see it, Louise passed away (only one hour after their meeting). This draft has some differences from a handwritten note that Louise had given her lawyer with her requested changes when they met. One of the nieces offered the draft for probate. NY has adopted the UPC harmless error doctrine. Although the trial court found there was clear and convincing evidence that Louise intended to change her estate plan to include her nieces, the court found there was not clear and convincing evidence she intended for the particular draft will to be her final will, especially because the draft did not reflect everything in the handwritten note. Because of her untimely demise she had no opportunity to read, review, modify, or express her assent to the draft. The court of appeals reversed trial court finding that a signature is required (finding that harmless error rule would be pointless for attestation if signature was always required) and affirmed the trial court’s judgment, ruling the below.
		+ Tool: Although a will need not be signed by the decedent under the harmless error doctrine, for there to be clear and convincing evidence that the decedent intended the document to be his or her will, the decedent must (1) actually review the document in question and (2) thereafter give his or her final assent to it.

#### Notarized Wills

* UPC §2-502(a) – a will must be (1) in writing; (2) signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and (3)(B) acknowledged by the testator before a notary public **or** other individual authorized by law to take acknowledgements.
* Only adopted in Colorado and North Dakota.

#### Holographic Wills

* Permitted in little more than half the states
* Requirements – Written by the testator’s hand, and signed by the testator.
* Signature
	+ In almost all states permitting holographs, doesn’t matter where signed on document
	+ But, if not signed at the end, there may be doubt about whether the decedent intended his name to be a signature.
* Handwriting
	+ First Generation (third of states) – “entirely written, signed, and dated.”
	+ Second Generation (1969 UPC) (1/5 of states)
		- “the signature and the material provisions.”
		- Material provisions include: provisions that affect the disposition of the property, and administrative provisions (e.g. appointment of personal representative), and maybe testamentary intent (see below)
	+ Third Generation (1990 UPC §2-502)
		- (b) – signature and material portions of the document are in the testator’s handwriting.
		- (c) – intent that a document constitute the testator’s will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator’s handwriting.
* Discerning Testamentary Intent (intent that document constitutes last will and testament)
	+ Common script in holographs – letter expresses intent but unclear whether it is will.
	+ Strict compliance – testamentary intent is material provision that must be discernible from handwritten portions
	+ UPC 2-502(c) – testamentary intent may be established from either handwritten words, not handwritten words, or other extrinsic evidence.
	+ ***In re Kimmel’s Estate*** (Pa. 1924)
		- Synopsis: decedent handwrote a letter to two of his children. The letter talked about some family matters and the weather. Near the end of the letter he wrote, “I have some very valuable papers I want you to keep fore me so if enny thing happens all the scock money in rhw 3 Bank liberty lones Post office stamps and my home on Horner St goes to George Darl & Irvin Kepp this letter lock it up it may help you out….Father.” The decedent mailed the letter and died suddenly that afternoon. Some of his children offered the letter for probate. The court held the document qualified as a holographic will.
		- Tool:
			* “if enny thing happens” helps indicate testamentary intent. Note: letter also says “Kepp this letter lock it up it may help you out.”
			* Signing just “Father” is sufficient to establish intent to execute especially since this is not formal will.
* Preprinted Will Forms. ***In re Estate of Gonzalez*** (Me. 2004)
	+ Synopsis: Decedent purchased a commercially printed form will, filled in the blanks giving his estate to three of his five children, and then signed the form will. The decedent showed the document to his brother and his brother’s wife, and then told them he intended to rewrite it more neatly on a second blank commercially printed form will. The brother signed the first form will, but no one else signed as a witness. The brother, his wife, and her mother signed the second form will, but the decedent fell ill and died before copying the testamentary provisions over to the second form will or signing it. The first document was offered for probate by three kids but two other kids argued it was not valid. The issue was whether the writing expressed the requisite testamentary intent. Some jurisdictions consider testamentary intent a material provision that must be in the testator’s handwriting and thus will not consider the printed words on the form will. Other jurisdictions do consider the printed words on the form will when analyzing whether the document has testamentary intent. The court concluded that the printed words were incorporated by reference and should be considered when analyzing whether the document has testamentary intent. The court ruled the document was a valid holographic will.
	+ Tool: Preprinted words in preprinted form wills may be implicitly incorporated into holographic wills.
* Extrinsic Evidence. ***In re Estate of Kuralt*** (Mont. 2000)
	+ Synopsis: Charles Kuralt was married to Suzanne Baird (“Petie”), but he also had a long-term and intimate relationship with Pat Baker (later known as Pat Shannon). In 1989, he executed a valid holographic will leaving all of his property in Twin Bridge, Montana, to Pat. In 1994, he executed an attested will that left all of his property to his wife and children. In 1997, he began the process of transferring inter vivos the Montana property to Pat, but he was hospitalized and died before finishing the process. While in the hospital, he handwrote and signed a document that he sent to Pat. The document discussed his health problems and concerns and provided in pertinent part, “I’ll have the lawyer visit the hospital to be sure you **inherit** the rest of the place in MT if it comes to that.” After Kuralt’s death, Pat offered the letter for probate. His estate opposed the letter on the ground that it expressed only a future intent to make a will. The court emphasized that the bedrock principle was to honor testator’s intent – Kuralt’s underlying word “inherit,” starting to transfer the property, and his long relationship of Pat indicated his intent to make a testamentary transfer of the property. The court ruled that there was sufficient evidence to conclude that the document was a holographic codicil to his 1994 will. (A codicil is a will that amends an existing will).
	+ Tool: Extrinsic evidence may be used in interpreting testamentary intent.
	+ Note: Sitkoff thinks case was wrongly decided, because more of a letter than will. Prior will shows that he knows how to make testament – full signature, address, and notarized.

### Revocation of Wills

#### Writing or Physical Act

* All states permit revocation of a will (1) by subsequent writing executed with Wills Act formalities, and (2) by a physical act such as destroying, obliterating, or burning the will.
* UPC § 2-507
1. A will or any part thereof is revoked:
2. By executing a **subsequent will** that revokes the previous will or part expressly or by inconsistency; or
3. By performing a **revocatory act** on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator’s conscious presence and by the testator’s direction. For purposes of this paragraph, “revocatory act on the will” includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing or canceling is a “revocatory act on the will,” whether or not the burn, tear, or cancellation touched any of the words on the will…
* Revocation by Writing
	+ Express revocation - a writing executed with Wills Act formalities may revoke an earlier will in whole or in part
	+ Revocation by inconsistency – a writing executed with Wills Act formalities may revoke a prior will in whole or in part by inconsistency (sometimes called implied revocation). UPC 2-507(a)(1).
	+ Will v. Codicil
		- New Will – If a subsequent will completely revoked the prior will, either expressly or by inconsistency (UPC §2-507(c)), the subsequent will becomes the testator’s sole will.
		- Codicil
			* If, however, the subsequent will only partially revokes or amends the prior will, either expressly or by inconsistency, the subsequent will is called a codicil. The prior will stands and is valid to the extent it is not revoked by the codicil. (§2-507(d)).
			* Execution – codicil is a will that must be executed with the requisite Wills Act formalities.
		- Revocation – Revocation of codicil does not kill underlying will. Revocation of underlying will kills codicil.
* Writing as Revocation by Act. ***Thompson v. Royall*** (Va. 1934)
	+ Synopsis: Kroll, the testatrix, had her attorney take out her will and codicil to revoke them. The attorney suggested that rather than destroying them, she keep them as memoranda. So on the back of the manuscript cover to the will, the attorney handwrote, in the presence of the testatrix and another, the following notation: “This will null and void.” The testatrix then signed the notation. The testatrix died three weeks later. The will and codicil were offered for probate. The court held that the writing did not qualify as revocation by writing because the notation did not qualify as a valid will (not attested because not witnessed and not holographic because the material provisions were not in the testatrix’s handwriting). The court held that the writing did not qualify as revocation by act because the handwriting did not touch any of the written portions of the will as required under the traditional common law approach and there were not marks or lines across the written parts or physical defacement. Court said that once you allow cancelling on the back, then you can cancel on a separate piece of paper (seems silly because would be easily distinguishable).
	+ Tool:
		- Can revoke by subsequent writing executed in the manner in which a will is required to be executed, or by the testator or person in testator’s presence and by his direction, cutting, tearing, burning, obliterating, canceling, ,or destroying the same, or the signature thereto, with the intent to revoke.
		- Cancellation must touch words on the will or must involve physical defacement.
	+ Modern Trend: Likely different outcome with UPC §2-507(a)(2) (whether or not it touched any words of the will) or harmless error rule
* Harmless Error – ***In re Estate of Stoker*** (Cal. App. 2011)
	+ - Synopsis: Stoker, the decedent, created a will and trust in 1977 that benefited Destiny Gularte (his then girlfriend). Thereafter they had a falling out. In 2005, while dining one evening with close friends, he had one of them handwrite a document he dictated and signed that (1) expressly revoked his 1977 trust, (2) expressly provided that Destiny and another beneficiary were to take nothing, and (3) stated, “Everything is to go to my kids Darin and Danene Stoker.” Although the document failed as an attested will because it was not witnessed and failed as a holographic will because it was not in the testator’s handwriting, the court applied California’s harmless error doctrine and found that there was clear and convincing evidence that the decedent intended the document to be a valid will revoking his prior will and trust. Intrinsic evidence – will said who was to get what but even if no testamentary intent, court allows for extrinsic evidence – what decedent told others indicated that decedent intended 200 document to be a valid will revoking his prior will and trust. Note: Under court’s version of events, Stoker urinated and set fire to will in 2001 but it was a copy and not original.
		- Tool:
			* Physical act to copy of will is not revocation of original will.
			* Harmless error rule applies to holographic wills not written by testator.
* Presumption of Physical Act Revocation
	+ Revocation by Presumption – if a lost or mutilated will was last known to have been in the possession of someone other than the testator, there is a presumption of revocation, and the will is entitled to probate unless, of course, there is proof (extrinsic evidence) that the testator in fact revoked the will.
	+ Lost will – a lost will may be probated if its contents can be proved.
	+ Duplicate originals
		- Revocation by act or by writing- affirmative evidence that the testator properly revoked one duplicate original by act or by writing automatically revokes all duplicate originals
		- Revocation by presumption – jurisdictions split over whether the presumption doctrine applies to revoke all duplicate originals if the one the testator took home is not found, but the other duplicate original is found.
	+ ***Harrison v. Bird*** (Ala. 1993)
		- Synopsis: Speer, testatrix, executed duplicate wills, leaving one with her attorney and taking the other home with her. Thereafter, the testratrix called the attorney and advised him that she wanted to revoke her will. The attorney tore the will into pieces in the presence of his secretary and mailed the pieces to the testatrix. The court held that the attorney’s act of tearing one of the duplicate originals into pieces was not a valid revocation by act because it was not done in the presence of the testatrix. The court went on to rule, however, that because the pieces of the will that were mailed to the testatrix were not found after her death, the presumption doctrine applied (Ms. Speer thereafter revoked the will herself). The court applied the approach that the presumption doctrine revokes all duplicate originals even if one or more are found following the testatrix’s death.
		- Tool: Presumption of revocation arises when a will last known to be in the testator’s possession cannot be found (or is found in a mutilated condition). Applies to duplicate originals. Theory is that the reason it cannot be found, is that the testator must have physically revoked.
* Partial Revocation by Physical Act
	+ Not allowed – look at whether testator would have preferred whole will or none of will (often look at relative dollar amount 🡪 was revocation going to change most of estate?).
	+ Modern Trend (most states)/UPC 2-507 – recognize partial revocation by physical act. States split over how to treat the revoked gift.
		- Majority – permits the revoked gift to fall to the residuary and to increase the residuary, but the partial revocation cannot increase a gift outside the residuary
		- Few states – “new gift” not made with Wills Act formalities so revoked gift may pass via intestacy only
		- UPC 2-507 – will should be given effect as it reads regardless of where revoked gift goes

#### Dependent Relative Revocation (DRR)

* Rule – if a testator undertakes to revoke his will upon a mistaken assumption of law or fact, the revocation is ineffective if the testator would not have revoked the will but for the mistaken belief.
* Elements: (1) valid revocation; (2) based on mistake of law or fact; and (3) would not have revoked but for mistake. If revocation by writing, (4) mistake set forth in writing and (5) mistake is beyond the testator’s knowledge.
* E.g. Mistake of fact – thought x and y were married.
* E.g. Mistake of law – new gift fails because violates RAP, public policy, etc.)
* ***LaCroix v. Senecal*** (Conn. 1953)
	+ Synopsis: Dupre (testatrix) executed a valid will leaving as heir her niece, the plaintiff, and the residue of her estate half to her nephew (identified by nickname) and half to Senecal, a friend. Thereafter, Dupre executed a codicil that revoked the residuary clause and substituted an almost identical clause, except this time she referred to her nephew by both his nickname and his proper name. Senecal’s husband, however, witnessed the codicil. Under the applicable interested witness statute, this voided the gift to Senecal. The court applied DRR: there was a valid revocation (the codicil) based on a mistake (the belief that the gift to Senecal in the codicil was valid), Dupre would not have revoked but for the mistake (as evidenced by the void gift in the codicil), and because the revocation is by writing, the mistake must be set forth in the writing (the gift to Senecal as set forth in the codicil – evidencing the testatrix’s mistaken belief that the gift in the codicil was valid). The court gave effect to the gift to Senecal under the original will.
	+ Tool: DRR – where the intention to revoke is conditional and were the condition is not fulfilled, the revocation is not effective.
* R3d of Property: Wills and Other Donative Transfers §4.3 Ineffective Revocation (Dependent Relative Revocation)

*(a) A partial or complete revocation of a will is presumptively ineffective if the testator made the revocation:*

 *(1) in connection with an attempt to achieve a dispositive objective that fails under applicable law, or*

 *(2) because of a false assumption of law, or because of a false belief about an objective fact, that is either recited in the revoking instrument* *or established by clear and convincing evidence.*

*(b) The presumption established in subsection (a) is rebutted if allowing the revocation to remain in effect would be more consistent with the testator’s probable intention.*

#### Revival of Revoked Wills

* Typical Case: Testator executes will 1. Subsequently, testator executes will 2, which revoked will 1 by an express clause or by inconsistency. Later, testator revokes will 2.
* Majority of states and UPC §2-509 – upon revocation of will 2, will 1 is revived if the testator so intends. Such intent may be shown from the circumstances surrounding the revocation of will 2 or from the testator’s contemporaneous or subsequent oral declarations that will 1 is to take effect.
	+ UPC §2-509. Revival of Revoked Will
		- (a) – if will 2 (the revoking instrument) **wholly** revokes will 1, the revocation of will 2 by a revocatory act does not revive will 1 unless the proponent of will 1 shows that the decedent intended the revocation of will 2 to revive will 1. (**presumption against revival**)
		- (b) – if will 2, which **partly** revoked will 1, is itself revoked, the presumption is that the revoked part of will 1 is revived, unless the party arguing against revival shows that the decedent did not intend the revocation of will 2 to revive those parts of 1 revoked by 2. (**presumption of revival**)
		- (c) – if will 2, which is revoked partly or wholly revoked will 1, is **revoked by will 3**, will 3 does not revive will 1 unless the text of will 3 indicates such a result is what the testator intended (**intent to revive must be set forth in will 3**)
* Minority of states – revoked will cannot be revived unless re-executed with testamentary formalities or republished by being referred to in a later duly executed will. At the time of the ***Alburn*** case, Wisconsin had this rule but it now follows majority. ***In re Estate of Alburn*** (Wis. 1963)
	+ Synopsis: Alburn, the testatrix, executed a will #1 while living in Milwaukee (the Milwaukee will). Then, the testatrix moved to Kankakee and executed will #2 (the Kankakee will). That revoked the Milwaukee will. After that, the testatrix moved back to Wisconsin, destroyed the Kankakee will, and told people she wanted her property to pass pursuant to the Milwaukee will. The court applied the minority American approach and held that the testatrix did not properly revive the Milwaukee will because she did not re-execute it with Will Act formalities. The beneficiaries under the wills then invoked DRR (with respect to will #2, the Kankakee will) to avoid intestacy. The Kankakee will was validly revoked (torn up). The beneficiaries had to prove (1) the revocation was based on a mistake, (2) there was a failed alternative testamentary scheme, and (3) the testatrix would not have revoked but for the mistake. The beneficiaries proved that (1) the testatrix revoked the Kankakee will based on the belief that the Milwaukee will had been revived (a mistake of law), (2) the Milwaukee will was not revived, thus constitute the failed alternative testamentary scheme (the attempt at a “new” will that failed), and (3) by comparing who took under the Milwaukee will, who took under the Kankakee will, and who took under intestacy, the Milwaukee will (what the testator wanted but could not have) was closer to the Kankakee will than it was to intestacy and that the testator would not have revoked but for the mistake. The court applied DRR and probated the Kankakee will.
	+ Tool: Wisconsin at the time had rule that revocation of later will does not revive earlier will.

#### Revocation by Operation of Law

* Change in Circumstances
	+ UPC 2-508 – Except as provided in Sections 2-803 (homicide) and 2-804 (divorce), a change in circumstances does not revoke a will or any part of it.
* Scope
	+ Traditional – revocation by operation of law applies only to wills and not will substitutes
	+ UPC 2-804 – applies to non-probate and wills
* Divorce
	+ Most states – divorce revokes any provision for the decedent’s divorced spouse and divorced spouse’s kin
	+ Few states – revocation occurs only if the divorce is accompanied by a property settlement and applies to provisions related to decedent’s divorced spouse’s relatives.
	+ Note: this can be overcome if expressly stated in will.
* Marriage
	+ Few states – premarital will is revoked upon marriage.
	+ Most states – premarital will remains valid in spite of a subsequent marriage, but a surviving pretermitted spouse is entitled to an intestate share of the deceased spouse’s estate, unless it appears from the will that the omission was intentional or the pretermitted spouse is provided for in the will or by a will substitute. UPC 2-301.
* Birth of Children
	+ Few states – marriage followed by birth of children revokes a will executed before marriage.
	+ Most states – pretermitted child statutes – give a child born after the execution of a parent’s will, and not mentioned in the will, a share in the parent’s estate. UPC 2-302.

### Components/Scope of a Will

#### Integration

* Doctrine – all papers that are **present at the time** of execution and are intended to be part of the will are treated as part of the will.
* ***In re Estate of Rigby* (Okla. App. 1992)**
	+ Synopsis: Following the decedent’s (Rigby’s) death, two handwritten pages, dated the same date, were found folded together. The first page clearly expressed testamentary intent, was signed at the bottom, and had approximately 2.5 inches of blank space at the bottom of the page. The second page was a list of personal property with the name of an individual after it (some of which conflicted with the gifts on the first page). The second page was initialed and dated on the top (same date as first page), and standing alone it did not express testamentary intent; nor was it signed at the bottom. The parties named on the second page claimed the second page was part of the will. Neither page referenced the other page. The court applied the traditional strict approach and held that there was insufficient evidence that the decedent intended the second page to be part of the will and probated only the first page.
	+ Tool: where the instrument offered consists of more than one sheet of paper, it must be made clearly apparent the testator intended that together they should constitute the last will and testament of the testator in order for the integration doctrine to apply.

#### Republication by Codicil

* Doctrine – a validly executed will is treated as re-executed (i.e., republished) as of the date of the codicil 🡪 a will is treated as if it were executed when its most recent codicil was executed, whether or not the codicil expressly republishes the prior will, unless the effect of so treating it would be inconsistent with the testator’s intent.
* Preexisting Will – classifying a will as a codicil implicitly presumes a preexisting valid will. If the underlying ill is no valid, the codicil is not a codicil, but rather is its own freestanding will (even if it does not dispose of all the testator’s property).
* Estate of Nielson (Cal. App. 1980) testator drew lines through the dispositive provisions of his typewritten will and wrote between the lines a new provision for the bulk of his estate. Near the margin of these cancellations and interlineations were the testator’s initial and date. At the top and bottom of the will were the handwritten words, “Revised by Llyod M. Nielson November 29, 1974.” The court held the handwritten words constituted a holographic codicil that republished the typewritten will as modified.

#### Incorporation by Reference

* Existing Writings
	+ A valid will can incorporate by reference a document (not present at time of execution of will) that was not executed with Wills Act formalities, thereby giving effect to the intent expressed in the incorporated document, as long as (1) the will expresses the intent to incorporate the document, (2) the will describes that document with reasonable certainty, and (3) the document being incorporated was in existence when the will was executed. UPC 2-510.
	+ ***Clark v. Greenhalge* (Mass. 1991)**
		- Synopsis: the testatrix’s 1977 will named Greenhalge as executor and principal beneficiary and provided that he was to receive all of her tangible personal property except for those items designated to be given to others “by memorandum.” Thereafter the testatrix, Nesmith, created a memorandum and a notebook in which she made entries giving certain items of tangible personal property to certain beneficiaries. The memorandum was created in 1972 and amended in 1976. The notebook was titled “List to be given [testatrix] 1979” and contained an entry giving a picture to Ms. Clark. The testatrix told Ms. Clark of her intent to add the picture to the list in early 1980. The testatrix dies in 1986, and Greenhalge refused to honor the purported gift of the picture via the list. Greenhalge argued that the will expressed the intent to incorporate only the memorandum.
		- Holding: Incorporation by Reference – The court held a literal interpretation of “memorandum” was not appropriate and included the notebook along with the memorandum. Court found that the notebook’s apparent purpose was consistent with that of a memorandum under Article Fifth of the will: It is a written instrument which is intended to guide Greenhalge in distributing such of Nesmith’ s tangible personal property…Evidence supports that Nesmith intended that the bequests in her notebook be accorded the same power and effect as those contained in the 1972 memorandum under Article Fifth. Republication by Codicil – As for whether the entry in question had been entered in the notebook when the will was executed, the court noted that the notebook was in existence of the dates Nesmith executed two codicils to her will, and that it thereby was incorporated in the will.
		- Problem: court applies incorporation by reference although unclear when additions in notebook were made – whether after execution of codicils or not. A couple of courts do this where they seem okay with people’s tendency to keep adding to lists. Court here applies UPC 2-513 although MA did not have this law.
* Subsequent Writings and Tangible Personal Property
	+ Slim majority of states have adopted version of UPC 2-513 – allows testator to dispose of tangible personal property by a separate writing, even if prepared after the execution of the testator’s will, provided that the will makes reference to the separate writing.
	+ UPC 2-513 (1990) – “Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator’s death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.”
	+ Some states have dollar cap on subsequent writings.
* Incorporating by Reference Changes to Actual Will
	+ ***Johnson v. Johnson*** (Okla. 1955)
		- Synopsis: a single-page instrument was offered for probate as the decedent’s will. The instrument (which was not signed or witnessed) consisted of three typed paragraphs. At the bottom of the page, in the decedent’s handwriting, was the following: “To my brother James I give ten dollars only. This will shall be complete…D.G. Johnson.” The typed portion of the paper did not qualify as a will. The bottom, handwritten portion did qualify as a valid holographic will. The issue was whether the scope of the valid holographic will could be expanded to give effect to testamentary intent expressed in the typed paragraphs that did not qualify as a will.
		- Holding: Typed portion incorporated by reference (typed portion likely in existence when handwritten provision added). Can’t do integration because typed portion are material provisions that are not handwritten. Court wrongly found that also republication by codicil but first will not valid so can’t be codicil.
		- Dissent: instrument was one will and part of a will cannot be incorporated into another part of the same will.
	+ Berry v. Trible (Va. 2006) – after the lawyer sent T a draft will, T made handwritten changes to it, signing as the bottom. On one of the pages T wrote, “I Give and bequeath all,” followed by an arrow pointing to her handwritten notation of the intended beneficiary. The court held that the document could not be probated as a holograph, because the handwriting and the typed text were interwoven, “both physically and in sequence of thought.”

#### Acts of Independent Significance/Nontestamentary Acts

* UPC 2-512. Events of Independent Significance – “A will may dispose of property by reference to acts and events that have significance apart from their effect upon the disposition 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 individual’s will is such an event.”

### Contracts Relating to Will

* If a party to a valid will contract dies leaving a will that does not comply with the terms of the contract, the will is probated in accordance with the Wills Act, but the contract beneficiary is entitled to a remedy for the breach (typically restitution by way of constructive trust).

#### Contracts to Make a Will

* Many states/UPC 2-514 – Because of the potential for fraudulent claims and the fact that the other party to the alleged contract is dead, some jurisdictions require contracts concerning wills to be in writing even if not required under the Statute of Frauds. In the absence of a signed writing, the contract beneficiary may be entitled to restitution of the value of services rendered to the decedent (quantum meruit). The difficulty is that the beneficiary must still prove the existence of the agreement.
* UPC 2-514. Contracts Concerning Succession – “A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this [article], may be established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.”
* Remedy depends on state but may be – damages, constructive trust in favor of the contract beneficiary to prevent the unjust enrichment of the will beneficiary, specific performance resembling constructive trust.

#### Contracts Not to Revoke a Will

* The execution of a joint will or mutual wills does not, by itself give rise to a presumption of contract. The contract must be proved by clear and convincing evidence (what the court in Keith called “clear and satisfactory”).
* Joint Wills and Mutual/Mirror Wills
	+ Ambiguity – Whether the wills implicitly contain a contract not to revoke, so that upon the death of the first party, the testamentary scheme the parties agreed on becomes binding on the surviving party.
	+ Modern Trend/UPC 2-514 – executing a joint will or mutual wills does not create even a presumption of a contract not to revoke.
* ***Keith v. Lulofs* (Va. 2012)**
	+ Synopsis: Arvid and Lucy Keith were married. It was not the first marriage for either party. Each had a child from a previous marriage (Arvid had a son, Walter Keith; Lucy had a daughter, Venocia Lulofs). Arvid and Lucy took out an insurance policy naming Walter and Venocia as the primary beneficiaries, 50-50, and Arvid and Lucy also executed mirror, reciprocal wills that left everything to the surviving spouse first, and then to the two children equally. Following Arvid’s death, Lucy (1) revised the insurance policy to make Venocia the sole beneficiary, and (2) executed a new will leaving all of her estate to Venocia and nothing to Walter. Following Lucy’s death, Walter sued, claiming that the reciprocal wills innately constituted a contract not to revoke, a fact that Walter claimed was supported by conversations he had with his father before he died and the insurance policy which he claimed was evidence of Arvid’s intent to make the 1987 wills irrevocable.
	+ Tool:
		- Wills, unlike contracts, generally are unilaterally revocable and modifiable.
		- A will does not become irrevocable or unalterable simply because it is drafted to “mirror” another testator’s will.
		- When reciprocal testamentary provisions are made for the benefit of a third party, there is sufficient consideration for the contractual element of the will to entitle the beneficiary to enforce the agreement in equity, provided the contract itself is established. Proof of the contractual nature of this agreement between the testators must be “clear and satisfactory.” Proof may include – language in the instrument, witness testimony of the admissions of the testators, implication from the circumstance and relations of the parties and what they have actually provided for by the instrument.
		- Court seems to want to avoid an “unreasonable interpretation” that would leave a testator “unintentionally hamstrung by the death of the purportedly reciprocal testator” where the testator “would be unable to provide for any future spouse or any child born or adopted during a later marriage.”
	+ Holding: The court ruled that there must be clear evidence of a contract not to revoke, that the standard mirror wills language used in the wills in question did not evidence a contract not to revoke, and that the extrinsic evidence Walter offered of Arvid’s oral statement before he died was insufficient to evidence a contract not to revoke. (Under Virginia’s Dead Man’s Statute, before a judgment can be entered against one incapable of testifying, a surviving witness must provide corroborating evidence.) The court rules that the insurance policy, taken out years after the wills were executed, did not constitute corroborating evidence, and therefore there was no evidence corroborating Walter’s testimony about his conversation with his father about the contract not to revoke.

## Capacity and Contests (Voluntariness)

* UPC 3-407. Formal Testacy Proceedings; Burdens in Contests Cases
	+ In contested cases, petitioners have burden of establishing prima facie proof of death, venue, and heirship. Proponents (sometimes also the petitioners) of a will have burden of establishing prima facie proof of due execution in all cases.
	+ Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation.

### Capacity to Make a Will – Testamentary Capacity and Insane Delusions

#### Mental Capacity

* R3d Property 8.1(b) – “[T]he testator…must be capable of knowing and understanding in a general way [1] the nature and extent of his or her property, [2] the natural objects of his or her bounty, and [3] the disposition that he or she is making of that property, and must also be capable of [4] relating these elements to one another and forming an orderly desire regarding the disposition of the property.”
* Capacity Standards

|  |  |  |  |
| --- | --- | --- | --- |
|  | Less Capacity Required | 🡪 | Greater Capacity Required |
| Form of Legal Obligation | Marriage | Will (and Revocable Gifts) | Irrevocable Lifetime Gift; Contract; Deed |
| Competing Policies | Protection of Property v. Individual Autonomy | Protection of Property v. Testamentary Freedom | Protection of Property v. Freedom of Contract |

* Evidentiary Burdens – proof of due execution ordinarily creates presumption of testamentary capacity. There is a split of authority, however, on whether the proponent or the contestant has the ultimate burden of persuasion if the contestant produces some evidence of incapacity.
	+ Majority rule (***Wright*** and ***Wilson*** and UPC 3-407) – contestant has the ultimate burden of persuasion.
	+ Minority rule – putting ultimate burden on the proponent.
* ***In re Wright’s Estate* (Cal. 1936)**
	+ Synopsis: the testator, Wright, died at 69, survived by one daughter. He owned three parcels of land and miscellaneous personal property. His will, executed one year and four months before his death, left only one parcel of land to his daughter, one to this granddaughter, and the third to a friend (along with the bulk of his personal property). He left only one dollar to a number of other individuals close to him (including his grandson). His daughter attacked the will, claiming the testator lacked capacity. Several witnesses, including the non-lawyer who drafted the will and the two subscribing witnesses, testified that they thought the testator to be of unsound mind on the day he executed the will. Examples of things testator did – ran out of house partly dressed, picked up silverware from trash, picked up paper flowers from garbage and pinned them to rose bushes, suffered a head injury that seemed to “change him,” would hold breath and pretend to be dead to scare neighbors, told granddaughter she was wearing too much makeup when she wasn’t wearing any, and told people he sent them presents when he hadn’t. The burden to overcome the presumption of capacity is on the contestant, and she failed to meet her burden. The court upheld the will given that there was no medical testimony, no proof of testator’s inability to transact or conduct business or take care of himself, and no evidence that he was not mindful of the property he possessed. There was only conclusory statements by witnesses.
	+ Tool:
		- Legal presumption of capacity, especially after a will has been signed and witnessed.
		- Witnesses (and drafter where he or she is an attorney) have a legal duty to satisfy themselves of testator’s capacity before signing the will.
		- Need evidence (medical testimony, proof of testator’s inability to transact or conduct business or take care of himself, and no evidence that he was not mindful of the property he possessed) not just conclusory statements.
* ***Wilson v. Lane* (Ga. 2005)**
	+ Synopsis: Katherine Lane (propounder), as executrix of Jewel Jones Greer’s will, offered her will for probate. The will distributed the estate in equal shares to 16 blood relatives and Lane, Greer’s caregiver before her death. Floyd Wilson (caveator) filed a caveat claiming that Greer lacked testamentary capacity. At a trial, the evidence included testimony that Greer was eccentric and feeble, but still of sound mind at the time of executing her will. The evidence also showed, however, that Greer may have been suffering from Alzheimer’s or senile dementia and that a petition for guardianship of Greer was filed by Lane a few months after the will was executed. The petition claimed that Greer was no longer capable of managing her own affairs and her incapacity was caused by Alzheimer’s-related dementia. An expert, whose report indicated that Greer may have early to mid-stage dementia related to Alzheimer’s disease, admitted that he had only reviewed her medical records and had not actually examined her. Testimony also indicated that the petition was filed by Lane in response to concerns raised by the Department of Family and Children’s Services, to enable Greer to continue living in her own home. Court found that there was no evidence to show that Greer lacked testamentary capacity. The drafting attorney and other friends testified that Greer had a clear mind at the time the will was signed. Thus, propounders established a presumption that Greer possessed testamentary capacity.
	+ Tool: “the law does not withhold from the aged, the feeble, the weak-minded, the capricious, the notionate, the right to make a will, provided such person has a rational desire as to the disposition of his property…eccentric habits and absurd beliefs do not establish testamentary incapacity.”
	+ Dissent: “when the totality of the evidence as to her mental condition during the relevant time period is considered, a jury certainly would be authorized to find that she suffered from serious dementia.”

#### Insane Delusion

* Contestant mush show: (1) that the testator labored under an insane delusion (false sense of reality to which a person adheres despite all evidence to the contrary) and (2) causation (the will or some part thereof was a product of the insane delusion).
* Insane delusion v. mistake – a mistake is susceptible to correction if the testator is told the truth. Courts do not invalidate or reform wills because of a mistake.
* Older Opinions: Less Tolerance – ***In re Strittmater’s Estate* (NJ 1947) D**ecedent, Louisa Strittmater, appeared to have a normal childhood. She never married and lived with her parents until age 32, when her parents died (in 1928). A few years after their deaths, however, she began to write vicious comments about her father (“My father was a corrupt, vicious, and unintelligent savage…Blast his wormstinking carcass and his whole damn breed.”) and to a lesser degree her mother (“That Moronic she-devil…”). She looked forward to the day when all males were put to death at birth. She became a member of the National Women’s Party a few years before her parents’ death and did volunteer work for them up until her death. She died with a will leaving her estate to the National Women’s Party. Her relatives, whom she saw rarely, sued, claiming she lacked capacity. Her doctor testified that she suffered from paranoia. The lower court master found that she believed in “feminism to a neurotic extreme.” The New Jersey Supreme Court ruled that because of her insanity, particularly her insane delusions about men, she lacked the requisite mental capacity to execute a will and invalidated her will.
* Modern Trend: More Tolerance – ***Breeden v. Stone* (Colo. 2000)**
	+ Synopsis: testator Spicer Breeden regularly abused alcohol and cocaine and suffered from delusions, mood swings, and paranoia, including the beliefs that everyone was spying on him – including family, friends, and even repairmen working in the area – and that people were trying to assassinate him. The testator cut off his TV antennae and his cable service because he thought the FBI could monitor his conduct through the TV screen. After a particularly long weekend of generously indulging in cocaine and alcohol with his friends (from Friday to Sunday morning), later that Sunday the testator hit another car while driving 110 mph, killing the driver. (That did not stop the testator; he merely switched cars and continued to party, consuming more alcohol and cocaine.) When the police came to his house on March 19 to question him about the accident, he barricaded himself inside and scribbled out a will that cut out his family (from whom he was estranged) and left all his property to one of his friends. Then he shot his dog (wounding it) and shot and killed himself.
	+ Tool: Two tests that must be met to show sound mind:
		- Cunningham Test: mental capacity to make a will requires: (1) the testator understands the nature of her act; (2) she knows the extent of her property; (3) she understands the proposed testamentary disposition; (4) she knows the natural objects of her bounty; and (5) the will represents her wishes.
		- Insane Delusion Test:
			* Insane delusion – a persistent belief in that which has no existence in fact, and which is adhered to against all evidence”
			* Causal relationship between an individual’s insane delusion and his capacity to contract 🡪 whether the delusion materially affects the contested disposition in the will.
	+ Holding:
		- Testamentary Capacity – The court held that the proof of due execution of the will created a presumption of general testamentary capacity that the contestants did not overcome (met Cunningham test). Decedent (1) could index major categories of the property comprising his estate; (2) knew his home and rental addresses; and (3) identified the devisee by name and provided current address. Handwriting experts indicated that decedent was in command of his motor skills when he wrote the will.
		- Insane Delusion – With respect to the insane delusion claim, although the court found that the testator did suffer from insane delusions at the time he executed his will, the delusions did not “materially affect or influence” the testator’s testamentary scheme as reflected in the holographic will, because testator had poor relationship with family and would not have given them any either way.

### Undue Influence

* “A donative transfer is procured by undue influence if the influence exerted over the donor overcame the donor’s free will and caused the donor to make a donative transfer that the donor would not otherwise have made.” R3d Property 8.3(b) cmt. e.
	+ Also applies to lifetime transfers
* Undue influence may be inferred from circumstantial evidence that shows all the following:
	+ Susceptibility – the testator was susceptible to the undue influence
	+ Opportunity – the defendant had the opportunity to exert undue influence
	+ Motive – the defendant had a motive for exerting undue influence
	+ Causation – the undue influence caused the testator to dispose of his or her property in a way that the testator would not have otherwise.
* Presumption of undue influence arises if (1) there was a confidential relationship between the defendant and the testator, and (2) there are suspicious circumstances present.
	+ Confidential relationship – three different types (R3d Property 8.3 cmt. g):
		- A fiduciary relationship (where one party owes the other party a duty of loyalty, such as in an attorney-client relationship) – highest form of confidential relationship
		- A reliant relationship (characterized by a special trust and confidence)
		- A dominant-subservient relationship (where one party has acquired a position of domination over the other, such as a caregiver to a dependent adult)
	+ Suspicious circumstances (R3d Property 8.3 cmt. h):
		- Donor was in weakened condition (mentally or physically)
		- Alleged wrongdoer helped prepare will
		- Donor did not receive independent advice from an attorney or other disinterested advisor
		- Will was prepared in secrecy or haste
		- Donor’s attitude changed toward others due to relationship with alleged wrongdoer
		- Decided discrepancy between a new and previous wills
		- Considering whether there was continuity of purpose running through iterations of will
		- Disposition of property was unnatural, unjust or unfair.
* Burden Shifting – If a presumption of undue influences arises, the burden shifts to the defendant to rebut the presumption. (defendant in better position to present evidence). ***Estate of Lakatosh* (Pa. Super 1995)**
	+ Synopsis: Roger Jacobs befriended Rose Lakatosh, a 70-year-old woman who lived alone, was easily distracted, and was forgetful. She quickly became dependent on Roger. He visited her daily, sometimes several times a day, and took her on errands. A few months after first meeting Roger, on November 11, 1988, Rose gave him a power of attorney over her affairs (“to protect her”) and executed a will giving all but $1,000 of her $268,000 estate to him. Roger was not present when the will was drafted or executed, but the attorney was his cousin (to whom Roger had referred Rose for a different matter). Roger used the power of attorney to use Rose’s assets for his own benefit and that of his friends (whom Rose did not know. Rose’s living standards deteriorated, and shortly before her death she revoked the power of attorney, but not the will.
	+ Tool:
		- **Burden Shifting** – When the proponent of a will proves that the formalities of execution have been followed, a contestant who claims that there has been undue influence has the burden of proof. The burden may be shifted so as to require the proponent to disprove undue influence.
		- Under **PA law, a presumption of undue** influence arose if (1) the contestant could show a confidential relationship, (2) that the person enjoying such relationship received the bulk of the estate, and (3) that the decedent’s intellect was weakened.
	+ Holding: The court found that (1) Rose’s granting Roger a power of attorney, confiding in him for legal and financial advice, and depending on him in everyday life indicated a confidential relationship; (2) inasmuch as Roger received all of Rose’s estate except for a $1,000 gift to her church, Roger received the bulk of her estate; (3) and although Rose had testamentary capacity, she still suffered from a weakened intellect, as evidenced by the trouble she had remembering things and managing her assets on her own and by the fact that she was easily distracted, had difficulty remaining focused, and at times was somewhat out of touch with reality (saw some of this in audiotape of her meeting with attorney and executing the will). Roger was unable to overcome the presumption of undue influence. Accordingly, the court revoked the November 11, 2011, will and imposed a constructive trust on Rogers to secure return of Rose’s assets he acquired inter vivos to her.
* Non-Traditional Relationships
	+ ***In re Estate of Reid* (Miss. 2002)**
		- Synopsis: Cupit, a 24-year-old law student, approached Reid, age 78, and endeared himself to her. Though Cupit maintained their relationship was that of mother and son, the trial court chancellor found the relationship went “beyond” that of a mother-son relationship. There were hints of a more intimate relationship, including public displays of physical affection that embarrassed some of Reid’s friends. Moreover, in 1982 Cupit took Reid to an attorney (Boutwell) to have Cupit adopted to cut off her more remote heirs, but the lawyer convinced him that was not necessary. Cupit then had the attorney prepare a deed gifting her real property to him (he paid $10 as consideration for approximately 205 acres of land an antebellum home that had been in her family for about 140 years). The day after the deed was recorded, Cupid helped Reid write a holographic will that devised her estate to him. In 1983, Cupit and Reid visited the same law firm again, but this time they saw a different attorney (Allen), and Reid initiated more of the discussion. Allen took steps to ascertain if there was overreaching by Cupit and concluded there was not, but the chancellor disagreed because of “antecedent circumstances” that were unknown to the lawyer. Thereafter, Reid adopted Cupit, gave him her power of attorney, and Cupit alienated Reid’s family and friends.
		- Tool:
			* Confidential relationship factors: (1) one person has to be taken care of by others, (2) one person maintains a close relationship with another, (3) one person is provided transportation and has their medical care provide for by another, (4) one person maintains joint accounts with another, (5) one is physically or mentally weak, (6) one is of advanced age or poor health, and (7) there exists a power of attorney between the one and another.
			* In MS, to overcome a presumption of undue influence the party must show by clear and convincing evidence, “(a) good faith on the part of the beneficiary, (b) the grantor’s full knowledge and deliberation of the consequences of her actions, and (c) the grantor’s independent consent and action.”
				+ When determining the issue of good faith, consider (1) who initiated the gift, (2) where the gift was executed and in whose presence, (3) consideration for the gift and who provided the consideration, and (4) the secrecy or openness of the gift.
		- Holding:
			* The court found the confidential relationship between Cupit and Reid by itself created a presumption of undue influence (with no suspicious circumstances).
			* Deed – the court found Cupit acted in bad faith and was unable to overcome the presumption.
			* Adoption – because Cupit had failed to disclose to the adoption court the full extent of his relationship with Reid, such failure constituted fraud that invalidated the adoption.
			* Will – because Cupit became her attorney following his graduation from law school, a presumption of undue influence arose from (1) the confidential/fiduciary relationship between Reid and Cupit, and (2) his taking under the will. Despite the drafting attorney’s actions, Reid failed to receive the independent counseling in the drafting and execution of the will necessary to rebut the presumption. (Note: this presumption approach has been rejected by other jurisdictions and the Restatement).
	+ ***In re Kaufmann’s Will* (App. Div. 1964)** two men lived together. One died leaving estate to other. Family sued for undue influence. Court found undue influence likely because they disapproved of relationship.
* Gifts to Attorneys/Interested Drafters:
	+ Presumption of Undue Influence – many courts hold that a presumption of undue influence arises when an attorney-drafter receives a legacy, unless the lawyer is closely related to the testator. Presumption can be rebutted only by clear and convincing evidence (higher standard) provided by the lawyer.
	+ Unethical Conduct – “a lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.” MRPC1.8(c).
	+ Fiduciary Appointments – “in obtaining the client’s informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer’s financial interest in the appointment, as well as the availability of alternative candidates for the position.” MRPC 1.8(c), comment.
	+ ***Lipper v. Weslow* (Tex. App. 1963)**
		- Synopsis: the testatrix’s will left her estate to her two surviving children and disinherited the issue of her predeceased son. The issue of the predeceased son sued, claiming undue influence on the part of the surviving son, Frank. He lived next door to the testatrix, he was the attorney (confidential relationship) who drafted the will, he bore malice toward his predeceased half-brother, and he had a key to the house. The testatrix was 81 years old when she signed the will. She did not read the will or discuss its terms when she signed it. She died 22 day later. The will contained a paragraph that states that the testatrix disinherited the grandchildren because they and their mother had been most unfriendly to her since the death of her son (questionable whether this was accurate), and that she included this paragraph to be clear that she was not influenced in the execution of this will.
		- Tool: Confidential relationship and suspicious circumstances “simply sets the stage.” The court still required the contestants to offer affirmative proof of undue influence.
		- Holding: Although there was evidence that showed that the testatrix was susceptible (because of her age and dependency on her son), that the son had the opportunity (he lived next door, he was an attorney, he drafted the will, and he had a key to the house), and motive (he disliked his deceased half-brother and he took more under the will), the court ruled that there was no causation. The court noted that for years the testatrix had told a number of different people, on different occasions when the son was not present, that she intended to disinherit her grandchildren because of their behavior. There was evidence of unnatural disposition (didn’t leave anything to one of her sons) but the will itself explains why.
* No contest clause
	+ Majority rule (UPC 2-517) – enforce a no-contest clause only if the unsuccessful contestant lacked “probable cause” for bringing the contest.
	+ Minority states – do not enforce no-contest clauses at all or enforce them unless the contest alleges forgery or subsequent revocation.
* Strategies if a Contest is Anticipated
	+ Explanatory Statement – not recommended to be included in will but in separate letter to attorney for reasons below:
		- If portrays family member poorly, person may feel need to contest to defend themselves
		- If gives reasons for testator’s actions, every reason needs to be accurate and defensible. Inaccuracy can be used to raise issues of capacity/undue influence.
		- If libel, can be basis for claim of testatmentary libel.
	+ Record Building – Recorded Video Discussion; Professional Examination of Capacity; Attentive Witnesses; Inter Vivos Trust (years’ worth of transactions)
	+ Maintain Secrecy – Inter Vivos Trust; Inter Vivos Gifts
	+ Soothe Feelings – Family Meeting; Letter or Video Explanation

### Duress

* Definition
	+ When undue influence crosses the line into coercion.
	+ A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made. R3d Property 8.3 cmt. c
* Restitution by Way of Constructive Trust – “a claim in restitution with a remedy via constructive trust is the traditional response to wrongful interference that prevents a donative transfer, given the inability of probate to enforce an intended disposition that was never carried out. Wrongful interference may prevent either the making or revocation of a will, codicil, or bequest; the alteration of prior dispositions, such as a substitution of insurance or trust beneficiaries; or the making of an intended inter vivos gift.” R3d Restitution and Unjust Enrichment 46 cmt. e.
* ***Latham v. Father Divine* (NY 1949)**
	+ Synopsis: testatrix’s will left almost all of her estate to Father Divine. The plaintiffs alleged that the testatrix intended to revoke that will and execute a new will leaving her estate to them, but the testatrix was prevented by Father Divine and his followers’ fraud, undue influence, and physical force (said that defendants conspired to kill and did kill testatrix by means of an operation performed by a doctor engaged by the defendants without the consent or knowledge of any of the deceased’s relatives). The court ruled that the plaintiff’s complaint stated a case for relief in equity and, if proved, entitled the plaintiffs to a constructive trust ordering the beneficiaries under the testatrix’s will to transfer the property to the plaintiffs. Court remanded to trial court.
	+ Tool: Where a devisee or legatee under a will already executed prevents the testator by fraud, duress, or undue influence from revoking the will and executing a new will in favor of another or from making a codicil, so that the testator dies leaving the original will in force, the devisee or legatee holds the property thus acquired upon a constructive trust for the intended devisee or legatee..
	+ Note: Not will contest because not saying earlier will was executed inappropriately. So earlier will has to be probated. Saying that she was prevented from making NEW will so claim is one of restitution.

### Fraud

* Rule: Testamentary fraud occurs where someone (1) intentionally or recklessly misrepresents a material fact to the testator (2) with intent of influencing the testator’s testamentary scheme or the knowledge that such influence was substantially likely to result, and (3) the misrepresentation causes the testator to dispose of his or her property in way that he or she would not have otherwise. See R3d Property 8.3(d) cmt. j
* Fraud in the Execution – a person intentionally misrepresents the character or contents of the instrument signed by the testator, which does not in fact carry out the testator’s intent.
* Fraud in the inducement – misrepresentation causes the testator to execute or revoke a will, to refrain from executing or revoking a will, or to include particular provisions in the wrongdoer’s favor.
* Estate of Carson (Cal. 1920) – wife leaves estate to husband. Turns out not married. Turns out not married because husband already had wife. Wife dies after a year together. “If, for example, the parties had lived happily together for 20 years, it would be difficult to say that the wife’s bequest to her supposed husband was founded on her supposed legal relation with him, and not primarily on their long and intimate association.”
* Estate of Richmond (ND 2005) – Lois and Donald married and unbeknownst to both, marriage is invalid because Donald married to someone else. Lois dies 21 years later leaving home to “my husband Donald.” Citing Carson, rejected faughter’s cliam for want of evidence “That Donald engage in fraudulent conduct or that Lois would not have devised Donald the home the couple shared together for more than 20 years” if she had known their marriage was invalid.

### Tortious Interference with Inheritance or Gift

* Where a third party has intentionally committed a tortious conduct in the testamentary process against the decedent (undue influence, fraud, or duress), those who would have taken but for the misconduct can also sue the third party for tortious interference with an expectancy.
* Tort recognized in almost half of states, including R2d Torts 774B
* Elements: (1) the existence of an expectancy; (2) intentional interference with the expectancy through tortious conduct; (3) causation; and (4) damages. ***Schilling***.
* Advantages
	+ Not a will contest – doesn’t trigger no-contest clause
	+ Punitive damages
	+ Longer statutes of limitations
* Procedural Issues – most jurisdictions require claim to be brought in the probate court if the remedy in probate is adequate; some permit it to be brought in civil court regardless of the party’s probate code options.
* ***Schilling v. Herrera* (Fla. App. 2007)**
	+ Synopsis: Schilling, the decedent’s brother, sued Herrera, the decedent’s caretaker, claiming tortious interference with an expectancy. The decedent’s health began to fail, and she executed a durable power of attorney naming Schilling as her only heir-at-law and attorney-in-fact. The decedent lived in FL, and Schilling lived in NJ. When the decedent was in a rehabilitation center, Herrera began to care for her. Herrera continued to care for her when she was released, visiting her in her apartment as needed and then converting her garage into a bedroom so that the decedent could move in with her. Schilling helped pay for the care. Herrera convinced the decedent to execute a new power of attorney naming Herrera as attorney-in-fact and a new will naming Herrera personal representative and sole beneficiary. When the decedent died, Herrera did not inform the decedent’s brother until after she probated the will and probate had closed. The decedent’s brother claimed that he called Herrera during this time but that she intentionally refused to answer or return his calls. The trial court dismissed the brother’s claim because (1) Herrera owed the decedent’s brother no duty, and (2) the brother had failed to exhaust his probate remedies.
	+ Tool:
		- Elements of intentional interference with an expectancy of inheritance: (1) the existence of an expectancy; (2) intentional interference with the expectancy through tortious conduct; (3) causation; and (4) damages.
		- If adequate relief is available in a probate proceeding, then that remedy must be exhausted before a tortious interference claim may be pursued. However, an exception exists where the circumstances surrounding the tortious conduct effectively preclude adequate relief in the probate court.
	+ Holding: The court of appeals reversed and remanded, emphasizing that it is the testator who was defrauded or unduly influenced by the defendant, not the claimant.
		- The court ruled that the brother did state a claim because he alleged that (1) he expected to inherit estate; (2) Herrera intentionally interfered by convincing the decedent while ill and dependent on Herrera; (3) and (4) Herrera’s “fraudulent actions” and “undue influence” were what caused the decedent to change her will leaving all her property to Herrera and revoking a prior will that left her estate to her brother.
		- Circumstances surrounding the tortious conduct effectively precluding adequate relief in the probate court existed here because of Herrera’s refusal to answer or return the brother’s call.

## Construction (Meaning)

* Modern trend – applies to nonprobate instruments as well

### Ambiguous or Mistaken Language in Wills

#### Plain Meaning and No Reformation

* Plain Meaning/No Extrinsic Rule – in construing and giving effect to a will, the words used in the will should be given their plain meaning. As a general rule, extrinsic evidence is not admissible to show that the testator used the words to mean something other than their plain meaning. Only after applying the plain meaning rule there is an ambiguity in the will should extrinsic evidence be admissible to help construe the will.
	+ No Reformation Rule – may not look to extrinsic evidence to reform a will to correct a mistaken term to reflect what the testator intended the will to say.
* ***Mahoney v. Grainger* (Mass. 1933)**
	+ Synopsis: testatrix, Helen Sullivan, instructed her attorney to leave the residue of her estate to her first cousins equally (she had 25 or so first cousins). While she told her attorney her first cousins were her nearest relatives, her maternal aunt was in fact her nearest relative. Rather than identifying each of the testatrix’s first cousins by name, the attorney drafted the will so that it left the residue of her estate to her “heirs at law,” thinking that the first cousins would take as her nearest relatives. The testatrix properly executed the will. Following the testatrix’s death, the maternal aunt claimed the residue as the nearest heir at law. The first cousins offered extrinsic evidence to show that the testatrix intended that the residue was to go to the first cousins,
	+ Tool: plain meaning rule – it is only where testamentary language is not clear in its application to facts that evidence may be introduced as to the circumstances under which the testator used that language in order to throw light upon its meaning.
	+ Holding: The court (a) applied the plain meaning rule, (b) concluded that the phrase heirs at law was not ambiguous, and (c) therefore rules that the extrinsic evidence was not admissible to establish a meaning that was inconsistent with the plain meaning of the phrase.
* Ambiguities
	+ Patent – apparent from the face of the will.
	+ Latent – recourse to circumstances outside of the will is necessary to realize that there is an ambiguity.
		- Equivocation – when two or more persons or things fit the description exactly.
		- Personal usage – if extrinsic evidence shows that a testator habitually used a term in an idiosyncratic manner, the evidence is admissible to show that the testator used that term in accordance with his personal usage rather than its ordinary meaning.
		- No Exact Fit – a description in a will does not exactly fit any person or thing
	+ Modern courts are increasingly inclined to admit extrinsic evidence to resolve both patent and latent ambiguities (used to be for just latent ambiguities)
* ***In re Estate of Cole* (Minn. App. 2001)**
	+ Synopsis: Cole’s (decedent’s) will provided that she gave her friend Veta Vining “the sum of two hundred thousand dollars ($25,000).” The lawyer who drafted the will was prepared to testify and offer file notes to show that in drafting the gift to Veta he “cut and pasted” from another gift in the will that bequeathed “two hundred thousand dollars ($200,000)” to another beneficiary. That he then edited the pasted paragraph to change the take to Veta Vining and he changed the numerical value of the gift to $25,000, but he failed to change the words indicating the size of the gift. Under the traditional common law approach, because the drafting error was a patent ambiguity no extrinsic evidence would be admissible.
	+ Tool:
		- Eliminated distinction between latent and patent ambiguities in admitting extrinsic evidence.
		- First, the surrounding circumstances should be considered only if the ambiguities or contradiction persists. Second, extrinsic evidence is to be used to determine what the testator meant by the words used, not to determine an intent that cannot be found in the words employed in the instrument.
	+ Holding: The trial court ruled that the common law patent-latent distinctions served no useful purpose and adopted the modern trend that extrinsic evidence should be admissible anytime there is an ambiguity in the will. The Court of Appeal affirmed finding that trial court rightly used extrinsic evidence to construe what the testator meant by the words she used as opposed to intent not found in the will.
	+ Note: Not clear that this is ambiguity as opposed to reformation

#### Ad Hoc Relief for Mistaken Terms

* Ad Hoc Relief from No Reformation Rule – courts sometimes correct a mistake under the guise of using extrinsic evidence to construe a supposedly ambiguous term.
* Misdescription Doctrine: ***Arnheiter v. Arnheiter* (NJ Super. Ch. Div. 1956)**
	+ Synopsis: Burnette Guterl’s, testatrix’s, will directed her executor to sell her interest in “304 Harrison Avenue” and to use the proceeds to establish trusts for two nieces. The testatrix, however, did not own any interest in 304 Harrison Avenue. She owned a one-half interest in 317 Harrison Avenue. Plaintiff-executrix applied to court to correct mistake.
	+ Tool:
		- No reformation rule – A court has no power to correct or reform a will or change any of the language therein by substituting or adding words. Can’t correct obvious mistake.
		- Misdescription doctrine/”mere erroneous description does not vitiate” – where a description of a thing or person consists of several particulars and all of them do not fit any one person or thing, less essential particulars may be rejected provided the remainder of the description clearly fits.
	+ Holding: The court applied the misdescription doctrine, admitting extrinsic evidence to establish the misdescription, striking the misdescription (the number 304) leaving just “Harrison Avenue,” and then construing the ambiguity as referring to the only property on Harrison Avenue in which the testatrix had an interest – 317 Harrison Avenue.
* ***In re Gibbs’ Estate* (Wis. 1961)**
	+ Synopsis: Mr. and Mrs. Gibbs died approximately one month apart. Each had a provision in their will devising one percent of their respective estates to “Robert J. Krause, now of 4708 North 46th Street, Milwaukee, Wisconsin.” Robert **W**. Krause, who was a 30-year employee of Mr.Gibbs and friend of the family for many years, claimed the gifts. Robert **J**. Krause, who lived at the address listed in the will, also claimed the gift. He *may* have met Mrs. Gibbs once when he worked as a cab driver, but the alleged cab ride where they met postdated the reference to Robert Krause in the Gibb’s earlier wills.
	+ Tool: Details of identification, particularly such matters as middle initials, street addresses, and the like, which are highly susceptible to mistake, particularly in metropolitan areas, should not be accorded such sanctity as to frustrate an otherwise clearly demonstrable intent. Where such details of identification are involved, courts should receive evidence tending to show that a mistake has been made and should disregard the details when the proof establishes to the highest degree of certainty that a mistake was, in fact, made.
	+ Holding:
		- The court concluded that it was appropriate to admit extrinsic evidence to establish that the middle initial and address were misdescriptions and to disregard both.
		- Court crossed out “J” and address, then in order to clarify ambiguity of who “Robert Krause” is, court admitted extrinsic evidence.
		- Extrinsic evidence included: Gibb’s housekeeper corroborated much of W’s testimony and said that Mr. Gibbs told her he made a will including “the boys at the shop” referring to them as “Mike, Ed and Bob” (Mr. Gibbs called W. Bob). Mr. Gibbs had written a memorandum concerning bequests to similar names. W’s address and address in will both had “North” and were in similar parts of town. W moved around a lot.

#### Openly Reforming Wills for Mistake

* Reformation of a will to correct a mistake proved by clear and convincing evidence is still a minority position but not that uncommon today.
* Uniform Trust Code – allows for reformation of trusts. Many states adopted UTC.
* UPC 2-805. Reformation to Correct Mistakes. “The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor’s intention if it is proved by clear and convincing evidence what the transferor’s intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.”
* Reformation for Tax Advantage
	+ Modern courts routinely reform a will or other donative instrument to correct a mistake that would prevent a tax advantage sought by the donor. They also commonly modify an instrument to achieve a subsequent tax savings that is consistent with the donor’s probable intent.
	+ UPC 2-806. Modification to Achieve Transferor’s Tax Objectives. “To achieve the transferor’s tax objectives, the court may modify the terms of a governing instrument in a manner that is not contrary to the transferor’s probable intention. The court may provide that the modification has retroactive effect.”
* ***In re Estate of Duke* (Cal. 2015)**
	+ Synopsis: Irving left all of his property to Beatrice, his wife, and one dollar to his brother. If Irving and Beatrice died at the same time, the estate would be equally divided between City of Hope (COH) and the Jewish National Fund (JNF). Irving died after Beatrice. Robert and Seymour Radin (the Radins), Irving’s nephews, petitioned that they are entitled to Irving’s estate as his sole intestate heirs, since there is no disposition of the estate in the event Irving survived Beatrice. COH and JNF offered extrinsic evidence to prove that Irving intended the will to distribute his estate to COH and JNF if Irving survived Beatrice. Probate court concluded that the will was not ambiguous and thus declined to consider extrinsic evidence of Irving’s intent and granted summary judgment in favor of Radins.
	+ Tool: “reformation is permissible if **clear and convincing evidence** establishes an error in the expression of the testator’s intent and establishes the testator’s actual specific intent at the time the will was drafted…”
	+ Holding: Reverse and remand for consideration of extrinsic evidence.
		- No sound basis exists to forbid the reformation of unambiguous wills in appropriate circumstances. Reformation should be allowed for following reasons:
			* In applying the misdescription doctrine, courts have essentially reformed wills.
			* Also, allowing reformation in these circumstances is consistent with the Legislature’s efforts to apply the same rules of construction to all donative documents and will promote fairness in the treatment of estates regardless of the tools used for estate planning.
			* Allowing reformation of trusts and other instruments but not of wills favor those with a means to establish trusts and other instruments.
		- Charities have articulated a valid theory that will support reformation if established by clear and convincing evidence
			* Reformation of a document that is subject to the **statute of frauds** or the statute of wills entails the enforcement of the written document in a manner that reflect what was intended when the document was prepared. Alleged mistake concerns Irving’s actual intent at the time he wrote the will (as opposed to a mistake in changing the will after Beatrice died)
			* Alleged mistake and intent are sufficiently specific – COH and JNF contend that Irving meant to pass estate to them also if Beatrice died before Irving.
			* **Remanded** so that charities have to prove with **clear and convincing evidence** that testator unartfully expressed actual intent at the time in order to reform the will.
* ***In re Estate of Herceg* (NY Sur. 2002)**
	+ Synopsis: Testator had will after will drafted and executed. For last will, lawyer inadvertently deleted half of the residuary clause. Mistake is that words were omitted. So, can’t say words are ambiguous. Only way to resolve is reformation. Had prior will drafts to know what rest of clause said.
	+ Tool: Court recognized reformation based on that fact that a lot of courts reform and just call it ambiguity.

### Death of Beneficiary Before Death of Testator

#### Summary

#### Lapsed and Void Devisees

* Lapse – if a devisee is alive when the will is executed but dies before testator, the devisee fails and is said to have lapsed.
* Void– if a devisee is already dead at the time the will is executed, or the devisee is a dog, cat or other ineligible taker, the devise is void. Same rules that apply to a lapsed devise apply to a void devise.
* Common law default rules:
	+ Class Gift – if a devise is to a class of persons, and one member of the class predeceases the testator, the surviving members of the class divide the gift.
	+ Specific or General Devise – if a specific (e.g. watch) or general devise (e.g. $10,000) lapses, the devise falls into the residue if there is one. If not, it falls to intestacy.
	+ Residuary Devise – if the residuary devise lapses, the heirs of the testator take by intestacy.
		- no-residue-of-a-residue rule – if only a share of the residue lapses, such as when one of two residuary devisees predeceases the testator, at common law the lapsed share passes by intestacy to the testator’s heirs rather than to the remaining residuary devisees.
		- UPC 2-604(b) – “Except as provided in Section 2-603, if the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.”
* No Residue of a Residue Rule: ***In re Estate of Russell* (Cal. 1968)**
	+ Synopsis: Thelma Russell’s valid holographic will provided in pertinent part as follows: “I leave everything I own Real & Personal to Chester H. Quinn & Roxy Russell” and “Ten dollar gold Piece & diamonds I leave to Georgia Nan Russell.” The plaintiff, Georgia (testator’s only heir-at-law and her niece), offered extrinsic evidence to prove that Roxy Russell was a dog and that the gift of one-half of the residue of the estate to testatrix’ dog was clear and unambiguous; that such gift was void and the property subject passed intestacy. Court ruled that the fact that Roxy Russell was a dog was a latent ambiguity, and extrinsic evidence was admissible to establish that facts (repudiated plain meaning rule and patent-latent distinction). Dogs, however, are not eligible beneficiaries, so the gift to Roxy failed. Because the failed gift was in the residuary clause, the court applied the “**no residue of a residue” rule** and held that Roxy’s half fell to intestacy to the testator’s heir.
	+ Tool: The portion of any residuary estate that is the subject of a lapsed gift to one of the residuary beneficiaries remains undisposed of by the will and passes to the heirs-at-law. The rule is equally applicable with respect to a void gift to one of the residuary beneficiaries.

#### Antilapse Statutes

* Nearly all states have antilapse statutes
* Scope: majority of state antilapse statutes only apply to wills
* Basic rule: Anti-lapse statute provides that (1) where there is a lapse, and (2) the predeceased beneficiary meets the statutory degree of relationship to the testator, and (3) the predeceased beneficiary has issue who survive the testator, then the lapsed gift goes to the issue of the predeceased beneficiary, unless (4) the will expresses a contrary intent.
* UPC 2-605 (1969). Antilapse; Deceased Devisee; Class Gifts. “If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.”
* Spouses – general rule (and UPC approach) is that does not apply to spouses’ issue
* Default Rules – Antilapse statutes are default rules (rule of construction) that yield to an expression of the testator’s intent. They do not apply when a testator’s intent contrary to the antilapse statute is stated expressly.
* Words of Survivorship
	+ Majority Rule – an express requirement of survivorship, such as “if he survives me,” evidences an intention contrary to the application of antilapse provisions.
	+ UPC 2-603(b)(3) (1990) (7 states) – “words of survivorship, such as in a devise to an individual ‘if he survives me,’ or in a devise to ‘my surviving children,’ are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of” antilapse provisions (substitute descendant for devisee).
	+ ***Ruotolo v. Tietjen* (Conn. App. 2006)**
		- Synopsis: John N. Swanson died with a will that left half of his residuary estate to his stepdaughter, Hazel Brennan, “if she survives me.” Hazel Brennan died 17 days before Swanson, survived by her daughter, Kathleen Smaldone (defendant). Swanson’s heirs-at-law (plaintiffs) challenged Smaldone’s right under the Connecticut antilapse statute to receive the bequest that Brennan would have received if she had survived Swanson. The Connecticut antilapse statute provided that if certain relatives, including a stepchild, predecease the testator and “no provision has been made in the will for such contingency,” then the issue of the predeceased devisee will receive the gift intended for the predeceased devisee. The court reasoned that the anti-lapse doctrine was adopted to overcome the harsh effects of lapse and therefore should be applied broadly and liberally, placing on those who opposed its application the burden of proving a contrary intent. The court expressed concern that such language is merely boilerplate language in many wills, there was no express gift-over in the event the beneficiary predeceased, and the effect under the factors of the case would be the gift would pass through intestacy (in contrast to the constructional preference for avoiding intestacy). The court adopted the UPC 2-603(b)(3) approach and held that the bare words of survivorship are not sufficient, standing alone, to constitute an express contrary intent.
		- Tool:
			* Antilapse statutes will apply unless testator’s intention to exclude its operation is shown with reasonable certainty
			* Burden is on those seeking to deny antilapse statute protection rather than on those who assert it.
			* Antilapse statutes must be liberally construed and disputes must be resolved in favor of their operation.
			* Mere words of survivorship (including boilerplate language “if she survives me”) do not defeat antilapse statutes.

#### Class Gifts

* Common law lapse rules – if a class member predeceases the testator, the surviving members of the class divide the total gift, including the deceased member’s share. Unless an antilapse statute applies.
* Class Gifts v. Anti-lapse – majority of states and UPC 2-605 apply anti-lapse first.
* What is a class? **R3d Property**
	+ 13.1 Class Gift Defined; How Created
		- (a) A class gift is a disposition to beneficiaries who take as members of a group. Taking as members of a group means that the identities and shares of the beneficiaries are subject to fluctuation.
		- (b) A disposition is presumed to create a class gift if the terms of the disposition identify the beneficiaries only by a term of relationship or other group label. The presumption is rebutted if the language or circumstances establish that the transferor intended the identities and shares of the beneficiaries to be fixed.
	+ 13.2
		- (a) A disposition does not create a class gift if the identities and shares of the beneficiaries are fixed.
		- (b) In determining whether a disposition is to beneficiaries whose identities and shares are fixed, the following rules apply:
			* (1) If the terms of a disposition expressly fix the identities and shares of the beneficiaries, the disposition is to beneficiaries whose identities and shares are fixed.
			* (2) If the terms of a disposition identify the beneficiaries (i) by their names or (ii) by a term of relationship or other group label and either by name or number or by name and number, the disposition is presumed to be to beneficiaries whose identities and shares are fixed. The presumption is rebutted if the language or circumstances establish that the transferor intended the beneficiaries to take as a class, i.e., as members of a group.
* ***Dawson v. Yucus* (Ill App. 1968)**
	+ Synopsis: The second clause of Nelle G. Stewart’s will devised her interest in her deceased husband’s farmland to Stewart Wilson and Gene Burtle, her nephews on her husband’s side of the family, in one-half shares. In so devising, she stated in the same clause that she believed the farmland should go back to her husband’s family. Her will also devised the residue of her estate to Ina Mae and Hazel Degelow (defendants). Before Stewart died, her nephew Gene Burtle died. Stewart was aware of his death but did not revise her will. As a result, after Stewart’s death, the trial court addressed the issue of whether the gift to Burtle had lapsed, causing it to fall into the residuary under the Illinois Lapse Statute, or whether it could be construed as a class gift, in which case it would pass to Wilson as the surviving class member. Urging the latter construction, Wilson conveyed his interest in Burtle’s half share to Burtle’s children (plaintiffs). The trial court admitted extrinsic evidence to determine Stewart’s intentions because it found that Burtle dying before Stewart created a latent ambiguity. The evidence included testimony that Stewart had wanted the farmland to either return to her husband’s family or go to Wilson and Burtle with whom she had a close relationship. Although she had three other relatives on her husband’s side who were of equal degree of kinship as Wilson and Burtle, the evidence indicated that Stewart was not in contact with these other relatives.
	+ Tool: Naming an individual beneficiary in a will prevents the gift from being a class gift unless the remaining provision in the will as applied to the facts show that the testator intended to make a class gift.
	+ Holding: The testator’s gift did not constitute a class gift because, even though the testator wrote that she desired that her farm lands go back to her “husband’s side of the house”, she then specified two individuals from her husband’s side and gave each of them specified gifts. The testator only mentioned two members from a class which had three other heirs. She did not make a gift to a class. Furthermore, the evidence showed that the testator knew how to make a gift of survivorship because she created a gift of survivorship of her residue estate in the ninth clause of her will.

### Changes in Property After Execution of Will

#### Ademption by Extinction

* Types of devises
	+ Specific – particular asset
	+ General – testator intends to confer a general benefit and not give a particular asset.
	+ Demonstrative – a general devise, yet payable from a specific source.
	+ Residuary – conveys that portion of the testator’s estate not otherwise effectively devised by other parts of the will.
* Doctrine of Ademption by Extinction – Only applies to specific devisees
	+ Identity Theory (majority approach) – if a specifically devised item is not in the testator’s estate, the gift is extinguished.
	+ Intent Theory (modern trend) – if the specifically devised item is not in the testator’s estate, the beneficiary may nonetheless be entitled to the replacement or cash value of the original item, if the beneficiary can show that this is what the testator would have wanted. Modern trend applies this to will substitutes too.
	+ Modified Intent Theory – allows identity approach but exempts property that was transferred through an act that is involuntary as to the testator and/or that was made without the testator’s knowledge and consent. The beneficiary of the gift is entitled to either the full pecuniary value of the gift, or whatever is left of it minus proceeds that were used to support the testator, depending on jurisdiction.
* ***In re Estate of Anton* (Iowa 2007)**
	+ Synopsis: Hestor Mary Lewis Anton (Mary) drafted a will leaving a half interest in her duplex and the property on which it was situated (the Duplex) to her stepdaughter, Gretchen Coy (plaintiff), and the other half interest to her son, Robert Lewis (defendant), who, along with his sister, Nancy Ezarski (defendant), stood to inherit the rest of their mother’s estate. Due to injuries sustained in a serious car accident that occurred after she executed her will, Mary had to enter a nursing home and around the same time she executed a durable power of attorney giving her daughter Nancy full control over her finances. Mary eventually moved into Green Hills Health Center (Green Hills) where she had a private suite and wanted to be able to remain. When Nancy tried to discuss with Mary the need to sell assets to allow her to remain at Green Hills, the staff told her to refrain from discussing financial affairs with her mother because it exacerbated her medical condition. For this reason, Nancy began selling assets and Mary was only generally aware that her assets were being sold so that she could remain at Green Hills. When Mary’s income from her husband’s trust and the Duplex was insufficient to meet her expenses, and the Duplex was the only remaining asset that could be sold, Nancy listed the Duplex for sale without telling Mary. Gretchen’s son asked her to take it off the market, which she did, but after consulting an attorney and unsuccessfully attempting to access the principal in the trust, Nancy sold the Duplex without telling Mary, believing it was the only option in order to pay her mother’s expenses. After Mary died, Gretchen sought to recover the proceeds of the sale of the Duplex. Of the $133,263 in proceeds from sale of the Duplex, $104,317.38 remained at the time of Mary’s death and testimony offered at trial was unclear as to Mary’s state of mind, but indicated possible advanced dementia.
	+ Holding: The court acknowledged that although Iowa historically followed the identity approach to ademption, it had recently adopted a “**modified intention**” approach to exclude transfers that occurred as a result of an involuntary act relative to the testator. Under that approach, Iowa courts had recognized exceptions to ademption where (1) the sale was by a guardian or conservator without the knowledge and consent of an incompetent testator, or (2) the property was destroyed contemporaneous with the testator’s death. The court extended the modified intention approach to include transfers by an attorney-in-fact without the knowledge of the testator. The court ruled, however, that where the proceeds are used for the testator’s support, the beneficiary is entitled to only half of the remaining proceeds.
* Avoidance/Softening Doctrines to Identity Approach
	+ Many states and UPC 2-608(a) – give the devisee any unpaid amount of condemnation award for the property or any unpaid casualty insurance proceeds after the property has been destroyed.
	+ To avoid ademption, courts will sometimes classify a devise as general or demonstrative rather than specific.
	+ Classify the inter vivos disposition as a mere change in form, not substance. e.g. will provides for shares of T stock. T merges with L which retires T stock and issues L stock. Most courts hold that a corporate merger or reorganization is only a change in form, not substance.
	+ Construe at time of death
* Intent Theory Presumptions and Burdens – UPC 2-606 (creates mild presumption against ademption)

(a) A specific devisee has a right to specifically devised property in the testator's estate at the testator’s death and to:

(1) any balance of the purchase price, together with any security agreement, owed by a purchaser at the testator’s death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;

(4) any property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation;

(5) any real property or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real property or tangible personal property; and

(6) if not covered by paragraphs (1) through (5), a pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator’s lifetime but only to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, the date of disposition or otherwise, the testator did not intend ademption of the devise.

(b) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal or a condemnation award, insurance proceeds, or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(c) The right of a specific devisee under subsection (b) is reduced by any right the devisee has under subsection (a).

#### Stock Splits and the Problem of Increase

* Stock Split (modern approach) – change of form not substance so subject to a showing of contrary intent, a devisee of stock is entitled to additional shares received by the testator as a result of a stock split.
* Stock dividends (majority approach) – treat stock dividends the same as stock splits. “Percentage of ownership theory” – award the stock dividend to the devisee. UPC 2-605(a)(1).

#### Satisfaction of General Pecuniary Bequests

* Common Law – if the testator is a parent of the beneficiary (or stands in loco parentis) and sometime after executing the will transfers 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.
* Modern Trend – Some states have enacted statutes requiring that the intention of a testator to adeem by satisfaction be shown in writing. See UPC 2-609.
* Satisfaction v. Ademption – Usually applies to general pecuniary bequests – when specific property is devised to a beneficiary, but then is given to that beneficiary during the testator’s life, the gift is adeemed by extinction, not by satisfaction.
* Satisfaction v. Advancement – advancement deals with the issue where the decedent dies intestate; satisfaction deals with the issue where the decedent dies testate.

#### Exoneration of Liens

* Common Law – if a will makes a specific disposition of real or personal property that is subject to a mortgage to secure a note on which the testator is personally liable, it is presumed that the testator wanted the debt, like other debts, to be paid out of the residuary estate.
* Modern Trend/UPC 2-607 and some states – presumption that the testator intended the beneficiary to take the property subject to the accompanying debt.

#### Abatement

* Abatement arises if an estate lacks sufficient assets to pay the decedent’s debts as well as all devises.
* In the absence of an indication in the will of how devises should abate, devises ordinarily abate in the following order: (1) residuary devises are reduced first, (2) general devises are reduced second, and (3) specific and demonstrative devises are the last to abate and are reduced pro rata.
* Minority/UPC 3-902 – adopt general approach but include provision giving the courts flexibility to alter the order of abatement where it appears inconsistent with the testator’s overall testamentary wishes.

# Trusts: Characteristics and Creation

## The Trust in American Law

### Sources of Law

* Restatements – First (1935), Second (1959), Third (2003, 2007, 2012) (uneven, some provisions rejected by state courts and statutes)
* The Great Treatises – Scott, Bogert
* Uniform Laws – Uniform Trustee Powers Act (1964), Uniform Prudent Investor Act (1994) Uniform Trust Code (2000) (codifies basics of American trust law)

### Vocabulary, Typology, and Illustrative Uses

* Person who creates a trust – settlor, grantor, or trustor
* Trust Typology

|  |  |  |
| --- | --- | --- |
|  | **Inter Vivos Trust** | **Testamentary Trust** |
| **Creation** | Declaration of Trust (yourself as trustee)Deed of Trust (third-party trustee) | Will (it is a will) |
| **Type of Transfer** | Nonprobate (Will Substitute) | Probate  |
| **Revocability** | Revocable or Irrevocable | Irrevocable once established |

### Bifurcation of Ownership



* Bifurcation: trustee holds legal title to the trust property, but the beneficiaries have equitable or beneficial ownership. Bifurcation essential to trust. If trustee and beneficiary same person, trust merges/terminates
* Two issues arise from this splitting of legal and equitable ownership:
	+ The effect on the rights of third parties with respect to the trust property and the property of the trustee personally (asset partitioning)
		- Asset partitioning rules – separate the personal property and obligations of an organization’s insiders from the property and obligations of the organization.
		- Modern law effectively splits the trustee into two distinct legal persons: a natural person contracting on behalf of himself, and an artificial person acting on behalf of the beneficiaries.
			* Creditor of the trustee in the trustee’s fiduciary capacity recovers directly out of the trust fund without recourse against the property of the trustee personally. And even though the trustee has legal title to the trust property, a personal creditor of the trustee has no recourse against the trust property.



* + The powers and duties of the trustee and the corresponding rights of the beneficiaries with respect to the trust property and against the trustee (fiduciary administration)
		- Duty of loyalty – trustee must administer the trust solely in the interest of the beneficiaries; self-dealing is sharply limited and often prohibited
		- Duty of prudence – trustee is held to an objective standard of care and must administer the trust in a manner suited to the purpose of the trust and the needs of the beneficiaries
		- Subsidiary rules
			* Duty of impartiality between beneficiaries
			* Duty not to commingle the trust property with the trustee’s own property
			* Duty to inform and account to the beneficiaries
		- Breach of duty beneficiary is entitled to an election among remedies – compensatory damages, disgorgement, trustee may be denied compensation and removed as trustee.
* Four Functions of Trusteeship
	+ Custodial – taking custody of the trust property and properly safeguarding it
	+ Administrative – accounting and recordkeeping as well as making tax and other required filings
	+ Investment – reviewing the trust assets and making and implementing an investment program for those assets as part of an overall strategy reasonably suited to the purpose of the trust and the needs of the beneficiaries.
	+ Distribution – making disbursements of income or principal to the beneficiaries in accordance with the terms of the trust.

## Creation of a Trust

* The creation of a trust requires: (1) intent by the settlor to create a trust; (2) ascertainable beneficiaries who can enforce the trust; and (3) specific property, the res, to be held in trust. In addition, if the trust is testamentary **or** is to hold land, (4) a writing may be required to satisfy the Wills Act (testamentary) or the Statute of Frauds (land) respectively.
* UTC 401. Methods Of Creating Trust. “A trust may be created by:
	+ (1) transfer of property to another person as trustee during the settlor’s lifetime or by will or other disposition taking effect upon the settlor’s death
	+ (2) declaration by the owner of property that the owner holds identifiable property as trustee; or
	+ (3) exercise of a power of appointment in favor of a trustee.”
* UTC 402. Requirements For Creation.

(a) A trust is created only if:

(1) the settlor has capacity to create a trust;

(2) the settlor indicates an intention to create the trust;

(3) the trust has a definite beneficiary or is:

(A) a charitable trust;

(B) a trust for the care of an animal, as provided in Section 408; or

(C) a trust for a noncharitable purpose, as provided in Section 409;

(4) the trustee has duties to perform; and

(5) the same person is not the sole trustee and sole beneficiary.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

* UTC 404. Trust Purposes. “A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.”

### Intent to Create a Trust

* Precatory Language
	+ Precatory – language that merely provides an unenforceable moral obligation (expresses hope or wish)
	+ Precatory trust – unenforceable precatory dispositions 🡪 no trust arises

#### Testamentary Trust

* Create by will – discerning whether a testator intended to create a trust involves construing the will.
* If the testator’s intent is not stated clearly, it must be inferred from the language and structure of the will in light of all circumstances.
	+ Objective Test – can create trust without knowing what trust is.
	+ Do not need to use words “trust” or “trustee” but create presumption of intent to create a trust
	+ A transfer to X “for the use and benefit” of A is typically held to create a trust.
	+ In Lux v. Lux, “shall be maintained” and “shall not be sold” when coupled with the circumstnaces surrounding the testator and her grandchildren, indicated intent to create a trust.
* **A trust will not fail for want of a trustee**
	+ A trustee may be the settlor (if inter vivos), a beneficiary, or a third party.
	+ If a will names someone as trustee of a testamentary trust but the named person refuses the appointment or dies, and no successor trustee is named in the will, the court will appoint a successor.
	+ If the testator intend to create a trust but fails to name a trustee, the court will appoint one, usually the executor.
	+ “The general rule is that, unless a contrary intention appears in the will or such an appointment is deemed improper or undesirable, the executor would be named to the position of trustee…[T]he Superior Court…is authorized to appoint a trustee whenever an instrument creating a trust fails to name the residuary fiduciary.” Lux v. Lux (RI 1972)
* Active Duties
	+ Trustee must have some active duties to perform or the trust is said to be “passive” or “dry” and it fails. The beneficiaries take legal title to the trust property.

#### Deed of Trust

* If the trustee is a third party, the expression of the intent to create a trust is called a deed of trust (whether written or oral). A deed of trust does not fund a trust; rather, to fund the trust the settlor must also transfer some property to the trustee.
* ***Jimenez v. Lee* (Or. 1976)**
	+ Synopsis: While Elizabeth Lee (plaintiff) was a minor, her paternal grandmother purchased a $1,000 face value E-bond that was to be used for Elizabeth’s educational needs. Mrs. Adolph Diercks, a client of Elizabeth’s father, Jason Lee (defendant), also made a gift of $500 that was to be used for Elizabeth’s education. The bond was registered in both Elizabeth’s and her parents’ names and the $500 was placed in a savings account in Jason’s name and the names of his three children, who all received similar gifts from Mrs. Diercks. Jason later cashed in the savings bond and withdrew the funds from the savings account. He invested $1,000 of the savings account balance and all of the proceeds from sale of the bond in shares of Commercial Bank of Salem stock. He registered the stock in his name as “custodian” for Elizabeth and his other children. Elizabeth brought an action against her father to compel him to account for the funds, which she claimed were held by Jason in trust for her. The evidence showed that Jason, a lawyer, had written to his mother stating that he held $1,000 E-bonds “in trust” for Elizabeth and her brother, Dave. The parties did not dispute that the $1,000 bond and the $500 gift from Mrs. Diercks were intended to be used for Elizabeth’s education. The evidence also showed that Jason did not keep separate records of expenditures he made from the funds held for Elizabeth or income earned on those assets. Jason did offer a summary of expenditures he made, including ballet lessons, a subscription to a ballet magazine and tickets for himself and other family members to attend ballet performances.
	+ Tool:
		- “The respective donors did not expressly direct defendant to hold the subject matter of the gift “in trust” but this is not essential to create a trust relationship. It is enough if the transfer of the property is made with the intent to vest the beneficial ownership in a third person.”
		- “Whether or not the assets of plaintiff’s trust are traceable into a product, defendant is personally liable for that amount which would have accrued to plaintiff had there been no breach of trust.”
	+ Holding:
		- A trust exists here even though the specific term “in trust” was not used to transfer the property. It is sufficient that the defendant testified that he received property for the benefit of his own children and he admitted in a letter that he wrote to the owner that he held property in trust for his children.
		- Even though the defendant purchased bank stock as the “custodian” (more flexible duties than trustees) for the plaintiff under the Uniform Gift to Minors Act, it was ineffectual to increase the defendant’s powers over the trust property from that of a trustee to a custodian.

#### Declaration of Trust

* I the trustee is the settlor, the expression of the intent to create a trust is called a declaration of trust (whether written or oral)
* Merger – to have a valid trust, the trustee must owe fiduciary duties to someone other than herself. If not, the equitable and legal titles would merge leaving settlor with absolute legal title. UTC 402(a)(5).
* No particular formalities needed. The settlor need only manifest an intention to hold certain of the settlor’s property in trust for an ascertainable beneficiary.
* Gift 🡪 Declaration of Trust?
	+ An outright gift requires the donor to deliver the property to the donee. Consequently, if a donor manifests an intention to make a gift but fails to complete delivery, the question may arise whether the manifestation can be recharacterized as a declaration of trust. The donee will argue that when the donor expressed the intent to create a trust, the donor also appointed himself trusteee, thereby “delivering” the property from him as settlor to him as trustee. Because a trust will not fail for want of a trustee, the donee will then ask the court to appoint a successor trustee and instruct him or her to transfer the property to the donee, thereby satisfying the delibery requirement for the gift, but only by recharacterizing the failed inter vivos gift as an intent to create a trust.
	+ ***Hebrew University Ass’n v. Nye* (Conn. 1961)**
		- Synopsis: Ethel S. Yahuda, wife of Abraham S. Yahuda, a Hebrew scholar, acquired ownership of her husband’s entire library after his death. Since Ethel and Abraham had spoken about establishing a research center in Israel, Ethel arranged to meet with officers of the Hebrew University in Jerusalem (the University) (plaintiff) regarding donating Abraham’s library to the University. While there, Ethel announced at a formal luncheon attended by University officials and the president of Israel, among others, that she was giving the library to the University. The next day Ethel approved a press release stating that she gave the library as a gift to the University. When Ethel made this announcement, she also gave the University a memorandum containing a list of the materials to be donated. Thereafter, Ethel referred to the library on several occasions as belonging to the University. Ethel began to catalogue the library materials and prepare them for shipping to Israel. Although Ethel expressed her intention to ship the library materials to the University by the end of the year in 1954, she did not deliver the library materials to the University before her death in early 1955. In her will, she left the bulk of her estate to a Hebrew charitable institution. The University brought an action against the executors of Ethel’s estate, Nye et al. (Executors) (defendants), seeking a declaratory judgment establishing ownership of the library and an injunction preventing the Executors from disposing of the library property. Court remanded so that plaintiff can present case on other theories. The donor did not create a trust by announcing a gift to the plaintiff. The declaration did not show that she intended to act as a trustee. An oral declaration of trust does not exist if the donor does not manifest intent to impose upon himself enforceable duties of a trust nature, but only shows intent to be a donor.
		- Tool:
			* “A gift which is imperfect for lack of delivery will not be turned into a declaration of trust for no better reason than that it is imperfect for lack of delivery.”
			* An oral declaration of a trust exists where the donor manifests an intention to impose upon herself “enforceable duties of a trust nature.” It is not enough that a donor express intent to be a donor
	+ ***Hebrew University Ass’n v. Nye* (Conn. Super. 1966)**
		- Synopsis: Facts aforementioned. Also, Ethel Yahuda gave to the University a memorandum containing a list of most of the contents of the library and of all of the important books, documents, and incunabula…University claims a gift inter vivos based on a constructive or symbolic delivery.
		- Tool: “For a constructive delivery, the donor must do that which, under the circumstances, will in reason be equivalent to an actual delivery. It must be as nearly perfect and complete as the nature of the property and the circumstances will permit.”
		- Holding: Ethel gave the Hebrew University Association a memorandum containing a list of most of the contents of the library. In light of her intent to make a gift of the library, the memo constituted constructive delivery constituting an inter vivos gift, thereby avoiding the failed gift issue.
	+ R3d Trusts 16(2)
		- “If a property owner intends to make an outright gift inter vivos but fails to make the transfer that is required in order to do so, the gift intention will not be given effect by treating it as a declaration of trust.”
		- Cmt. d fuzzes up the picture – “If the manifestation of intention provide reliable, objective evidence of a deceased property owner’s intended purpose and there is no indication that this purpose has been abandoned, the conduct and words ordinarily are interpreted as intending a type of transaction that would be effective to accomplish this purpose under the circumstances. That is, the preferred interpretation in marginal cases of this type is not that the property owner was merely expressing an intention to make a gift in the future but rather that the owner intended a declaration of trust.”

### Trust Property (“Res”)

* Importance of funding – a trust is not created until some property is transferred to the trust (to the trustee), and only property transferred to the trust is part of the trust.
* Scope – mostly an inter vivos trust issue. As long as there are enough funds in the probate estate to fund the gift to a testamentary trust, funding is not an issue.
* Two Key Components: (1) act of funding and (2) what type of property interest will qualify as an adequate property interest for purposes of funding the trust.
* Act of Funding
	+ Written declaration of trust – if specifically identifies property that the trust holds (real or personal), general rule is that declaration of trust will also transfer the property interest into the trust as long as that is the party’s present intent, thereby funding the trust without a separate writing or delivery. UTC 401.
	+ Oral declaration of trust – UTC permits oral trusts even if the trust property is real property but (1) requires clear and convincing evidence of all oral trusts, and (2) acknowledges that a state may have other statutes (Statute of Frauds) that require a writing for the transfer of the property interest, and that such statute may overlap and de facto prohibit oral trusts for real property. UTC 407. For personal property, general rule is the oral declaration will be sufficient to create the trust and transfer the personal property interests into the trust if specifically identifies the personal property the trust holds.
	+ Written deed of trust – if specifically identifies property that the trust holds, the general rule is that it is sufficient to create and fund the trust. Some jurisdictions may require evidence of a separate transfer of the property in question (e.g. grant deed transferring title or reregistering of stock) to fund the trust
	+ Oral deed of trust
		- Traditional law – Insufficient to create the trust and to transfer the property into the trust. There must be some other evidence of delivery – actual delivery of personal property, or delivery of written list of the personal property assets being transferred to the trust/trustee, or written delivery of a grant deed transferring the real property to the trustee.
		- Modern trend and some jursidictions and UTC – permit as long as there is clear and convincing evidence of the intent to create the trust and of the property subject to the terms of the trust. UTC 407. UTC acknowledges that some state laws may require writing to transfer property and thus oral trust may not be valid.
* Adequate Property Interest
	+ Anything qualifies – real property, personal property, money, leasehold interest, possessory estates, future interests, life insurance policies, etc.
* ***Unthan v. Rippstein* (Tex. 1964)**
	+ Synopsis: C.P. Craft wrote a letter to Iva Rippstein (plaintiff) three days before he died. His letter stated that he had decided to send Rippstein $200 monthly for five years “provided I live that long.” In the margin next to this statement, Craft wrote a notation that he had stricken “provided I live that long” intending to “hereby and herewith bind my estate to make the $200.00 monthly payments.” After Rippstein unsuccessfully attempted to probate the letter as a holographic codicil to Craft’s will (court of civil appeals held no testamentary intent), she brought an action against the executors of Craft’s estate (defendants) for the monthly payments that would have already been due, and sought a declaratory judgment decreeing the executors’ obligation to make future payments consistent with the instructions in the letter. After the trial court granted summary judgment in favor of the executors, the Court of Civil Appeals reversed and held in favor of Rippstein that the letter had established a trust that bound the portion of Craft’s estate needed to make the promised payments for the benefit of Rippstein (declaration of trust). The executors of Craft’s estate appealed to the Supreme Court of Texas. Rippstein asserted in defense that the notation in Craft’s letter imposed a trust on his entire estate in order to make the promised payments and that the portion not needed to make the payments automatically reverted to Craft and merge in him.
	+ Tool: A promise to make a gift is not a declaration of a trust
	+ Holding: A donor does not create a trust by promising to make monthly payments in the future. “It is manifest that Craft did not expressly declare that all of his property, or any specific portion of the assets which he owned at such time, would constitute the corpus or res of a trust for the benefit of Mrs. Rippstein; and inferences may not be drawn from the language used sufficient for holding to such effect to rest in implication.”
* Trust v. Debt – Trust property is specifically identifiable property that must be separate from the trustee’s other property. In the case of debt, the money owed is neither specifically identifiable nor necessarily segregated from other property.
* Not adequate property interest – future profits and other expectancies

### Ascertainable Beneficiaries

* UTC 402(a)(3)

#### The Beneficiary Principle

* Beneficiaries need not be ascertained when the trust is created – only ascertainable. E.g. A trust created by O, who is childless, for the benefit of her children would be valid.
* On the other hand, if at the time the trust becomes effective the beneficiaries are too indefinite to be ascertainable, the attempted trust will fail for want of an ascertainable beneficiary.
* ***Clark v. Campbell* (NH 1926)**
	+ Synopsis: While the will enumerated a list of examples of personal property to be distributed, it did not indicate any specific intended beneficiaries other than the “friends” to whom the trustees were to distribute these items “by the way of a memento from myself.” The will further provided that any property not distributed by the trustees to the testator’s friends was to be distributed as part of the residue of his estate. A question arose before the court of whether the testator’s bequest to his “friends” failed for lack of certainty in defining the beneficiaries of the trust that the terms of his will seemed to establish. The New Hampshire Supreme Court addressed the following arguments: (1) that the ninth clause of the testator’s will made an outright gift to the trustees rather than establishing a trust and (2) alternatively, that the ninth clause granted the trustees an optional power to distribute the property as they chose.
	+ Tool:
		- A power [of appointment] differs from a trust in that it is not imperative and leaves the act to be done at the will of the donee of the power 🡪 not a fiduciary
		- A private trust, unlike a public trust, must have an identifiable beneficiary or class of beneficiaries indicated in the will who are capable of coming into court and claiming the benefit of the bequest. The basis assigned for this distinction is the difference in the enforceability of the two classes of trusts – private (no one to compel performance) and public (performance is considered to be sufficiently secured by the authority of the Attorney General to invoke the power of the courts)
	+ Holding:
		- Not power of appointment: Powers of appointed are different from trusts in that (1) with a power of appointment, the holder owes no fiduciary duty to the possible appointees; and (2) exercise of the power is purely discretionary. The clause imposed a mandatory duty on trustees to despise of the property.
		- Not private trust: The document does not create a private trust because it does not clearly identify the identity of the testator’s friends. Settlor’s friends is not a sufficient description of a class of persons. The term “friends” is broad and can include persons related by kinship or marriage.
* Power of appointment – “A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.” UTC 402(c).

#### Pet and Other Noncharitable Purpose Trusts

* Beneficiary principle does not apply to a charitable trust which instead must be for a charitable purpose.
* ***In re Searight’s Estate* (Ohio App. 1950)**
	+ Synopsis: In his will, George P. Seawright bequeathed his dog, Trixie, to Florence Hand and directed the executor of his estate to deposit $1,000 in an account from which he was to pay Hand seventy-five cents per day for Trixie’s care “as long as it shall live.” If Trixie died before the $1,000 was exhausted, the balance of the account was to be divided equally between Hand and four other named individuals. After Seawright died, Hand accepted the bequest of Trixie and agreed to care for the dog. The executor began to pay Hand as provided in Seawright’s will.
	+ Tool: A valid honorary trust may exist where the donor gives another a dog for the purpose of caring for the dog, “where the person to whom the power is given is willing to carry out the testator’s wishes.”
	+ Holding: A gift of a dog is a proper honorary trust because the donor expressed a desire that the beneficiary care for the dog and the beneficiary is willing to carry out the testator’s wishes.
* To accommodate the desire for trusts for noncharitable purposes and for pet animals in particular, two adaptions have evolved:
	+ (a) common law honorary trusts (as in ***Searight’s Estate***), and
		- The transferee is not under a legal obligation to carry out the settlor’s state purpose, but if the transferee declines or neglects to do so, she holds the property upon a resulting trust and the property reverts to the settlor or the settlor’s successors.
		- Rule Against Perpetuities – an honorary trust for a noncharitable purpose is void if it can last beyond all relevant lives in being at the creation of the trust plus 21 years.
			* Pet is not a validating life.
	+ (b) statutory pet and other noncharitable purpose trusts.
		- Almost every state has enacted legislation that permits a trust for a pet animal for the life of the animal and often other non-chartiable purposes such as perpetual maintenance of a grave.
		- UTC 408-409 or UPC 2-907.
			* A trust for a pet or certain other noncharitable purposes is valid, but the court is authorized to reduce the amount of the trust property if it is excessive.
			* Trust is enforceable by a person named by the settlor or by the court.

### A Written Instrument?

* Must be writing – testamentary trust (to satisfy the Wills Act) and an inter vivos trust of land (to satisfy the Statute of Frauds)

#### Oral Inter Vivos Trusts of Personal Property

* Oral trust may be established by clear and convincing evidence and does not need to be in writing unless required by other statute. UTC 407
* ***In re Estate of Fournier* (Me. 2006)**
	+ Synopsis: George Fournier gave $400,000 in cash to his friends, Mr. and Mrs. Josephat Madore. Fournier asked the Madores to keep the cash until his death and then to give the cash to his sister, Faustina Fogarty, after his death, and he explained to the Madores that he felt Fogarty had a greater need for the money than his other sister, Juanita Flanigan. Fogarty met with the Madores after Fournier’s death and they gave her the $400,000. Pursuant to Fournier’s will, Fogarty was appointed personal representative after his death. Fogarty then commenced an action for a declaratory judgment to determine that the $400,000 had been held by the Madores under an oral trust created by Fournier for Fogarty’s sole benefit. At trial, the Madores testified that Fournier instructed them to give the money to Fogarty after his death. Mr. Madore testified that Fournier said he wanted the money to go to Fogarty because she had a large family, his other sister Flanigan was already wealthy and he did not want his brother Curtis Flanigan to receive the money. Mrs. Madore provided similar testimony. However, Flanigan’s daughter testified that Fournier told her about the money and Flanigan testified that Fournier told her the Madores were holding the money for both Fogarty and Flanigan. The evidence also established that Fournier had paid Fogarty $100,000 a few years after giving the money to the Madores.
	+ Tool: “Although a trust need not be in writing, the creation of an oral trust must be established by clear and convincing evidence.” An oral trust may be proved by oral testimony.
	+ Holding: Neither Fournier’s discussion with Flanigan’s daughter, nor his previous gift to Fogarty contradicts the overwhelming evidence (provided primarily by the couple) that Fournier intended Fogarty to take the money in her individual capacity. Court concludes that Fournier created an oral trust in which the couple was to hold the money during his lifetime and turn it over to Fogarty personally after his death.

#### Testamentary Trusts

* Must be in writing pursuant to the Wills Act formalities. Where a testamentary trust fails for want of a writing, the issue is whether the relief should be a constructive trust or a resulting trust
* Secret and Semisecret Trusts

|  |  |
| --- | --- |
| **Semisecret Trust** | **Secret Trust** |
| * Intent to create trust appears on face of will
* Terms are unstated in the will
* Courts don’t need extrinsic evidence to realize that the devisee is not to take the beneficial interest/prevent unjust enrichment
* Trust is invalid, not enforceable. Courts impose resulting trust and give property back to settlor/testator. Typically, the property then falls to the residuary clause or, if the failed testamentary trust was the residuary clause, to intestacy.
 | * No intent to create trust appears on face of will
* Devise is absolute on face
* Extrinsic evidence necessary to prevent unjust enrichment of promisor/trustee
* Court will impose a constructive trust on trustee/promisor
 |

* + But what of the intestate heirs? Are they not unjust enriched?
		- Majority – follow ***Ollife***
		- R3d Restitution and a few states – relief should be available in both situations.
			* “If the problem is approached from the perspective of unjust enrichment…it is impossible to draw a persuasive distinction between the secret trust and the semi-secret trust…In either case, failure to give effect to the intent of the donor will result in unjust enrichment…”
* ***Olliffe v. Wells* (Mass. 1881)**
	+ Synopsis: In her will, Ellen Donovan devised the residue of her estate to Reverend Eleazer M.P. Wells (defendant) with the proviso that he distribute this gift “to carry out wishes which I have expressed to him or may express to him.” While the will gave Wells discretion to determine the manner in which he would distribute the residue to carry out Donovan’s wishes, which she had orally conveyed to him, the will did not authorize him to receive the gift outright. Donovan’s heirs (plaintiffs) challenged this devise to Wells and requested that the residue be awarded to them. Wells responded in his answer that Donovan had orally expressed to him her wish that the residue of her property be used for charitable purposes, in particular for the benefit of needy people served by the Saint Stephen’s Mission of Boston. Wells confirmed that he intended to use the residue of Donovan’s estate to carry out these purposes and the heirs did not challenge Wells statement of facts in his answer.
	+ Tool: A trust that is not sufficiently declared on its face to be a trust cannot be used to defeat the rights of heirs at law by extrinsic evidence of a trust – “The will upon its face showing that the devisee takes the legal title only and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased, not disposed of by his will.”
	+ Holding: Extrinsic evidence may not be admitted to show that the testator intended to create a trust because it would defeat the rights of the heirs at law. The defendant holds the property in a resulting trust for the testator’s heirs at law.

#### Oral Inter Vivos Trusts of Land and the Statute of Frauds

* Suppose O conveys land to X upon an oral trust to pay the income of A for life and upon A’s death to convey the land to B. The Statute of Frauds, which requires a writing to evidence a conveance of land, prevents the enforcement of this arrangement as an express trust. Does this mean that X is permitted to keep the land?
* Cases split between permitting X to retain the land, on the grounds that the Statute of Frauds forbids proof of the oral trust, and allowing relief in restitution by way of constructive trust imposed on X to prevent his unjust enrichment.
* A constructive trust in favor of A and B will be imposed if the transfer was wrongfully obtained by fraud or duress; if X was in a confidential relationship with O; or if the transfer was made in anticipation of the O’s death.
* UTC 407 – Oral trust for inter vivos trusts of land may be established by clear and convincing evidence and does not need to be in writing unless required by other statute.

# Nonprobate Transfers and Planning for Incapacity

* Rules of construction generally unified between probate and nonprobate, e.g. divorce revocation, slayer statute, 120 hour rule for survivorship, antilapse
* The Will Substitutes – Revocable Inter Vivos Trust, Life Insurance, Pension and Retirement Accounts. POD Bank Accounts, TOD Securities Accounts, Non-probate Transfers of Real Property

## Revocable Inter Vivos Trusts

* Revocable trust may be created by:
	+ Deed of trust – settlor transfers to the trustee the property to be held in trust. On the settlor’s death, the trust property is then distributed or held in further trust in accordance with the terms of the trust.
	+ Declaration of trust – settlor simply declares himself to be trustee of certain property for his own benefit during his life, with the remainder to pass at his death in accordance with the terms of his declaration.

### The Wills Act and a Present Interest in the Beneficiary

* Traditional Doctrinal Perspective – Revocable inter vivos trusts do not have to comply with Wills Act formalities.
* “[T]he traditional explanation for why will substitutes are not wills is the present-transfer theory. A will substitute need not be executed in compliance with the statutory formalities required for a will because a will substitute effects a present transfer of a nonpossessory future interest or contract right, the time of possession or enjoyment being postponed until the donor’s death.” R3d of Property 7.1, cmt. a.
* ***Farkas v. Williams* (Ill. 1955)**
	+ Synopsis: Albert Farkas declared a trust of certain mutual fund shares for the benefit of himself during life. Farkas retained the right to all cash dividends; to sell or otherwise dispose of the stock and keep the proceeds, which would terminate the trust as to the stock sold; and to revoke the trust. If Farkas died without revoking the trust and without changing the remainder beneficiary (he retained this right too), then the remainder was to be paid to Richard Williams if Williams survived Farkas. Litigation ensued after Farkas died survived by Williams over whether Farkas had created a valid trust, so that Williams would take the remainder, or if instead the trust was an attempted testamentary disposition and invalid for want of compliance with the statute on wills.
	+ Holding: Court upheld the trust. Formally the court reasoned that the trust consummated an inter vivos gift because an interest passed to Williams before the death of Farkas. This interest passed at the creation of the trust, technically a contingent equitable interest in remainder, differentiated the trust from a will. Under will, nothing passes to a devisee until the testator’s death; the devisee has only an expectancy of receiving a future gift and not a cognizable legal interest. Under the trust, by contrast, Williams took a future interest that, subject to a variety of conditions, would become possessory at the death of Farkas. On this view, the trust passed a property right – a contingent equitable interest in remainder – when created by Farkas.

### Abandoning the Present Interest Fiction

* No present interest – beneficiary has no legally enforceable interest while the trust is revocable. Any action by the settlor-trustee that diminishes the interest of a beneficiary cannot be a breach of trust but rather is an implied revocation.
* UTC 603. Settlor’s Powers; Powers of Withdrawal

(a) While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

* Post-death rights – “When a person or entity different from the settlor removes property or money from a revocable trust, those withdrawals could conceivably be made without the settlor’s knowledge or consent. In this situation, we hold that,…after the death of the settlor, the beneficiaries of a revocable trust have standing to challenge pre-death withdrawals from the trust which are outside of the purposes authorized by the trust and which were not approved or ratified by the settlor personally or through a method contemplated through the trust instrument.” Siegel v. Novak (Fla. App. 206).
* ***Fulp v. Gilliland* (Ind. 2013)**
	+ Ruth Fulp placed her family farm in a revocable trust, reserving the right to revoke or amend the trust and to use its assets- with any remaining trust assets going to her three children upon her death. A few years later, she decided to sell the farm to her son Harold Jr. for a low price, to pay for her retirement-home care and keep the farm in the family. Ruth’s daughter, Nancy Gilliland argued that a bargain sale would breach Ruth’s fiduciary duty to her children and deprive Nancy of “her share” of the trust.
	+ Tool: Trustee of a revocable trust owes a duty to the settlor alone and not the remainder beneficiaries. No lifetime enforcement power of the beneficiary (abandonment of present fiction)
	+ Holding: Duty of trustee was only to herself as settlor. Holding that trustees also owe a duty to remainder beneficiaries would create conflicting rights and duties for trustees and essentially render revocable trusts irrevocable. Ruth was free to sell her farm as trustee for whatever price she desired, without breaching a duty to her children.

### Revoking or Amending a Revocable Trust

* Revocability
	+ Majority – presumed to be irrevocable unless the terms of the trust expressly state that the trust is revocable.
	+ Modern Trend/UPC – presumption that inter vivos trust is revocable unless declared irrevocable. UTC 602(a).
* Particular Revocation Method Expressed – Revocable trust can be amended or revoked in any manner that clearly manifests the settlor’ s intent to do so, unless the trust instrument specifies a particular method of amendment or revocation and expressly makes that method exclusive. UTC 602 (c).
* UTC 602. Revocation or Amendment of Revocable Trust

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before [the effective date of this [Code]].

(b) If a revocable trust is created or funded by more than one settlor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses;

(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard the portion of the trust property attributable to that settlor’s contribution; and

(3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(c) The settlor **may revoke or amend a revocable trust**:

(1) by substantial compliance with a method provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

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

(B) any other method manifesting clear and convincing evidence of the settlor’s intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs…

* ***Patterson v. Patterson* (Utah 2011)**
	+ Synopsis: In 1999, Darlene Patterson created the Darlene Patterson Family Protection Trust. Upon Darlene’s death, her children were to divide the trust property among themselves. Darlene reserved the right to amend or revoke the trust by written instrument delivered to the trustee. In 2006, Darlene amended the trust to remove her son, Ron Patterson (plaintiff), as a beneficiary. Darlene explained in the amendment that she was not providing for Ron because she felt she had already provided for him during his lifetime. Darlene passed away 11 months later. Ron brought suit against the trust and the estate (defendants), seeking to have the amendment invalidated because it violated the terms of the trust.
	+ Tool:
		- UUTC provides that “a settlor may revoke or amend a revocable trust…by substantially complying with a method provided in the terms of the trust…” If the terms of a revocable trust do not provide a method for revocation or amendment that is expressly made exclusive, the settlor may amend or revoke the trust by any method manifesting clear and convincing evidence of the settlor’s intent.
		- Trust is revocable by any means.
	+ Holding: Under UUTC, Amendment is valid. Terms of the trust do not specify an exclusive method for amendment or revocation and the Amendment constitutes a clear expression of Darlene’s intent to terminate Ron’s interest.
		- Utah Uniform Trust Code (UUTC), which allows for liberal modification of revocable trusts, statutorily overruled Banks v. Means. Thus, amendment terminated Ron’s interest in the Trust.
		- Trust purported to grant beneficiaries “presently vested interests…” This language does not actually create a present or vested interest, but creates a future interests contingent upon a lot of factors.
		- In the trust, Darlene reserve the right to amend, modify or revoke the trust. Trust states that it may be amended or revoked by written instrument delivered in writing to the then acting trustee. “May” so not only way to amend.
		- Just has to amend by clear and convincing evidence of her intent. Amendment satisfies this requirement by specifically revising provisions to leave Ron out.

### The Subsidiary Law of Wills

#### Rights of Creditors of the Settlor

* Traditional view – a creditor of the settlor had no recourse against property in the settlor’s revocable trust unless the settlor was also a beneficiary of the trust.
* Modern view – settlor’s power to revoke the trust and take back the trust property is regarded as equivalent to ownership and, hence, the trust property is subject to the claims of the settlor’s creditors during life and at death. UTC 505(a)(3)
* Scope – creditors of the settlor can reach the trust property to the full extent the trustee could have used the property in the trust for the settlor’s benefit.
* Spendthrift clause – if the settlor is also the life beneficiary and the trust is a spendthrift clause, the clause is null and void as to the settlor’s creditors.
* Post-death – where a settlor retains a life estate, jurisdictions split over whether settlor’s creditors can reach his or her interest in the trust following the settlor’s death.
	+ ***State Street Bank and Trust Co. v. Reiser* (Mass. App. 1979)**
		- Synopsis: Wilfred A. Dunnebier held capital stock of five closely held corporations that were involved in building single family home subdivisions. Dunnebier executed an inter vivos trust and conveyed the capital stock of his corporations to the trust. He retained the right to amend and revoke the trust during his lifetime and executed a will that left his residuary estate to the trust. After executing these documents, Dunnebier applied for a working capital loan with State Street Bank and Trust Co. (State Street) (plaintiff) in the amount of $75,000. On his financial sheet in his application he included the income and assets of the five closely held corporations that he had conveyed to the trust. After seeing the construction projects that Dunnebier’s corporations had completed or were working on, the loan officer approved an unsecured loan of $75,000 to Dunnebier. Dunnebier died in an accident four months later. Since Dunnebier’s estate had insufficient assets to repay the loan, State Street brought an action to recover the assets from Dunnebier’s inter vivos trust.
		- Tool: “where a person places property in trust and reserves the right to amend and revoke, or to direct disposition of principal and income, the settlor’s creditors may, following the death of the settlor, reach in satisfaction of the settlor’s debts to them, to the extent not satisfied by the settlor’s estate, those assets owned by the trust over which the settlor had such control at the time of his death as would have enabled the settlor to use the trust assets for his own benefit.”
		- Holding: A creditor may reach the property of a settlor’s trust if he reserved the rights to amend and revoke, or direct payment to himself during his lifetime. It violates public policy for an individual to have an estate to live on but not an estate to pay his debts with. The creditors may reach the assets of the trust to the extent that the debt is not satisfied by the estate. The creditors may not reach any amount that the settlor could not have used for his personal benefit during his lifetime.
* Creditors cannot reach certain other nonprobate transfers – creditors of a joint tenant cannot reach the jointly held property after the joint tenant’s death; life insurance proceeds are usually exempt if payable to a spouse or child; and retirement benefits are usually exempt. US savings bonds with a POD beneficiary may be exempt as well.

#### Will Construction Doctrines

* Revocation on Divorce
	+ UPC 2-804 – revokes a disposition in favor of a former spouse in a governing instrument (includes deed, will trust, insurance or annuity policy, account with a POD or TOD designation, pension plan, or other such nonprobate transfer).
	+ R3d Property 7.2 – “Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions.”
	+ ***Clymer v. Mayo* (Mass. 1985)**
		- Synopsis: In 1973, Clara Mayo executed a revocable trust and a new will directing that most of her estate pour over into her revocable trust. Clara designated James (defendant), her husband at the time, as life beneficiary of the trust, with her nieces and nephews receiving remainder interests until the youngest reached 30 years of age, after which the assets were to be distributed to Boston University (B.U.), where she was employed as a professor, and Clark University. In order to direct the disposition of all of her assets through the revocable trust, Clara named the trustees of her revocable trust as beneficiaries of her B.U. group life insurance policy and her B.U. retirement plans. Previously, Clara had designated James as beneficiary of her B.U. life insurance policy and her B.U. retirement plans. After Clara and James divorced in 1978, Clara changed the beneficiary of her life insurance policy to Marianne LaFrance. However, Clara did not change the beneficiary of the trust, which remained designated as James. Clara did not fund the trust while she was alive. When Clara died, her parents were her only heirs and they stood to inherit Clara’s intestate estate if her trust was declared invalid. If the trust was found to be valid, a question arose as to whether the designation of James was revoked by the Massachusetts statute, G.L. c. 191, § 9, under which bequests in a will to a former spouse are automatically revoked.
		- Tool: If a spouse remarries, any interests a former spouse may have under a will are revoked. This will statute revoking interests of a former spouse applies to a revocable pour-over trust where considering the time and manner in which the trust was created and funded, the decedent’s will and trust were integrally related components of one testamentary scheme.
		- Holding: Because the trust and will were made as one scheme, the trust was also revoked as to the former spouse under the will statute. Furthermore, the legislature did not intend under the statute to allow the former spouse to receive a gift or power through a trust.
* Courts have applied to revocable trusts most of the rules of construction from the law wills.
	+ Abatement rules. Handelsman v. Handelsman (Ill. App. 2006)
	+ Ademption Doctrine. Wasserman v. Cohen (Mass. 1993).
* Unless the instrument provides otherwise, the following rules apply (UPC 2-707):
	+ Implied condition of survival – all future interests are contingent on the beneficiary’s surviving to the date of distribution.
	+ Antilapse: Substitute gift in descendants – if a remainder beneficiary does not survive to the distribute date, a substitute gift is created in the remainder beneficiary’s descendants who survive to the date of distribution.
	+ Failed remainders revert to settlor’s devisees or heirs.
* Requiring Survival to Time of Possession
	+ The Traditional No-Survivorship Rule of Construction
		- Majority of states – a vested remainder in trust passes as part of the remainder beneficiary’s estate if the beneficiary does not survive until the time of possession, unless the instrument provides expressly that the remainder is divested by the beneficiary’s death. Courts reason that there is no lapse (interest vests when trust created), so there is no need to bring in the antilapse concept from the law of wills. See ***Tait***.
		- ***Tait v. Community First Trust Co.* (Ark. 2012)**
			* Synopsis: In November 2000, William J. Fowler and Annie R. Fowler created a family trust and appointed Community First Trust Company (Community First) (plaintiff) as trustee. The trust terms provided that the trust would be revocable until the death of either William or Annie. Upon the death of the surviving spouse, the trust would terminate and the trust property would be distributed to the beneficiaries of the trust. The beneficiaries included two of William’s stepchildren, Dale Paschal Jones and Billy Ray Jones. Annie passed away in 2001. Dale passed away in 2004, and was survived by his two daughters. Billy Ray passed away in 2008, and was survived by his two daughters. William passed away in 2011. Community First filed a petition in Polk County Circuit Court to determine whether the interests of the deceased beneficiaries lapsed when they predeceased William, thereby barring their children from claiming their shares in the trust.
			* Tool: The interest of a beneficiary to an inter vivos trust vests at the time the trust is created, and thus the beneficial interest does not lapse when the beneficiary predeceases the settlor.
			* Holding: Interests of beneficiaries did not lapse, so no need to address whether anti-lapse statute applies to an inter vivos trust.
	+ Multigenerational Class Gifts and Other Exceptions
		- Multigenerational Class Gift
			* Courts do not find an implied requirement of survival in gifts to a single-generational class, such as to “children” or “sisters.”
			* Courts do find an implied requirement of survival in gifts to a multigenerational class, such as to “issue” or “descendants.” Courts apply the concept of representation.
		- Condition of Survival Ambiguous Regarding Time
			* When the testator inserts the word “surviving” in an instrument, the word is ambiguous unless additional language specifies at what time the donee must be surviving.
		- Gift Over on Death Without Descendants
			* Suppose T bequeaths a fund in trust “for A for life, then to B, but if B dies without descendants surviving her, to C.” Does T intend C to take only if B dies before A without descendants? Or does T intend C to take if B dies at any time without descendants? The prevailing view favors the first construction, which permits the trust to terminate on A’s death. If B survives A, the trust property is distributed to B and C can never take. If B dies before A, and then C dies during A’s life, C’s interest passes to C’s heirs or devisees.
	+ The Survivorship-Plus-Antilapse Rule of UPC 2-707
		- UPC 2-707 – unless the instrument provides otherwise, the following rules apply:
			* Implied Condition of Survival – All future interests in trust are contingent on the beneficiary’s surviving to the date of distribution
			* Substitute Gift in Descendants – if a remainder beneficiary does not survive to the distribution date, a substitute gift is created in the beneficiary’s descendants who survive to the date of distribution.
			* Failed Remainders Revert to Settlor’s Devisees or Heirs – if a remainder beneficiary dies before distribution and leaves no descendants, the remainder fails. If there is no alternative remainder that takes effect, the trust property passes to the settlor’s residuary devisees or to the settlor’s heirs.

### Revocable Trusts in Contemporary Practice

* Unified Estate Planning via Revocable Trust

Revocable Trust

Beneficiary of T’s Will: Trustee of T’s Revocable Trust

T Makes Lifetime Transfer to the Trustee of T’s Revocable Trust

Beneficiary of All of T’s Nonprobate Tranfers: Trustee of T’s Revocable Trust

#### The Pour-Over Will

* Concept – O sets up a revocable trust with himself or a third party as trustee. O then executed a will devising his probate estate to the trustee of that trust.
* Pour-over clause must be validated
	+ UTATA – trust instrument must be signed
	+ Acts of Independent Significant – trust must be funded inter vivos
	+ Incorporation by Reference – trust instrument must be in existence at time will was executed

#### Statutory Validation for Pour-Over Wills and Unfunded Revocable Trusts

* UPC 2-511(b) and UTATA – a will can pour over the testator’s probate assets to “the then acting trustee of a trust that I will execute” if the testator thereafter executes the trust instrument before dying.
* UPC 2-511- pour over will property devised to trust not held under a testamentary trust. UTATA trust treated like inter vivos trust in that not subject to probate court supervision.

#### Lifetime Consequences

* Revocable trust is now widely regarded as a will substitute but it can have lifetime consequences that figure into contemporary estate planning:
	+ Property management by a fiduciary
	+ Planning for incapacity
	+ Keeping title clear
	+ Segregating assets
* No tax benefits (settlor treated as owner as long as trust revocable)

#### Probate Avoidance

* Revocable trust avoids probate – because the trustee holds legal title to the trust property, there is no need to change title by probate administration upon the death of the settlor.
* **Avoid ancillary probate**
* **Continuity in property management/facilitates dead hand control**
* **Privacy and more difficult to contest than a will** – revocable trust need not be filed with any court unless a dispute arises. Revocable trust can be contested for same grounds as will, but generally more difficult:
	+ Heirs who are not beneficiaries of the trust are not usually entitled to see the trust instrument (unlike a will)
	+ If trust is making money before death of settlor, court more reluctant to set the trust aside and years’ worth of transactions.
* **Not subject to ongoing court supervision.**
* **More leeway than a will in choice of law** – Settlor of revocable trust that is funded with personal property (but not land) may be able to choose the state law that is to govern the trust.
* Potential downsides to revocable trusts
	+ **Lack of certainty about the applicability of the constructional aids in the subsidiary law of wills**
	+ **Probate nonclaim statute may not be applicable** – nonclaim statute applies to probate (if a creditor does not file a claim within a relatively short period of time, the creditor is forever barred), but many states do not have similar limitations period for revocable trusts.

## The Other Will Substitutes

### Life Insurance

* Types
	+ Term insurance – obligates insurance company to pay the named beneficiary if the insured dies within the policy’s term – commonly 1 to 30 years.
	+ Whole/ordinary/straight life insurance – combines life insurance with a savings plan. Policy eventually becomes paid up or endowed after which no further premiums are owed.
* Wills Act formalities
	+ Common law – Life insurance exempt but other contracts with POD clauses not exempt
	+ Modern Trend/UPC – expands exemption to all contracts with POD clauses. UPC 6-101
* Will Construction Rules
	+ Common law – apply to wills only. See ***Cook***
	+ Modern Trend/UPC – apply to will substitutes
* ***Cook v. Equitable Life Assurance Society* (Ind. App. 1981)**
	+ Synopsis: Douglas Cook bought a life insurance policy from Equitable Life Assurance (Equitable) (plaintiff) while he was married to Doris Combs (defendant). The policy named Doris as beneficiary. Years later, Douglas and Doris divorced. The divorce decree did not mention the life insurance policy but did provide that the agreement served as full satisfaction of all claims between the two. Douglas then married Margaret Cook (defendant), with whom he had a son named Daniel (defendant). The terms of the life insurance policy provided that Douglas could only change the beneficiary by providing written notice to Equitable, but Douglas gave no such notice. Douglas did, however, execute a holographic will. The will provided that the life insurance policy from Equitable was to go to Margaret and Daniel. Douglas died three years later. Margaret made a claim on the policy. Instead of paying Margaret, Equitable filed an interpleader action for a determination of who was entitled to the proceeds of the policy and deposited the funds with the court. The trial court entered summary judgment in favor of Doris, and Margaret and Daniel appealed to the Court of Appeals of Indiana, arguing that they were entitled to the life insurance policy on the basis of Douglas’s will, despite the fact that Douglas had not complied with the policy requirements for changing the beneficiary.
	+ Tool:
		- Revocation by operation of law (divorce) doctrine applies to will only
		- Beneficiaries of a life insurance policy may not be changed by a will if the policy contract provides a specific method for changing beneficiaries. Three exceptions: (1) insurance company waives strict compliance with its own rules; (2) it is beyond the power of the insured to comply literally with the regulations; (3) insured has followed rules to change policy but dies before new certificate is issued.
		- Second exception – must show that the insured has done all within his powers or all that reasonably could have been expected of him to comply with the policy provisions respecting a change of beneficiary, but that through no fault of his own, he was unable to achieve his goal.
	+ Holding: Margaret and Daniel needed to show that second exception was met – No evidence of this – Douglas had years after divorce to change policy, he then lived three years after holographic will.
	+ Note: result would have been different if UPC 2-804 applied (revocation on divorce applies to life insurance)
* Superwill – concept of a will that allows the testator’s will to trump the beneficiary designations in all nonprobate transfers.
	+ Endorsed by R3d Property 7.2, cmt. e but rejected in many jurisdictions.
	+ UPC 6-101 – adopts doctrine only if the contract permits the beneficiary of the policy to be changed by a subsequently executed will.

### Pension and Retirement Plans

#### The Growth in Pension and Retirement Plans

* Increase in life expectancy
* Most parental wealth now takes the form of financial assets
* Elderly no longer expect much financial support from their children
* Tax qualified pension plan – three benefits
	+ Most contributions are tax-deferred
	+ Earning on qualified plan investments accrue and compound on a tax-deferred basis
	+ Most retirees have lower taxable income in their retirement years than in their peak earning years, they find that distributions from pension accounts are usually taxed at lower marginal rates.

#### Types of Pension and Retirement Plans

|  |  |  |
| --- | --- | --- |
| **Defined Benefit Plan** | **Defined Contribution Plan** | **Individual Retirement Account** |
| * Employee typically receives an annuity.
* If benefit is annuitized, no remainder to pass at death. Any remainder disappears.
* Uncommon today among private employers ($2.3 trillion (2012))
* Common today among public employers ($4.6 trillion (2012))
 | * Employee owns a specific account to which employee makes contributions
* Employee controls investment and distributions in retirement
* Remainder passes outside of probate to designated beneficiaries
* Favored by private employers ($4.7 trillion (2012))
 | * Similar to a defined contribution plan, but subject to contract between account holder and custodial institution
* Remainder passes outside of probate to designated beneficiaries
* IRAs are common ($5.1 trillion (2012)), may include “roll over” from DC plan.
* Governed by state law, not federal.
 |

#### Succession Issues for Pension and Retirement Accounts

* Courts trying to figure out what rules apply to IRAs but inasmuch as they are a form of POD contracts, often the courts analogize them to life insurance contracts. ***Nunnenman v. Estate of Grubbs*** (Ark. App. 2010)
	+ Synopsis: In 2003, Donald Grubbs named Jannie Christine Nunnenman as the beneficiary of the residue of his individual retirement account (IRA account). On June 3, 2005, Grubbs summoned attorney to hospital and executed a last will and testament, expressly revoking any prior will, and leaving his entire estate to his mother, Shervena Grubbs (Shervena). This will did not mention the IRA account. Grubbs passed away on June 9, 2005. Shervena filed this action seeking that the IRA account be frozen based upon a handwritten note found by Shervena in Grubbs’ Bible. The note, dated May 2005, left the IRA account to Shervena.
	+ Tool:
		- Majority rule – where a life insurance policy (analogize to IRA) reserves to the insured the right to change the beneficiary but specifies the manner in which the change may be made, the change must be made in the manner and mode prescribed by the policy, and any attempt to make such change by will is ineffectual.
		- Minority rule – “contrary to the general rule: Arkansas holds that a change of beneficiary can in fact be accomplished in a will so long as the language of the will is sufficient to identify the insurance policy involved and an intent to change the beneficiary.”
	+ Holding:
		- Court analogized an IRA to a life insurance policy, reasoning that the same rule for changing a beneficiary designation by will should apply to both. The majority rule (see *Cook*) is that a will is ineffective to change a life insurance beneficiary designation. In Arkansas, however, the opposite rule applies: if a will is specific enough, it can change a death beneficiary designation.
		- Court found that last will was not specific enough to identify the IRA account and thus change its beneficiary.
		- Even if the note was an authentic will (which court doubts), it was revoked by the express terms of the last will.
		- Donald did not do everything reasonably possible (considering he was able to summon an attorney for his last will) to change beneficiaries given his failure to communicate his intent to do so to the custodian to the IRA.
* Federal Regulations – federal law preempts state law (revocation after divorce) on time-of-death issues and the wills-related doctrines. ***Egelhoff v. Egelhoff* (US 2001)**
	+ Synopsis: David A. Egelhoff (David, Sr.) and Donna Rae Egelhoff (defendant) divorced in April 1994. David died intestate after a car accident. While they were married, David had designated Donna Rae as the beneficiary of a life insurance policy and pension plan provided by his employer, both of which were governed by ERISA. After life insurance proceeds were paid to Donna Rae as the named beneficiary of the policy, Samantha and David Egelhoff (David, Jr.), David’s children from a prior marriage, commenced two separate actions against Donna Rae in Washington state court to recover the insurance proceeds and the pension plan benefits. In both actions Samantha and David Jr. claimed a Washington statute had revoked the beneficiary designation of Donna Rae by operation of law because Dona Rae and David, Sr. were divorced at the time of his death. **The state statute on which they relied provided that any nonprobate asset, defined to include “a life insurance policy” or “employee benefit plan,” that is payable or transferable upon death to a former spouse is revoked and treated as though the surviving spouse had predeceased the decedent spouse.**
	+ Tool:
		- 29 USC 1144(a) – ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA.
		- State law is related to an ERISA plan “if it has a connection with or reference to such a plan.”
	+ Holding (Thomas): Washington statute (which revokes the payment of a nonprobate asset to a former spouse) has a “connection with” ERISA plans and is therefore pre-empted.
		- To determine whether state law has a connection with the ERISA plan, look to (1) the objective of the ERISA statute and (2) the nature of the effect of the state law of ERISA plans.
		- Statute runs counter to ERISA in which the participant provides who the beneficiaries are in the terms of the plan and the trustee administers this plan.
		- Statute also runs counter to ERISA goal to have uniformity across the country. Not having uniformity also runs counter to ERISA goal to minimize the administrative and financial burden on plan administrators who would have to learn different laws across the states.
		- Presumption against pre-emption in areas of traditional state regulation such as family law is overcome because Congress has made its desire for preemption clear.
	+ Dissent (Breyer): (1) Court has previously made clear that the fact that state law imposed some burden on the administration of ERISA plans does not necessarily require preemption. (2) Court’s decision does not stop at divorce revocation laws and applies to other traditional state-law rules such as 120 hour rule and slayer rule.
* **Federal Common Law** – After Egelhoff, some courts have continued to apply various constructional rules familiar from the law of wills under the guise of federal common law.

### Pay-on-Death (POD) and Transfer-on Death (TOD) Contracts

* UPC 6-101. “ A provision for a **nonprobate transfer on death** in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature **is nontestamentary**…”
* Multiple-Party Bank and Brokerage Accounts
	+ Issues inherent in multiple-party accounts – what are the rights of the respective parties to the property in the account inter vivos, and what are the rights of the parties to the property in the account upon the death of one of the parties?
	+ Depositors intent – three possible reasons explain why a depositor(s) might open a multiple-party account:
		- Joint Tenancy Account – other party takes a proportional interest in the account inter vivos, and upon death, a right of survivorship exists such that the property will pass nonprobate.
		- Convenience/agency account – depositor adds a second party to the account for the convenience of the deposit (e.g. facilitate paying bills). Second party acts as agent for the depositor and depositor does not intend that the second party receive any interest in the account. Inter vivos, the second party can access the account, but only to use it for the benefit of the depositor, and there is no right of survivorship.
		- POD Account – avoids probate. Depositor does not intend for the other party to take any interest inter vivos, but at time of death the depositor intends a right of survivorship.
			* Common law – Testamentary transfer through POD accounts require compliance with Wills Act
			* Modern Trend/UPC 6-101 – nontestamentary in nature so don’t need to comply with Wills Act
	+ Bank’s/Brokerage house’s perspective - often give their customers a joint tenancy form without regard to depositor’s intention. Thus, courts are sometimes left with the problem of discerning which type of account was intended.
	+ Extrinsic Evidence – Courts take extrinsic evidence to determine depositor’s true intent
		- Temporal – intent as the time multiple party account was created (time opened or time a second party’s name was added)
		- Subsequent comments/actions
		- Burden of Proof
			* If the depositor executes paperwork that expressly states that the account is a joint tenancy account, the paperwork creates a presumption that the account is a true joint tenancy account (present gift is intended). To overcome the presumption, most jurisdictions require clear and convincing evidence. See ***Varela***.
			* In some states, the presumption of a gift is conclusive and evidence to the contrary is not admissible.
	+ ***Varela v. Bernachea* (Fla. App. 2005)**
		- Synopsis: Bernachea, a married man with children, commenced a relationship with Varela. Bernachea asked Varela to stop working and move into his condo with him. Varela moved in with Bernachea who paid all of her expenses and added her to his Meryl Lynch CMA account as a joint tenant with right of survivorship, and she was given a check card for accessing the account. The couple also had a joint account at Southtrust. Bernachea then suffered a heart attack and Varela stayed with him at the hospital until his daughters prevented Varela from staying with him. They also directed Varela to vacate the apartment, which she did willingly. Varela then wrote a check for $280,000 on the Meryl Lynch account and deposited the funds in her personal account. After being released from the hospital, Bernachea disputed Varela’s right to use the joint account and instructed Meryl Lynch to return the funds. Meryl Lynch did so. Bernachea claimed that Varela’s access to the account was restricted and that she did not have the authority to write checks on the account and that she only had full access to the Southtrust account. Jorge Herrera, Bernachea’s banker, testified that he explained to Bernachea in English and Spanish the significance of adding Varela as a joint tenant and Bernachea, a retired attorney, did not indicate that he did not understand. Herrera and his assistant also testified that they were not instructed by Bernachea to restrict Varela’s access to the account. Varela responded that she had full access to both accounts and that they opened the Southtrust account simply for convenience because it was nearby.
		- Tool: When a joint account is established with the fund of one person, a gift of the funds is presumed (presumed that it is a true joint tenancy). This presumption may be rebutted only by clear and convincing evidence to the contrary.
		- Holding: Reverse. Bernachea did not present clear and convincing evidence to rebut the presumption of a gift. But the court allowed Varela to keep only one-half of the balance. Trial court premised its finding on Bernachea’s claim that he lacked donative intent but the only evidence was his own dubious testimony that he misapprehended the significance of a joint tenancy. Herrera was a credible witness and testified that he explained the details of a joint tenancy with right of survivorship.

### Nonprobate Transfer of Real Property

* Probate transfer of real property – deed
* Forms of Nonprobate Transfer of Real Property
	+ Joint Tenancy and Tenancy by the Entirety
	+ Revocable trust
	+ A TOD Deed (TODD) for Real Property – a substantial minority of states have enacted statutes, which allow the transfer of real property by TOD deed.
		- The deed must be executed and recorded inter vivos, but it does not become effective until the death of the grantor – that is, absolutely no interest is transferred t the grantee until the grantor dies
		- The deed is revocable during the grantor’s life
		- The transfer is effective immediately upon the grantor’s death and avoids probate

## Planning for Incapacity

### Property Management

#### Conservatorship

* UPC 5-401 (1998) – a conservator may be appointed if the court finds by clear and convincing evidence that the person “is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions” and by a preponderance of the evidence that the person “has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the” person.
* Priority for appointment – typically given to someone chosen in advance by the person, an agent under a durable power of attorney, or the person’s spouse, adult child, or parent, in that order. UPC 5-413.
* Judicial involvement is more substantial

#### Revocable Trust

* Successor trustee can act with respect to trust property immediately and without judicial involvement.
* Trust instrument should include a mechanism for determining whether the settlor has become incapacitated, e.g. unanimous vote of the settlor’s spouse, children, and doctor.
* Limitation – trustee can act only with respect to property put in the trust by the settlor prior to becoming incapacitated. For other property held by the settlor outright, only a conservator or an agent under a durable power of attorney will have the legal power to act.

#### Durable Power of Attorney

* Definitions
	+ Power of attorney –agent, called an attorney-in-fact authorized to act with respect to any of the principal’s property, but only while principal is alive.
	+ Simple power of attorney – agent’s authority terminates on the principal’s incapacity
	+ Durable power of attorney – effective during the incapacity of the principal and until the principal dies.
* Property does not avoid probate
* Authorized by the Uniform Power of Attorney Act (2006)
	+ § 104 –presumes all powers are durable unless expressly stated otherwise
	+ § 105 – must be created in writing
	+ § 114 – agent (attorney-in-fact) owes principal fiduciary duties
	+ § 201 – powers and authority of agent. E.g. in ***Kurrelmeyer*** – an agent under power of attorney may create, amend, revoke, or terminate an inter vivos trust only if the power of attorney expressly grants the agent such authority.
	+ Model Forms
* ***In re Estate of Kurrelmeyer* (Vt. 2006)**
	+ Synopsis: Louis Kurrelmeyer executed two durable general powers of attorney in favor of his wife, Martina, and his daughter, Nancy. Pursuant to these powers, Martina transferred real estate owned by her husband, including the Clearwater property, into a trust she created. Later, Louis died, and his will designated that the Clearwater property, would be given to Martina in life estate and upon her death pass to Louis’s children. Her trust, however, gave Martina additional rights in the property, including the ability to sell the house. Louis’s son objected to the exclusion of the Clearwater property from the inventory of Louis’s estate.
	+ Tool: Under durable power of attorney, principal can give agent power to create/fund a revocable trust.
	+ Holding:
		- The durable power of attorney did have the power to create a trust because the express words in the instrument included the conveyance of real estate and a clause to “do and perform all and every act and thing whatsoever necessary to be done… as [Louis] might or could do.”
		- The delegation of authority to create a trust through a durable general power of attorney to serve the interests of the principal does NOT violate public policy as a matter of law, even when a trust’s dispositive terms may serve a function similar to that of a will. Revocable living trusts serve a number of legitimate purposes. Fact that the trust was created by an agent, Louis’s attorney-in-fact, did not affect the trust’s legitimacy, because a trust does not require personal performance such as an affidavit does.
		- Court remanded case to lower court to determine whether Martina’s actions in this insurance breached her fiduciary duty of loyalty to Louis or violated the power of attorney instrument, which prohibited the agent from making gifts to herself. (one remand, trial court ruled Martina did not breach her fiduciary duties of loyalty and care).

### Health Care

#### Default Law

* Absence of advance directive – Uniform Health Care Decisions Act provides that responsibility for an incompetent patient’s health care decisions fall on surrogates in the following order: (1) spouse, unless legally separated; (2) adult child; (3)parent; or (4) adult sibling. If there is more than one person in a class, the majority controls.
* Substituted agent standard – what the patient has chosen or would have chosen in that situation.

#### Advance Directives

* Advance directive – allows person to state her wishes about refusing or terminating medical treatment, or to appoint an agent to make such decisions for her.
* Three types:
	+ Instructional directives – specify either generally or by way of hypothetical examples how one wants to be treated in end-of-life situations or in the event of incompetence. E.g. living wills
	+ Proxy directives – designates an agent to make health care decisions for the patient. E.g. health care proxy or durable power of attorney for health care
	+ Hybrid or combined directives – incorporates both of the first two approaches, that is, directs treatment preferences and designates an agent to make substituted decisions.
* Uniform Health Care Decisions Act

§ 2. ADVANCE HEALTH-CARE DIRECTIVES.

(a) An adult or emancipated minor may give an individual instruction. The instruction may be oral or written. The instruction may be limited to take effect only if a specified condition arises.

(b) An adult or emancipated minor may execute a power of attorney for health care, which may authorize the agent to make any health-care decision the principal could have made while having capacity. The power must be in writing and signed by the principal. The power remains in effect notwithstanding the principal’s later incapacity and may include individual instructions. Unless related to the principal by blood, marriage, or adoption, an agent may not be an owner, operator, or employee of [a residential long-term health-care institution] at which the principal is receiving care.

(c) Unless otherwise specified in a power of attorney for health care, the authority of an agent becomes effective only upon a determination that the principal lacks capacity, and ceases to be effective upon a determination that the principal has recovered capacity.

(d) Unless otherwise specified in a written advance health-care directive, a determination that an individual lacks or has recovered capacity, or that another condition exists that affects an individual instruction or the authority of an agent, must be made by the primary physician.

(e) An agent shall make a health-care decision in accordance with the principal’s individual instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent’s determination of the principal’s best interest. In determining the principal’s best interest, the agent shall consider the principal’s personal values to the extent known to the agent.

(f) A health-care decision made by an agent for a principal is effective without judicial approval.

(g) A written advance health-care directive may include the individual’s nomination of a guardian of the person.

(h) An advance health-care directive is valid for purposes of this [Act] if it complies with this [Act], regardless of when or where executed or communicated.

§ 4. OPTIONAL FORM.

#### Physician Aid in Dying

* Three states authorize physician aid in dying – Oregon, Washington, and Montana

### Disposition of the Body

#### Post-Mortem Remains

* Mortal remains legislation in a majority of states codifies court’s discretion in carrying out the expressed wishes of the deceased person.
* If a person dies by violence or in suspicious circumstances, statutes in all states require an autopsy regardless of the wishes of the deceased person or next of kin.

#### Organ Donation

* All states have enacted some form of the Uniform Anatomical Gift Act (UAGA).
* UAGA permits a person to give her body to any hospital, physician, medical school, or body bank for research or transplantation. It also permits a gift of a body, or parts therof, to any specified person for therapy or transplantation.
* Many states have enacted legislation providing for an organ donation designation a driver’s license.

# Limits on Freedom of Disposition

## Protection of the Surviving Spouse

* Separate property state
	+ No automatic sharing of earnings during marriage; whatever spouse earns or acquires is his or hers.
	+ Protection against disinheritance provided through elective or forced share (varies but often of 1/3) of all of decedent’s probate property plus certain non-probate transfers for surviving spouse
	+ Individual autonomy
	+ Most common
* Community property state
	+ Spouses retain separate ownership of property brought to the marriage but they own all earnings and acquisitions from earnings during the marriage in equal, undivided shares.
	+ No elective share because each spouse owns one-half of the earnings of the other spouse during the marriage.
	+ Economic partnership
	+ Nine states and two states with option of community property
* Theories
	+ Support Obligation – older view that marriage entails a support obligation. Implies: smaller percentage applied to all of the decedent’s property, minimum amount, and accounting for other resources available for support of survivor.
	+ Partnership – elective share justified because surviving spouse contributed to decedent’s wealth. Surviving spouse should be entitled to one-half of decedent’s property acquired during marriage.
* Variation Across States
	+ Must the surviving spouse accept a life estate? Most states provide that life estate does not satisfy forced share – Win for partnership theory.
	+ Election by a representative:
		- May a subsequently deceased surviving spouse elect by representative? Most states say no. Win for support theory.
		- May an incompetent surviving spouse elect by representative? Most states say should elect if in interest of surviving spouse.
	+ May an abandoning spouse elect a forced share?

### The Elective Share of a Separate Property Surviving Spouse

#### Non-Probate Property

* Traditional Scope – elective share is limited to probate estate only. Thus, nonprobate transfers potentially allow for circumventing the elective share by avoiding probate.
* Judicial Responses
	+ Illusory transfer test – In Newman v. Dore (NY 1937) (superseded by statute), court upheld widow’s claim that a revocable inter vivos trust established by her husband during their marriage was “illusory” and invalid. Later courts clarified that this meant that an “illusory” revocable trust is a valid trust, but it counts as part of the decedent’s assets subject to the elective share, so the trustee may have to contribute some of the trust property to make up the elective share. Key is how much control decedent retained.
	+ Intent-to-defraud test – depends on whether decedent intended to defraud his surviving spouse.
		- Subjective approach – did the deceased actually intend to defraud the surviving spouse of his or her right to an elective share in property by creating the nonprobate transfer
		- Objective approach – factors include: amount of property in question relative to party’s overall property, when the nonprobate arrangement was created relative to the party’s death and relative to the party’s marriage, how much of an interest the deceased spouse retained, etc.
	+ Present donative intent – focuses not on what the transferor retained, but on whether the transferor intended to make a present gift. ***Sullivan v. Burkin* (Mass. 1984)**
		- Synopsis: husband and wife separated but did not divorce. Husband created an inter vivos trust, to which he transferred his real estate (his principal asset). He retained a life estate interest in the income generated by the property in the trust, the right to withdraw principal upon written request to the trustee, and the right to revoke. Upon his death, any and all property in the trust was to be distributed to two friends. His will likewise made no provision for his separate wife. She invoked her right to an elective share and argued that it included the property in the trust.
		- Holding: Trust was a valid inter vivos trust, but announced **that henceforth, assets in an inter vivos trust created during the marriage would be subject to the elective share if the deceased spouse retained a power to revoke or general power of appointment (exercisable by deed or will).** It is neither equitable nor logical to extend to a divorced spouse greater rights in the assets of an inter vivos trust created and controlled by the other spouse than are extended to a spouse who remains married until the death of his or her spouse.
* Statutory Reform
	+ Statutes provide objective criteria for determining which nonprobate transfers are subject to the elective share.
	+ For the most part, these statutes include a list of nonprobate transfers that are added to the probate estate to constitute an augmented estate against which the surviving spouse’s elective share is applied.
		- Advantage – avoids cost of administration associated with more subjective judicial approaches
		- Disadvantage – creates presumption that any nonprobate transfer not included in the list can be used to avoid the doctrine. See ***In re Estate of Myers***.
	+ ***In re Estate of Myers* (Iowa 2012)**
		- Synopsis: Karen Myers passed away. At the time of her death, Karen had a checking account, certificate of deposit, and an annuity (POD assets). The POD assets were payable upon her death to her daughters. Karen’s husband, Howard, filed for an elective share of Karen’s estate and assigned his right to an elective share in order to satisfy a judgment against him. The assignees requested a determination as to whether the POD assets should be included in Howard’s elective share. The executor argued that the general assembly, by amending Iowa Code section 633.238, expressly limited the surviving spouse’s elective share to the four categories of assets listed in the statute, none of which include POD assets.
		- Tool: POD contracts are excluded from the elective share because not expressly listed in statute.
		- Holding:
			* Amendment (addition of “limited to”) to section 633.238 trumps *Sieh* (looked at decedent’s control over the assets to determine whether part of elective share). The controlling statutory language omits PODS assets from the surviving spouse’s elective share.
			* Assignees make a public policy argument that elective share rights may be defeated by the use of POD assets if court interprets section 633.238 to omit them. Court holds that further legislation would be required to change this.
* Majority of states – either by statute or judicial decisions, revocable trust created by the decedent spouse is included in determining the surviving spouse’s elective share.
* Delaware – if a nonprobate transfer is taxable at death (as are revocable trusts, POD contracts, and joint tenancies), it is subject to the surviving spouse’s elective share.

#### The Uniform Probate Court

* Embraced NY statute by applying the elective share to an augmented estate that includes both the probate estate and certain nonprobate transfers.
* UPC 1969
	+ To prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share.
	+ Includes in the augmented estate a schedule of nonprobate transfers.
* UPC 1990 as amended in 2008
	+ To bring elective-share law in line with the partnership theory of marriage.
	+ Elective share of a surviving spouse of a domiciliary decedent is 50% of the value of the marital-property portion of the augmented estate (2-202).
	+ The augmented estate is defined by 2-203(a) to include the sum of the decedent’s net probate estate (2-204), plus the decedent’s nonprobate transfers to others (2-205), plus the decedent’s nonprobate transfers to the surviving spouse (2-206), plus the surviving spouse’s property and nonprobate transfers to others (2-207).
	+ The marital property portion of the augmented estate is computed by multiplying the augmented estate by a percentage that is determined by the length of the marriage under 2-203(b).
	+ Amount of elective share property the surviving spouse can claim (if positive) = [(H’s assets +W’s assets) × marital property fraction (UPC 2-203) × 50%] – [full value of assets that surviving spouse is receiving from deceased spouse (probate and nonprobate assets, not just the marital fraction)] – [marital assets that surviving spouse already owns (surviving spouse’s total assets × UPC 2-203 fraction)]

### Premarital and Marital Agreements

* A spouse can waive her right to an elective share in advance
* Separate property states – enforce a waiver of the right of election by premarital/prenuptial agreement, and most also enforce a waiver agreed to during the marriage – a postnuptial marital agreement.
* Uniform Premarital Agreement Act (UPAA)
	+ Party opposing enforcement must prove that the agreement either (1) was not voluntary, or (2) was unconscionable when executed and the party opposing enforcement did not have fair and reasonable disclosure of the other party’s property and finances.
	+ Adopted in about half the states.
* Uniform Premarital and Marital Agreement Act (UPMAAA)
	+ Expressly validates postnuptial marital agreements, called simply marital agreements.
	+ Applies the same substantive standards to the enforceability of both premarital and marital agreements
	+ Section 9. Enforcement.

(a) A premarital agreement or marital agreement is unenforceable if a party against whom enforcement is sought proves:

(1) the party’s consent to the agreement was involuntary or the result of duress;

(2) the party did not have access to independent legal representation under subsection (b);

(3) unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or

(4) before signing the agreement, the party did not receive adequate financial disclosure under subsection (d).

(b) A party has access to independent legal representation if:

(1) before signing a premarital or marital agreement, the party has a reasonable time to:

(A) decide whether to retain a lawyer to provide independent legal representation; and

(B) locate a lawyer to provide independent legal representation, obtain the lawyer’s advice, and consider the advice provided; and

(2) the other party is represented by a lawyer and the party has the financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.

(c) A notice of waiver of rights under this section requires language, conspicuously displayed, substantially similar to the following, as applicable to the premarital agreement or marital agreement:

“If you sign this agreement, you may be:

Giving up your right to be supported by the person you are marrying or to whom you are married.

Giving up your right to ownership or control of money and property. Agreeing to pay bills and debts of the person you are marrying or to whom you are married.

Giving up your right to money and property if your marriage ends or the person to whom you are married dies.

Giving up your right to have your legal fees paid.”

(d) A party has adequate financial disclosure under this section if the party:

(1) receives a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party;

(2) expressly waives, in a separate signed record, the right to financial disclosure beyond the disclosure provided; or

(3) has adequate knowledge or a reasonable basis for having adequate knowledge of the information described in paragraph (1).

(e) If a premarital agreement or marital agreement modifies or eliminates spousal support and the modification or elimination causes a party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, on request of that party, may require the other party to provide support to the extent necessary to avoid that eligibility.

(f) A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole[:]

[(1)] the term was unconscionable at the time of signing[; or

(2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed].

(g) The court shall decide a question of unconscionability [or substantial hardship] under subsection (f) as a matter of law.

* + 9(f)(2) – adopted in substantial minority of states
	+ 9(d) – most litigation concerns financial disclosure provision (see ***Reece***).
* ***Reece v. Elliott* (Tenn. App. 2006)**
	+ Synopsis: Reece and Elliott signed a prenuptial agreement before marrying, as both had children from a previous marriage and both wanted to ensure that their assets would pass to their children. Both parties had independent counsel and created a list of their assets. Reece listed all of his properties and bank accounts, but values were not listed for every item, including Reece’s stock in his former employer’s company. Elliot alleged that the prenuptial agreement was invalid because she did not enter the agreement with “full knowledge” of the value of the deceased’s assets because she did not know the value of the stock. Eilliot’s sole argument is that she did not enter into the agreement with full knowledge of the value of the assets, because there was no value disclosed regarding the stock in Routh.
	+ Tool:
		- Prenuptial/antenuptial agreements are favored by public policy in Tennessee, and will be upheld so long as the parties enter into the agreements voluntarily and knowledgeably.
		- Basic question is whether the spouse was misled. Where the proponent of the agreement makes a fair disclosure, even if it not 100% exhaustive, and the spouse had the opportunity to ask questions and discover the extent of the other’s holdings but failed to do so due to lack of interest, then the agreement has been held valid.
	+ Holding: Affirm – Agreement is valid because Elliot was not misled.
		- Widow had full knowledge of husband’s wealth.
		- Widow consulted independent counsel and admitted to understanding what agreement meant.
		- Widow had opportunity to ask questions and did not have her counsel investigate.
		- Widow admitted that husband was honest with her.

### Community Property

* Fundamental principle – during marriage, all earnings of the spouses, and property acquired from those earnings, are community property unless both spouses agree to separate ownership. Each spouse is the owner of an undivided one-half interest in the community property.
* Community property v. Separate property
	+ Community property – any earning acquired by either spouse during marriage (and any property purchased with community property earnings)
	+ Separate property – property acquired by gift devise, or inheritance during marriage or by either spouse before marriage
* The one-half of the community property belonging to the deceased spouse may be devised to whomever the decedent pleases, the same as separate property.
* There is no elective share over the decedent spouse’s half of the community property because the surviving spouse already owns the other half.
* Conflict of law rules to determine which state law governs marital property:
	+ The law of the situs controls problems related to land.
	+ The law of the marital domicile at the time that personal property is acquired controls the characterization of the property as separate or community.
	+ The law of the marital domicile at the death of one spouse controls the survivor’s rights.

### Miscellaneous Additional Rights

* Social security – spouse can generally draw his own earned benefits, or one-half of the other spouse’s benefits, whichever is greater. At the death of the other spouse, the surviving spouse is entitled to his own earned benefits, or the full amount of the decedent spouse’s benefits.
* Pension and Retirement Accounts – ERISA gives spouse of an employee survivorship rights to pension plan if the employee predeceases the spouse.
* Homestead – probate homestead law secures the family home to the surviving spouse and minor children, free of the claims of the decedent’s creditors. UPC = $22,500
* Personal Property Set-Aside – the surviving spouse (and sometimes minor children) have right to receive tangible personal property of the decedent up to a certain value. UPC = $15,000
* Family Allowance –an allowance for maintenance and support of the surviving spouse (and often of dependent children). UPC = “reasonable allowance”
* Dower and Curtesy – life estate in one-third (dower) or entirety (curtesy) of land

## Intentional Omission of a Child

### American Law

* In all states except Louisiana, a child or other descendant has no statutory protection against intentional disinheritance by a parent.

### The Family Maintenance System of the English Commonwealth

* Family Maintenance System – a court has the power to override a decedent’s will. The court can make distributions to a spouse, child, or other dependent of the decedent in accordance with the court’s view of the dispositions that the testator ought to have made in light of all the circumstances.
* England, Australia, most Canadian provinces, New Zealand
* ***Lambeff v. Farmers Co-operative Executors & Trustees Ltd.* (Supreme Court of South Australia 1991)**
	+ Synopsis: George Lambeff married and had a daughter. Ten years later, he and his wife separated. George established a relationship with Barbara Lambeff, his de facto wife, shortly thereafter. George and Barbara had two sons. He died with an estate of over $200,000, which he left in trust to his two sons equally (each was married with young children). His single daughter petitioned the court for a share of the estate as her maintenance share. She noted that she had regularly attempted to establish ties with her father but had repeatedly rebuffed her. The court noted that she was significantly better off financially more assets) and professionally (better job) than the two sons but nevertheless awarded her $20,000.
	+ Tool:
		- Family Provision Act Section 7 – “Where… a person entitled to claim the benefit of the Act is left without adequate provision for his proper maintenance, education or advancement in life, the Court may in its discretion, allow that person to receive such provision as the Court deems fit for the maintenance, education or advancement of the person entitled.” That individual may also be precluded from receiving from the estate if their character or conduct is such as to disentitle him from the benefit of the Act.
		- “advancement in life” – not necessarily confined to early period of life
		- “proper” means all of the proper circumstances of a case including the size of the estate, needs of the applicants, nearness in kinship to the decease, bounty of the deceased.
		- Court must place itself in the position of the testator “treating the testator for that purpose as a wise and just, rather than a fond and foolish…”
	+ United Kingdom Inheritance Act §§1-3 – <http://www.legislation.gov.uk/ukpga/1975/63>

## Protection Against Unintentional Omission

* Rules designed to protect the surviving spouse and children from unintentional disinheritance

### Pretermitted Spouse

* Omitted Spouse Presumption – where the testator (1) marries after executing his or her will and (2) dies without revision or revoking his will, in a substantially majority of states this combination creates a presumption that the testator accidentally disinherited his spouse.
* Rebuttable presumption – key is what evidence is admissible to rebut the presumption.
	+ Most omitted spouse statutes provide that the presumption can be rebutted only by showing that (1) the failure to provide for the new spouse was intentional and that intent appears from the will; (2) the testator provided for the spouse outside of the will and the intent that the transfer outside of the will be in lieu of the spouse taking under the will is established by any evidence, including oral statement by the testator and/or the amount of the transfer; or (3) the spouse validly waived the right share in the testator’s estate.
	+ UPC 2-301 – (1) evidence from the will; (2) other evidence that the will was made in contemplation of the testator’s marriage to the surviving spouse; or (3) testator provided for spouse outside of the will and intent that the transfer outside of the will be in lieu of a the spouse taking under the will is established by evidence, including oral statement by the testator and/or the amount the transfer.
	+ Modern Trend – omitted spouse doctrine arises only if the marriage occurs after execution of all the deceased spouse’s wills and revocable trusts, and the surviving spouse’s share is of the property included in the probate estate and revocable trusts.
* ***In re Estate of Prestie* (Nev. 2006)**
	+ Synopsis: the deceased’s will failed to provide for his surviving spouse, but the decedent amended his revocable trust just a few weeks before he married to grant his new spouse a life estate in his real property. The son argued that the new spouse should not qualify as an omitted spouse because the deceased spouse provided for her in his revocable trust. The state’s omitted spouse statute, however, specifically limited the evidence that was admissible to rebut the presumption to (1) a marriage contract, or (2) a will showing the intent to disinherit. The decedent’s son and primary beneficiary under the decedent’s estate plan asked the court to expand the scope of the doctrine judicially to take into consideration the decedent’s revocable trust. The court refused to consider the gift in revocable trust, ruling that the state’s statute did not permit it to.
	+ Tool: The only evidence admissible to rebut the presumption for revocation under NRS 133.110 is a marriage contract, a provision providing for the spouse in the will, or a provision in the will expressing an intent to not provide for the spouse. Thus, an amendment to a trust, which provides for the spouse, is NOT admissible to rebut the presumption of a will’s revocation.
	+ Epilogue – NV legislature amended omitted spouse doctrine to join modern trend to expand scope and include evidence outside the will.
* Omitted Spouse’s Share
	+ Few states –will revoked
	+ Most states – give an intestate share, otherwise leaving the premarital will intact.
	+ UPC 2-301 – no less than his or her intestate share of the deceased spouse’s estate from that portion of the testator’s estate, if any, that is not devised to a child of the testator or the child’s descendants if (1) child is not a child of the surviving spouse, and (2) the child was born before the testator married the surviving spouse. Effect is that surviving spouse may get nothing if testator devises all of his probate estate to his child or descendants from a prior relationship/marriage.

### Pretermitted Children

* Application – testator executes a will, has a child, and dies without revising or revoking his or her will.
	+ Gift – if a will gives a share to children born after the execution of the will, as a general rule that child does not qualify as an omitted child.
	+ Children after execution – some states extend the omitted child statute to include children born after execution of the will as well as children born before execution of the will but not named in the will. In these cases, states will often require affirmative disinheritance.
* Presumption – where the testator has a child after executing his or her will and dies without revising or revoking his or her will, this combination creates a presumption that the testator meant to amend his or her will for his or her new child but died before getting around to it.
* Rebuttable Presumption
	+ Traditional – Presumption can be rebutted only by evidence showing that (1) the failure to provide for the new child was intentional and that intent appears from the will; (2) the testator provided for the child outside the will and the intent that the transfer outside of the will be in lieu of the child taking under the will is established by any evidence, including the amount of the transfer; or (3) the testator had one or more children when the will was executed and devised substantially all of his or her estate to the other parent of the omitted child.
	+ UPC 2-302 – #1 and 2 apply but 3 does not apply
* Evidence of Intent
	+ Missouri-type statute/UPC – drawn to benefit children “not named or provided for” in the will. Extrinsic evidence of intent is not admissible.
	+ Massachusetts-type statute – allows the child to take “unless it appears that such omission was intentional and not occasioned by any mistake. Extrinsic evidence is admitted to show the presence or absence of an intent to disinherit.
* Omitted Child’s Share
	+ Typical omitted child statute gives the omitted child his or her intestate share of the testator’s probate estate.
	+ UPC 2-302
		- No children at time will executed – omitted child receives his or her intestate share, unless (1) testator devised all or substantially all of his or her estate to the other parent of the omitted child, and (2) the other parent survives the testator and is entitled to take. In that case the omitted child takes nothing.
		- One or more children at time will executed and will devised property to one or more of the then-living children, the omitted child’s share (1) is taken out of the portion of the testator’s estate being devised to the then-lviing children, and (2) should equal the share or interest the other children are receiving, had the testator included all omitted children with the children receiving shares and given each an equal share.
* ***Gray v. Gray* (Ala. 2006)**
	+ Synopsis: When John Gray II (John) married Mary Rose Gray, he had two children from a prior marriage, Robert B. Gray and Monica L. Muncher. Before John and Mary’s son, John Merrill Gray III (Jack), was born, John executed a will in which he devised his entire estate to Mary. Subsequently, John and Mary divorced and executed a property settlement in which John agreed to place one-half of all assets he inherited from his mother into a trust for Jack. John died without changing his will and the bequest of his estate to Mary was revoked by statute because they were divorced. When the executor of John’s estate, William Terry Gray, (John’s brother) (defendant), sought to probate the will, Jack petitioned to receive a share of the estate as an omitted child under Ala. Code §43-8-91 (omitted child statute). Subsection (a) of this statute allowed an omitted child to receive their intestate share of the estate unless one of the following three exceptions applied: (1) if exclusion from the will appeared to be intentional, (2) if the testator had one or more children living when the will was executed and devised the entire estate to the other parent of the omitted child and omitted all of the children, or (3) if a transfer to the child made outside the will is shown to have been intended as a substitute for a devise by will. Gray filed a motion to dismiss Jack’s petition, asserting that Jack was not entitled to an intestate share of the estate because the exceptions under subsections (2) and (3) applied. Jack asserted that subsection (2) was not intended to apply to situations where the testator’s children living at the time of executing the will are from a prior marriage and the will is executed during a subsequent marriage, but before conceiving the omitted child.
	+ Tool: Exception for when testator has children and leaves entire estate to spouse and omits all children applies even when children are from another marriage than the afterborn.
	+ Holding: Fact that John’s other children were from a prior marriage is immaterial. (2) exception applies.
* Probate v. Nonprobate – Most pretermitted heir statutes refer only to wills and not to revocable trusts or other nonprobate modes of transfer. As in Jackson, courts have held that these statues cannot be applied to a revocable trust used as a will substitute. ***In re Estate of Jackson* (Okla. 2008)**
	+ Synopsis: Walter Jackson (Jackson) died intestate. Johnny Benjamin (Benjamin) was Jackson’s adult son and Jackson’s sole surviving heir at law. Benjamin brought an intra-probate proceeding against the Butlers, the co-trustees of a revocable inter vivos trust established by Jackson (and his also dead wife). Benjamin sought the removal of the Butlers as co-trustees with him named as trustee in their place, and sought the disgorgement of any trust assets which had been disbursed. Benjamin argued that OK’s pretermitted heir statute should be construed to extend to children omitted from revocable inter vivos trusts as well as wills.
	+ Tool: OK Pretermitted statute pertains only to wills and court will not extend it to revocable inter vivos trusts.
	+ Holding: Pretermitted statute does not apply to inter vivos trusts
		- Court disagrees with Benjamin’s argument that children should be treated the same as surviving spouses in that they are forced heirs under OK’s pretermitted heir statute (and thus cannot disinherit through trust under Thomas case).
		- OK’s pretermitted heir statute is not a limitation on a testator’s power to dispose of his or her property (such as forced heir statutes for spouses). It is an assurance that a child is not unintentionally omitted from a will. Unlike a spouse, a testator can disinherit a child if the will shows a clear intent to do so.

# Trusts

## Fiduciary Administration

### From Limited Powers to Fiduciary Administration

* Shift
	+ Before – trust used more for conveying land so trust law protected beneficiaries by giving the trustee only **limited** **powers**.
	+ Modern practice – trusts commonly used to facilitate professional management of property on behalf of the beneficiaries, so trustee is given **broad powers** of administration, but the exercise of those powers is **subject to** the trustee’s **fiduciary duties**.
* Three Kinds of Trusts in Practice
	+ Business Trusts for Commercial Deals – created for a commercial purpose such as organizing a mutual fund or facilitating asset securitization.
	+ Revocable Trusts for Nonprobate Transfers – commonly used as a will substitute for conveying property at death outside of probate.
	+ Irrevocable Trusts of Ongoing Fiduciary Administration – focus of this chapter. Administration of property by a trustee in accordance with the settlor’s intent. Increasingly, the trustee of such a trust is a fee-paid professional.
* Trustees Powers
	+ Judicial authorization – a trustee can petition a court of equity for authorization to undertake an action not expressly or implicitly authorized under the terms of the trust.
	+ Inherent Powers (UTC 815) – in addition to the “powers conferred by the terms of the trust,” a trustee has “all powers over the trust property which an unmarried competent owner has over individually owned property,” plus “any other powers appropriate to achieve the proper investment, management, and distribution of the trust property.” Catch all provision followed by list of specific powers in UTC 816.
	+ UTC 816 – gives a trustee specific transactional powers, including the power to “Acquire or sell property,” to “deposit trust money in an account in a regulated financial-service institution,” to “pay or contest any claim,” and to “sign and deliver contacts.”
	+ Third Parties Liability (UTC 1012) – abrogation of common law which held parties doing businesses with trustees liable for trustee’s breach of fiduciary duties. Deterred third parties from dealing with trustees.

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee’s powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee’s powers or the propriety of their exercise.

* Fiduciary Governance
	+ Cornerstone fiduciary duties – duty of loyalty, duty of prudence/care, duty to make distributions

### The Duty of Loyalty

* Duty of Loyalty – trustee must administer the trust solely in the interests of the beneficiary.

#### Duty Against Self-Dealing

* ***Hartman v. Hartle* (NJ Ch. 1923) – (why are talking about executor? executor has same duty of loyalty as trustee)**
	+ Synopsis: the testatrix had five children. Her will appointed two of her sons-in-law executors of her estate and directed that her real property was to be sold and divided equally among the five children. The land was sold for $3,900 at public auction, and one of the testatrix’s sons bought it for his sister, who was the wife of one of the executors. Two months later, the sister sold the land for $5,500. The court ruled that the duty against self-dealing applied to the spouse of the fiduciary. Absent court approval of the transaction, the sale was inappropriate. The sale could not be rescinded because of the subsequent sale to a bona fide purchaser without notice of the breach of trust, but the sister was forced to share one-fifth of the profit upon resale with the complaining beneficiary.
	+ Tool: A trustee cannot purchase from himself at his own sale, and his wife is subject to the same disability, unless leave so to do has been previously obtained under an order of the court.
	+ Holding: A trustee’s wife may not sell property from himself at his own sale. Nonetheless, a resale may not be ordered because the property is currently owned by innocent purchasers. Instead, the executors will be held to account for the complainant’s one-fifth share of the profits made on the resale of the property.
	+ Note: In fiduciary law, beneficiary has election among remedies. One option is compensatory damages (won’t do this because no loss – no finding that first sale price was unfair. Another option – disgorgement (= profits, used here because there were profits)
* ***In re Gleeson’s Will* (Ill App. 1955)**
	+ Synopsis: Con Colbrook (defendant) had been leasing farmland from Mary Gleeson for one year when she renewed the lease for a second year. However, Gleeson died two weeks before the second lease was set to expire. In her will, Gleeson devised her farmland to Colbrook as trustee for the benefit of her children. When the second year of his lease on the farmland expired, Colbrook held over for another year before he leased the land to another tenant. When the question arose as to whether Colbrook breached his fiduciary duty to the beneficiaries by holding over for another year, he defended that he acted honestly and in good faith and that the trust suffered no harm due to the circumstances surrounding rental of the farmland. Colbrook, who had part of the farmland with wheat that needed to be harvested that year, explained to the court that Gleeson’s death occurred just shortly before the new farming year and that it would be very difficult to find good farm tenants to take over the lease on such short notice. Accordingly, Colbrook asserted that his holding over was in the best interests of the trust.
	+ Tool: A trustee may not deal in his individual capacity with the trust property.
	+ Holding: The petitioner dealt individually with the farm land as a tenant and breached his duty of loyalty to the trust. An exception is not made for the petitioner because he held over shortly before the lease expired and farm land tenant are not easy to find. Though the petitioner’s holdover did not damage the property, he is still liable for breach. Court did not like that petitioner didn’t at least try. The petitioner must turn over the profits he made while he remained a tenant at the time that he was the trustee over the farm land, to the trust.
* No-Further Inquiry Rule **-** here a trustee engages in self-dealing, an irrebutable presumption of breach of the duty of loyalty arises. Once it is established that self-dealing has occurred, no further inquiry into the trustee’s reasonableness or good faith is necessary or appropriate.

#### Exceptions to the Duty of Loyalty

* UTC 802
	+ The settlor authorized the particular self-dealing or conflicted action in the trust instrument
	+ The beneficiary consented after full disclosure
	+ The trustee obtained judicial approval in advance.
	+ The transaction involves a contract entered into by the trustee before the person became trustee
	+ SoL
* Structural conflict
	+ No Further Inquiry Rule is inapplicable
	+ Conduct of trustee in the administration of the trust will be subject to especially careful scrutiny.
	+ Categorical exceptions to no-further-inquiry rule for circumstances in which self-dealing or a conflict is likely to benefit the beneficiaries:
		- A corporate trustee may deposit trust assets with its own banking department and invest the trust assets in a mutual fund operated by the trustee or an affiliate. UTC 802(f)
		- Trustee may take reasonable compensation even though compensating herself with trust funds is self-dealing. UTC 802(h)
* Fairness and interest of beneficiaries – even if the trustee has a defense, the beneficiary remains entitled to judicial review of whether the trustee acted in good faith and of the fairness of the transaction

#### Duty to Avoid Conflicts of Interest

* ***In re Rothko* (NY 1977)**
	+ Synopsis: the testator’s will appointed three friends executors of his estate (which consisted primarily of almost 800 paintings). The executors contracted with an art gallery that agreed to purchase 100 of the paintings and to sell the rest on consignment. In analyzing the contracts, the court found that two of the executors had a conflict of interest. One of the executors was a director and officer of the art gallery. The contract resulted in that executor receiving greater financial remuneration and status than he would have otherwise, and the gallery gave favorable treatment to the executor’s own art collection. The second executor had a conflict of interest because was a struggling artist seeking to curry favor with the gallery so it would buy and sell his paintings, something that in fact happened during the contract negotiations. The court found that the contracts were neither fair nor in the beneficiaries’ best interest. The court found that the third executor was aware of the breaches of trust being committed by the other executors and failed to act – a breach of trust, even where the third executor was acting on the advice of counsel. The advice of counsel gave the executor good faith, but the transactions were not reasonable, and the executor did not act reasonably in failing to properly assess the contracts.
	+ Tool:
		- Trustees have a duty of loyalty that prevents them from accepting employment from a third party who is entering into a business transaction with the trust.
		- An executor who knows that his co-executor is committing breaches of trust and not only fails to exert efforts directed towards prevention but accedes to them is legally accountable even though he was acting on the advice of counsel.
		- Damages – court ruled that where the sale of the trust property constitutes a breach of misfeasance other than just selling the property for too low a price, the fiduciary may be liable for appreciation damages. Transferees who take with notice of the breach of trust are liable for appreciation damages as well. Court imposed appreciation damages on the two executors who acted with the conflict of interest, as well as the art gallery.

#### Cotrustees

* UTC 703(a) – a majority of trustees can act if there are three or more.
* UTC 703(g) – each co-trustee is liable for a breach of trust if the trustee (1) consents to the action that constitutes the breach, or (2) negligently fails to act to stop or try to stop the other trustees from engaging in the action that constitutes the breach.

#### Remedies for Breach

* Compensatory damages
	+ Where a trustee is authorized to transfer trust property but improperly sells it for too low a price, the trustee is personally liable for the difference in the actual sale price and the price that should have been realized.
	+ When a trustee sells property he or she was not authorized to sell, appreciation damages are appropriate. Appreciation damages constitute the difference between the sale price and the value of the property as of the date of the court's decree (thereby putting the beneficiaries back in the position where they would have been but for the unauthorized sale).
* Disgorge
* Constructive trust or equitable lien (if in wrongfully disposing of trust property, the trustee acquires other property)
* Trust pursuit rule – among the remedies available to trust beneficiaries is the ability of the trust beneficiaries to pursue the trust property and secure its return, despite its transfer, unless the property is sold to a subsequent bona fide purchaser without notice of the breach of trust.

### The Duty of Prudence

* UTC 804 – “a trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”
* UTC 806 – “A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, shall use those special skills or expertise.”

#### The Distribution Function

* Distribution function – involves making disbursements of income or principal to the beneficiaries in accordance with the terms of the trust, which may be mandatory or discretionary.
* Mandatory trust – the trustee must make specified distributions to an identified beneficiary.
* Discretionary trust – trustee has discretion over when, to whom, or in what amounts to make a distribution.
* Spray trust – trustee must distribute all income currently, but has some discretion over to whom and in what amounts.
* Sprinkle trust – trustees authorized to accumulate income and add it to principal.
* Support trusts – trustee has discretion over distributions but are subject to standard such as “to provide for the beneficiary’s support and maintenance.

#### Discretionary Distributions

* Duty to Inquire - ***Marsman v. Nasca* (Mass. App. 1991)**
	+ - Synopsis: Sara created a testamentary trust that provided that the trustees were to pay the income to her husband (“Cappy”) at least quarterly, and “after having considered the various available sources of support for him, my trustees shall, if they deem it necessary or desirable…in their sole and uncontrolled discretion, pay over to him…such amount or amounts of the principal thereof as they shall deem advisable for his comfortable support and maintenance.” During Sara’s lifetime, Sara and Cappy lived well. Following Sara’s death, Capy lost his employment, and his standard of living fell substantially. When Cappy brought his plight to the trustee’s attention, the trustee gave Cappy a minimal distribution of principal ($300) and asked Cappy to explain in writing the need for the principal. Cappy failed to reply, and the trustee failed to follow up.
		- Tool:
			* A trustee that holds discretionary power to pay principal for the “comfortable support and maintenance” of a beneficiary, has a duty to inquire into the financial resources of that beneficiary to ascertain his needs.
			* Even where the only direction to the trustee is that he shall in his discretion pay such portion of the principal as he shall deem advisable, the discretion is not absolute. Prudence and reasonablenesss, not caprice or careless good nature, much less a desire on the part of the trustee to be relieved from trouble furnish the standard of conduct.
			* Although exculpatory clauses are not looked upon with favor and are strictly construed, such provisions inserted in the trust instrument without any overreaching or abuse by the trustee of any fiduciary or confidential relationship to the settlor are generally held effective except as to breaches of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary.
		- Holding:
			* The court ruled that the trustee had breached his duty to inquire into Cappy’s situation, and that the trustee had breached his or her discretion in not disbursing more principal to Cappy. Despite the broad discretion in the trust, the court found that Cappy’s standard of living had been reduced substantially and, in light of the settlor’s intent that the principal was to be used to maintain Cappy’s comfortable support and maintenance, the trustee had breached the duty to distribute principal under the trust.
			* Remand as to remedies – Farr’s actions do not fall under willful neglect or default or even bad faith and recklessness. No claim was made that the exculpatory clause was the result of abuse of confidence. Therefore, the clause is effective and Farr cannot be held personally liable.
* Scope of Discretion
	+ Court will not interfere with a discretionary judgment of a trustee so long as the trustee acts reasonably and in good faith.
	+ Extended Discretion - “sole, absolute, or uncontrolled”
		- Trustee is still subject to judicial review
		- Trustee must not act arbitrarily or capriciously, or abuse its discretion, and must act in good faith
		- In ***Marsman***, the trust instrument said that the decision to invade principal for Cappy’s support was to be made by the trustee in his “sole and uncontrolled discretion.” Yet the court found Farr’s parsimony to be in breach of his fiduciary duties.
		- UTC 814(a) – “Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as “absolute,” “sole,” or “controlled,” the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.
* Exculpation Clauses – trustee is excused from liability for breach of trust
	+ ***Marsman*** – allowed exculpation clause which excused the trustee/lawyer because there was no evidence that lawyer had inserted it in an abuse of confidence.
	+ UTC 1008 – “an exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.” Cannot excuse liability for breach of trust committed in bad faith or with reckless indifference, or intentional or willful neglect.
* Mandatory Arbitration
	+ Provisions requiring arbitration in a trust instrument
	+ No agreement on whether enforceable.

#### The Investment Function

* Investment function – involves reviewing the trust assets and then making and implementing an ongoing program of investment in light of the purpose of the trust and the circumstances of the beneficiaries.
* Uniform Prudent Investor Act (UPIA)
	+ Prefatory Note – five major alteration to former criteria for prudent investing: (1) look at entire portfolio rather than individual investments; (2) fiduciary’s central consideration is trade-off between risk and return; (3) no categoric restrictions on types of investments; (4) requires diversification; and (5) trustees can delegate investment and management functions
	+ Section 1. Prudent Investor Rule – trustee owes duty to beneficiaries to comply with this rule. Default rule that can be altered by provisions of trust.
	+ Section 2
		- (a) Standard of Care – invest and manage trust assets as prudent investor would
		- (b) Market Risk Rule [x-axis rule] – look at trust portfolio and overall investment strategy balancing risk and returns
		- (c) List of example circumstances that a trustee shall consider in investing and managing trust assets: (1) general economic conditions; (2) the possible effect of inflation or deflation; (3) the expected tax consequences of investment decisions or strategies; (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property; (5) the expected total return from income and the appreciation of capital; (6) other resources of the beneficiaries; (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and (8) an asset’s special relationship or special value to the purposes of the trust or to the beneficiaries.
		- (d) A trustee shall make a reasonable effort to verify facts
		- (e) No categoric restriction on types of investments
		- (f) Trustee chosen for special skills or expertise has duty to use such
	+ Section 3. Diversification (**y-axis rule**) – A trustee **shall** diversify the investments of the trust unless the purposes of the trust are better served without diversifying.
	+ Section 4. Duties at Inception of Trusteeship - Within a “reasonable time” after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance.
* Prudent Investor Rule’s Basis in Modern Portfolio Theory
	+ Modern Portfolio Theory (MPT) isolates three distinct components of the risk of owning any security: market risk, industry risk, and firm risk.
	+ Industry risk and firm risk can be reduced by diversification.
* Duty to Diversify and Inception Assets
	+ UPIA 4 – a trustee must divest inception assets within a “reasonable time” if necessary to bring the trust portfolio into compliance with the prudent investor rule.
	+ ***In re Estate of Janes* (NY 1997)**
		- Synopsis: Rodney B. James’ will left most his $3.5 million estate, including a $2.5 million stock portfolio mostly comprised of Eastman Kodak Company stock, to three trusts. Two of these trusts, containing seventy-five percent of the estate together, paid the income to Rodney’s seventy-two year old wife, Cynthia W. Janes (plaintiff) during her lifetime. Following Rodney’s death in May 1973, officers of the trustee company (Trustee) (defendant) met with Cynthia to suggest selling some of the Kodak stock in order to pay the administrative expenses and taxes of the estate and Cynthia agreed. At the time of this meeting, the Kodak shares were worth $139 per share for a total value of almost $1,840,000. However, the price of Kodak stock fell to $109 per share by the end of that year. Trustee continued to retain the Kodak stock and between 1973 and the filing of Trustee’s initial accounting in 1980, the Kodak shares fell to $47 per share, for a total value of approximately $530,000. Cynthia and the charitable beneficiaries (plaintiffs) filed objections when the Trustee requested judicial settlement of the account in 1981. The Surrogate’s Court found that Trustee’s retention of the Kodak stock and failure to diversify was imprudent and that the stock should have been sold in August 1973. The court calculated damages as the difference between the stock’s value at the time of trial and its value if sold and reinvested in August 1973 (“lost profits” or “market index” measure of damages). Trustee appealed and the Appellate Division affirmed imposition of the surcharge but reduced it by calculating damages as the difference between the value of the stock when it was sold and when it should have been sold (:the value of the capital that was lost”). Trustee appealed to the Court of Appeals of New York asserting that retention of the Kodak stock was not an imprudent investment because it was a “blue chip” stock so no investment risk factors, such as the stock issuing company’s capital structure, management and historical profitability, were applicable to the Kodak stock.
		- Tool:
			* A trustee must diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes and terms and provision of the governing instrument.
			* In imposing liability upon a fiduciary on the basis of the capital lost, the court should determine the value of the stock on the date it should have been sold, and subtract from that figure the proceeds from the sale of the stock, or, if the stock is still retained by the estate, the value of the stock at the time of the accounting. The court has discretion on whether interest should be awarded. Dividends and other income attributable to the retained assets should offset any interest awarded.
		- Holding:
			* Whether a fiduciary’s duty of investment prudence may be limited to the opinion of investment bankers and analysts who follow the company’s stock, and an overall determination of the investment quality determined by (1) the capital structure of the company, (2) the competency of its management, (3) whether the company is a seasoned issuer of stock with a history of profitability, (4) whether the company has a history of paying dividends, (5) whether the company is an industry leader, and (6) the expected future direction of the company’s business?
				+ No. A fiduciary’s duty of investment prudence may not be limited to the opinion of investment bankers and analysts who follow the company’s stock and other factors offered by the petitioner. “Prudent person standard dictates against any absolute rule that a fiduciary’s failure to diversify, in and of itself, constitutes imprudence, as well as against a rule invariably immunizing a fiduciary from its failure to diversify in the absence of some selective list of elements of hazard, such as those identified by petitioner.”
			* Whether, under all of the facts and circumstances of this case, the fiduciary violated the prudent person standard in maintaining a concentration of the Kodak stock? Yes. The petitioner here acted imprudently by failing to divest the estate of the Kodak stock by August 9, 1973 because the petitioner paid insufficient attention to the needs and interests of the testator’s 72-year-old widow.
			* Whether August 9, 1973 was a reasonable time by which the petitioner should have divested the estate of the stock? Yes. The petitioner’s internal documents and correspondence, as well as the testimony of Patterson, Young and objectants’ experts establish that the petitioner had all the information a prudent investor would have needed to conclude that the percentage of Kodak stock in the estate’s stock portfolio was excessive, and should have been significantly reduced in light of the estate’s over-all investment portfolio and the financial requirements of Janes and the other charitable beneficiaries.
			* Damages – where the imprudent conduct is that the trustee negligently retained assets it should have sold, the measure of damages is limited to the **lost capital**, the difference between the value of the stock at the time it should have been sold and its value when ultimately sold. The court noted that lost profits are appropriate where deliberate self-dealing or faithless transfers are involved.
	+ How much diversification is enough? Studies show that diversifying into 20 to 30 unrelated large capitalization stocks removes nearly all of the diversifiable risk from a stock portfolio. Common rule of thumb is that a concentration in a single security of more than 5% requires explanation.
	+ Excuses for not diversifying
		- If because of special circumstances, the purposes of the trust are better served without diversifying. UPIA 3. E.g. personal family assets – family home.
		- If the tax or other transaction costs of reorganizing the portfolio are likely to outweigh the benefits of diversification. UPIA 3 cmt.
		- Family business that is closely held and not readily marketable. In re Hyde (NY App. Div. 2007).
		- Trust is but one piece of a larger program of wealth management such that the beneficiary’s financial interests are diversified overall. UPIA 2(c)(6) (“other resources of the beneficiaries” is a relevant circumstance to be considered).
	+ Compensatory Damages for Imprudent Investment
		- Capital lost plus interest (***Jane***)
		- Total return measure – compare the actual performance of the imprudent portfolio against the performance of a hypothetical prudent portfolio, and award damages in the amount of the difference, perhaps adjusting for taxes and other expenses and for distributions.
* Terms of the Trust – Effect of an instruction from the settlor not to diversify
	+ Majority view – permissive authorization, which endows power, (as opposed to direction which imposes duty) to retain an undiversified portfolio does not excuse the trustee from liability if not diversifying was imprudent.
		- Authorization v. Mandate – authorization does not excuse a trustee’s liability for failing to diversify absent good reason while a mandate arguably does. Even if a trust mandates asset retention, the trustee may have a duty to petition the court for guidance if failure to diversify would harm the beneficiaries.
	+ Trustee’s duty to conform to the terms of the trust is qualified by a duty to petition the court for appropriate modification of or deviation from the terms of the trust if conforming will cause substantial harm to the trust or its beneficiaries.
	+ ***Wood v. U.S. Bank, N.A.* (Ohio App. 2005)**
		- Synopsis: John Wood II created a trust worth over $8 million and of which his wife, Dana Barth Wood (plaintiff) was a beneficiary. At the time of John’s death, the trust assets consisted of eighty-two percent Firstar stock and eighteen percent Cincinnati Financial stock. The trust named Star Bank, of which Firstar (defendant) was a successor-in-interest, as trustee and specifically allowed Firstar, to “retain any securities in the same form as when received, including shares of a corporate Trustee…, even though all of such securities are not of the class of investments a trustee may be permitted by law to make and to hold…” Firstar met with the beneficiaries shortly after John’s death and suggested a plan for liquidating stock to pay the debts and expenses of the estate that resulted in further concentration of Firstar stock. In early 1999, after the Firstar stock price had increased to $35 per share, Dana and her financial advisors made non-written requests to Firstar to diversify the Firstar stock, but Firstar did not diversify. By mid-2000, Firstar’s stock price dropped to $16 per share, costing Dana $771,099. Dana Barth commenced an action against Firstar claiming that it had a duty to diversify under Ohio’s version of UPIA absent special circumstances. Firstar claimed that the duty to diversify did not apply because the language of John’s trust authorized Firstar to retain the stock.
		- Tool:
			* The duty of loyalty generally disables a corporate trustee from purchasing or retaining its own stock. A settlor may override this default rule expressly or by implication in the terms of the trust. However, such an override “does not relieve the trustee of its duties to act with prudence and solely in the interest of the trust beneficiaries.”
			* To abrogate the duty to diversify, the trust must contain specific language authorizing or directing the trustee to retain in a specific investment a larger percentage of the trust assets than would normally be prudent.
		- Holding: Duty to Diversify – Language of the trust authorized the trustee to retain stock received from the trustor to abrogate the duty of loyalty but not the duty of care (and thus to diversify). The authorization to “retain” was not sufficient to abrogate the duty to diversify.

#### The Custodial and Administrative Functions

* Definitions
	+ Custodial function – taking custody of the trust property and properly safeguarding it.
	+ Administrative function – recordkeeping, bringing and defending claims held in trust, accounting and giving information to the beneficiaries, and making tax and other required filings.
* Duty to Collect and Protect Trust Property
	+ “A trustee shall take reasonable steps to take control of and protect the trust property.” UTC 809.
	+ “A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.” UTC 812.
* Duty to Earmark Trust Property
	+ Trustee must designate property as trust property rather than the trustee’s own.
	+ Pooled trust investments allowed – “If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.” UTC 810(d).
* Duty Not to Mingle Trust Funds with the Trustee’s Own
	+ A trustee must “keep trust property separate from the trustee’s own property.” UTC 810(b).
* Duty to Keep Adequate Records of Administration
	+ A trustee must maintain adequate records of the trust property and the administration of the trust. UTC 810(a).
* Duty to Bring and Defend Claims
	+ A trustee is under a duty “to take reasonable steps to enforce claims of the trust and to defend claims against the trust.” UTC 811.
	+ Informed by the duty of cost sensitivity – a prudent trustee will consider “the likelihood of recovery and the cost of suit and enforcement,” litigating cost effective claims and compromising or dropping claims that are not cost effective. UTC 811 cmt.
	+ Derivative suit - beneficiaries have the right “to sue for the benefit of the trust on a cause of action which belongs to the trust if the trustees refuse to perform their duty in that respect.

#### Trustee Selection and Divided Trusteeship

* Choosing a Trustee
	+ Individual trustee (settlor asks friend or relative to serve)
	+ Corporate trustee (settlor names a bank or trust company)
	+ Trend – divide trusteeship among more than one individual or company
* Costs of Administration
	+ In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee. UTC 805.
* Delegation by a Trustee
	+ A trustee may delegate the investment function, but in doings so the trustee must exercise reasonable care, skill, and caution in selecting, instructing, and monitoring the agent. UPIA 9.
	+ Delegation rule extended to all functions of trusteeship. UTC 807 (2000)

*(a) A trustee may delegate duties and powers…The trustee shall exercise reasonable care, skill, and caution in:*

*(1) selecting an agent;*

*(2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and*

*(3) periodically reviewing the agent’s actions in order to monitor the agent’s performance and compliance with the terms of the delegation.*

*(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.*

*(c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.*

*(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.*

* + In accepting the delegation of a trust function from a trustee, an agent assumes a fiduciary role with fiduciary responsibilities. Accordingly, the trustee’s duty to enforce claims held in trust may require the trustee to bring an action against a negligent or malfeasant agent to make the trust whole.
* Division by a Settlor
	+ Settlors increasingly likely to divide trusteeship in the terms of the trust
	+ Co-Trustees
		- Each co-trustee has a duty…of active, prudent participation in the performance of all aspects of the trust’s administration.” R3d Trusts 81 cmt. c.
		- Each trustee remains under a continuing duty to take reasonable steps to prevent a breach of trust by a co-trustee.
	+ Power of Appointment
		- No fiduciary obligation
		- Control over distribution function
	+ Directed trust – trustee must follow the directions of a third party with respect to some function of trusteeship.
		- Typical Forms
			* Direction by Distribution Committee
			* Direction by Outside Investment Advisor
		- VERY LOW THRESHOLD: Trustee must follow a direction unless it is “manifestly contrary to the terms of the trust” or “would constitutes a serious breach of fiduciary duty” owed by “the person holding the power.” UTC 808(b).
		- A person “Who holds a power to direct a trustee is presumptively a fiduciary.” UTC 808(d).
	+ Trust Protector – name a trust protector with discretionary powers over the trustee’s administration of the trust.
		- E.g. T devises property to X, a bank, in trust to pay the income to A for life and on A’s death to distribute the property to A’s descendants. T also names her trusted friend P, who lacks the skills to serve as trustee herself, as the trust protector. T empowers P as protector: (1) to replace X with another corporate fiduciary; (2) to approve modifications to the trust’s administrative and dispositive provisions; (3) to change the situs of the trust; (4) to terminate the trust; and (5) to select a successor trust protector.
		- UTC 808 – ratifies use of trust protectors
* Private Trust Company – lightly regulated private trust companies meant to serve as trustee of one or more trusts within a single family.
* Uniform Direct Trust Act (in progress)
	+ Trust Director and Directed Trustee
	+ Categories of powers – direction, approval, consent, and protection
	+ Fiduciary Provisions
		- Trust Director
			* Direction, approval, consent – generally as if trustee
			* Protection – in accordance with the terms and purposes of the trust
		- Directed Trustee – obedience unless “willful misconduct”

### Impartiality and the Principal and Income Problem

#### Due Regard and the Terms of the Trust

* Duty of Due Regard (Duty of impartiality) – “If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests.” UTC 803
* Waiver – the duty to be impartial can be waived by the settlor where the trust instrument adequately expresses an intent to favor one beneficiary over another. ***Howard v. Howard* (Or. App. 2007)**
	+ Synopsis: Leo and Marcene Howard (plaintiff), spouses who had both been previously married with children from those marriages, created trust agreements to replace their earlier wills. Since Leo had three children and Marcene had two children, they placed sixty percent of their estate in Leo’s trust and forty percent in Marcene’s trust in order to provide the children equal shares. After amending their trusts, Leo’s trust provided that his assets were to be divided into two trusts if Marcene survived him for estate tax reasons – a family trust and a marital trust. Marcene was to receive all of the net income from both trusts and the assets (principal) of the family trust were to be distributed to Leo’s children after Marcene died. Leo’s trust further provided that he intentionally made no provision for his stepchildren and that the support and comfort of his surviving spouse was to be preferred over the rights of the remaindermen. In addition, the trust authorized the trustee to consider other income and support in making discretionary distributions to the issue of Leo’s deceased children until they reached the age of 25, and when making discretionary distributions in the event of Leo’s incapacity. When Marcene and Leo’s son, Coy Howard (defendant), were serving as co-trustees after Leo’s death, they disagreed regarding interpretation of certain terms of the trust. When Marcene petitioned the court to request interpretation of the trusts’ terms, the trial court held that Marcene’s interests were to be preferred over the interests of the remaindermen (natural children) and directed Coy, as co-trustee, not to consider Marcene’s other resources in administering the trust. Coy appealed the second determination, asserting that the trustees must consider Marcene’s other resources in making investment decisions that favor income over growing the principal. Coy argued on appeal that favoring income without considering Marcene’s other resources allowed Marcene to direct some of that income to her children, which was contrary to Leo’s intent that his trust provide for his natural children, and not for his stepchildren.
	+ Tool: Although a trustee owes a duty to any remainder beneficiaries as well as to the life income beneficiary, the trustee must carry out those duties in light of any preference expressed in the trust instrument. We construe trust instruments in accordance with the trustor’s intent by looking at the entire instrument and, if possible, giving effect to all of the instrument’s provisions.
	+ Holding: Affirm trial court finding that Leo did not intend to require the trustee to consider Marcene’s other financial resources when administering the assets of the trusts. **Provisions in the trust explicitly refer to consideration of the beneficiaries’ needs and other resources but not the needs of Marcene in the provision requiring the trustee to pay all the net trust income to Marcene.** **NOTE: Sitkoff points out that why would a provision be included requiring that Marcene’s needs need to be considered if she is to obtain all income? Income v. principal problem ignored by court.**
	+ Beneficiary’s resources – whether the trustee should consider the beneficairy’s other resources in deciding whether to exercise his or her discretion in favor of the beneficiary is a question of settlor’s intent. Where the settlor creates the conflict structurally (appoints a life beneficiary trustee as well), the conflicted situation should be analyzed under the duty of impartiality, not the no further inquiry rule.

#### The Principal and Income Problem

* Impartiality problems are common among concurrent beneficiaries but more common among current and successive beneficiaries. E.g. T devises a fund in trust to X to pay the income to A for life and then the principal to B on A’s death.
* Traditional law under UPIA (1962)
	+ Income – rent, interest on loans and bonds, cash dividends on stock, net profits from a business or farming operation, royalties from natural resources (except 7.5% allocated to principal), and royalties from patent and copyrights (but not in excess of 5% per year of inventory value)
	+ Principal –sale of property proceeds, proceeds of insurance on property, stock splits and stock dividends corporate distributions from a merger or acquisition, payment of bond principal, royalties from natural resources (27.5%); and royalties from patents and copyrights in excess of 5% of inventory value.
* Modern Approach
	+ Prudent Investor Act – requires trustees “pursue an overall investment strategy to enable the trustee to make appropriate present and future distributions to or for the benefit of the beneficiaries under the governing instrument, in accordance with risk and return objectives reasonably suited to the entire portfolio.”
	+ Adjustment Power
		- UPIA 104 (a) – “A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust’s income, and the trustee determines, after applying the rules [of formal allocation] in Section 103(a), that the trustee is unable to comply with [the duty of impartiality in] Section 103(b).”
		- Default rule that applies unless the settlor provides otherwise.
		- Power usually denied to a trustee who is also a beneficiary. UPIA 104(c)(7)
	+ Unitrust – settlor may set a percentage of the value of the trust corpus that must be paid to the income of the beneficiary each year, so there is no need to distinguish income from principal.
		- No per se denied to a trustee who is also a beneficiary such as in ***In re Heller***.
* ***In re Heller* (NY 2006)**
	+ Synopsis: Jacob Heller created a trust under which his wife, Bertha Heller, was to receive the trust income and the remainder was to be distributed to his children. Jacob designated his brother, Frank Heller, as trustee, and Jacob’s two sons, Herbert and Alan Heller as successor trustees after his brother died. After Jacob died in 1986 and Frank died in 1997, Herbert and Alan became trustees. In 2003, Herbert and Alan elected under EPTL 11-2.4(e)(1)(B)(I) to have the unitrust provision of UPIA applied retroactively to January 1, 2002. Herbert and Alan informed the trust beneficiaries of the election as required by the statute. Under the unitrust provision, trustees were entitled to elect to have trust income calculated under a fixed formula based on the market value of the assets. As a result of the trustees’ election, Bertha’s annual income from the trust dropped from $190,000 to $70,000. Acting as attorney-in-fact for Bertha, Sandra Davis (plaintiff), Bertha’s daughter, brought an action to annul the election under the unitrust provision and remove Alan and Herbert as trustees. Davis moved for summary judgment asserting that Alan and Herbert were not entitled to elect under the unitrust provision because they are remainder beneficiaries of the trust, and that they cannot elect retroactively.
	+ Tool:
		- A trustee’s status as a remainder beneficiary does not in itself invalidate a unitrust election made by that trustee. **No further inquiry rule does not apply because this is a structural conflict.**
		- A unitrust election from which a trustee benefits will be scrutinized by the courts with special care.
	+ Holding:
		- Statute that gives trustees the power to adjust between the principal and income, expressly prohibits a trustee from exercising this power if “the trustee is a current beneficiary or a presumptive remainderman of the trust” or if “the adjustment would benefit the trustee directly or indirectly.”
		- **Unitrust provision does not prohibit trustee from electing for unitrust, Statute provides for presumption in favor of unitrust application.**
		- Prohibition against self-dealing? Trustees owe fiduciary obligations not only to the trust’s income beneficiary but also to the other remainder beneficiaries (settlor also left to daughters as remaindermen). That these beneficiaries’ interests happen to align with the trustees’ does not relieve the trustees of their duties to them. 🡪 unclear whether this was critical to decision

### The Duty to Inform and Account

* UTC 813

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests…

(b) A trustee:

(1) upon request of a beneficiary, shall promptly furnish…a copy of the trust instrument;…

(3) …shall notify the qualified beneficiaries of the trust’s existence…

(c) A trustee shall send to the distributees…, and to other qualified or nonqualified beneficiaries who request it, at least annually…a report of the trust…

(d) A beneficiary may waive the right to a…report or other information…required to be furnished under this section…

#### Affirmative Disclosure

* ***Allard v. Pacific National Bank* (Wash. 1983)**
	+ Synopsis: J.T. and Georgiana Stone established testamentary trusts for the benefit of their children and the issue of their children, with Pacific Bank as trustee. The sole asset of the trust was a quarter-block of real estate in downtown Seattle subject to a 99-year lease entered into by the settlors with Seafirst Bank. Seafirst assigned its leasehold interest to Credit Union, and Credit Union approached Pacific Bank about purchasing the real estate for $139,000. Pacific Bank countered with $200,000. Credit Union agreed, and Pacific bank sold the property to Credit Union. The trust beneficiaries sued, alleging breach of fiduciary duty by failing to inform the trust beneficiaries of the possible sale.
	+ Tool: The power to sell without consent does not negate duty to inform. Implied: although beneficiaries can’t stop trustee from selling, duty to inform is important – allows beneficiaries opportunity to engage trustees and discuss their reasoning behind decision.
	+ Holding: Pacific Bank breached its fiduciary duties regarding management of the trusts because it **had duty to inform of sale** and should have either **obtained independent appraisal** or to place the property on the **open market** prior to selling it to Seattle Credit. **Just because Pacific Bank did not need to obtain consent of the beneficiaries to sell the property did not mean that they did not have to inform the beneficiaries of the sale.**

#### Responding to a Request for Information

* Concealing the Trust Instrument
	+ UTC 813(b)(1) – requires that upon request a trustee must “promptly furnish to the beneficiary a copy of the trust instrument.” This provision is not included in the schedule of mandatory rules in UTC 105, which means that a settlor is free to provide otherwise in the terms of the trust.
	+ R3d Trusts 82 cmt. e – settlor can direct in the terms of the trust that the trustee disclose only the provisions of the trust instrument relating to beneficiary’s separate share of the trust so long as it does not impair the ability of a beneficiary to protect his interest in the trust.
* Secret Trust?
	+ Traditional law – settlor may limit a beneficiary’s right to information, but not eliminate it. Trustee always remains subject to a fiduciary duty to act in good faith in the interests of the beneficiary. Therefore, a settlor cannot override a beneficiary’s right to information reasonably necessary for the protection of the beneficiary’s interest in the trust.
	+ Today
		- UTC 105(b)(8)-(9) – settlor could prevent a beneficiary from learning of a trust’s existence only until the beneficiary reached age 25.
		- Many states omitted this UTC provision providing instead that a beneficiary could be kept in the dark until a later age or, in some states, indefinitely if there is a trust protector or other surrogate to whom information must be given and who has standing to bring suit against the trustee for breach of trust.
* ***Wilson v. Wilson* (NC App. 2010)**
	+ Synopsis: Wilson Jr. created two irrevocable trusts, one for each of his children, and made Wilson Sr. the trustee for both trusts. Both instruments included a provision stating, “The Trustee shall not be required by any law, rule or regulation to prepare or file for approval any inventory, appraisal or regular or periodic accounts or reports with any court or beneficiary, but he may from time to time present his accounts to an adult beneficiary or a parent or guardian of a minor, or incompetent beneficiary.” Beneficiaries filed suit alleging a breach of fiduciary duty by Sr. requesting that Sr. provide an accounting of the trusts and alleging that Sr. had allowed Jr. to take control of trusts and invest in his own business. Defendants (Sr. and Jr.) filed motion that discovery requested cannot be had due to provision in the trust.
	+ Tool: “The beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.”
	+ Holding: In NC, Section 105 does not cross reference 813. 813 says have right to information necessary to enforcement of the trust. But, 813 is not in 105 (which lists mandatory duties) so 813 is not mandatory and can be overridden by terms of the trust under statute. However, 105 (2) still requires trustee to act in good faith. Information sought by beneficiaries is reasonably necessary to enable them to enforce their rights under the trust. 🡪 **when beneficiary sues you for breach of trust, you have to comply with discovery no matter what trust says. Court is not ruling on whether you can have silent trust. Just saying once you are in front of the court, you have to account.** State statute does not override the duty of the trustee to act in good faith, nor can it obstruct the power of the court to take such action as may be necessary in the interests of justice.

#### Accountings and Repose

* Informal Accountings and Releases
	+ A beneficiary can compel a trustee to render an accounting to a court regarding the administration of the trust.
	+ To hold down the costs of administration, a settlor sometimes waives this rule in the terms of the trust, providing instead that an informal accounting approved by some or all of the beneficiaries shall have the same effect as a judicial accounting. Whether such a provision is enforceable is uncertain (***Vena***).
	+ UTC 813(c) – requires a trustee to provide an annual report, but because this provision is not included in the schedule of mandatory rules in UTC 105, a settlor may release the trustee from this requirement.
	+ UTC 813(d) – beneficiaries may waive their right to reports or other information, but this waiver cannot be irrevocable.
		- Cmt – cautions that “a waiver of a trustee’s report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.
	+ UTC 111. Nonjudicial Settlement Agreements – “interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.”
* Majority Approval Provision: ***Vena v. Vena* (Ill. App. 2008)**
	+ Majority Approval/Approval by Third Parties – not settled law
	+ Synopsis: Harry executed a trust instrument in which he transferred property to his brother Guy. On Harry’s death, Guy was to distribute the remaining principal and any accrued and undistributed income in equal shares to 19 individuals. Trust provision states that a majority in interest of the persons may approve the trustee’s accounts or the accounts of the successor trustee with the same effect as if a court approved the accounts. After Harry died, Guy made two distributions which got approval from 18/19 (except Philip) and 13/19 respectively. Guy filed for declaratory judgment that the accounts were approved as though the court had approved them. Trial court granted summary judgment to Guy based on its decision that the majority-approval provision was enforceable. Philip appealed arguing that the majority-approval provision is unenforceable because it improperly restricts judicial review of trustee acts.
	+ Holding: Majority approval provision is contrary to public policy because of the limitations it places on redress for serious trustee misconduct. Majority approval process does not provide effective oversight of the trustee for two reasons: responsibility is too diffused; and the trustee has too much control over the process. A provision waiving judicial accounting and authorizing release of the trustee by a majority of the income beneficiaries is unenforceable. Because the provision is unenforceable, reverse and remand granting summary judgment in favor of Guy.
* Liability for Distribution to Ineligible Person
	+ Traditional law – a trustee is liable for a mistaken delivery of trust property to an ineligible person even if “the trustee…reasonably believe[d] that the person” was a proper recipient. R2d Trusts 226 cmt. b.
	+ Modern law – trustee given a defense of “diligent, good-faith efforts or…reasonable reliance” on the terms of the trust. R3d 76 cmt. f.

## Alienation and Modification

### Alienation of the Beneficial Interest

* As a general rule, a creditor can reach a debtor’s property as long as the property interest in question is transferable. Absent special provisions in the trust, if the beneficiary’s interest is mandatory, the beneficiary’s creditors can reach the beneficiary’s interest.
* Consider the rights of a beneficiary’s creditors to the trust property in (1) a discretionary trust, (2) a spendthrift trust, and (3) a self-settled asset protection trust.

#### Discretionary Trusts

* Three types
	+ Pure discretionary trust – trustee has absolute discretion over distributions to the beneficiary
	+ Support trust – trustee is required to make distributions as necessary for the beneficiary’s needs Use of the word support does not necessarily make a trust a support trust unless the level of distribution is limited to as much as necessary for support.
	+ Discretionary support trust – absolute discretion is combined with a distribution standard.
* Pure Discretionary Trust
	+ Traditional law – creditor has no recourse against the beneficiary’s interest in the trust except for a supplier of necessity. Nor can the beneficiary voluntarily alienate his beneficial interest.
	+ Hamilton Order
		- Creditor may be entitled to a court order prohibiting the trustee from making any further distributions to the beneficiary until the creditor has been paid. Hamilton v. Drogo (NY 1926).
		- UTC 501 – “subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary.” In other words, a creditor cannot compel a trustee to make a discretionary distribution, but the creditor can obtain an order requiring that, if any distributions are to be made from the trust, the creditor shall be paid before the beneficiary.
* Support Trust
	+ Beneficiary cannot alienate her interest in the trust nor can an ordinary creditor reach the beneficiary’s interest. Creditors that do have recourse against the trust include a child or spouse enforcing a claim for support or alimony, as well as a supplier of necessities.
* Discretionary Support Trust
	+ Traditional law does not recognize this hybrid trust.
	+ Courts tend to treat them (e.g. “to provide for the comfort and support of my daughter in the trustee’s sole and absolute discretion”) as pure discretionary trusts.
* Collapsing the Categories
	+ UTC and R3d collapse the distinction between discretionary trusts and support trusts.
	+ UTC 504 – subject to an exception for claims by a child or spouse for support or alimony, a creditor cannot compel a distribution even if the beneficiary could do so.
* Protective Trusts
	+ Trustee is directed to pay income to A (mandatory), but if A’s creditors attach A’s interest, it is automatically changed to a discretionary interest. Once A’s interest is discretionary, the creditors cannot demand any part of it.

#### Spendthrift Trusts

* Spendthrift clause – standard spendthrift clause bars a beneficiary’s ability to transfer his or her interest voluntarily (by sale or gift) or involuntarily (creditors reaching).
* Creditor’s rights
	+ Creditors cannot attach interest even if distribution is mandatory. UTC 502(c).
* Express spendthrift provision
	+ Traditional law – trust is not spendthrift unless the settlor includes a spendthrift clause
	+ Growing number of jurisdictions no longer require an express spendthrift provision.
		- Delaware – all trusts are presumptively spendthrift
		- NY – all trusts are presumptively spendthrift with respect to income.
* Validity
	+ UTC 502 – has to restrain voluntary and involuntary transfer of a beneficiary’s interest (sufficient to say in trust that beneficiary is held subject to spendthrift trust).
	+ Some allow restraint on just voluntary transfers
	+ Null and void if beneficiary is settlor but see self-settled asset protection trusts
* Exceptions
	+ Tort Victims – Most states have rejected an exception for tort victims. Only Georgia has a clear exception. ***Scheffel v. Krueger* (NH 2001)**
		- Synopsis: A beneficiary of a support trust was found liable for several sexual assault charges and also faced criminal charges. The plaintiff in the civil sexual assault charge case sought to attach the defendant’s interest in the trust to satisfy the judgment of $551,286.25.
		- Tool: A statute that bars creditors from claiming an interest to a beneficiary’s trust does not make an exception for tort creditors.
		- Holding: The purpose of support and maintenance trust may still be fulfilled while the beneficiary is incarcerated and after he is released, therefore trust should not be terminated based on purpose not being able to be satisfied. The statute that bars creditors from making a claim against a beneficiary’s trust interest does not make an exception for tort creditors. Where the legislature has made specific exemptions, the law must presume that no other exceptions were intended.
	+ Children and Spouses – Judgments for child or spousal support, or both, can be enforced against the debtor’s interest in a spendthrift trust in a majority of states and under UTC 503(b)(1).
	+ Necessary Support – a claimant who provided a beneficiary with necessities, such as a physician or grocer. Most of these claims are handled by the enactment of special legislation as authorized by UTC 503(b)(3)(2).
	+ Government Claim – claim by state or federal government to the extent state or federal law allows. UTC(b)(3)
	+ Attach Distributions – creditor may obtain court order attaching present or future distributions to or for the benefit of the beneficiary. UTC 503(c)
	+ Station-in-Life Rule – in a few states, including NY, a beneficiary’s creditors can reach spendthrift trust income in excess of the amount needed for the support of the beneficiary. Creditors can reach only the amount in excess of what is needed to maintain the beneficiary in his station in life.

#### Self-Settled Asset Protection Trusts

* Traditional law – a person cannot shield assets from creditors by placing them in trust for her OWN benefit. Codified in UTC 505 (2000). Even if the trust is discretionary, spendthrift, or both, the settlor’s creditors can reach the maximum amont that the trustee could under any circumstances pay to the settlor or apply for the settlor’s benefit.
* History and Policy considerations
	+ Why is protection for creditors available only to recipients of gifts and not also to persons who earn wealth and then create a self-settled trust? Principle of Freedom of Disposition that allows a donor to impose restraint on alienation collapses if the donor and the donee are one and the same. “The invalidity of self-settled spendthrift trusts stems from the idea that no settlor…should be permitted to put his own assets in a trust, of which he is a beneficiary, and shield those assets with a spendthrift clause, because to do so is merely shifting the settlor’s assets from one pocket to another, in an attempt to avoid creditors.” *Phillips v. Moore* (Ga. 2010).
	+ In the 1980’s, a host offshore jurisdiction (typically exotic offshore locales) amended their trust laws to allow a self-settled trust against which the settlor’s creditors have no recourse. The Cook Islands’ International Trusts Act of 1984 is representative. It authorizes a self-settled trust in which the settlor may have a beneficial interest that the settlor’s creditors cannot attach, provided that the settlor is not a resident of the Cook Islands. Act provides that no judgment rendered by a foreign court against an interest in a Cook Islands trust, or against the settlor, trustee, or beneficiary of such a trust, will be enforced by a Cook Islands court.
	+ In 1997, Alaska legislature domesticated the APT concept.
	+ A few months later, Delaware enacted an APT statute. The official synopsis says that it “is similar to legislation recently enacted in Alaska. It is intended to maintain Delaware’s role as the most favored domestic jurisdiction for the establishment of trusts.
	+ In the hopes of attracting trust business to the state, 14 states have enacted APTs.
	+ The politics underlying the validation of APTs is similar to that for the validation of perpetual trusts. Local bankers and lawyers, who stand to benefit from an influx of trust assets, have lobbied for such legislation. However, the motivations are different. Whereas the interest in perpetual trusts was sparked by tax avoidance, interest in APTs is rooted in avoiding personal liability exposure.
	+ Extent to which APTs are used in practice is unclear. Anecdotes abound of doctors and corporate executives who, in the face of rising insurance premiums have dropped their coverage in favor of moving assets into an APT.
	+ Likely will only benefit the rich who can afford lawyers to do this for them
	+ However, if U.S. bans them, people will just put money in exotic locales that allow them
	+ U.S. has some laws and exceptions in place that make APTs NOT airtight (fraudulent transfer laws, exception creditors, and federal bankruptcy law.
* Self-settled asset protection trust (APT) – 14 states have enacted statutes authorizing a self-settled discretionary trust that protects one’s own assets if (1) the trust is irrevocable, (2) the trust interest is discretionary, and (3) the trust was not created to defraud creditors.
* Fraudulent Transfers
	+ Under the law of fraudulent transfers, codified by the widely adopted Uniform Fraudulent Transfer Act, it is actual fraud to make a transfer with the intent to hinder, delay, or defraud creditors, and constructive fraud to make a transfer without receiving equivalent value if the transfer leaves the debtor with insufficient assets to pay anticipated debts.
	+ Several APT states have modified their fraudulent transfer laws to require a showing that the trust was fraudulent as to the person bringing the challenge.
* Exception creditors – most APT states recognize exception creditors, who can recover against the settlor’s interest in an APT – spouse, child, sometimes tort victim.
* Federal Bankruptcy Law – Permits recovery against a debtor’s interest in property transferred to a self-settled trust within ten years of bankruptcy if the transfer was made with actual intent to hinder, delay, or defraud a creditor.
* Judicial Response: ***Federal Trade Commission v. Affordable Media, LLC* (9th Cir. 1999)**
	+ Synopsis: Denyse and Michael Anderson (defendants) formed Financial Growth Consultants, LLC (Financial) (defendant) to sell media units to investors with the promise that investors would receive a 5-% return. The media units were a share of the profits from products sold on late night television, which Financial sold through telemarketing, but not enough of the products could be sold to match the promised returns. Typical of a Ponzi scheme, Financial made up for the media units’ profit shortfalls by paying the profits promised to earlier investors with the investments of later investors. Of the $13,000,000 raised from investors, Financial retained $6,300,000 in commissions. The Federal Trade Commission (plaintiff) brought an action for injunctive relief that required the Andersons, who had placed their assets in an asset protection trust they created in the Cook Islands, to repatriate all assets held outside the United States “(1) by them, (2) for their benefit; or (3) under their direct or indirect control.” After the court issued a temporary restraining order and preliminary injunction against the Andersons, the Andersons sent a letter to their co-trustee, asking for an accounting and repatriation of the assets. The co-trustee denied the request claiming that the request constituted “duress” under the provisions of the trust and removed the Andersons as co-trustees. The Andersons claimed that this rendered them incapable of complying with the injunction.
	+ Tool:
		- A party petitioning for an adjudication that another party is in civil contempt does not have the burden of showing that the other party has the capacity to comply with the court’s order, but the party asserting the impossibility defense must show categorically and in detail why he is unable to comply.
		- In the asset protection trust context, the burden on the party asserting an impossibility defense will be particularly high because of the likelihood that any attempted compliance with the court’s order will be merely a charade rather than a good faith effort to comply.
	+ Holding: Affirm district court’s finding the Andersons in contempt. Andersons are protectors of the trusts and the trust gives them affirmative powers to appoint new trustees and makes the anti-duress provisions subject to the protector’s powers, therefore, they can force the foreign trustee to repatriate the trust assets to the U.S. Most damning evidence is that after district court issued an order for the repatriation of the trust funds, the Andersons attempted to resign as protectors of the trust. This attempted resignation indicates that the Andersons knew that, as the protectors of the trust, they remained in control of the trust and could force the foreign trustee to repatriate the assets.
	+ Note: blunder in drafting the offshore APT was giving the settlors, over whom a domestic court would have jurisdiction, affirmative powers to override or to replace the offshore trustee. The Ninth Circuit seized upon these powers, which settlors typically do not include in offshore trusts, as evidence that the Andersons had a power to arrange repatriation of trust assets.

#### Trusts for the State-Supported

* A person qualifies for Medicaid and public support benefits only if the person has few financial resources.

In determining whether an applicant is under the disqualifying threshold, the question arises whether a trust in which the applicant has a beneficial interest should be counted.

* Federal law draws a distinction between self-settled trusts (generally included when assessing financial needs) and trusts created by third parties (generally not included unless the beneficiary has the right to compel a distribution of income such as with a mandatory or support trust).
* Self-settled trust
	+ “Available” in eligibility consideration
	+ “Self” includes the person, spouse, or another person who acts on the person’s behalf such as a guardian, or if trust is revocable by the person
	+ Exceptions
		- Discretionary trust created by spouse for surviving spouse
		- Trust for disabled person from the person’s property by parent, grandparent, or guardian, provided that the state gets the remainder up to amount of state assistance
		- E.g., tort victim supplemental care trust
* Not self-settled trust
	+ Follows usual rules of creditor rights in mandatory and support trusts (yes) and discretionary trusts (no).
	+ Spendthrift does not protect because of necessities or government exceptions.

### Modification and Termination

* Revocable Trust – if the settlor retains the power to revoke the trust, the settlor can terminate the trust. Power to terminate implicitly includes the power to modify. Rest of section covers irrevocable trust.
* Requirement for Modification/Termination of Irrevocable Trust
	+ Settlor plus all beneficiaries may modify or terminate even if contains spendthrift clause
	+ Trustee and beneficiaries consent
	+ Grounds for judicial modification or termination of a trust without the settlor’s consent:
		- Claflin Doctrine – court stands in for settlor
			* Consent of all the beneficiaries, and
			* Not contrary to a material purpose of the settlor
		- Equitable Deviation
			* Consent of all beneficiaries not required
			* Petitioner must show unanticipated change in circumstance that:
				+ Will defeat or substantially impair accomplishment of the purposes of the trust (traditional law), or
				+ Will further the purposes of the trust (UTC/Third Restatement)
		- Non-judicial Settlement Agreements
		- Decanting – 20 states, Kroll case
* UTC 105(b)(4) – provides that a settlor cannot vary “the power of the court to modify or terminate a trust,” such as under UTC 411 and 412.

#### Claflin Doctrine

* Traditional
	+ Claflin Doctrine – a trust cannot be terminated or modified on petition of all beneficiaries if doing so would be contrary to a material purpose of the settlor.
	+ Unfulfilled material purpose, include: (1) spendthrift trusts, (2) the beneficiary is not to receive the principal until attaining a specified age, (3) discretionary trusts, or (4) support trusts.
	+ ***In re Estate of Brown* (Vt. 1987)**
		- Synopsis: the decedent’s testamentary trust authorized the trustee to use the income and principal to provide an education for the decedent’s nephew’s children. Upon completion of that purpose, the income and principal were to be used for the care, maintenance, and welfare of said nephew and his wife, so that they may live in a style and manner to which they were accustomed, for the remainder of their lives. Upon the death of the survivor, the trust res was to be distributed to their then-living children equally. When the educational purpose had been fulfilled, all the beneficiaries petitioned to terminate the trust. The trustee objected. The court construed the trust as expressing a material purpose that the nephew and his wife were to be assured of a lifelong source of income through the trustee’s management of the trust property. The court declined to terminate the trust.
		- Tool: An active trust may not be terminated, even with the consent of all the beneficiaries, if a material purpose of the settlor remains to be accomplished.
* Reform of Claflin Doctrine – UTC and the R3d Trusts

|  |  |
| --- | --- |
| **UTC 411** | **R3d 65** |
| * Preserves material purpose
* Weakens requirement of beneficiaries’ unanimity
* Authorizes termination if interests of absent beneficiary will be adequately protected
* Spendthrift clause not per se material purpose (optional provision)
 | * Weakens material purpose
* Preserves requirement of beneficiaries’ unanimity
* Authorizes termination if reason outweighs material purpose (not adopted anywhere)
* Spendthrift clause not material purpose
 |

#### Deviation and Changed Circumstances

* Traditional Law
	+ Equitable Deviation – A court will permit a trustee to deviate from the administrative terms of a trust if compliance would defeat or substantially impair the accomplishment of the purposes of the trust in light of changed circumstances not anticipated by the settlor. It is not enough to show that deviation would be advantageous or better for the beneficiaries. The proposed deviation must be necessary to accomplish a purpose of the trust.
	+ Administrative v. Dispositive Provisions – courts more willing to modify administrative provisions than dispositive provisions
* Extension to Dispositive Provisions
	+ Increasingly, courts and legislatures are inclined to authorize deviation from dispositive provisions.
	+ UTC 412 – adopts modern view of equitable deviation as applicable to both administrative and dispositive terms.

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor’s probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust’s administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

* + ***In re Riddell* (Wash. App. 2007)**
		- Synopsis: George and Irene creates trusts to benefit their only son, Ralph, and his wife, Beverly. Upon the death of the latter of them, the trusts would provide benefits to Ralph’s children, Donald and Nancy, until they turned 35 when the principal would be distributed outright to them. Nancy suffered from schizophrenia and lived in a state hospital. Ralph filed a petition to modify the trust to create a special needs trust that would (1) manage Nancy’s funds for her benefit, (2) avoid the state seizing the funds to be reimbursed for medical expenses, and (3) avoid Nancy’s mismanagement of the money. The trial court was concerned the modification would allow the family to shield itself from reimbursing the state for the costs of her medical care and denied the request.
		- Tool: Equitable deviation – the court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if (1) because of circumstances not anticipated by the settlor (2) the modification or deviation will further the purposes of the trust.
		- Holding: (1) Nancy’s special needs constituted circumstances not anticipated by the settlors because Irene and George were unaware of them. (2) Special needs modification would further the purpose of the trust (court deduced that George and Irene’s intent was to avoid forfeiting money to the state). (3) Modification was not against public policy because the law expressly permits special needs trusts that allow disabled persons to receive trust benefits while continuing to receive government assistance for their care. Remanded with instructions that trial court “order such equitable deviation as is consistent with the settlor’s intent in light of changed circumstances.”
* Combination or Division of Trusts – trustee may combine trusts or divide a trust if there is good reason and if it would not adversely affect the purposes of the trust. UTC 417.
	+ ***Ladysmith Rescue Square, Inc. v. Newlin* (Va. 2010)**
		- Synopsis: Cosby’s will created a charitable trust that named Newlin and Howell (defendants) as trustees. The trust language named four individuals as income beneficiaries who were to receive income payments for their lifetime. Their interests in the trust were insulated from creditors by a spendthrift provision and they were not permitted to withdraw from the trust corpus. Upon the deaths of all four income beneficiaries, the trust assets were to be divided evenly and distributed to the Upper Caroline Volunteer Fire Department (Upper Caroline) and Ladysmith Volunteer Rescue Squad (Ladysmith) (plaintiff). As of April 2009, two income beneficiaries remained. The beneficiaries and Upper Caroline sought a court order authorizing Newlin and Howell to divide the trust into two trusts, the Upper Caroline Trust and the Ladysmith Trust. They also sought an order authorizing Newlin and Howell to terminate the Upper Caroline Trust and pay out the income beneficiaries and Upper Caroline immediately. Ladysmith objected claiming that (1) the only reason for the proposed action was that the other beneficiaries wanted the property now, and (2) the proposed action violated the testator’s/settlor’s intent.
		- Tool: Court has authority to modify or terminate the trust only in circumstances not anticipated by the settlor and when such modification or termination will further the purposes of the trust. Beneficiaries preferring to have their money today than wait is not per se unforeseen
		- Holding: No splitting of trust.
			* Beneficiaries wanting to have money now rather than wait is not unforeseen based on past similar suits seen in court and not evidence to show that testator did not anticipate this risk.
			* Modifications would not further purpose of the trust. The trustee were to manage the corpus, preserving it until the death of the last income beneficiary, and only then were they to disburse the residue to the charitable beneficiaries.
* Uneconomic Trusts –modification or termination of trust authorized where continuation of the trust is uneconomical in light of administrative costs. UTC 414.
* Reformation to Correct Mistakes – “The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s intention if it is proved by clear and convincing evidence what the settlor’s intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.” UTC 415
* Tax Objectives
	+ UTC 416 – “To achieve the settlor’s tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor’s probable intention. The court may provide that the modification has retroactive effect.”
	+ Courts tend to be receptive to petitions seeking to modify or reform a trust to obtain an income or estate tax advantage.
		- Reformation – an equitable remedy that conforms the trust instrument to what the settlor actually intended it to say. E.g. courts have corrected a drafting error that, if left uncorrected, would result in a tax inefficiency.
		- Equitable deviation – e.g. courts have modified a trust because an unanticipated change in circumstance has frustrated the settlor’s tax objectives.

#### Non-Judicial Settlement Agreement

* UTC 111
	+ Interested persons (persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court) may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.
	+ Valid if would be approved by court and does not violate material purpose of the trust

#### Decanting

* Decanting – [if a trustee or trust protector has the power to distribute all the trust res outright,] trustee can pour over all the assets of one trust into another trust with updated terms.
* Growing number of states have codified the practice (20+ states)
* Three major types
	+ Updating administrative terms – everyone typically okay with this
	+ Trustee given power to distribute to descendants as trustee’s discretion and trustee decants for just one child and leaves out other children.
	+ Income quarterly to wife and principal invasion power for wife and descendants as necessary for health, education and welfare. Trustee then decants principal for trust for one child.
* Have to serve notice on all the beneficiaries
* ***In re Kroll* (NY Surr. 2013)**
	+ Synopsis: Moses left trust to Daniel (Moses’ grandson) and trustees were Rachel (Daniel’s Mom and Alan Kroll). The invaded trust permits Daniel, upon turning 21, to withdraw all or any part of the trust principal. At the time of the creation of the trust, Daniel had not yet exhibited signs of disabilities he now has. Trustees seek court approval of the transfer of assets (decanting) from this trust (the invaded trust) to a new supplemental needs trust (the appointed trust). The purpose of the purported decanting is to maintain Daniel’s eligibility for government benefits while utilizing the trust assets for his supplemental needs, with the remainder payable to Daniel’s issue or if no issue, his siblings. The AG argues, and the petitioners concede, at least absent an intervening circumstance, that Daniel’s right to withdraw all or part of the trust principal, estimated at approximately $400,000.00, would render him ineligible for Medicaid and other government benefits. However, as permitted by EPTL10–6.6(b), the trustees purportedly appointed the trust principal from the invaded trust to the appointed trust prior to Daniel’s 21st birthday.
	+ Tool/Holding
		- Authorized Trustee – Any trustee is an authorized trustee for decanting except for a trustee who is also either the creator of the trust or a beneficiary. Thus, trustees were authorized trustees.
		- EPTL Section 8 – a parent or guardian who was not also a trustee shall have authority to act for the beneficiary under the agreement.
			* The decanting of the trust assets from the invaded trust to the appointed trust was effective before Daniel turned age 21 (otherwise trust assets would have to go toward paying back government medical expenses). Daniel’s father was not a trustee and thus was authorized to perform decanting.
* Uniform Trust Decanting Act
	+ Section 11 – Expanded Distributive Discretion
		- (a) Definitions
		- (b) An an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.
		- (c) A second trust may not include as a beneficiary someone who is not a beneficiary in the first trust except as provided in (d); and may not reduce or eliminate a vested interest.
		- (d) – (e) powers of appointment
		- (f) The authorized fiduciary may exercise the decanting power only over that part of the principal over which the authorized fiduciary has expanded distributive discretion.
	+ Section 12 – Limited Distribute Discretion
		- (a) “limited distributive discretion” means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.
		- (b) An authorized fiduciary that has limited distributive discretion may exercise decanting power
		- (c) can’t change overall beneficial interest of each beneficiary
		- (e) The authorized fiduciary may exercise the decanting power only over that part of the principal over which the authorized fiduciary has expanded distributive discretion.
	+ Section 13 – Trust for Beneficiary with Disability
		- (a) Definitions
		- (b) A special-needs fiduciary may exercise the decanting power under section 11 as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if: (1) second trust is special needs trust and (2) decanting power will further the purposes of the first trust.
		- (c) can’t change beneficiary’s interest much

### Trustee Removal

* Traditional Approach
	+ Trustee cannot be removed even if all the beneficiaries consent, unless the trustee is unfit to serve or commits a serious breach of one of his or her underlying duties.
	+ Beneficiaries’ consent – all beneficiaries must consent at least for modifying dispositive provisions
* UTC 706
	+ (b) The court may remove a trustee if:

(1) the trustee has committed a serious breach of trust;

(2) lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries **[(comment says that a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts might warrant removal under this provision)];** or

(4) **[includes claflin rule and deviation rules]** there has been a substantial change of circumstances or removal is requested by all of the **qualified** beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

* + Qualified beneficiary – one who would be entitled to receive property if the trust was terminated on the day the petition were filed.
* ***Davis v. U.S. Bank National Association* (Mo. App. 2007)**
	+ Synopsis: Lorenz K. Ayers executed a trust under which his grandson, Harold A. Davis (plaintiff) was the life income beneficiary and after Davis’ death, the trust assets were to be distributed to Davis’ children. In the event that Davis’ children did not survive him, the assets go to his heirs-at-law, and if no heirs survived him, to the Lafayette College. The trust appointed Mercantile Trust Company, National Association (Mercantile) (defendant) as trustee. Davis filed a petition on behalf of himself and his two children, Dillon and Marguerite, to remove Mercantile as trustee, appoint U.S. Trust Company of Delaware (UST) as successor trustee and transfer the trust assets to UST. Davis argued that all of the statutory requirements for removal of a trustee without wrongdoing were met. First, all qualified beneficiaries were seeking removal of the trustee. Second, UST was a suitable successor trustee. Third, removal of Mercantile was not inconsistent with a material purpose of the trust. Fourth, removal of Mercantile best served the interests of the beneficiaries for the following reasons: (1) UST’s fee was 23.94 percent lower than Mercantile, as shown by the affidavits of an investment advisor and a bank officer and UST’s published fee schedule, (2) UST was more conveniently located within a thirty minute drive of Davis, (3) UST was located in Davis’ state of domicile, unlike Mercantile, and the change in domicile would avoid out of state income tax on the trust assets, and (4) UST understood Davis’ financial situation and was willing to work with an independent investment coordinator. The circuit court granted Davis’ motion for summary judgment and ordered removal of Mercantile and appointed UST as successor trustee. Mercantile appealed, asserting, inter alia, that Davis failed to join necessary parties, that Davis had a conflict of interest in representing his children, that issues of fact remained regarding UST’s reduced fee, that changing the trustee was inconsistent with a material purpose of the trust, and that discovery was needed before summary judgment could be granted.
	+ Tool: State law based on UTC 706(b)(4) – provides for the removal of a trustee within any showing of wrongdoing by the trustee if: removal is requested by all the **qualified** beneficiaries and in either such case the party seeking removal establishes to the court that (a) removal of the trustee best serves the interests of all of the beneficiaries; (b) removal of the trustee is not inconsistent with a material purpose of the trust; and (c) a suitable cotrustee or successor trustee is available and willing to serve.
	+ Holding: Affirm decision to allow change of trustees.
		- No failure to join necessary parties. **Remainder beneficiaries are not qualified beneficiaries.** All qualified beneficiaries (Davis and his kids) were in court.
		- Was in best interest of beneficiaries – lower fees (evidence that fees were correct), closer, less taxes.
		- Davis did not have a conflict of interest. Davis and his kids have substantially identical interests.
* Duties of a Successor Trustee
	+ Successor trustee is not liable for a breach of trust by a prior trustee.
	+ Successor trustee may be liable if she unreasonably fails to rectify a prior breach or if she continues the breaching practice.

## Powers of Appointment

* UPOAA 301-309
* Benefits of Powers of Appointment
	+ Changes in circumstances – postpone and delegate decisions about who will receive future distributions of trust property
	+ Tax avoidance – can be structured to avoid estate or gift tax when exercised
	+ Asset protection – can be structured to avoid claims by creditors of the power holder

### Purposes, Terminology, and Types of Powers

* (1) flexibility, (2) tax planning, (3) asset protection

#### Terminology and Relationships

* The Parties
	+ Donor – person who creates a power of appointment
	+ Donee – person who holds a power
	+ Objects/Permissible Appointees – persons in whose favor a power may be exercised
	+ Appointee – person in whose favor the power is actually exercised
	+ Takers in Default of Appointment – persons who take if power is not exercised
	+ Appointive Property – property subject to a power of appointment
* Power of Appointment – a power that enables the donee of the power to designate recipients of beneficial ownership interests in the appointive property.
* Creation
	+ To create a power of appointment, the donor must manifest the intent to do so, either expressly or by implication.
	+ Not necessary to use the words “power of appointment” or “appoint.” Any words or phrases are sufficient to create a power of appointment if they establish that the transferor so intended.
* Discretionary – power to appoint is purely discretionary. The holder owes no fiduciary duty to anyone
* General and Nongeneral Powers
	+ General power – power which is exercisable in favor of the donee, his estate, his creditors, **or** the creditors of his estate. Note: comes out of tax code. Why? For tax purposes, general power treated as ownership equivalent. State power of appointment law tracks federal definitions.
		- Power to consume – if a party is given a life estate with a power to consume the principal, the power to consume is deemed to constitute a general power of appointment.
	+ Nongeneral power/special power/limited power – power not exercisable in favor of the donee, his estate, his creditors, **or** the creditors of his estate
* Time and Manner of Exercise of Power of Appointment

|  |  |
| --- | --- |
| Time of Exercise | Manner of Exercise |
| During Life | Deed or writing (lifetime power) |
| At Death | Will (testamentary power) |
| During Life or Death | Deed or Will |

* + Presently exercisable – power that may be exercised at the time in question
	+ Postponed power – power exercisable only upon the occurrence of a specified event, satisfaction of an ascertainable standard, or passage of a specified time.
* Ownership Equivalence
	+ Nongeneral powers of appointment – can be fairly described by relation-back theory, where a power of appointment was viewed as merely empowering the donee to do an act for the donor. The appointee was deemed to receive the appointive property directly from the donor, not the donee.
	+ General power of appointment – may permit the donee to do almost anything with the property that an owner of the fee simple could do. This is clearest in the case of a general power that is presently exercisable. For this reason, it is common to speak of a presently exercisable general power as an **ownership-equivalent power**.
* Revocable Trusts, Directed Trusts, and Fiduciary Powers
	+ Any person who has a power to designate a recipient of a beneficial ownership interest in trust property has a power of appointment. E.g. settlor of revocable trust, trust protector
	+ This chapter focuses on **nonfiduciary** powers of appointment, primarily in beneficiaries.

#### Tax Considerations

* General and Nongeneral Powers
	+ General power – Donee is treated as owner of appointive property and taxed accordingly (income, gift, and estate)
		- Two exceptions where not treated for tax purposes:
			* Powers of appointment that is subject to an ascertainable standard (e.g. health, education, support, or maintenance), is treated as a nongeneral power for tax purposes.
			* Five-or-five power of withdrawal – if the donee’s annual power of appointment is limited to either $5,000 or 5% of the trust property, whichever is great, the power will not be taxed as the donee’s property in the years the donee did not exercise it.
	+ Nongeneral power – does not have an ownership-equivalent power. For tax purposes, therefore, the donee of such a power is not treated as the owner of the appointive property.
* Flexibility Without Estate Tax Liability – By carefully designing a trust to include nontaxable powers of appointment, the donor can give the donee the functional equivalent of ownership of the appointive property without causing the donee to be treated as owner for federal tax purposes. P. 802

### Creditor Rights

* Nongeneral power of appointment – creditors of donee of a nongeneral power of appointment cannot reach the appointive property.
* General power of appointment
	+ Common Law
		- Failure to exercise – creditors cannot reach the property
		- Exercised – even if not for himself, creditors of the donee can reach the appointed property
	+ Modern trend – creditors can reach the property whether or not exercised because it is ownership-equivalent power.
	+ Draft UPOAA 503(b) exempts property subject to a five-or-five power from claims by the donee’s creditors, and also denies recourse to appointive property if the donee’s power is subject to an ascertainable standard as that term is defined for federal tax purposes.
* Surviving Spouse – Property subject to power of appointment – even a general power of appointment – is unavailable to the surviving spouse in an elective share in most states.
* Self-Settled General Power – if the donee of a general power of appointment, even a postponed power, is also the donor, the appointive property is subject to claims by the donor-donee’s creditors as if she owned the property outright.
* UPOAA 501-504
* **Irwin Union Bank & Trust Co. Long (Ind. App. 1974)**
	+ Synopsis: As a result of a divorce judgment, Phillip Long owed Victoria Long $15,000. Victoria sued the trustee of a trust in which Phillip Long had an interest in an attempt to satisfy her judgment. The trust granted Phillip the right to withdraw up to 4% of the principal per year. The court ruled that the right to withdraw up to 4% of the principal per year was a general power of appointment over 4% of the trust res per year. The court applied the traditional view that a donee of a general power of appoint has no property interest int eh appointive property unless and until the power is exercised. Because Phillip did not exercise the power, Victoria had no right to reach any of the property.
	+ Tool: “where the donee of a general power created by some person other than himself fails to exercise the power, his creditors cannot acquire the power or compel its exercise, nor can they reach the property covered by the power, unless it is otherwise provided by statute.”
	+ Modern Trend: Increasingly, statutes now treat property that is subject to a general power of appointment as belonging to the donee, even if the power has never been exercised, including for purposes of allowing the donee’s creditors to reach the trust property. However, such statutes make an exception for a five-or-five power of withdrawal.

### Exercise of a Power

* To exercise a power of appointment, (1) a donee must manifest an intent to exercise the power; (2) the manner of expression must satisfy any formal requirements imposed by the donor; and (3) the appointment must be a permissible exercise of the power. R3d Property 19.1

#### Manifestation of Intent

* Donee’s Intent – although no express reference to the power is generally required, failure to refer to the power expressly constitutes an ambiguity that often results in litigation over whether donee manifested intent
* Residuary Clause
	+ Majority
		- A residuary clause does not presumptively exercise a general or nongeneral power of appointment.
		- Variation on whether contrary intent may be shown only by reference to the face of the will or whether extrinsic evidence may also be considered.
	+ Minority
		- A residuary clause exercises general power of appointment unless a contrary intent affirmatively appears.
		- MA, at the time of the Beals case, adhered to minority rule but has since adopted majority rule.
	+ Few (including NY) – a residuary clause exercises a general and nongeneral power of appointment if the residuary devisees are objects of the power.
	+ UPC 2-608 – a residuary clause expresses the intent to exercise a power of appointment that the testator held only if: (1) the power is a general power of appointment and the creating instrument does not contain a gift-over in the event the power is not exercised, or (2) the testator’s will manifests an intention to include the property subject to the power.
* Choice of Law when Not Land
	+ Traditional view (Beals) – apply law of the donor’s domicile on grounds of certainty and consistency.
	+ Growing body of authority – unless the donor specifies otherwise, the law of the donee’s domicile governs the exercise of a power.
* ***Beals v. State Street Bank & Trust Co.* (Mass. 1975)**
	+ Synopsis: The residuary clause of Arthur Hunnewell’s will created a trust for the benefit of his wife for life. Upon her death, separate trusts would be created for each of their daughters for life. Upon each daughter’s death, the principal in her trust was to be paid as appointed by her will. In default of appointment, the property would be paid to that daughter’s heirs. Daughter Isabella asked the trustees to distribute most of the principal in her trust to her husband’s office so he could manage it, which the trustees did. Thereafter, Isabella executed a partial release of her power, limiting her power to appoint the property to the descendants of Arthur. When Isabella died, the trustees still held $88,000 in trust for her. Her will made no express reference to the power of appointment, but her residuary clause gave the rest of her property to the issue of her sister, Margaret.
	+ Tool:
		- In interpreting the will of a donee to determine whether a power of appointment was exercised, we apply the substantive law of the jurisdiction whose law governs the administration of the trust.
		- A residuary clause exercises general power of appointment unless a contrary intent affirmatively appears.
		- A general power is closer to a property interest while a special power is one where a person decided who will share in the trust property. Thus, a person having a general power of appointment is not expected to distinguish his own property from the property subject to the appointment.
	+ Holding: The court applied the law of the donor’s domicile, which followed the minority approach that a residuary clause is deemed to exercise a general power of appointment but not a nongeneral power of appointment. The court ruled, however, that although the power was a nongeneral power of appointment at the time of Isabella’s death by virtue of her partial release, her actions with respect to the appointive property showed that Isabella treated the appointive property as if it were her own. Thus, the rationale for the general power of appointment should be applied – her residuary clause exercised the power.

#### Formal Requirements Imposed by the Donor

* Nature of the Instrument
	+ Will
	+ Power of appointment exercisable by will can be exercised in a revocable trust document, as long as the revocable trust remained revocable at the donee’s death.
	+ Deed – requires only an instrument that would be formally sufficient to be legally operative in the donee’s lifetime to transfer an interest to the appointee if the donee owned the appointive assets.
* Specific Reference to the Power Requirement
	+ To prevent the unintentional exercise of a power of appointment, a donor will sometimes provide that a power can be exercised only by an instrument that is executed after the date of the creating instrument and that refers specifically to that power. UPC 2-704 (1990)
	+ Blended Residuary/Blanket Exercise Clause
		- A blanket clause purporting to exercise any powers of appointment that the testator may hold: “I hereby give the rest, residue, and remainder of my estate, including any property over which I hold a power of appointment, to…”
		- Prevailing rule is that it is ineffective to exercise a power that requires a specific reference. In re Estate of Shenkman (NY App. Div. 2002) and UPC 2-704 comment.
	+ Strict v. substantial compliance with donor’s formal requirements – varies by state

#### Permissible Exercise of the Power

* Appointment to an Object
	+ Clearest example of an impermissible exercise of a power is one that purports to benefit someone who is not an object of the power. Such an appointment is invalid.
	+ ***Timmons v. Ingrahm* (Fla. App. 2010)**
		- Synopsis: Frank Timmons’s will created two testamentary trusts: the Timmons Family Trust and the Timmons Marital Trust. Frank had two adopted children from a prior marriage, and his wife Myrtle had four children from a prior marriage. Myrtle was the life beneficiary of both trusts, and upon her death, any remaining property in the Marital Trust was to be poured into the Family Trust and distributed outright to his “children.” His will defined his children to include both his adopted children and Myrtle’s children. The Family Trust gave Myrtle a limited power of appointment to appoint the property among Frank’s “lineal descendants.” Myrtle validly created a document that purported to exercise the power in favor of her lineal descendants, completely disinheriting Frank’s adopted children. Frank’s children objected on the ground that Myrtle’s children did not qualify as Frank’s lineal descendants. The trustees relied on the definition of Frank’s children in Franks’ will to argue that Myrtle’s children qualified as Frank’s lineal descendants. The court ruled that Frank had expanded only the term “children” to include Myrtle’s children, not the term “lineal descendant.” Thus, Myrtle’s children were impermissible objects and the exercise of the limited power failed.
		- Tool: In determining the intent of the settlor, a technical term used in a trust instrument should be accorded its legal definition, unless obviously used by the settlor in a different sense.
	+ Lapse – where a donee exercises a testamentary power of appointment, but the appointee predeceases the donee, the issue arises whether lapse and anti-lapse should be applied to the appointment.
		- General power – as a general rule, the courts have applied lapse and anti-lapse where the appointee of a general power of appointment predeceases the donee and meets the necessary degree of relationship to the donee.
		- Nongeneral power – the appointee of a nongeneral power of appointment must be an eligible object as defined in the instrument creating the power of appointment. If the effect of applying anti-lapse would be that the appointive property would end up in the hand of issue who were not eligible takers on under the express terms of the power, the traditional rule is that anti-lapse cannot be applied. Under the modern trend, however, anti-lapse applies to objects of the nongeneral power of appointment class even if their issue are not express objects of the class.
		- Some states/UPC 2-603 – anti-lapse applies to appointees of a power of appointment.
		- R3d Property 19.12(c) – persons who would be substituted as takers by an antilapse statute may be treated themselves as objects of the power.
		- R3d Property 19.12, cmt. d – antilapse statute applies if the specified relationship exists with respect to either the donor or the donee of the power.
* Appointment in Further Trust
	+ Whether a donee may exercise a power of appointment to appoint in further trust or if instead the appointment must be made outright.
		- General power of appointment – in most jurisdictions, a donee of a general power of appointment can appoint outright or in further trust.
		- Nongeneral power of appointment – under traditional law, the donee was not allowed to appoint in further trust unless the governing instrument expressly permitted appointment in trust. In modern law, default has been reversed so that the presumption today is that the donee of a nongeneral power may appoint in further trust for the benefit of an object.
	+ ***Brown v. Miller* (Fla. App. 2008)**
		- Synopsis: Elinor Miller established a trust (Trust A-2), naming Thomas W. Miller, Jr. (Bill) as trustee. The trust language specified that Bill would receive all net income for his lifetime, and allowed for payments from the trust principal to Bill upon his request. It also gave Bill the power to appoint, through his will, the beneficiary of the remaining balance of the trust property upon his death. Any balance not appointed was to be held in trust for Elinor’s son, Thomas W. Miller, III (Tom). Elinor passed away in 1999. Up until January 25, 2002, Bill transferred about $420,000.00 to himself and others. On January 25, 2002, Bill transferred the remaining balance of about $7 million to the Thomas W. Miller, Jr., Trust (Bill Miller Trust). Bill passed away in 2004. Tom brought suit against Bill’s estate and the trustees of the Bill Miller Trust, seeking to invalidate the $7 million transfer. The trial court granted Tom summary judgment, finding the transfer was improper because: (1) the trust language limited transfers to her husband; (2) it was not consistent with the trust language allowing transfers “from time to time;” and (3) it violated Bill’s duty to act in good faith by protecting the interests of the trust’s remaindermen.
		- Holding: Reverse and remand. Error for the trial court to set aside the $7 million transfer.
			* Transfer to husband: Bill Miller Trust was a revocable trust and, thus, a conveyance to the Bill Miller Trust was equivalent to a transfer to Bill Miller. Bill maintained 100% control over the Bill Miller Trust assets. He had the right to end the trust at any time and thereby regain absolute ownership over the trust property.
			* Time-to-Time: Bill made prior transfer so did make transfer from time to time. Time-to time language not intended by Elinor to limit Bill’s right to withdraw amounts of principal.
			* Properly exercised power: don’t decide on this
* Creation of a New Power of Appointment
	+ General power of appointment – in most jurisdictions, a donee of a general power of appointment may create a new power of appointment.
	+ Nongeneral power of appointment
		- R3d Property: Wills 19.14 and UPOAA 305(c)(2)-(3) – a donee of a nongeneral power can create a general power in an object of the original power or a nongeneral power in any person to appoint to an object of the original power.
* Exclusive and Nonexclusive Powers – nongeneral power can be exclusive or nonexclusive
	+ Exclusive – donee can appoint all the property to one or more objects, excluding the other objects
		- Language such as “to any” or “to such of”
		- Strong rule of construction – presumption that exclusive. R3d Property: Wills 17.5 and UPOAA 203
	+ Nonexclusive – donee must appoint some amounts to each object
		- Language such as “to all and every one” or “to each and every one”
		- Illusory rule – each object of a nonexclusive power must receive a “reasonable benefit.” R3d Property: Wills 17.5 cmt. j (not much case law supporting this)
	+ Whether a power is exclusive or nonexclusive depends on the intention of the donor as revealed by the governing instrument. If the donor’s intent cannot be determined, whether a power is exclusive or nonexclusive will turn on the presumption adhered to in the jurisdiction.
* Salvage Doctrines: Allocation and Capture
	+ When a donee intends to exercise a power of appointment, but the exercise is ineffective for some reason, it may be possible to carry out the donee’s intent through the doctrines of allocation or capture.
	+ Allocation
		- If a donee of a nongeneral power of appointment expresses the intent to exercise the power of appointment but inappropriately attempts to mix the appointive property with the donee’s own property in the distributive clause (typically in a blended residuary clause), the doctrine of allocation “unblends” the property to ensure that only eligible objects receive the appointive property.
		- To satisfy an ineffective appointment, the donee must have property of her own sufficient to substitute for the appointive property.
		- What if there is no blending of property? Under traditional law, the appointment would fail. Under R3d Property: Wills 19.19 and UPOAA 308, the gifts can still be saved by allocation (no blending needed).
	+ Capture
		- If the donee of a general power of appointment (1) expresses the intent to exercise the power of appointment, and (2) blends the exercise with the distributive provisions of his or her own will (typically in a blended residuary clause), if any of the appointment gifts fails for any reason, the donee is held to have appointed the failed gifts to him- or herself (“captured the appointive property”), and the failed appointive property is distributed as a part of the donee’s general assets.
		- R3d Property: Wills 19.21 and UPOAA 309 –modifies the doctrine of capture as follows: where the power of appointment’s governing instrument has a takers-in-default clause, it trumps over the capture doctrine, but if the takers-in-default clause fails for any reason, the capture doctrine applies.

#### Disclaimer, Release, and Contract

* Disclaim – a donee may disclaim a power of appointment in whole or in part. If a donee disclaims a power in accordance with the applicable disclaimer statute, the donee is treated as never having acquired the power in the first place.
* Release – a donee who has acquired a power may subsequently release it in whole or in party, and in such a manner that reduces or limits the objects, unless the donor intended the power not to be releasable. If the release is partial, it is important to note whether the release relates (1) to the property that may be appointed, (2) to whom the property may be appointed, or (3) to when the power may be exercised.
* Contract
	+ Donee of power presently exercisable – may enter into an enforceable contract to exercise a power of appointment if the power is presently exercisable and the promised appointee is an object of the power.
	+ Donee of power not presently exercisable – If a donee of a power not presently exercisable enters into a contract, inter vivos, that promises to exercise the testaementary power in a certain way upon the donee’s death, the contract is null and void.

### Failure to Exercise a Power of Appointment

#### General Power

* Traditional law – if the donee of a general power of appointment fails to exercise it, the appointive property passes to the takers in default of appointment. If there is no valid gift in default of appointment, the property reverts to the donor or the donor’s estate.
* R3d Property 19.22 and UPOAA 310 – if there is no valid gift in default of appointment, the property reverts to the donor or the donor’s estate only if the donee released or otherwise expressly refrained from exercising the power. Every general power of appointment in effect comes with an implied gift in default of appointment to the donee or the donee’s estate.

#### Nongeneral Power

* If the donee of a nongeneral power of appointment fails to exercise it and there is no gift in default of appointment, the appointive property may – if the objects are a defined and limited class – pass to the objects of the power. Otherwise, the property reverts to the donor or the donor’s estate.
* Imperative power – a nongeneral power is imperative if the creating instrument manifests an intent that the objects be benefited even if the donee fails to exercise the power. If the donee of an imperative power fails to exercise it, the court will divide the property equally among the objects.

## Charitable Trusts

* In general, the same rules that apply to the formation and administration of a private trust also apply to a charitable trust. Exceptions that differentiate a charitable trust from a private trust:

|  |  |  |
| --- | --- | --- |
|  | **Private Trust** | **Charitable Trust** |
| Purpose | Benefit of an ascertainable beneficiary | Benefit of a charitable purpose |
| Modification | Claflin doctrine deviation | Cy pres doctrine deviation |
| Enforcement | Beneficiaries | State attorney general |
| Term | Rule Against Perpetuities | Exempt from Rule Against Perpetuities |

* Noncharitable Trust – Almost every state has enacted legislation, such as UTC 408-409 or UPC 2-907, that permits a trust for the benefit of pet animal for the life of the animal or for certain other noncharitable purposes, such as perpetual maintenance of a grave.

### Charitable Purposes

* Charitable purposes include: the relief of poverty; the advancement of knowledge or education; the advancement of religion; the promotion of health; governmental or municipal purposes; and other purposes that are beneficial to the community. R3d Trusts 28 and UTC 405(a).
* Benevolent Trusts and not Charitable Trusts: ***Shenandoah Valley National Bank v. Taylor* (VA 1951)**
	+ Synopsis: Settlor’s trust provided that the income was to be distributed on the last day of school preceding Easter and Christmas to children at a local elementary school and was to be used by the children to further their education. The timing of the payments indicated that the true purpose of the trust was to be a benevolent trust, not a charitable trust. There were no enforceable restrictions on how the children used the money, and, in light of the timing of the payments, the children were unlikely to use it on education. Where a trust conveys mere financial enrichment, the trust qualifies as a charitable turst only if, from a totality of the circumstances, it becomes apparent that the intended beneficiaries are poor or in necessitous conditions. No evidence suggested that these children were poor. As a benevolent trust, the trust failed because it violated the Rule Against Perpetuities.
	+ Tool:
		- To be sustained as a charitable trust, the dominant intent must be charitable and not merely benevolent. The dominant intent is not assessed by a specific intent declared by the trust but by the effect of the trust in application.
		- Gifts which are mere exhibition of liberality and generosity, without regard to their effect upon the donees, are not charitable. There must be an amelioration of the condition of the donees as a result of the gift, and this improvement must be of a mental, physical, or spiritual nature, and not merely financial.

### Cy Pres and Deviation

#### Cy Pres

* Cy Pres doctrine – if a charitable trust’s specific purpose becomes **illegal, impossible, or impracticable**, the court may direct the application of the trust property to another charitable purpose that approximates the settlor’s general charitable intent.
* ***In re Neher’s Will* (NY 1939)**
	+ Synopsis: Ella Neher’s will devised her home in Red Hook Village to the incorporated village of Red Hook, “**as a memorial to the memory of my beloved husband**, Herbert Neher, with the direction to said Village that said property **be used as a hospital to be known as ‘Herbert Neher Memorial Hospital.**’” The will appointed the trustees of Red Hook Village (Trustees) (plaintiffs) to serve on the managing board of the hospital “for the benefit of the people of Red Hook.” The Trustees initially accepted the devise according to the terms of Neher’s will, but later petitioned the Surrogate’s Court because it lacked the resources to establish a hospital on the devised property and because another hospital was already serving the needs of the Red Hook community (**IMPRACTICABLE**). The Trustees requested in the alternative that the relevant provision of Neher’s will be reformed to allow the Trustees to use the devised property to “erect and maintain thereon a building for the administration purposes of said Village to be known and designated as the Herbert Neher Memorial Hall.”
	+ Tool: When compliance with a grafted direction of a charitable purpose is **impracticable**, the court may execute the gift cy pres through a scheme framed by the court for carrying out the trust’s general charitable purpose.
	+ Holding: The trust has as general charitable purpose to use the property for the Red Hook village in dedication to her husband. The later expression is a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. Therefore the direction that the property be used for a hospital may be ignored because compliance is impracticable since another hospital exists in the area and is serving the needs of the Village. The gift may be executed cy pres by the court for carrying out the general charitable purpose.
* General v. Specific Charitable Intent – traditionally, as a precondition to applying cy pres, the courts required that the settlor have (1) a general charitable intent and (2) within that general charitable intent, a specific charitable intent. The modern trend, as embodied in UTC 413(a), is to presume a general charitable intent. The UTC approach lightens the burden of proof on those seeking application of cy pres.
* Wasteful
	+ Many states (and UTC 413(a)) – permit application of cy pres if the particular charitable purpose becomes wasteful.
	+ Philanthropic Inefficiency – idea of waste originated in Buck case, where there were surplus funds well in excess of what was needed for its particular charitable purpose ($9 million of stock grew to $300 million for the support and relief of poverty and other charitable purposes in Marin County. Court did not find waste but concept was incorporated in UTC.
	+ R3d Trusts 67 cmt. c(1) – “…a situation in which the amount of property held in the trust exceeds what is needed for the particular charitable purpose to such an extent that the continued expenditure of all of the funds for that purpose, although possible to do, would be wasteful…Faced with circumstances of the type required for cy pres intervention in a surplus-funds case, a court might broaden the purposes of the trust, direct application of the surplus funds to a like purpose in a different community, or otherwise direct the use of funds not reasonably needed for the original purpose to a different but reasonably similar charitable purpose”

#### Deviation

* Applicable to all trust (cy pres just applicable to charitable trusts)
* A court will permit a trustee to deviate from the administrative terms of a trust if compliance would defeat or substantially impair the accomplishment of the purposes of the trust in light of changed circumstances not anticipated by the settlor.
* Philadelphia Story: The Barnes Foundation
* Cy pres allows for modification of the donor’s stated purpose (the “Ends”), whereas deviation authorizes departure from administrative terms (the “means”).
* UTC 412(1)-(b) blurs the line between cy pres and deviation.

#### Discriminatory Trusts

* If the trustee of a racially restrictive trust is a governmental body, such as a public school granting scholarships to whites, courts have held that administration of the trust would be discriminatory state action forbidden by the Equal Protection Clause of the Constitution, making the racial restriction unenforceable (**UNDER THEORY OF ILLEGALITY**).
* If the trustee is a private individual and not a public body, enforcing the racial restriction is usually not unconstitutional as discriminatory state action. But a racially restrictive trust may nonetheless run afoul of some federal or state law forbidding racial discrimination. Most courts apply cy pres or deviation to strike the racial restriction.

### Supervision/Enforcement

#### Traditional Law

* Settlors/Donors – do not have standing to enforce the terms of their trusts, absent a remained special interest in the property
* State Attorney General has primary responsibility for enforcement
* Individuals with special interest – Some courts recognize that members of the community who have a special interest in the trust also have standing to sue to enforce the terms of the trust and the trustee’s fiduciary duty

#### Settlor Standing

* More than half the states allow the settlor of a charitable trust to enforce the trust.
* UTC 405(c) – “The settlor of a charitable trust…may maintain a proceeding to enforce the trust.”
* R3d Trusts 94(2) – “A suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officer or by a co-trustee or successor trustee, by a settlor, or by another person who has a special interest in the enforcement of the trust.”
* ***Smithers v. St. Luke’s-Roosevelt Hospital Center* (NY App. Div. 2001)**
	+ Synopsis: In a letter to St. Luke’s-Roosevelt Hospital Center (Hospital) (defendant), R. Brinkley Smithers announced his intention to make a $10 million gift to the Hospital over time to establish an alcoholism treatment center. In the letter, he retained a veto power for himself over the center’s project plans and staff appointments. As it was Smithers’ intention that the treatment center be established in a separate facility, the Hospital purchased a building and opened the Smithers Alcoholism Treatment and Training Center (Center) in 1973. By 1978, Smithers informed the Hospital that no further gift funds would be transferred because the Hospital was not complying with the terms of his gift. After the hospital president convinced Smithers of the Hospital’s intention to strictly comply with the terms of the gift, Smithers completed the gift in 1983. When Smithers died in 1994, he and his wife, Adele Smithers (Adele) (plaintiff), had been planning, at the Hospital’s request, a gala to raise funds for the Center. However, the Hospital suddenly announced in 1995 its intention to relocate the Center and instructed Mrs. Smithers to cancel the event. When Mrs. Smithers’ accountants discovered that the Hospital had been misappropriating gift funds, she alerted the Attorney General (AG) (defendant), who commenced an investigation and learned that the Hospital had been transferring the gift funds to its general fund as “loans.” Although the Hospital complied with the Attorney General’s demand to return the funds, the Hospital persisted in its plan to sell the building where the Center was located. The AG believed that the terms of the gift did not prevent the Hospital from selling the building and agreed with the Hospital that it would pay $1 million from the proceeds of the sale to the Center. Mrs. Smithers brought an action as Special Administratrix of J. Brinkley Smithers’ estate against the Hospital and the AG, both of whom moved to dismiss for lack of standing. The trial court dismissed the complaint, holding that Mrs. Smithers lacked standing because she represented the beneficiaries and had no tangible stake in the gift. On appeal, the new AG reversed its position, agreeing that all net proceeds from sale of the building belonged to the Center and therefore the issue of standing need not be reached. While the appeal was pending, the AG and Hospital reached a new agreement. The AG again reversed his position, asserting to the Appellate Division that only an Attorney General had standing to enforce the gift.
	+ Tool: A donor of a gift has standing along with the AG to enforce the terms of their own gifts.
	+ Holding: The plaintiff is the donor of the gift and donors have standing with the Attorney General to enforce the terms of their own gifts. There is a need for coexistent standing of the donor and the Attorney General. Donors are more likely to pursue litigation and conduct the necessary research for litigation. Since the plaintiff is not a beneficiary, there is no risk of vexatious litigation by irresponsible parties who do not have a tangible stake in the matter. Also, the plaintiff has a right to sue because she is the administratix of the estate of her husband and both he and the plaintiff made an agreement with the defendant that the latter use the gift in a specific manner.
	+ Dissent: The plaintiff does not have standing to bring this action. The general rule is that when a charitable gift is made, without any provision for a reversion of the gift to the donor or his heirs, the interest of the donor and his heirs is permanently excluded. The right to seek enforcement of the terms of the gift is restricted to the Attorney General, absent a right to reverter. Furthermore, the plaintiff does not have standing as the administratrix because Mr. Smither’s right to exercise control over the gift as the donor abated upon his death. Finally, the plaintiff does not have standing because the donor did not expressly reserve a right of reversion.

#### Local Politics

* Concern that the attorney general will be tempted to curry favor with local voters by imposing local preferences at the expense of the trust’s charitable purpose.
* Hershey’s – Milton and Catherine Hershey, founders of Hershey Chocolate Company, left substantially all of their assets to the Hershey Trust, which provides schooling for 1,850 needy children. More than 50% of the trust’s assets (worth $8.8 billion) are invested in one company, the Hershey Company. AG urged diversification. The trustees decided that the trust should diversify and let it be known that they were planning to sell the company stock. The Hershey residents and workers, however, opposed the plan and pressured the state attorney general, who was also running for governor, to intervene. AG turns against sale seeking preliminary junction against sale. Following trial testimony about the potentially devastating effect the sale could have on the local community, the trial court enjoined the sale. While the case was on appeal, the trustees voted to cancel the sale in response to local community and political pressure. Cancelling sale made stock price drop dramatically.

#### Persons with a Special Interest in the Trust

* Even traditional law, a person who has a special interest in the enforcement of the trust may be able to enforce a charitable trust. E.g. an elderly indigent widow living in a charitable home for the aged has been held to have standing to sue the board of trustees who, because of the costs of operating an obsolete facility, proposed to relocate the residents elsewhere. Hooker v. Edes Home (DC 1990). A parishioner can sue to enforce a trust for the benefit of his church. Gray v. St. Matthews Cathedral Endowment Fund (Tex. App. 1976). A minister can sue to enforce a trust to pay the salary of the clergy of his church. First Congregational Soc’y v. Trustees.
* A person who is merely eligible within the trustee’s discretion for a benefit from a charitable trust does not have special interest standing. E.g. a student does not per se have standing to sue college trustees. Russell v. Yale Univ. (Conn. App. 1999).
* Special interest standing extends only so far as the person’s special interest. E.g. a senior citizen center has a special interest standing to enforce a pledge to contribute.
* Relator Standing – “A suit may be brought by the Attorney General on the relation of a third person, a “relator,” who is liable for the costs that the state would otherwise be required to bear. The Attorney General, however, cannot be compelled to sue (or to allow suit) by the relator; and the Attorney General may exercise control over the conduct of the suit, and may terminate the suit and the authorization granted to the relator.” R3d Trusts 94 cmt. e.

#### Federal Supervision

* In the usual case, a trust that is charitable under state trust law will also qualify as charitable under federal tax law.
* The Bishop Estate in Hawaii – IRS concluded that the estate was not being operated primarily for charitable purposes; it had become directly involved in local and national political campaigns; trustee fees were grossly in excess of the value of the trustee’s services; and there had been numerous other instances of private benefit from trust assets. IRS revoked the Estate’s charitable tax exemptions retroactively. However, the IRS took the unprecedented additional step of advising the probate court that it would reconsider its position if certain conditions were satisfied, starting with the immediate resignation or removal of the five trustees. Because the immediate cost of a retroactive revocation would have been nearly $1 billion, this was an offer the probate court could not refuse. Court replaced all five trustees and established a new selection process for trustees.
* IRS big steps
	+ Form 990
	+ Charitable trusts that are larger than certain thresholds

## Trust Duration and Perpetuities

### The Common Law Rule

#### History

* “No interest [in real or personal property] is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.” John Gray. (not actually at creation anymore)

#### The Policy Against Remote Vesting

* Purposes of rule

|  |  |
| --- | --- |
| **Keep Property Marketable** | **Limit Deadhand Control** |
| * Property cannot be conveyed with clear title unless all persons with an interest in the property agree.
* Requiring the identity of all persons with a claim to be ascertained within the perpetuities period ensures the property will become marketable periodically.
 | * Best understood in light of the disagreeable consequences that can arise from property arrangements made obsolete by changes in circumstances
* Rule effectively puts an outer boundary of roughly 100 years or so on the temporal reach of the dead hand.
 |

* No longer really about keeping property marketable because typically about liquid assets

#### A Rule of Logical Proof

* When will the interest vest or fail? A contingent future interest is void at the outset if it is not certain to vest or fail – that one or the other MUST happen – within 21 years after the death of “some life in being at the creation of the interest.”
* Some Life in Being
	+ Any person
	+ Life in Being – sometimes called the “measuring life” but “validating life” is more accurate
* When the Lives in Being are Ascertained
	+ Validating life or lives must be in being when the perpetuities period starts to run.
	+ Generally, the perpetuities period begins when the instrument takes effect.
	+ If an interest is created by will, the validating life or lives must be in being at the testator’s death.
	+ If the interest is created by deed or irrevocable trust, the validating life or lives must be persons in being when the deed or trust takes effect.
	+ If the interest is created by a revocable trust, the perpetuities period begins when the power to revoke terminates, as this is when the property becomes tied up. The validating life or lives must be persons in being at that time. If the power to revoke terminates at the settlor’s death, as is typical, the validating lives must be persons alive at the settlor’s death.
* The Rule and Trust Duration – all interests must vest or fail within perpetuities period; puts an indirect limit on trust duration.
* Cases
	+ Case 2 p. 883 – good because A is validating life
	+ Case 3 – no problem because one of the students will become a judge or not within life time
	+ Note 1 p. 884 – void because could make a gift and A could have another child. That another child is not a validating life because it was not in being when gift was made.

#### What Might Happen and the Fantastical Characters

* The Fertile Octogenarian
	+ Common law presumes that an individual is fertile and capable of having children no matter how advanced his or her age.
	+ Some states limit presumption to likely childbearing years and permit the introduction of evidence of infertility. These statutes also provide that the possibility that a person may adopt a child is disregarded.
* Precocious Toddler
	+ Invalid unless assume toddler can’t have child
* The Unborn Widow
	+ Presume that designated person may remarry someone who is not even alive when the future interest is created.
	+ Some state statutes provide for presumption that the widow will be living at the date that the period of the RAP commences to run to avoid a remote vesting.
* Slothful Executor
	+ Conceivable that probating an estate can take longer than the lives in being plus 21 years to probate.
* The Magical Gravel Pit and Other Marvels
	+ Magical Gravel Pit – might not run out of gravel
	+ Endless war
	+ 21st birthday – common law ruled that technically one turns 21 the day before one’s 21st birthday because that is the day the 20th year is completed. Under that reasoning, one’s 21st birthday is the first day after 21 years.

### Perpetuities Reform

* No state follows RAP in pure form
* Four categories of reform:

#### Saving Clauses

* Clause in the instrument creating the future interests that provides that in the event the trust has not yet terminated, it shall terminate 21 years after the death of the last living beneficiary alive when the trust was created, and the property shall be distributed to the then income beneficiaries in the same ratio as they are entitled to receive the income.
* Self-help through saving clause. Purpose is to ensure RAP is not violated.
* Malpractice to not include savings clause (so rarely see violation these days)

#### Reformation (or Cy Pres)

* Reformation – permits a court to modify a trust so as to carry out the testator’s intent within the perpetuities period.
* Statutory Specific Correctives
	+ Rule-based specific reformation terms for the most frequent violations of the Rule:
		- Age contingencies > 21 years that would cause a gift to fail are reduced to 21 years
		- Presumptions that deal with the unborn widow and the fertile octogenarian

#### Wait-and-See

* Common Law – wait and see whether the interest vests or fails within the lives relevant to vesting plus 21 years. Some states permit the court to modify an otherwise voidable interest while others void the interest and strike it.
* The Uniform Statutory Rule Against Perpetuities (USRAP)
	+ Wait-and-see period of 90 years
	+ Reformation – If the interest has not vested at the end of the 90-year period, the interest is not invalid, but rather the statute authorizes the courts to reform the conveyance to validate the interest in a manner that most closely follows the transferor’s intent.
	+ Some version of USRAP is in effect in roughly half the states

#### Abolition of the Rule Against Perpetuities/Perpetual Trusts

* RAP was developed to prevent entails, though it was eventually boiled down to preventing an interest in a trust from vesting more than 21 years after the death of all lives in being at the time the trust became irrevocable. This rule led to some well-known ridiculous scenarios, and as a result was subject to reform in the 1980s discussed above.
* Huge tax advantages
	+ Pre-1986: Successive Life Estate Loophole
		- No taxable transfer on death of a life tenant – the estate tax could be avoided by using successive life interests. Because a life tenancy terminates at death and the estate tax applies only the decedent’s transferable interests, there is no tax on death of a life tenant.
	+ Post-1986: Generation Skipping Transfer (GST) Tax
		- Congress sought to close the successive-life-estates loopholes with the GST.
		- GST – a transfer to a grandchild, great-grandchild, or any other person who is two or more generations below the transferor is a generation-skipping transfer. The GST tax is assessed on such transfers.
		- Equal to highest rate of the estate tax (now 40%).
		- One-time exemption – each transferor has a lifetime exemption from the estate and GST taxes
			* Now up to $5.25 million
			* A transferor can fund a trust with the amount of the exemption down the generations, free from estate or GST taxes, which will endure as long as state perpetuities law permits.
			* Can do this for as long as state perpetuities law will allow
* Abolition of RAP plus GST Exemption
	+ Idaho, South Dakota, and Wisconsin had already abolished RAP before 1986. But, these states experienced little to no resulting advantage in the jurisdictional competition for trust funds prior to 1986.
	+ Then came the Tax Reform Act (including GST). It became apparent to lawyers that making use of the GST transferor’s exemption in a perpetual trust had significant long-term tax advantages. A trust could continue free from federal wealth transfer taxation, generation after generation forever.
* Interstate competition for trust funds
	+ Given prevailing choice-of-law principles and the shift in the nature of wealth from land to financial assets (making trust assets portable), it was only a matter of time until jurisdictional competition sparked a race to abolish RAP. To ensure that state B (with no RAP) will govern the validity and administration of a trust created by a settlor who resides in state A, lawyers usually advise the settlor not only to provide in the trust instrument that the law of state B govern, but also to name a trustee located in state B and to give that trustee custody of the trust fund. As a result, an out-of-state settlor who wants to invoke the law of state B typically will appoint a trustee a bank or trust company located in state B.
	+ Delaware became first state AFTER enactment of GST to abolish RAP as applied to interest in trusts – “Delaware’s repeal of the rule against perpetuities for personal property held in trust will demonstrate Delaware’s continued vigilance in maintaining its role as a leading jurisdiction for the formation of capital and the conduct of trust business.”
	+ State’s abolition of RAP increased its reported trust assets by about $6 billion and its average trust account size by about $200,000.
	+ More than half of states have abolished RAP
	+ Ever since the perpetuities loophole in the GST tax was understood, abolition of RAP has been pushed by banking associations.
* Problems with Perpetual Trust
	+ Beneficiary proliferation – administrative issues because a trust that lasts 250 years is expected to have more than 7,000 beneficiaries
	+ Genetic Dilution/Benefitting Strangers – after 300 years, each beneficiary’s genetic connection to the settlor will be not that much different from a complete stranger.
	+ Trust Document Obsolescence – today’s state of the art trust documents will be obsolete in the future
	+ Inequality of Opportunity – income and human capital
	+ Laziness – certainty of receiving trust income makes beneficiaries lazy and unproductive (e.g. leisure class in England)
	+ Decrease in Charity – diversity of philanthropic enterprises is enormous in America, far greater than in Western European countries where the charitable agenda is largely set and supported by government
* Benefits pf Perpetual Trust
	+ Freedom of Disposition
	+ People may just go to other countries
* Solutions to Perpetual Trust
	+ Power to divide – trustee’s power to divide trust might be useful
	+ Power to terminate – trustee’s power to terminate if trust’s value is less than $50,000 and the trustee concludes that the administrative costs do not justify continuing the trust.
	+ R3d 27.1 – abolishes lives in being measuring stick but opposes perpetual trusts. Permits trust to last for two generations regardless of when the members of the generation are born relative to the creation of the trust. It also expressly grants the courts the power to modify any trust that lasts for more than two generations.

### Other Durational Limits

#### The Rule Against Suspension of the Power of Alienation

* Suspension of Power of Alienation – occurs when no living person, or living persons joined together, can convey an absolute fee in the property at issue
* Rule Against Suspension of Power of Alienation – Prohibition against there being no living person, or living persons joined together, who are able to convey an absolute fee (i.e., the power of alienation)
* Rule Against Suspension of the Power of Alienation – directed against interests that make the property inalienable. If there is any possibility that the power of alienation will be suspended longer than lives in being plus 21 years, the interests causing such invalid suspension are void ab initio.

#### Rule Against Accumulation of Income

* Limits the period during which the settlor may direct a trustee to accumulate and retain income in trust.
* Typically the same as the period of the Rule Against Perpetuities.