Spring 2014
Melanie Leslie – Trusts and Estates – Attack Outline

Order of Operations (Will)

- Problems with the will itself
  - Facts showing improper execution (signature, witnesses, statements, affidavits, etc.), other will challenges (Question call here is whether will should be admitted to probate)
    - Look out for disinherited people who have standing under the intestacy statute!!
    - Consider mechanisms to avoid will challenges (no contest, etc.)
  - Will challenges (AFTER you deal with problems in execution)
    - Capacity/undue influence/fraud
  - Attempts to reference external/unexecuted documents
    - Incorporation by reference
    - Facts of independent significance
      - Spot: Property/devise identified by a generic name – "all real property," "all my stocks," etc.
- Problems with specific devises in the will
  - Ademption (no longer in estate)
    - Spot: Words of survivorship
    - Identity theory vs. UPC
  - Abatement (estate has insufficient assets)
    - Residuary → general → specific
    - Spot: Language opting out of the common law rule
  - Lapse
    - First! → Is the devisee protected by the anti-lapse statute!?!
    - Opted out? Spot: Words of survivorship, etc. UPC vs. CL
    - If devise lapses (or doesn't), careful about who it goes to
      - If saved, only one state goes to people in will of devisee, all others go to descendants
      - Careful if it is a class gift! Does not go to residuary unless whole class lapses
- Other issues
  - Revocation – Express or implied?
  - Taxes – CL is *pro rata*, look for opt out, *especially* for big ticket things
  - Executor – Careful! Look out for undue influence stemming from this
    - Look for power of executor to sell assets to make up for deficits, etc.
  - Distribution – Opt out of statute? *Per stirpes*? Careful! Look at definition

1) **INTRODUCTION AND POLICY**
   a) **Policy**
      i) **Against** – Inconsistent with "equal opportunity," reduces incentive for children to be productive when they inherit a lot
      ii) **In Favor** – Increased incentive to be productive to pass on to kids, incentive to care for the sick, too easily circumvented by *inter vivos* transfers, part of property right (historical family farms), popular
      iii) **Three Perspectives**
         (1) Theoretical – What should the law be?
         (2) Practical – What are the arguments going to be in litigation?
         (3) Drafting – How do we draft to not create tons of litigation?
   b) **Slayer Statutes**
      i) **UPC § 2-803 – Effect of homicide on intestate succession**
         (1) (b) Forfeit statutory benefits as an heir if committed feloniously and intentionally
         (2) (c) Revocation of benefits under governing instrument
            (a) (1) Revokes any revocable appointment of property, power of appointment, or appointment of the killer as fiduciary
            (b) (2) Severs interests of the decedent and killer in property held as joint tenants with right of survivorship → treated as tenants in common
         (3) (e) Revocation treated as if disclaimed or the killer died before the victim
         (4) (f) Other property not under this section is treated by the same principle
         (5) (g) Determination is made by the court – Criminal conviction conclusively establishes the requirement, absent that, the court determines by preponderance
      ii) *Ford v. Ford* (MD 1986) (held that slayer statute did not prevent murdering daughter from inheriting when she was found not guilty by reason of insanity)
         (1) Could share if killing is unintentional even if it would result in involuntary manslaughter conviction
         (2) Applies to killer and killer's heirs
         (3) Disposition of criminal case is not conclusive
   c) **Probate vs. Non-Probate Assets**
      i) **Probate** – Checking account (unless joint tenancy w/ right of survivorship), car, home (unless joint tenancy w/ right of survivorship)
      ii) **Non-Probate** – Anything in joint tenancy w/ right of survivorship or a payable on death designation (life insurance, home, co-bank account, 401K)

d) **Gifts**

i) **Rule** – Valid *inter vivos* gift requires intent of donor to transfer, delivery of the gift (actual/constructive), and acceptance

(1) Intent – Must show present/irrevocable transfer of title

(a) If intent is to make disposition effective after death → not a gift

(2) Delivery – Letter passing title is sufficient for constructive delivery given appropriate facts

(3) Acceptance – Presumed if gift is of value

ii) *Gruen v. Gruen* (NY 1986) (holding that letter indicating to son that father gave a valuable painting to him which the father retained until his death was a transfer of title as a gift while retaining a life estate in the painting)

iii) *Franklin v. Anna National Bank* (Ill. 1986) (holding that decedent's signing of a bank card purporting to create joint tenancy with right of survivorship in his account was not intended as a gift when evidence showed it was intended to allow access to his account by the caretaker to help him out)

2) **INTESTATE SUCCESSION STATUTES**

a) **Generally**

i) If there is a spouse, presumption is distribution between spouse & descendants

ii) Non-blood relatives are not heirs, except for adoption

b) **Share of Surviving Spouse**

i) **WY § 2-4-101 (2010)**

(1) (a)(i) 50% to surviving spouse, rest to surviving children & descendants

(2) (a)(ii) If no surviving children, all to the surviving spouse

ii) **UPC § 2-102**

NOTE: The part the spouse doesn't take goes into intestate succession as if the spouse died, NOT just to the bastard kids

(1) (1) Entire estate if (i) no surviving parent or (ii) all decedent's surviving descendants are also descendants of the spouse and no surviving descendant of the surviving spouse

(2) (2) $300k + 75% to spouse, the rest to any surviving parents if no descendants

(3) (3) $225k + 50% to spouse, if all decedent's surviving descendants are with the spouse and the spouse has 1+ surviving descendants not from the decedent

(4) (4) $150k + 50% to spouse, if 1+ of the decedent's surviving descendants are not descendants of the surviving spouse

iii) **NY § 4-1.1(a)(1)-(2)**

(1) If spouse + issue → 50k + 50% to spouse, rest to issue by representation

(2) If spouse + no issue → 100% to spouse

iv) **Case**

(1) *Estate of Goick* (MO 1996) (holding that a verbal agreement to settlement in a non-finalized divorce did not constitute a divorce to prevent the spouse from inheriting or being appointed representative of decedent)

(a) Standing – Mother was a "creditor" so she had standing, bro/sis no standing

(b) Divorce – Must be a final decree to terminate the divorce

(c) Challenge to personal representative designation is a challenge to application of the statute – spouse is appointed over creditors, *Q.E.D.*

c) **Share of Lineal Descendants**

i) **Rule** – Living descendant cuts off rights of that descendant's children to inherit

ii) **Strict *per stirpes* (WY § 2-4-101(c)(i) (2010))**

(1) Divide at the generation of decedent's children

(2) Then each child of those children divide of their parent's share accordingly

iii) **Modern *per stirpes* (Majority; PA § 2104 (p. 87))**

(1) Divide at closest generation in which there is 1+ descendant living

(2) Then *per stirpes* after that

(3) Spot: All of decedent's children are dead when decedent kicks it

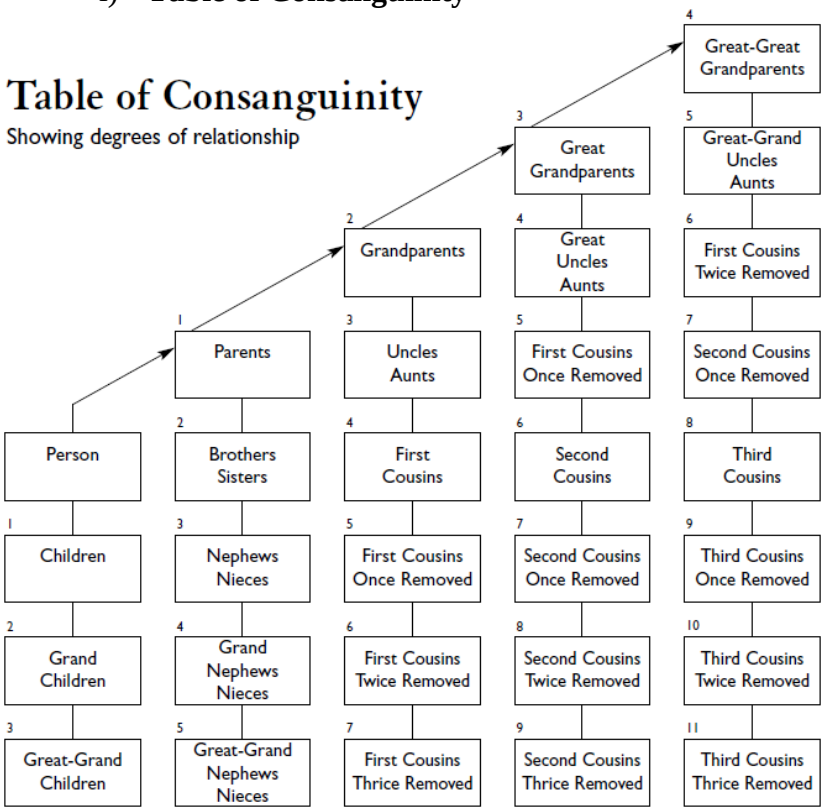
iv) **Representation (UPC § 2-106(b); NY §§ 1-2.16, 4-1.1(a))**

(1) At each level where there is a survivor, divide shares of the dead with descendants amongst the living of the next generation equally (dead with no descendants do not have a share in that generation)

(2) "Per capita" at each generation

d) **Share of Ancestors and Collateral Heirs**

i) **Table of Consanguinity**




**STOP!** Be **sure** you **are not** distributing to inappropriate non-blood relatives (*e.g.*, someone's husband)!!

ii) **Mass General Laws § 2-103 – Share of Heirs other than Surviving Spouse**

(1) Anything not passing to spouse passes (1) to decedent's descendants per capita at each generation, (2) if none then to decedent's parents, (3) if none, then to descendants of parents per capita at each generation, (4) if none, split equally between paternal/maternal grandparent sides, then to next of kin in equal degree favoring less remote

**Careful!** Be sure to note when you're going through grand-parents!

iii) **UPC § 2-103 – Share of Heirs other than Surviving Spouse**

(1) (a) Anything not passing to spouse passes (1) to decedent's descendants by representation, (2) if none, to parents, (3) if none to descendants of parents by representation, (4) if none, split equally between paternal/maternal grandparent sides, then by representation to descendants of grandparents

(2) (b) If no one from (a), then to descendants of ex-spouse

iv) **UPC § 2-106(c)** – For descendants of grandparents, shares are divided "per capita" at each generation

v) **UPC § 2-105 – No Taker** – Passes to state if no one under § 2-103

vi) **NY EPTL § 4-1.1**

(1) (a) Passes to (1) spouse/issue 50/50, (2) if no issue all to spouse, (3) if no spouse all to issue, (4) if none then to parents, (5) if none then to descendants of parents, (6) if none then split equally between paternal/maternal grandparent sides by representation **but not more remote than grandchildren of grandparents**, (7) if no grandparents and no grandchildren of them, then per capita to any surviving great grandchildren of the grandparents

**See next page for *Estate of Locke***

vii) *Estate of Locke* (NH 2002)
   (1) Locke dies intestate, no spouse, children, siblings, parents, grandparents
   (2) On maternal grandparent, 2 1st cousins (4th degree), on paternal, 4 1st cousins once removed (5th degree)
   (3) RSA 561:1, II(d) – Divide in half to paternal, issue taking equally if all are of the same degree, if unequal degree, more remote take by representation, and the other half passes to maternal in the same manner
   (4) RSA 561:3 – No representation allowed among collaterals beyond 4th degree
   (5) Held: 561:3 only kicks in if, *on one of the sides*, there are issue of different degree such that there will be taking by representation – here all on each side are of the same degree

e) **Community Property**
   i) Property acquired during marriage (other than by gift or inheritance) is the product of joint efforts of husband and wife
   ii) Each spouse has testamentary disposition only over his/her half thereby guaranteeing the other spouse half of the marital property
   iii) When one spouse dies, their separate property and their half are distributed
   iv) **Wash. Code § 11.04.015 – Descent and Distribution of Real/Personal Estate**
      (1) (1) Share of surviving spouse or state registered partner
         (a) (a) All of decedent's share of net community estate and
         (b) (b) ½ of the net separate estate if the intestate is survived by issue
         (c) (c) ¾ of the net separate estate if no surviving issue, but one or more parents, or issue of one or more parents or
         (d) (d) All to spouse if no one from (b)-(c)
      (2) (2) Shares of those other than the spouse
         (a) (a) To issue of intestate, if in the same degree then equally, otherwise more remote take by representation
   v) *Estate of Borghi* (Wash 2009)
      (1) Issue: Whether real property bought by one spouse before marriage was moved into the marital estate by signing a deed in both her and the spouse's name
      (2) 2 presumptions – (1) Property acquired before marriage is separate, (2) "Joint gift presumption" which arises when there is a change in title to include both spouses
      (3) Rule – Character of the property as separate is determined when acquired
         (a) Once established, must rebut by showing intent to transmute into community
      (4) Held: Separate property, would have to quit claim and reestablish as community
      (5) Dissent – Any lay person would assume that putting the deed in both names would move the property into community property
      (6) Note: Some evidence showed they were treating it as community property

f) **Half-Bloods**
   i) **UPC § 2-107** – Halfblood = Whole blood (Same in NY)
   ii) **FL 732.105** – Halfblood takes half share
   iii) **MS § 91-1-5** – Halfblood loses to whole blood of same degree
      (1) *Jones v. Stubbs* – Also lose to those who inherit from wholeblood of same degree
   iv) **OK 84 § 222** – Halfbloods don't inherit property received from decedent's ancestor unless halfblood shares the same ancestor

g) **Adoptees**

i) **UPC § 2-118 – Adoptee and adoptee's adoptive parent or parents**

(1) (a) Parent-child relationship between adoptee and adoptive parent(s) exists

ii) **UPC § 2-119 – Adoptee and adoptee's genetic parents**

(1) (a) No parent-child between adoptee and genetic parents unless otherwise

(2) (b) Stepchild adopted by stepparent

(a) Parent-child between individual adopted by the spouse of either genetic parent and (1) genetic parent whose spouse adopted the individual and (2) the other genetic parent, BUT only to allow adoptee or their descendants to inherit from that genetic parent (NOTE this only goes 1-way towards the kid)

(3) (c) Individual adopted by relative of genetic parent has parent-child with them and the genetic parent, but only to inherit from the genetic parent

(4) (d) Individual adopted after death of parents has parent-child relationship with genetic parents for purposes of inheritance

(5) (e) Child of assisted reproduction is the kid of whoever they came out of

Adoptive parent inherits from adopted child

Non-adopting genetic parent (and kin) do not inherit from adopted child

iii) **UPC § 2-113** – If adoption by a relative (related through more than one line), you get to inherit from whichever line gives you more $, but not both

iv) *Estates of Donnelly* (Wash 1972)

(1) RCW 11.04.085 – Lawfully adopted child is not considered the heir of his natural parents for purposes of this title

(2) Notably silent about inheriting from natural grandparents and obviously does not contemplate step-parent adoptions

(3) Held: Child cannot inherit from genetic grandparents because she is no longer the natural heir of her biological father who would inherit from them

(4) Dissent points out that the child had a good relationship with the grandparents, thus none of the circumstances contemplated by the legislature are present

h) **Simultaneous Death**

i) **UPC § 2-104 – Requirement of Survival by 120hrs**

(1) (a)(1) Individual born before decedent's death who fails to survive decedent by 120hrs is deemed to predecease unless C&C shows otherwise

(2) (a)(2) Individual in gestation at decedent's death is deemed living if they survive 120hrs after birth by C&C evidence

ii) **UPC § 2-702** – Same for (a) surviving an event, (b) construing written instrument, (c) property in joint tenancy w/ right of survivorship, (d) doesn't count if instrument contemplates simultaneous death

iii) *Estate of Villwock* (Wisc. 1987)

(1) One spouse has a daughter from previous marriage, issue is whether her parent died first when both spouses died as a result from a car accident

(2) Facts – After the accident, father goes into arrest in ambulance, after attempts to revive at hospital, he is declared dead after the wife

(a) Doctor testifies he died in ambulance and attempts in hospital were academic

(3) Wisc. 146.71 – Determination of death is made according to accepted medical standards

(4) Simultaneous death – If no sufficient evidence other than simultaneous then estate divided as if they each survived the other

(5) Held: Doctor testimony established that father died first

i) **Disclaimer**

i) **Relation Back** – A properly executed disclaimer is treated as if the beneficiary never received the interest (*i.e.* relates back to the moment they got the inheritance)

ii) *Estate of Baird* (Wash. 1997) (holding that the plain language of Washington statute does not allow anticipatory disclaimer of an expectancy interest created by intestacy)

(1) Attempt to disclaim interest in inheritance from mother to keep it from wife who had a judgment against him

(2) Property that be disclaimed includes an interest *created* by intestate succession

(3) Note: He was in bankruptcy and the code wouldn't allow disclaimer within 180d of filing, thus this was an attempt to disclaim before the bankruptcy

iii) **Federal Tax Liens**

(1) *Drye v. US* (1999) (holding that disclaimer cannot defeat federal tax lien)

(a) Reasoning that power to channel the assets constitutes taxable property

iv) **Bankruptcy**

(1) Two courts have held that *effective disclaimer under state law* prior to filing prevents the trustee from attaching the assets (*See Estate of Baird*)

v) **Public Assistance**

(1) *Molloy v. Bane* (NY 1995) (holding that renounced distributions count for calculating Medicaid benefits – policy that benefits should only go to truly needy)

vi) **Tax Consequences**

(1) By disclaiming assets, beneficiary gives the money to children without paying taxes – thus the kids get it by only paying taxes once rather than twice

vii) **UPC § 2-1105/6**

(1) 1105(a) May disclaim in whole/part, may disclaim appointment

(2) 1105(b) Fiduciary may disclaim as representative

(3) 1105(c) Must be in writing or on record, must declare disclaimer, describe what is disclaimed, be signed and filed

(4) 1105(e) Irrevocable on delivery

(5) 1106(b)(1) Effective on death or whenever instrument became irrevocable

(6) 1106(b)(3)(B) Passes as if disclaimant had died immediately before the time of distribution

NOTE – 1106(b)(3)(C) says if descendants of disclaimant would share by representation if disclaimant pre-deceased T, then **they only share in D's share, *not* by representation as if D pre-deceased**

j) **Advancement**

i) Common law – When parent gives something to child in life, it is an advance on inheritance and is subtracted later

ii) **UPC § 2-109 – Advancements**

(1) (a) Advancement only if (i) declared in writing or heir acknowledged in writing that it is an advancement or (ii) declared/acknowledged that it will be taken into account for computing division of the decedent's estate

(2) (b) Property advanced is valued at time heir came into possession or at decedent's death, whichever is first

(3) (c) If recipient doesn't survive decedent, property isn't considered in computing the division of decedent's estate unless writing provides otherwise

(4) Note: If recipient's share is smaller than the advancement, they are not required to pay anything back into the estate

3) **WILLS – FORMATION**

a) **Formalities**

i) **UPC § 2-502 – Execution, witnessed wills, holographic wills**

(1) (a) Will must be (1) in writing, (2) signed by testator, or in their name by another in testator's presence and by their direction and

(2) (3) either (A) signed by 2+ individuals within a reasonable time after the individual witnessed either the signing or acknowledgement of the signature or (B) acknowledged by testator before a notary public or equivalent

(3) Cmt – Witness can sign within reasonable time of testator's execution

ii) **NY § 3-2.1**

**NOTE**: In non-UPC jurisdictions, argue substantial compliance. For UPC, argue § 2-503

(1) (a) Must be in writing, (1) signed *at the end* by testator or proxy, ((B) anything after signature doesn't count, (C) proxy cannot also be a witness)

(2) (2) In front of 2+ witnesses, or acknowledge signature to each witness if signs not in their presence (each separately)

(3) (3) Inform each witness that this is testator's will

(4) (4) All sign within 30d

(5) (b) No need to do everything in order

iii) **TX § 251.051 – Written, signed and attested**

(1) Will must be (1) in writing, (2) signed by (A) testator in person or (B) another on their behalf (i) in testator's presence and (ii) under testator's direction and

(2) (3) attested by 2+ credible witnesses over 14y who sign in testator's presence

iv) **Holographic Will** – Non-witnessed will with material portions in testator's handwriting (minority of states, but includes CA)

b) **Presence**

i) *Moris v. West* (TX 1982) (holding that will was invalid when attesting witnesses were not in the presence of the testator when witnesses signed the will)

ii) **Conscious Presence** – Some jurisdictions allow witness to be where testator, unless blind, is able to see them from his actual position or from a slightly altered position where he can make the alteration without assistance

c) **Signature** – Essentially anything that can be identified as testator's mark

i) NOTE – If T can't sign by themselves, *they should* ***ask for help***

**Watch out for helpers that T didn't ask for!**

d) **Witnesses**

i) Most states require 2, LA and Puerto Rico require 5

ii) Often law office personnel, must be competent to testify, should be someone who will remember it

iii) DO NOT USE

(1) Anyone who might contest the will (someone named in intestacy statute)

(2) Anyone who is named in the will (interested parties)

iv) **NY § 3-3.2 – Competence of Interested Witness**

UPC does not disqualify interested witnesses, but information is used to evaluate undue influence

(1) (a) Interested witness is competent subject to: (1) any interest is void unless there are 2+ other witnesses who are disinterested, (2) their interest is effective unless the will cannot be proven without their testimony

(2) (3) Any witness with a void disposition who would take if the will wasn't established, is entitled to get up to what they would have gotten if the will was invalid

v) Note: Some states invalidate the entire will, not just the part for the interested witness

e) **Attestation Clause**
   i) Establishes facts that occurred at the ceremony, not required by statute
   ii) Creates a rebuttable presumption that will is validly executed and events described in the clause actually occurred – thus it is good so long as witness can ID their signature

f) **Self-Proving Affidavit**
   i) Serves as testimony to show witness saw the signing and is the person that signed it
   ii) Attached to will, signed by witnesses, testator, and notary at time of execution
   iii) Sufficient to lay foundation for will to be admitted to probate, eliminates need to track down witnesses unless will is contested
   iv) **UPC § 2-504** – Drafter may combine attestation clause and self-proving affidavit

g) **Keeping the Will**
   i) Concern is testator might lose it, keeping it in bank might limit ability to retrieve it, probate court might lose it, lawyer keeping it raises ethical issues because he may use it to make sales of services to survivors

h) **Salvage**
   i) **UPC § 2-503** – Although document wasn't executed properly (§ 2-502), it is treated as if it was if proponent establishes by C&C evidence that decedent intended the document to constitute the decedent's will
   ii) *Estate of Hall* (Mont. 2002)
      (1) Testator drafted "Joint Will" with new spouse, met with lawyer and approved draft but asked lawyer if they can make the draft official pending the final
      (2) Lawyer has them sign in front of him and he notarizes (not valid)
      (3) Final is never signed, but held that draft was valid
         (a) Reasoning that joint will specifically revoked prior, testator had wife destroy the old one, and wife testified this was his intent
      (4) Note – All data came from interested wife, & boiler plate language on will

i) **Proper Ceremony**
   i) Will in final form, numbered pages (page X of total), fastened ("blue-backer" thing that wraps around the clutch of papers and staples everything together)
   ii) Attestation clause and self-proving affidavits
   iii) 2+ witnesses
   iv) Witnesses should hang out with testator to make sure he has capacity
   v) No interested parties present
   vi) No interruptions
   vii) No one leaves
   viii) Everyone can hear and see each other
   ix) Attorney asks testator if this is his will and if he wants to sign
   x) Sign while witnesses watch
   xi) Have testator declare this is the will, etc. to the witnesses
   xii) Witnesses sign while testator watches

j) **Policy**
   i) Protective function – protects from undue influence
   ii) Ritual function – lets testator know it is important
   iii) Evidentiary function – serves as evidence of testator's intent
   iv) Channeling function – simplifies probate because similar form and structure of wills make it easier to recognize by the courts

4) **WILLS – CONTESTING WILLS**

a) **Capacity**

i) **UPC § 2-501** – An individual 10y or over who is of sound mind can make a will

ii) **Elements**

(1) Testator understands the nature and extent of her property

(2) The natural objects of her bounty (*e.g.* disinheriting a close family member)

(3) And that she is engaged in the enterprise of making a will

iii) **Analysis**

Most states uphold jury verdict if there is evidence to support the determination.

**Watch out!**
Affidavit.
Presumption
Lay witness test.

**UPC § 3-407 provides analytical framework**

(1) UPC § 3-407 – Contestants have the initial burden of proof and the ultimate burden of persuasion on issues of incapacity

(a) Self-proving affidavit creates presumption of capacity (some states)

(b) Some states require proponent to prove capacity even with self-proving aff.

(2) Stale diagnosis can be admissible if still relevant (*i.e.* a 10y/o diagnosis of a degenerative condition (*Barnes*))

(3) Lay witnesses can provide opinion about capacity **if they first detail facts that they base their opinion on** (*Barnes*)

(4) Experts can come to medical opinion based on facts in evidence even if they haven't met the testator (*Wilson*)

iv) **Standard** – *Any* evidence to support jury determination

(1) Person is mentally capable to make a will if she has sufficient intellect to enable her to have a decided and rational desire to dispose of her property (*Wilson*)

(2) *Barnes v. Marshall* (MO 1971) (invalidating will bequesting $5/y to daughter, rest to various charities based on previous diagnosis of manic depression and overall eccentric behavior of testator)

(3) *Wilson v. Lane* (GA 2005) (upholding a will bequesting part of the property to a caretaker on lay and expert (hadn't met her) testimony of her competence, in the face of eccentricities, a petition for guardianship ("just to help with day-to-day decisions"), and a diagnosis of Alzheimer's disease)

(4) *Daley v. Boroughs* (AK 1992) (upholding will based on lay testimony and a **lucid interval** theory despite evidence testator was confused, had trouble following commands, needed to be restrained and the doctor's refusal to testify)

(5) Leslie argues the court will look at the quality of the relationship between testator and disinherited heir

v) **Insane Delusion (*Dougherty v. Rubenstein* (MD 2007))**

(1) Testator's delusion must be insane and will a consequence of the delusion

(2) ID is a belief in things impossible, or belief in things possible, but so improbable under the circumstances that no one of sound mind would give them credence

(a) Eccentricity, peculiar beliefs and hostility/aversion to a relative is not an insane delusion on its own

(b) Not a general defect, instead is directed at something specific (person or thing), and therefore can be otherwise quite normal

(3) *Dougherty* – Son written out of will, argues insane delusion that father thought son had stolen money from him. Held: Not an insane delusion because, despite mistake re: money, had a rational reason to disinherit the son (placed father in a shitty boarding home). Reasoning plenty of evidence of capacity

(4) If evidence supports the ID, court will hold mistake of fact & probate (*Dougherty*)

vi) **Lawyer's Obligation to Inquire**
(1) 3rd party beneficiaries to a will can recover against attorney whose malpractice results in the invalidation of the will
(2) Primary duty of attorney is to the client – Lawyer's duty is fulfilled if the lawyer is convinced of testamentary capacity by his/her own observations & experience
(a) Can challenge the will in probate but no malpractice action for failure to investigate client's capacity
(3) *Gonsalves v. Superior Court* (CA 1993) (Woman disinherited by aunt argues malpractice for failing to investigate her capacity, held: no malpractice given adequate evidence of capacity and articulates the above rule)

b) **Undue Influence**
i) **Two Scenarios**
(1) Testator's free will is overcome by pressure from someone where they believe they have no real choice
(2) Close advisor manipulates testator into believing that the will advances the testator's agenda when it doesn't
ii) **Elements**
(1) Confidential Relationship – Relationship of trust and intimacy where testator assumes this person has their best interest in mind
(2) Suspicious Circumstances – Radical change in distribution plan, active involvement of beneficiary, testator being emotionally/physically dependent on beneficiary
(3) Once met, burden shifts to show by preponderance there was no undue influence
(a) Conflicted attorney must show by C&C that there was no undue influence
iii) *Haynes v. First National State Bank of NJ* (NJ 1981)
(1) Testator with two daughters, one died leaving 2 sons, other has 4 daughters
(2) Testator lived with dead daughter for 30y, moved in with other daughter after
(3) Daughter/husband pressure testator to change will, have her switch to husband's lawyer (who represents husband's company), result is will leaving trust to daughter with remainder split *per stirpes* at daughter's death
(a) She could draw on the principal of the trust though
(4) Court found confidential relationship with daughter and suspicious circumstances stemming primarily from presence of conflicted lawyer
(5) Held: In cases where the attorney is conflicted, proponent must prove lack of undue influence by C&C evidence
(6) Note: Testator was of sound mind, and there was some animus towards the grandsons because they eventually were estranged from her
iv) *Will of Moses* (Miss. 1969)
(1) Testator's sister contests will leaving estate to 15y younger boyfriend
(2) Confidential relationship – Yes, sexual relationship between the two
(3) Suspicious circumstances – Based entirely upon majority suspicions about the relationship/age difference (though lasted 16y)
(4) Dissent points out (1) that suspicious circumstances must surround the drafting of the will and (2) the testator was represented by independent counsel, produced multiple drafts, and had witnesses attesting to her being fine
v) Note: CA invalidates nearly all donative transfers to drafter outside narrow exception

c) **Fraud**
   i) **Elements**
      (1) Knowing false statements of material fact to testator
      (2) Made with the intention of deceiving the testator
      (3) Deceives the testator
      (4) Causes the testator to act in reliance upon the statements
   ii) **Remedy** – Constructive trust against fraudster
   iii) *Latham v. Father Divine* (NY 1949)
      (1) Testator wrote will benefitting Father Divine
      (2) Shortly before she died she drafted another one benefiting cousins
      (3) Allegation that FD had testator killed to prevent execution of the will
      (4) Withstood motion to dismiss

d) **Tortious Interference with Inheritance**
   i) **Elements (RST § 774B)**
      (1) Π had reasonable expectation of inheritance
      (2) Π would have received the inheritance but for Δ's conduct
      (3) Δ's intentional interference with the expectancy amounted to fraud, duress, or undue influence
      (4) Damages

**NOTE**: Majority of jurisdictions require Π to have no remedy in probate before they allow tortious interference

   ii) **Issues**
      (1) This is a tort claim against Δ so it doesn't affect the estate assets
      (2) This enables Π to go after *inter vivos* transfers (can't in probate)
         (a) Technically executor can claw back some *inter vivos* transfers
      (3) Remedy is damages against Δ (punitive available), and constructive trust of estate
   iii) *Estate of Ellis* (IL 2009)
      (1) Will naming Shriners Hospitals superseded by later will naming pastor
      (2) Shriners technically showed up after SOL had run
      (3) Held: Probate statute applied to "petitions to contest the will" and tortious interference is not a will contest, but tort remedy does not extend to situations where the will contest remedy is available and makes Π whole

e) **Issues With Unconventional Couples**
   i) *Will of Kaufmann* (NY 1965) (holding undue influence when testator left majority of his estate to his partner, wrote letter explaining his intentions, court focuses on fact that partner introduced testator to the attorney and managed his finances)
      (1) Dissent points out 10y relationship and indicates incidents the court focused on were isolated and non-representative

**Remember!** If contestants are **residuary beneficiaries** AND **intestate heirs**, there is no difference if the will is there or not → Π will challenge the will

If will challenge fails, residuary fails (no-contest), but goes to intestate heirs

See also Negative Inheritance: p.21 – UPC § 2-101(b) – treated as dead

f) **Devices to Avoid Will Contests**

i) **Evidence of Capacity**

(1) Explain reasoning in will, write explanation letter, prepare affidavits, video ceremony, interview testator and provide transcript, etc.

ii) **Witnesses**

(1) Have witnesses inform themselves about testator

(2) Possibly medical experts new to testator, people familiar with testator who can make comparisons

(3) Have them interview testator, have testator explain reasoning

iii) **No-Contest Clause (*in terrorem* clauses)**

(1) Modest, but conditional devises to people expected to contest which they lose if they contest the will

(2) UPC § 3-905 – Penalty Clause for No Contest

(a) No-Contest clause is unenforceable if probable cause exists for contesting will

(3) NY EPTL § 3-3.5(b) – No-contest clause is enforceable even with probable cause

(a) § 3-3.5(b)(1) – Exception if the allegation is that the will is a forgery or that the will was previously revoked

(4) What is a contest? (*e.g.*, asserting a will interpretation issue rather than challenging a will outright, asserting creditor claim, allegation that property is non-probate, etc.)

iv) **Ante-Mortem Probate**

(1) Arkansas, North Dakota, Ohio and Alaska

(2) Mostly when people under guardianship have wills prepared

(3) Exacts a high price on the testator in return for a secure will

v) **Spot the Issue – Need to Be Defensive in Preparing Will**

(1) Unconventional relationship, cutting out people that take under intestate statute (especially children), lawyer named executor, representing husband and wife

vi) *Will of Kaufmann* (NY 1965)

(1) Jury found undue influence between gay couple

(2) First will left substantial sums to brothers, later gave to Robert

(a) Court suspicious of their financial arrangements, travels, etc.

(b) Testator wrote letter discussing his reasoning/intent, but court disregards as "not grounded in reality"

(c) Majority points out that Robert introduced testator to the drafting attorney

(3) Held: Undue influence

(4) Dissent – Relationship for 10y with only isolated incidents indicating that Robert handled their business affairs which is not inconsistent of a healthy relationship

vii) **Best Practices**

(1) Agreements with testator's family to release right to contest

(2) Charitable remainder trust – Life estate in spouse with remainder to charity who will want to defend the will also (sometimes AG will step in too)

(3) Non-probate alternatives

(4) Keep the partner out of all will drafting things

5) **WILLS – FORMATION**

a) **Generally**

i) Number pages: "Page 1 of X"

ii) Use "Blue-Back" to bind entire integrated document together

iii) Initial each page

iv) **Integration** – Pages that were present at the will's execution comprise the final will

b) **Incorporation By Reference**

i) **Elements (*Estate of Norton*, UPC § 2-510)**

(1) Referenced document is in existence and complete prior to or contemporaneous with the will's execution

(2) Will must evince clear intent to incorporate the document into the will

(3) Will must clearly and specifically describe the document so there's no doubt about the identity of the document

ii) **UPC § 2-513 – Separate Writing IDing Devise of Tangible Property**

(1) Will may refer to written statement/list to dispose of items of **tangible personal property** not otherwise disposed in the will **other than money**

(2) Writing **must be signed** by testator and describe the items

(3) Writing **may** be referred to as one in existence, at the time of testator's death; **may** be prepared before or after execution, **may** be altered after preparation; and **may** be a writing that has no significance apart from effect on the dispositions made by the will

**NOTE**: A house **is not** tangible personal property

(4) Note – Stocks, cash, real estate, and the like must be disposed by will

iii) *Estate of Norton* (NC 1991)

(1) 6-page doc. w/ cover sheet describing disposition of testator's property, initialed but not signed, later 2 page codicil leaving some land to his son is executed and stapled to the 6-pages

(2) All kept in safety deposit box which also contained part of another codicil that was incomplete and unexecuted

(3) Held: The 6-pages alone are not a will, the codicil failed to make specific reference to the 6-pages and thus failed to incorporate them by reference

(4) Dissent – Stapling the document together, placing in a single envelope, then placing in safety deposit box should have been sufficient to ID the 6-pages

iv) *Clark v. Greenhalge* (MA 1991)

(1) Will designating Greenhalge executor, says that testator will designate disposition of personal property "by memorandum, or in accordance with her known wishes"

(a) Memorandum at the time

(b) Later a notebook followed by 2 codicils (which incorporate the notebook)

(2) Held: Notebook is a memorandum within the meaning of the will even if not explicitly labeled as such, language of the will doesn't preclude more than one memorandum, and codicil re-executes the memorandum clause in the will which perfects incorporation by reference

v) **Clients that Insist on "The List"**

(1) Re-execute every so often (costly)

(2) Make it and warn them that it is not enforceable if contested

(3) Outside of UPC (§ 2-513) there is no efficient way to pull this off

(4) Allocate sole decision-making to executor (also unenforceable)

c) **Facts/Events of Independent Significance**
   i) **UPC § 2-512** – Will may dispose of property by reference to acts and events that have significance apart from their effect on the dispositions made by the will, whether they occur before or after the execution or testator's death
      (1) Execution/revocation of another individual's will counts
      (2) "All employees of my favorite coffee shop" or "all stocks in my portfolio" work
      (3) Note that some place for safekeeping could be used solely for the ability to change what someone in the will receives → fails
   ii) *In re Tippler's Will* (TN 1998)
      (1) Testator's executed will and later holographic codicil directing that, if her husband predeceased her, her property should distribute according to his will
      (2) When codicil was executed, husband didn't have a will, executed 6mo prior to his death leaving her a trust remainder to his relatives
      (3) Facts showing she had a poor relationship with her family
      (4) Doctrine of independent significance – Husband's will was designed to distribute his estate and wasn't written with intention of distributing her's
      (5) TN rule requiring material provisions of holographic will to be in testator's writing – held: material issue was that she wanted it distributed in accordance with husband's will, *not* that she wanted it distributed to anyone in particular
         (a) So the holograph contained the material provisions and is valid even if specific beneficiaries are found in a different document
d) **Pour Over Will**
   i) *Inter vivos* trust is used to consolidate probate/non-probate assets (*e.g.*, life insurance)
   ii) Will devises the residuary to the trustee of the *inter vivos* trust
   iii) Issue: Incorporation by reference only works if the trust was never changed
      (1) If testator funded the trust during life, then the motive in amending it was to change the way the trust was managed, not distribution of assets → independent
      (2) Most people use "standby trusts" which are unfunded so they fail
   iv) Uniform Testamentary Additions to Trusts Act (UTATA) – Validates pour over will provisions regardless of whether the receptacle trust is funded or amended after will execution (UPC § 2-511 for same)

**Note – When something adeems, apply § 3-902 to determine abatement!**

6) **WILLS – TIME GAP PROBLEMS**

a) **Abatement**

i) **Generally/Definitions** – Determines the order of priority among devisees when value of estate is of insufficient value to satisfy all devises in the will

(1) Specific – testamentary gift of a particularly described item of property

(2) General – from the general assets of the estate instead of a particular fund/asset

(3) Demonstrative–particular amount of money drawn from a specific probate asset

(4) Residuary devise –distributes all of the property that has not been described as either a specific, general or demonstrative devise

ii) **Analysis (UPC § 3-902)**

(1) (a) Shares abate without priority between real/personal property, subject to surviving spouse's elective share according to the following order

(2) Order of Abatement (*Estate of Potter*)

(a) Property not disposed by the will

(b) Residuary

(c) General devises

(d) Specific devises

(i) General devise charged on specific property is a specific devise up to the value of the charged property, then becomes a general devise to the extent the specific property fails to fulfill the devise

**Don't forget** to mention that § 3-902 allows evidence that abatement would frustrate T's intent!

(3) Within a group (*e.g.*, general devises), you total up what is available and each person gets their proportionate percentage ("ratably" within class)

(4) (b) If will expresses an order of abatement, or there is express/implied purpose of the devise that would be defeated by the order, abate with testator intent

(5) (c) If subject of a specific devise is sold/used, abatement is achieved by appropriate adjustments in other interests in remaining assets

(6) IA Code § 633.436 – Devises to surviving spouse of any type abate last, problematic statute because estates may have to pay out debts from devises

iii) *In re Estate of Potter* (FL 1985)

(1) House to daughter and equal amount in cash to son from *inter vivos* trust her husband left her, but trust has insufficient funds

(2) Held: Residence to daughter was specific devise, payout to son was general

(a) Daughter gets the house, son gets whatever is left over from trust

b) **Exoneration** – Payment of debt owed of bequeathed property

i) **Minority** – Specific devisee is entitled to have mortgage paid at the expense of residuary unless will or circumstances that testator intended otherwise

ii) **Majority (UPC § 2-607)** – Specific devise passes subject to any mortgage without right of exoneration, regardless of general directive in the will to pay debts

c) **Taxes**

i) Common law (IA) treats taxes as claims against the estate (by residuary)

ii) Some states apportion tax liability among all beneficiaries proportional to their share (not just all on the residuary) (UPC)

iii) Will can direct against apportionment

iv) Taxes may be levied on life-time transfers, may be additional inheritance taxes, etc.

d) **Ademption**

i) **Generally** – When testator devises a particular piece of property which is disposed of before testator's death

ii) **Analysis – Common Law**

(1) Ademption occurs when the specific gift no longer exists as part of the estate

(a) Prior consumption, loss, destruction, substantial change, sale/alienation

(2) Is there a gift of a specific legacy?

(3) Is the specific legacy in the estate upon testator's death?

(a) If no → ademption – testator's intent is irrelevant

iii) **UPC § 2-606 – Nonademption of Specific Devises**

(1) (a) Specific devisee has a right to specifically devised property in the estate and

(a) (1) Balance owed from sale of item

(b) (2) Balance owed from condemnation of item

(c) (3) Balance owed from fire/casualty insurance or other recovery for injury to the item

(d) (4) Property received from foreclosure of item

(e) (5) Replacement property for real/tangible personal items

(f) (6) Pecuniary devise equal to value of specific devise if ademption would be inconsistent with testator's intent

Note: If (a)(6) applies, the devisee gets the whole amount, **not** a ratable portion

(2) (b) If specific property is sold by agent acting with authority for an incapacitated principal, devisee gets a pecuniary devise of equal value

iv) **UPC § 2-605 – Increase in Securities**

(1) (a) If devise is securities, devise includes additional securities owned to the extent they are from after execution and are the result of the described securities

(a) (1) Same organization, including by exercise of purchase options

(b) (2) Another organization resulting from merger, reorganization, etc.

(c) (3) Same organization by a plan of reinvestment

v) **UPC § 2-609 – Ademption by Satisfaction**

(1) Property given in life is treated as a satisfaction of a devise only if

(a) Will provides from deduction of the gift

(b) Testator declared in writing that it satisfies the devise or

(c) Devisee acknowledges in writing that it satisfies the devise

(2) Valued when devisee took it

(3) If devisee doesn't survive testator, presumption is reversed (satisfied unless writing otherwise)

vi) *McGee v. McGee* (RI 1980)

(1) $20k to friend, all money "standing in deposit in any bank" to kids split equally

(2) Son (power of attorney) took the bank money and bought bonds with it

(3) Held: Buying bonds adeemed the bank devise

(a) Reasoning that in another part of the will she contemplated "proceeds of the sale" of something, and that she ratified the purchase of the stock

vii) **Drafting** – Reserve specific devises to small items of high subjective value and be sure to have the will contemplate what happens if it is disposed of

For anti-lapse questions, be sure to address the differences between CL, UPC and the states

e) **Lapse**
  i) **Generally** – When the devisee predeceases the testator
  ii) **Anti-Lapse Statutes**
    (1) Common Law – When devisee predeceases testator, devise lapses
    (2) **NH § 551:12** – Saves all devises in the will to the heirs of persons that predecease
    (3) **NY EPTL § 3-3.3 (by representation)**
      (a) Unless will provides otherwise, disposition to the issue or to brother/sister of testator and they predecease testator leaving issue, disposition goes to issue
      (b) Also applies to the issue/brothers/sisters as a class
    (4) **VA § 64.1-64.1(modern *per stirpes*)** – Unless otherwise in the will, if devisee, is
      (a) Grandparent or descendant of grandparent and dead at will execution or testator's death, children/descendants of deceased devisee take in their place by representation if not in equal degree
    (5) **MD** – Gives saved gifts to beneficiaries in deceased person's will (all other states go to issue of the deceased)
  iii) **Lapsed Residuary Gifts**
    (1) At common law it went to intestacy, now apply anti-lapse statute
    (2) If anti-lapse statute is inapplicable, the rest goes to surviving residuary devisees
  iv) **Class Gifts**
    (1) Most anti-lapse statutes apply to class gifts as well (NY does not apply when devisee predeceased *execution* of the will)
    (2) Class gifts need to be precise – "to my heirs" is not a class gift
    (3) Gift within a class that lapses is distributed to the rest of the class
    (4) If the entire class gift lapses, it goes to the residuary
  v) **UPC § 2-603 – Anti-Lapse, Etc.**
    (1) (b) If devisee fails to survive testator and is a grandparent, descendant of grandparent, or stepchild
      (a) (1) Substitute gift to devisee's descendants by representation if not a class gift
      (b) (2) If class gift, goes to descendants by representation unless class is defined by "issue," "heirs," "next of kin," or equivalent
      (c) (3) Words of survivorship alone are not sufficient to opt out
      (d) (4) If will is drafted with an alternative devise, then alternative devisee takes
    (2) (c) If alternative devisee predeceases, then goes to issue of original person getting the gift

Note – Under UPC, gift to "children" = gift to "issue"

  vi) *Estate of Rehwinkel* (WA 1993)
    (1) Will giving the residuary "to those of the following who are living at the time of my death" – followed by exhaustive list of testator's family
    (2) On testator's death, his niece (named) had died a month earlier, son wanted $
    (3) Son argues will distribution to all branches of family shows intent that he take – notes a class gift to children of people testator knew pre-deceased him
    (4) Held: "Living at the time of" language opts out of anti-lapse statute
    (5) NOTE – NY courts hold that conditioning a gift on surviving testator opts out
  vii) *Morse v. Sharkey* (MI 2009)
    (1) Will: to my brothers/sisters that survive me… or to the survivor/survivors thereof
    (2) Held: "or to the survivor(s) thereof" references original group → opts out
    (3) Note: This is an incorrect application of UPC § 2-603

7) **WILLS – INTERPRETATION PROBLEMS**

a) **Negative Inheritance**

i) General rule is disinheritance provisions are ineffective

(1) Note: No-contest clause disinheriting contestant is more likely to be effective if it provides for alternative taker

ii) **UPC § 2-101(b)** – Statement that someone is disinherited is treated as if they pre-deceased the testator

b) **Mistake**

i) Rule – Mistake must appear *on the face of the will*, and it must also appear what would have been the will but for the mistake

(1) Note: This standard is almost impossible to meet

ii) *Gifford v. Dryer* (RI 1852)

(1) Will leaving out son, had been gone for 10y, presumed dead

(2) When drafting, she contemplated mentioning him, but motivations were unclear

(3) Held: Evidence showed she would have done the same thing even if she knew he was alive

c) **Ambiguity**

i) **Rule** – Must be ambiguity in the will to consider extrinsic evidence, cannot use extrinsic evidence to add in something not in the will

(1) Requires misdescription of something or a name that refers to more than one entity/person

(2) **NOTE** – Majority of courts would allow evidence of a latent ambiguity – *i.e.* a term which is not ambiguous on its face, but extrinsic evidence shows that T may have defined it differently (*e.g.*, "grandchildren" when T thinks one of his grandchildren is the product of marital infidelity and is thus not a "grandchild")

ii) *Knupp v. District of Columbia* (DC 1990)

(1) Will's 6th ¶ states residuary to the person in the 8th ¶, but no person mentioned

(2) In 2 prior wills, Knupp is given significant $, alleges intent to give him residuary

(3) Testator lawyer affidavit admitting he accidentally left out Knupp as residuary

(4) Held: Attorney affidavit is improper extrinsic evidence

Note: Modern trend is to admit extrinsic evidence when scrivener admits to an error (see RTP)!

iii) RTP § 11.2 Cmt. p – Permits extrinsic evidence to reform a mistaken omission

Note: Ambiguity problems are also "mistake" problems – be sure to address both (albeit briefly)

8) **WILLS – REVOCATION AND REVIVAL**

a) **Revocation**

i) **Generally** – Revocation by subsequent written instrument (express or implied by inconsistent provisions), by physical act to original will, or by operation of law due to changed circumstances (divorce)

ii) **UPC § 2-507 – Revocation by Writing or By Act**

(1) (a) Will is revoked (1) by subsequent will (express/implied by inconsistency), or (2) by performing revocatory act on the will with intent/purpose of revoking

(a) UPC allows partial revocation by physical act, some states don't

(2) (b) If subsequent will doesn't expressly revoke, previous is revoked by inconsistency if testator intended subsequent to replace rather than supplement

(3) (c) Testator presumed to intend subsequent will to replace previous if subsequent makes a complete disposition of the estate (rebut with C&C)

(4) (d) Assumed to supplement if subsequent will doesn't make complete disposition of estate (rebut by C&C)

iii) NOTE – Revocation of a copy usually is insufficient (*Gushwa*), but RTP allows it if testator mistakes the copy for the original

iv) **NY SCPA § 1407 – Proof of Lost and Destroyed Will**

(1) Admitted to probate only if (1) will isn't revoked, and (2) execution is proved and (3) all provisions are proved by 2 witnesses or by a copy/draft

v) **Cases**

(1) *Gushwa v. Hunt* (NM 2008)

(a) Will gives trust for wife to be distributed to his nieces/nephews at her death

(i) Will in Ted's possession (not taking under the will)

(b) Wife claims decedent called Ted asking for the will and he refused

(c) Ted claims wife asked for it, called the lawyer who told him to call decedent

(i) Decedent instructed him to send a copy of 3 pages

(d) Decedent gets another lawyer, drafts "Revocation of Missing Wills," wrote "revoked" on the 3 copied pages, and on copy of the will from former attorney

(e) NM – Will can be revoked with subsequent will expressly/impliedly

(f) FL – Will can be revoked with subsequent will expressly/impliedly or through revocation executed with same formalities

(g) Held: NM doesn't allow revocation by other document, photocopies are not the same as the original – remand to determine if Ted prevented revocation

(h) Dissent wants revocation to be a will – signed by witnesses and notarized

(2) *Ward-Allen v. Gaskins* (DC 2010)

(a) 1992 will, then 1995 codicil revoking 3 items in the will and changing alternative representative – dies in 2001, in 2006 petition to probate

(b) 2008, testator's nieces (old alternate) file objections that codicil is no good because Ward-Allen filed copy

(c) Rule – If a will can't be found at death, presumption that testator destroyed

(i) Show by preponderance that testator didn't

(d) Held: Even if codicil is revoked, it doesn't revive the revoked portions of the original will without being re-executed

vi) **UPC § 2-804 – Revocation by Operation of Law (Post-1990)**
   (1) (b) Divorce revokes any revocable disposition of property to the spouse or any relative of the former spouse, and any nomination of the spouse/relative to representative capacity unless otherwise by law, K or the will
   (2) (d) Works as if spouse/relatives disclaimed all provisions revoked, or for nominations to fiduciary capacity – as if they died before the divorce
   (3) (e) Revival if divorce is nullified

vii) **UPC § 2-508 (Pre-1990)**
   (1) If testator is divorced/annulled, it revokes any disposition/appointment of property made by the will to the former spouse, any power of appointment, nomination as executor, etc. unless the will expressed otherwise
   (2) Works as if spouse failed to survive decedent
   (3) **Note: does not revoke bequest to ex-spouse's family, applies to testamentary bequests, NOT non-probate assets**

viii) **ERISA** – Non-probate assets pass according to federal law (which doesn't automatically revoke on divorce) which preempts state law

ix) **Pre-Marital Wills** – Some states revoke entire will, some give spouse elective share, some make spouse "pretermitted" or "omitted"

b) **Revival**

i) **Generally** – Will can be revived by re-executing, or "republishing" through incorporation by reference with codicil

ii) **UPC § 2-509 – Revival of Revoked Will**
   (1) (a) If subsequent will wholly revoked previous, and is thereafter itself revoked, the previous remains revoked unless revived which occurs if testator's intent was to have the previous will take effect as executed
   (2) (b) If subsequent will partly revoked previous, and is thereafter itself revoked, the revoked part of the previous is revived unless testator intends otherwise
   (3) (c) If subsequent will that revoked a previous will in whole/part is thereafter revoked by another, later will, the previous will remains revoked unless revived which can happen by terms of the later will

iii) **RTP § 4.3 – Ineffective Revocation**
   (1) (a) Partial/complete revocation is presumptively ineffective if made
      (a) (1) In connection with an attempt to achieve a dispositive objective that fails
      (b) (2) Because of a false assumption of law, or belief about an objective fact that is recited in the revoking instrument or found by C&C
   (2) (b) Presumption is rebutted if allowing revocation to remain would be more consistent with testator's intent

iv) *Oliva-Foster v. Oliva* (IN 2008)
   (1) 1995 will, then 2002 will both leaving stuff to wife and kids
   (2) Kids allege 2002 is invalid and 1995 is revoked
   (3) **Dependent Relative Revocation** – Testator destroys will with present intention of making a new one as a substitute, if the new one isn't made/fails, the old one is admitted to probate absent evidence overcoming presumption that testator preferred the old will to intestacy
   (4) Held – Testator ordered destruction of old will after the new was made therefore 1995 kicks back in if 2002 will fails

c) **Contractual Wills**

i) **UPC § 2-514 – Contracts Concerning Succession**

(1) Established by

(a) Provisions of a will stating material provisions of the K

(b) Express reference in a will to a K and extrinsic evidence of the terms

(c) Writing signed by decedent evidencing a K

(2) Execution of joint/mutual wills does *not* create presumption of K not to revoke

ii) Factors to determine if will is a K

(1) Provision for distribution upon death of survivor

(2) Provision for disposition of any share in case of lapsed residuary

(3) Use of plural pronouns, joinder and consent language

(4) Identical distribution of property on death of survivor

(5) Joint revocation of former wills

(6) Consideration – mutual promises, etc.

iii) *Garrett v. Read* (KS 2004)

(1) Husband/wife reciprocal wills leaving to spouse, then evenly across children

(a) "To my husband absolutely"

(2) Wife re-writes her will cutting out his kids and her grandkids

(3) Held: Will reciprocal provisions, and drafting attorney testimony that survivor couldn't cut out testator's kids, but court cut out their own

(4) Result – Will is probated but husband's kids have a creditor claim on the estate

**REMEMBER** – Easy factual points when you have party to a K that later makes $$$ – they contracted to the distro at the time of the K and not to distro of the later $

*i.e.* you can find a K exists **AND** argue that each party will have different interpretations of what the K terms are

9) **TRUSTS – FORMATION AND BASICS**

a) **Generally – Requirements (Trustee, Beneficiaries, Property)**

i) Settlor – Creator of trust

ii) Trustee (**appointed by court if no trustee is named!**)

(1) Has fiduciary duties (loyalty and care) to beneficiaries

(2) Typically want a trustee appointment mechanism for appointing new trustees

(3) Sole trustee cannot also be sole beneficiary → merger and trust fails

iii) Beneficiaries (sole trustee and sole beneficiary can't be the same → merger)

(1) Trust to animals, or for purpose are no longer presumptively invalid

(2) **RTT §46-47** – Power but no duty to indefinite class of persons ("my friends") or non-charitable purpose ("clean my grave" – less than 21y)

(3) If beneficiaries are indefinite and no extrinsic evidence → revert to heirs; if beneficiaries can be proven by extrinsic evidence (secret trust) → ok

iv) Trust property – Current and identifiable (NO "anything I inherit from my mom")

b) **Trust Creation (Capacity, Intent, Formalities)**

i) **Two Methods – Private Express Trust or Charitable Trust**

(1) Testamentary Trust – Created in will

(2) *Inter Vivos* Trust – Created during life

ii) **Capacity**

(1) Testamentary or revocable trust requires same as will

(a) Comprehend nature/extent of assets, know objects of his bounty, understand you're making a will (or trust I guess)

(2) Irrevocable trust requires capacity for gift → must understand the effect the gift has on settlor's future financial interests/security

(3) If part of negotiated settlement, requires capacity to make a K

iii) **Intent** (**Precatory Words** – Words expressing desire/request)

(1) *Spicer v. Wright* (VA 1975)

(a) Leave all to sister "to be disposed of as already agreed between us"

(b) IF intent to create, but trust fails for indefiniteness → goes back into will/intestate succession and husband (rather than trustee/sister) gets it

(c) Precatory words are *prima facie* a trust when directed to executor, but not if directed to legatee unless intent to impose legal obligation to make specific disposition of property is clear

(d) Held: No evidence to impose duty on sister – no evidence of terms, details, etc. – no obligation to distribute → all to sister

(2) *Levin v. Fisch* (TX 1966)

(a) "It is my desire that …$2400 [of the shit I'm leaving you be given to my sister each year you greedy bastards]"

(b) For 2y, testator was paying sister $200/mo to help her, creates inference that precatory language was intended to obligate the kids

(c) Express intent to obligate the kids to specifically pay the sister an amount of $ each year → trust created and not invalid

(3) Note – Consider who it is given to (family vs. accountant/lawyer), and how specific the mandate is (can you figure out what they're supposed to do?)

(a) If it is clearly a trust but fails – back to estate, if not clearly a trust → gift to the putative trustee

**Note**: CL does not require formalities!

iv) **Formalities**
  (1) FL § 737.111 – For express trusts requires will formalities
  (2) NY EPTL § 7-1.17 – Requires signature of settlor, at least one trustee, either acknowledged by notary or signed by 2 witnesses
  (3) Delivery
    (a) Settlor must deliver property to named trustee
    (b) NY EPTL § 7-1.18 – No trust until title of real property transferred and stocks are re-registered into trustee's name
    (c) RTT cmt. b – Delivery of trust document sufficient
    (d) If settlor = trustee – usually declaration is enough, but will scrutinize settlor's use of property after declaration to determine if there is a trust
  (4) *Goodman v. Goodman* (WA 1995)
    (a) Tavern to mother to hold "until the kids were ready"
    (b) Held: Trust created for "when they're ready" – NOT "when they're 18" so SOL didn't toll until the first kid showed and was rebuffed
    (c) Note: Oral trust is created here, extrinsic evidence to prove terms

v) **Non-Trust Trusts (Constructive/Resulting)**
  (1) Constructive Trust – Remedial device preventing unjust enrichment
    (a) *E.g.*, B violates oral promise to hold A's property in trust for C
  (2) Resulting Trust – When settlor *intends to create a trust*, but the trust fails

c) **Estate Planning for Minor Children**
  i) **Contingencies** – Death of testator prior to spouse, death of testator after/concurrently with spouse
  ii) **Key Provisions** – Nominate guardian for primary care, create testamentary trust for child usually with guardian as trustee
    (1) Dispose of non-probate assets (alternative beneficiaries – *e.g.* trustee)
    (2) Ensure spouse's will is reciprocal/similar, but with statement it isn't a K

d) **Considerations – Select Appropriate Trustee, then Appropriate kind of Trust**
  i) **Choosing Trustee** – Consider possibility of abusing position, how long they will survive, whether there is a mechanism to appoint a new one
    (1) Careful choosing same trustee/beneficiary because remaindermen have standing and may sue about every transaction
  ii) **Remaindermen** – Don't make them trustees because they won't pay out shit
  iii) **Institutional Trustees** – Fine, but they self-deal and they're allowed to

e) **Types of Trusts (Discretionary, Support, or Hybrid)**

i) **Discretionary** – No mandatory obligation on trustee – pay income/invade principal for beneficiaries – can consider beneficiary's finances, etc. ("absolute discretion")
   (1) Spot: Create trust but no guidance how to distribute the assets to B

ii) **Support Trust** – Power to pay income for the support of beneficiary – Spot: "for the support and maintenance of B"
   (1) Must pay irrespective of beneficiary's individual financial situation
   (2) Duty to pay – Consider standard of living at trust creation
      (a) Definitely pay for necessary medical stuff, or things clearly within testator's intent and B's standard of living, otherwise discretion of T
   (3) *Wells v. Sanford* (AK 1984)
      (a) "I authorize T to expend for the support and maintenance of B"
      (b) Balance to trustee (who is also guardian of B)
      (c) Held: Trustee must pay for B's nursing home from trust assets – can't consider B's assets absent language by testator showing intent that guardianship assets be exhausted first

iii) **Hybrid** – Spot: "to distribute in T's uncontrolled discretion, as T deems necessary *for the support and maintenance* of B"
   (1) Standard of Conduct – Duty of prudence, good faith, and reasonableness
      (a) Focus on settlor's objectives!
   (2) *Marsman v. Nasca* (MA 1991)
      (a) "B be provided with *reasonable maintenance, comfort and support*… pay the net income to B, and *after considering available sources of support for* B, rest to daughter's trust" – Mandatory WRT income, discretion WRT principal
      (b) Exculpatory clause – Only liable if willful neglect or default
         (i) Lawyer drafted and is also trustee
      (c) Trustee's neglect resulted in B having to give home to daughter, when B/daughter died, son in law evicted B's new wife
      (d) Remedy – Trust principal equivalent to what would have kept B in the home goes to Π → exculpatory clause makes lawyer not personally liable
      (e) Note: Discretion has to mean something – denying payment for the home was an abuse of discretion

10) **TRUSTS – DUTY OF LOYALTY**
   a) **UTC § 802 – Duty of Loyalty**
      i) (a) Trustee administers trust solely in the interests of beneficiaries
      ii) (b) Transactions are voidable unless
         (1) (1) Authorized by terms of the trust
         (2) (2) Approved by the court
         (3) (3) Beneficiary didn't sue within SOL
         (4) (4) Beneficiary consented/ratified/released trustee
         (5) (5) Transaction involves K entered into or claim acquired by trustee before they became/contemplated becoming trustee
      iii) (c) Transactions are *rebuttably* presumed to be affected by conflict of interest if entered into by the trustee with
         (1) (1) Trustee's spouse, (2) descendants, siblings, parents, or their spouses, (3) agent or attorney of trustee or
         (2) (4) Corporation/other enterprise in which trustee, or person that owns significant interest in trustee has an interest that might affect trustee's best judgment
   b) **No Further Inquiry** – Permits beneficiary to rescind *any interested transaction* regardless of fairness (NOTE: UTC § 802(c) allows showing fairness!!!)
      i) Thus *interested transactions require prior approval*! (UTC § 802(b)(2)/(4))
      ii) Self-dealing can be authorized by settlor, but *no blanket immunity* (UTC § 802(b)(1))
   c) *Matter of Kinzler* (NY 1993)
      i) Will leaves 1/3 to each of 2 daughters, with 1/3 in trust to third daughter with other two as trustees (spouse of one daughter is also the will drafter/executor)
      ii) Executor sold house (trust has 1/3 interest) to one daughter (co-trustee breach of duty of loyalty) and paid his wife (other co-trustee) in cash and gave debt to the trust (breached duty of impartiality)
      iii) Held: Court docked the legal fees the lawyer paid himself from the estate
   d) *Matter of Estate of Rothco* (NY 1977)
      i) **Conflicts**
         (1) Reis sold paintings to MNY where he is director/secretary/treasurer and also collector who sells paintings through MNY and profits if MNY is famous
            (a) UTC § 802(c) – "No further inquiry" when conflicted transaction – beneficiaries can void without going to fairness
            (b) Held: Transaction is unfair whether or not "no further inquiry" applies
         (2) Stamos is an artist trying to curry favor with MNY
         (3) Levine capitulated to R/S (in NY requires unanimity between executors)
      ii) **Conflicted Transactions**
         (1) In 3 weeks, 100 paintings to MAG for $1.8mil (paid over 12y interest free), 700 to MNY sold at 40-50% commission (10% while T was alive)
         (2) Sold 57 paintings in violation of court restraining order
      iii) **Damages**
         (1) Levine – $6.5mil; All others joint and several for $9mil and Levine's damages
         (2) Rule – When transaction is negligent, damages are difference between sale and market price at transaction time
         (3) Rule – When transaction is conflicted, you get difference between sale and market price at time of litigation

**NOTE**: Disbursements outside of the trust instructions are a breach of the Duty of Care!

11) **TRUSTS – DUTY OF CARE**

a) **Analysis**

i) **Duties** – Duty to inform/account to beneficiaries, obtain highest price on sale of assets, special duties re: delegation, special duties re: investments/diversification

ii) **Duty to Inform/Report**

(1) Normally periodic → Quarterly/yearly

(2) Duty to pre-inform beneficiaries when there is a *material*, *non-routine transaction* which significantly affects the trust estate (*Allard*)

iii) **Price** – Shown by appraisal or market test (*Allard*)

iv) **Delegation**

(1) CL – Trustee cannot delegate *material or discretionary* functions of trustee

(a) Trustee can seek expert advice, but must exercise *independent judgment*

(2) RTT/UPIA – Exercise care in (1) choosing delegate, (2) forming terms of delegation, and (3) monitoring the delegate's performance

v) **Diversification/Prudent Investor**

(1) Primary objective is protection of principal, secondary is generating income

(2) Prudent Investor – Evaluate each investment individually

(3) Portfolio Theory – Evaluate investment portfolio as a whole

(a) Consider: Whether risk is diversifiable, reasonable care, risk tolerance of trust

(4) Exculpatory clauses are unenforceable if they allow bad faith or abuse of confidential relationship (UTC § 1008)

(5) Inception Assets – Absent specific instructions, trustee breaches duty of care if they retain/fail to reduce overinvested assets (*See In re Estate of Janes*)

vi) **Multiple Trustees/Beneficiaries**

(1) Default is majority rule for trustee action (can be altered), generally no liability for breach by co-trustee

(2) Duty of impartiality between beneficiaries, must articulate reasons for disparities

vii) **UTC § 1008 – Exculpation of Trustee**

(1) (a) Exculpation is unenforceable if it (1) excuses bad faith/reckless indifference, or (2) was inserted because of abuse by trustee of a fiduciary or confidential relationship with settlor

(2) (b) Exculpation drafted by trustee is invalid as abuse of fiduciary/confidential relationship unless trustee proves the term is fair under the circumstances and was adequately communicated to settlor

viii) **Multiple Trustees**

(1) Default requires majority of trustees to join before action can be taken

(a) Altered through express trust language

(2) Trustees can delegate responsibilities between each other, but still duty to monitor

(3) Generally no liability for breach of duty by co-trustee

ix) **Multiple Beneficiaries**

(1) Duty of impartiality as between beneficiaries

(2) Must share info equally between them

(3) Must articulate reasons for disparate treatment between them

b) **Cases**
   i) *Allard v. Pacific National Bank* (WA 1983)
      (1) Discretionary trust, asset is land w/ 99y lease and right of first refusal for renter
      (2) Trustee sold property, lessee offered $140k, trustee countered $200k → sold
      (3) Held: Required appraisal, inform beneficiaries to get counter offer, or sale on open market
         (a) Duty to inform of material, non-routine transaction
   ii) *Shriners Hospitals for Crippled Children v. Gardiner* (AZ 1987)
      (1) Trust for daughter/grandsons, Π is remainderman
      (2) Daughter-trustee puts assets with brokerage house and allows grandson to run investments resulting in his embezzling $300k
      (3) Held: Liable to Π, mother should have stepped down, can't delegate functions of trustee → must exercise independent judgment
   iii) *In re Estate of Janes* (NY 1997)
      (1) Trust to wife for life, remainder to charity (AG joins suit)
      (2) Issue: Estate is in Kodak Stock which took a shit
      (3) Held: Δ violated prudent person standard when he maintained the high concentration of Kodak stock while it took a total shit
         (a) Must determine the time they should have sold it for damages
   iv) *McGinley v. Bank of America* (KA 2005)
      (1) Settlor sues trustee for holding Enron stock for 9mo while it crashed
         (a) Trust gave settlor power to direct investments, she signed a letter from the bank exonerating them from loss or duty to monitor the Enron stock
      (2) Held: Bank shielded by letter – Exoneration letter was specific (not blanked)
         (a) Note: Exoneration was still over-broad – should still have duty to inform, but doesn't persuade the court

12) **TRUSTS – PROTECTING FROM CREDITORS**

a) **Analysis**

i) When creditor attaches a trust, they step into the beneficiary's shoes

(1) Get no more and no less than beneficiary is entitled to

ii) Note – If trustee pays out to a creditor that trustee is not required to, trustee may be in breach of duty to remaindermen

iii) **Pure Support Trust**

**NOTE!** Go through each of: support, discretionary and UTC § 504!

(1) Common Law – Non-support related debt cannot attach, support related debt can attach, and can compel payment if refused by trustee

(2) UTC – Same, but cannot compel if trustee refuses payment (only beneficiary can)

iv) **Pure Discretionary Trust** (*Wilcox*)

(1) Beneficiary/creditor can't compel payment

(2) If creditor attaches and trustee pays out *anything to anyone* (to/for beneficiary), trustee is personally liable to creditor

v) **UTC § 504** – Creditors (except ex-spouse and dependent children) cannot claim abuse of discretion for *failure* to pay out from trust (even if required by trust)

vi) **Spendthrift Provision**

(1) Valid only if it prevents *both* voluntary assignments by beneficiary *and* involuntary garnishment by creditors

(2) Some states allow providers of necessaries to attach

(3) Some states allow attachment of payments not for "education or support" – but "support" refers to Δ's "station in life"

(4) NY EPTL 7-1.5 – All trusts are spendthrift trusts unless indicated otherwise

(a) Supplier of necessaries or payments above "station in life" can be attached

(5) RTT § 58 cmt. a – If beneficiary can have principal paid out any time he calls for it, spendthrift provision is invalid

(6) UTC § 503 – Exceptions to Spendthrift Provisions

(a) (b) Child, spouse, former spouse with judgment for support/maintenance, or lawyer protecting the trust may attach trust assets

(b) (c) Provision is unenforceable against claim of the US or states if law provides

(7) No exception for tort creditors (*Scheffel v. Krueger*)

vii) **UTC § 505 – Creditor Claim Against Settlor (Self-Settled Spendthrift Trust)**

(1) (a) Despite spendthrift provision

(a) (1) Property of revocable trust is attachable during settlor's life

(b) (2) In irrevocable trust, creditor can reach max amount that can be distributed to/for settlor's benefit

(i) Note: Literally just look at trust, figure out the max the beneficiary could get *under any circumstance* → *any* creditor can attach that amount

(ii) Only if trustee's hands are tied (*e.g.*, only pay income on specified interval) would you get less than the whole

(c) (3) After death, subject to settlor's right to direct source from which liability will be paid, property of trust that was revocable on death is subject to creditor claims, estate costs, etc. to the extent probate estate is inadequate

viii) **Asset Protection Trusts (Self-Settled Spendthrift Trusts)**

(1) Foreign (*Affordable Media*) – "Event of duress" causes settlor to be removed as co-trustee – typically settlor is also "protector" giving limited powers to veto trustee decisions (sometimes hire/fire trustee)

(a) Note: Contempt if court finds Δ has some ability to repatriate funds

(2) Domestic

(a) Must be irrevocable, have choice of law provision, have spendthrift clause

(b) Trustee power: Complete discretion (some states), settlor can demand income payments (some states), support trust/required disbursements allowed (DE)

(i) DE – Cannot require payments at beneficiary's request, only discretionary

(c) Trustee must be resident of state or commercial trustee from within state

(i) Trust Advisor – Non-settlor can direct trustee investment/disbursements

(ii) Settlor can hire/fire trustees, give trustee discretion to invade principal

(iii) Can have 5% principal per year pay out provision

(iv) Trustee has administrative duties

(d) Some trust assets are within the state

(e) DE removes trustee automatically when trustee is brought under court order

(f) Exceptions

(i) Fraudulent transfers into trust can be attached

(ii) If debt arose before trust created and suit brought within SOL

(iii) Of debt arose after and brought within 4y of trust creation

(iv) Exception for alimony

(g) Note: Physical assets like homes can still be seized by state where located

b) **Cases**

i) *Wilcox v. Gentry* (KA 1994)

(1) Pure discretionary trust, creditor attaching fraudulent transfer judgment

(2) Held: No distinction between payment *to/for the beneficiary* (RST § 155(2))

(a) Beneficiary (and creditor) can't compel discretionary trustee to pay

(b) But if creditor attached, they can receive *any money* paid out, and if trustee doesn't pay attached creditor, trustee is *personally liable*

ii) *Scheffel v. Krueger* (NH 2001)

(1) Π sues Δ for sexually assaulting her minor child and putting video on internet

(2) Seeks to attach Δ's spendthrift trust – Instructs quarterly payment or more frequently if beneficiary asks in writing, can't invade principal til he's 50y/o

(3) Statutory spendthrift exceptions – Beneficiary is settlor, or fraudulent transfer into the trust – tort judgment is not an exception

iii) *FTC v. Affordable Media* (9th Cir. 1999)

(1) FTC suing Δ for Ponzi scheme, trying to attach trust in Cook Islands

(2) Trust – In an "event of duress," Δ is removed as co-trustee preventing repatriation

(a) Discretionary trust and trustee is foreign, so court can only deal with Δ who is claiming their hands are tied

(3) Inability to comply is a defense to civil contempt

(a) Δ is a "trust protector" – Can hire/fire trustee, decide what is "event of duress"

(b) Held: Protector is sufficient control → contempt

(4) Note: Usually protector only gets veto power

13) **TRUSTS – AVOIDING PROBATE**

a) **Non-Trust Vehicles**

i) **Totten Trust/POD Designation** – Bank deposit made "in trust" for beneficiary

(1) Depositor has free access to $, turns over what is left to beneficiary on death

ii) **Joint Account w/ Right of Survivorship** – On death of account holder, transfers to other in entirety

(1) Gives someone a present interest in the account, and heirs can challenge that it wasn't account holder's intent to create right of survivorship

(2) Note: For real property, joint tenant has right to occupy property and can force a partition (sale of property and division of proceeds)

b) **Revocable Living Trust**

i) "Declaration of Trust" – Settlor appoints herself trustee and beneficiary for life

(1) Have to move assets into the trust – change title, etc.

ii) **Pour Over Will** – To mop up assets that are not transferred into trust

(1) Residuary of T's estate is given to trustee to distribute

(2) Consolidates T's assets for management (probate/non-probate)

iii) **Challenges** – Harder to challenge for undue influence/etc.

(1) Remaindermen have no standing to challenge decisions during settlor's life

iv) **Incapacity** – Trust provision can indicate certified writing by settlor's doctor can automatically appoint another trustee and turn trust into support trust w/ broad authorization to pay out (to keep remaindermen away)

v) **Revocation** – Usually requires a writing (look at the trust document)

(1) *Heaps v. Heaps* (CA 2004)

(a) Husband/wife have house in revocable trust, becomes irrevocable at death

(b) Before wife died, they sold the house, got note to them as joint tenants

(i) Issue: Whether proceeds of sale are in the trust or not

(c) Trust document requires written revocation, and contemplates that assets may be held in beneficiary's name but are still in trust

(i) Though they acted as if the trust didn't exist, because they never wrote a written revocation

(ii) Proceeds were in the trust and the trust was valid/irrevocable

vi) **Privacy** – *Inter vivos* trust gives privacy on death – not handled by probate court

c) **Standby Trust** (*See* Incorporation By Reference and Facts of Independent Significance)

i) **UPC § 2-511 – Testamentary Additions to Trusts** (*see also* UTATA)

(1) (a) Will may devise property to trustee of trust established (i) during T's life, or (ii) at T's death, if trust is ID'd and terms are in written instrument, other than a will, executed before/concurrent/after execution of the will regardless of the size/character of trust corpus

ii) *Clymer v. Mayo* (MA 1985)

(1) T had will/trust to benefit husband, gets divorced and dies without changing it

(2) Statute: Unfunded/funded trust is valid if identified in will and terms of trust is in a written instrument executed before/concurrently with the will

(3) *Pinion* validated doctrine of independent significance for *funded* trusts and commentators agree the statute was meant to augment the rule

(4) Held: Trust is valid, but husband still loses due to divorce revoking revocable instruments by operation of law

UTATA permits pour over will/stand by trust without trust property and without trustee duties
Court will appoint trustee if none named

**REMEMBER!** Talk about incorporation by reference and facts of independent significance in states with no UTATA

d) **Pro/Con of Revocable Trusts**

| Pros | Cons |
|---|---|
| Control for settlor<br>Can structure to avoid certain taxes<br>Avoids significant portions of probate<br>• Note: Much of this can also be handled through POD/etc.<br>Allows for planning for incapacity<br>Privacy (if no litigation)<br>Harder to challenge (time point of challenge, and standing issues)<br>Avoids "ancillary probate matters" for assets (vacation home) in other states | Need a lawyer<br>Have to transfer assets (can have transfer taxes)<br>Pay trustee<br>Keep track of trust property (consult laywer regularly – *see Heaps*)<br>Creates unnecessary complications |

e) **Ethical Issues**

i) *Committee on Professional Ethics v. Baker* (IA 1992)

(1) Δ-lawyer involved with financial planner selling revocable trusts

(2) Reprimanded because Δ never offered referred clients independent advice, allowed planner to fill out documents using Δ as scrivener, allowed planner to be present during client meetings → conflicts of interest, assisting unauthorized practice of law, improper referrals, allowing others to influence professional judgment

**Available funds**: Support trusts are considered available, pure discretionary are not – although any mandatory payment of income would be available.

## 14) TRUSTS – INCAPACITY

a) **Generally**
   i) **Medicare** – 65y/o and older, no income requirements, private insurance supplemental
   ii) **Medicaid** – No age limit, threshold is income/asset limitations

b) **Supplemental Needs Trust**
   i) Funded by someone *other than the beneficiary*
      (1) Judgment on behalf of beneficiary is funded by beneficiary
   ii) Completely discretionary with no support standard (no right to demand anything)
   iii) Express purpose of providing care to *supplement* government benefits
   iv) Expressly instructs to administer *so beneficiary doesn't lose benefits*

c) **Payback Trust** – Created for beneficiary under 65y/o, repays Medicaid up to the amount owed, or the amount left in trust on death (cannot be self-settled)

d) **Pooled Trust** – Managed by non-profit for group of disabled, on death, remainder gets distributed to the other pool members (can be self-settled)

e) *Estate of Gist* (IA 2009) – Spendthrift trust
   i) Issue: Whether state can enforce Title XIX lien against trust w/ spendthrift clause
   ii) Trust – Discretion of trustee up to whole of principal to maintain beneficiary's standard of living with spendthrift provision
   iii) Medicaid – Estate is property recipient has *any legal title or interest* in at death
      (1) Exceptions in statute – Code doesn't upset CL, and CL has exception to spendthrift for necessities
   iv) Held: Trust is discretionary w/ standards, common law allows state to recover lien for necessities supplied during beneficiary's life

f) *Cohen v. Commissioner* (MA 1996) – Self-settled spendthrift
   i) 3 trusts to benefit settlors with intent of removing assets for Medicaid
   ii) The amount "available" for Medicaid is the maximum amount of payments permitted under any circumstances by the terms of the trust to be distributed to grantor assuming full exercise of discretion by the trustee
      (1) "Peppercorn of discretion" to trustee → government gets it all

g) **Trust vs. Power of Attorney**

| Power of Attorney | Trust |
|---|---|
| Agent steps into principals shoes – can act on her behalf for a specific set of acts | |
| Usually specific grants of power (rights of survivorship, write will, manage investments, healthcare, etc.) | Settlor automatically removed as trustee<br><br>Trust terms govern what trustee can do |
| NOT a transfer of ownership (banks may not acknowledge it) | Remaindermen can challenge trustee's fitness<br>• Note: Remaindermen often don't have standing if trust is revocable |
| Principal monitors agent, guardianship proceeding is *the only way* to undo this if principal is incapacitated | Transfer of ownership – banks have no choice but to acknowledge |
| Assets go through probate | |

h) **Power of Attorney**
   i) *In re Maher* (NY 1994) – Conservatorship/guardianship proceedings
      (1) Son's attempt to get power of attorney over father after father had stroke, exposes son's attempt to prevent $ going to father's new wife
      (2) Held: Sufficient testimony to capacity, sufficient lesser alternatives (new wife able to handle much of finances/business stuff, medically he is ok)
   ii) **UPAA § 120** – Liability for refusal to accept acknowledged statutory form power of attorney (may require certification/translation/opinion of counsel before accepting)
   iii) **Springing Power of Attorney** – Comes into effect after half of principal's doctors agree principal can't manage affairs, or principal is put in nursing home
   iv) **Durable Health Care Power of Attorney** – Make health care decisions of principal
   v) **Living Will** – "Advanced directive" – instructions about care (*see also* DNR)
   vi) **Uniform Statutory Power of Attorney Act § 217 – Gifts**
      (1) (b) General authority WRT gifts authorizes (1) up to the annual federal gift tax exclusion, (2) or double if spouse agrees
      (2) (c) Must be consistent with principal's objectives (listing factors)
   vii) *Estate of Huston* (CA 1997) – Gifts to Attorney-in-Fact
      (1) Invalidated gift to attorney-in-fact (at principal's direction) when power-of-attorney document forbade "gifts to yourself"
      (2) Principal can't ratify the gift without it being in writing (same mechanism as power of attorney document)

15) **CHARITABLE TRUSTS**

a) **Generally**

i) Tax incentives – Federal estate & gift tax gives 100% deduction for charitable gifts

(1) Trust for spouse's life followed by charitable remainder is tax free

ii) Not subject to RAP, AG enforces, cannot benefit particular individuals

b) **Analysis**

i) T's **dominant intent** must be charitable to be valid

ii) If T's dominant intent is merely benevolent, the trust is not a valid charitable trust

iii) **Valid Charitable Purposes** – Relief of poverty, advancing education, health or religion, government, municipal, or other purposes beneficial to the community

(1) § 501(c)(3) – Religious, charitable, scientific, testing for public safety, literary, or educational, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals, etc.

(2) Net Earnings cannot inure to benefit a private shareholder/individual

iv) Cannot have ascertainable beneficiaries (*e.g.* there is a changing beneficiary class)

v) ***Cy pres* (UTC § 413)**

(1) It is impossible, impractical, or illegal to carry out settlor's charitable purpose

(2) Donor had a general and not a specific charitable intent

(a) Trust document does not anticipate failure of the trust purpose

(b) Whether the charitable bequest was a residuary bequest

(c) The extent to which testator imposed limitations on the charitable bequest

(d) Whether the bulk of testator's estate was devised to charity

(e) Whether testator made gifts to those who would take if the trust failed

(3) Court looks for another agent, as nearly identical to the original, that will receive the gift to effectuate the general charitable intent

c) *Shenandoah Valley National Bank of Winchester v. Taylor* (VA 1951)

i) Trust instructs to give income to school kids at Christmas/Easter to use for education

ii) Held: Invalid against RAP because it is merely a benevolent trust – once income is paid to kids, no guarantee it is used for their education

d) *Estate of Crawshaw* (KA 1991)

i) Trust designating Marymount as trustee w/ purpose to provide loans to nursing students – Marymount dissolved into MMETF (trust fund)

ii) Held: T had general charitable intent, MMETF gets the money BUT must agree to spend the $ on education only (MMETF usually is fully discretionary)

16) **POWERS OF APPOINTMENT**

a) **Analysis**

i) Type of power

(1) **Special** – Entitles donee to appoint from a class of permissible appointees

(2) **General** – Entitles donee to appoint anyone including herself/her estate

(a) RTP § 17.3 – Donee, donee's estate, creditors of donee/estate

ii) Timing of power

(1) **Present** – Donee can exercise immediately

(2) **Testamentary** – Donor specifies donee to exercise the power by will

iii) Consequences of non-exercise – Takers in default

b) **Statutes**

i) **Generally (If will does not mention exercise of power)**

(1) **CL/RTP (Majority)** – Will disposing of all donee's property *does not* manifest intent to exercise powers held by donee

(2) **EPTL 10-6.1(a)** – Effective exercise of power doesn't require express reference

(a) Sufficient if donee leaves will disposing of all his property unless express intent not to exercise power is present

(b) **EPTL § 10-6.1(a)(4)** – Conventional residuary clause exercises a power unless grant of power indicates the will shouldn't operate as such

(3) **UPC § 2-608** – General residuary clause is sufficient if no takers in default and power is general. If takers in default or power is special, residuary clause is enough only if it manifests intent to exercise the power

ii) **Failure to Appoint**

(1) **RTP § 19.22(b)** – General power passes to donee's estate unless donee released power or expressly refrained from exercise

(a) Special power goes to takers in default, to defined class of permissible appointees, or if nothing else, back to donor's estate

iii) **Specific Reference Requirement**

(1) **UPC § 2-704** – Power of appointment (specific reference requirement)

(a) If instrument requires specific reference to the power, it is presumed the intention is to prevent inadvertent exercise of the power

(b) Majority – General disposition of "all property I have a power of appointment over" is sufficient

(2) **RTP** – Substantial compliance with requirements of donor if sufficient if (1) donee knew of and intended to exercise, and (2) donee's manner didn't impair donor's purpose in imposing the requirement

(3) **EPTL § 10-6.1(b)** – If the donor requires specific reference to the power, an instrument not containing such a reference is not a valid exercise of the power

iv) **Impermissible Appointees (Allocation of Assets Doctrine)**

(1) **RTP § 19.19** – If donee has blended assets, allocate to maximize effectiveness of donee's intended dispositions

(2) **EPTL § 10-6.6** – Exercise in favor of some impermissible appointees is not void, nor indicative of donor's lack of intent to exercise

(3) General power – Ineffective exercise goes to donee's estate

(4) Special power – *see* RTP § 19.22(b)

(5) Else – Allocation doctrine (RTP § 19.19)

v) **Creditors of Donor** – Can attach if creditor predates the gift (fraudulent transfer)
vi) **Creditors of Appointee** – Can attach when appointment is made
vii) **Creditors of Donee**
(1) **ALL Special powers are not subject to claims by donee's creditors**
(2) General Presently Exercisable Powers – Can attach (RTP § 22.3, NY, CA, BK)
(3) General Testamentary Powers
(a) CL/RTP § 22.3 – Attach *only if* donee exercises the power
(i) If donee doesn't exercise, goes to class of permissible appointees
(b) NY – No right to attach, no matter what
(c) CA – Only if donee's assets are insufficient to satisfy creditor claims
(i) General testamentary powers, whether or not they are exercised
(ii) If donee *releases the power* altogether, creditors cannot attach
(4) **Bankruptcy § 541(b)(1)** – Special powers are not part of BK estate

c) *Estate of Hamilton* (NY 1993) – Specific reference requirement
i) Will creates marital deduction trust with two daughters as takers in default
ii) Exercisable "only by specific reference to said power in T's last will"
iii) Wife dies and appoints assets to T's step-son (wife's son), but referenced an old will
(1) T had executed two subsequent wills giving wife the same powers
iv) Held: Wife failed to exercise the power → goes to T's daughters

d) *Will of Block* (NY 1993) – Exercise in favor of improper appointee
i) Trust to benefit T's son and son's twins, special power to distribute between the twins
ii) In default, goes into two trusts equally for the twins
iii) Son's will gave 35% each to the twins and 30% to their half-brother (not permissible)
iv) Note – Son is resident of OH where silence is non-exercise of power
v) Held: Appointive property to the twins in equal shares, son exercised the power

e) *Will of Carroll* (NY 1937) – **Fraud on the power**
i) Donee gave significant money to a permissible appointee relying on agreement that the appointee would give some money to her husband (impermissible appointee)
ii) Held: Promise made by cousin was attempted fraud on the power → void

K to appoint is **not enforceable against trust property**, but it **is enforceable against T's estate** as a breach of K claim.

If T releases the power prior to dying, the trust is distributed to the class of permissible appointees, and Π can still seek the K claim *against the estate but not the trust property*

17) **ESTATE TAXES**

a) General powers of appointment are included in donee's taxable estate (§ 2041(a)(2))
   i) Exceptions – Power that is governed by ascertainable standard (health, education, support, and maintenance), or jointly held powers (§ 2041(b)(1)(A), (b)(1)(C)(ii))

b) **Generally**
   i) Transfers over exclusion amount are taxed @ 35% (now 40%)
   ii) Aggregate lifetime and testamentary transfers are "unified"
      (1) Exclusion amount is $5mil indexed to inflation (~$5.25mil now)

c) **Analysis**
   i) Taxable estate – Assets owned at death, retained interests, joint tenancies, insurance and retirement accounts, general powers of appointment, taxable lifetime gifts
   ii) Deductions – Marital, and charitable gifts
   iii) Subtract exemption
   iv) Multiply tax rate

d) **Gift Tax**
   i) Payments to providers of education or medical services are tax free
   ii) Additional $14k per donee, per year tax free – gift exemptions don't count in lifetime unified exemption (note: must be a present interest – *see Crummey* Trust)
   iii) ***Crummey* Trust** – Trust that gives beneficiary right to withdraw settlor's annual gift exemption amount for ~30d after which time it lapses → qualifies as gift
   iv) *Estate of Kohlsaat* (US Tax Court 1997)
      (1) $155k trust consisting of building, 2 trustee/beneficiaries, 16 contingent remainder beneficiaries – all had 30d to withdraw gift tax exemption maximum
      (2) Issue: Did this qualify as a present interest gift to the beneficiaries exempting the trust from the gift tax? → Held: Valid *Crummey* trust

e) **Credit Shelter Trust**
   i) Lifetime exemption of one spouse is now "**portable**" to the other spouse
      (1) Old rule: Unused lifetime exemption amount of one spouse was wasted
   ii) **Credit Shelter Trust** – Trust with spouse as trustee & power to invade principal *limited by an ascertainable standard*, remainder to kids with special power to spouse
      (1) This is tax-free to T, and doesn't pass through spouse's estate
      (2) Alternative is tax-free to spouse (marital deduction) then taxed going to kids
   iii) **QTIP Trust**
      (1) Issue: T dies, wants marital deduction, but doesn't want spouse to have general power of appointment (*a la Estate of Hamilton* – reference the power case)
      (2) § 2056(b)(7) – T makes trust, spouse has life interest & no power of appointment, executor can *elect* to have trust qualify for marital deduction
         (a) Annual payment of income to spouse and no one else can have power to invade principal during spouse's lifetime
      (3) § 2044 – QTIP trust is part of spouse's estate for tax purposes

f) **Generation Skipping Tax**
   i) Generation skipping tax deduction is $5mil (*i.e.* trust to kids remainder to grandkids)
   ii) Requires ascertainable standard and only special powers of appointment

g) *Best v. US* (NB 1995) (ascertainable standards: for support, support in reasonable comfort, maintenance in health and reasonable comfort, support in his accustomed manner of living, education, health, medical, dental, hospital and nursing expenses)

18) **TRUST MODIFICATION AND TERMINATION**

a) **By Settlor**

i) Half of states do not revoke trusts on divorce (though they revoke wills)

ii) **EPTL § 7-1.16 (Majority)** – All trusts are presumed irrevocable unless indicated otherwise (note: requires gift tax return & separate taxes for trust)

iii) **UTC § 602** – Unless expressly irrevocable, settlor may revoke/amend

iv) **RTT § 63 cmt. h** – Revocation by any means that is C&C of intent to revoke

(1) Physical act, oral statement & withdrawal of property, etc.

v) *Connecticut General Life Ins. v. First National Bank of Minneapolis* (MN 1977)

(1) T creates trust for life insurance proceeds, to wife & kids, divorced later, new will

(2) Rule – Settlor reserves power to revoke *inter vivos* trust by notice to trustee, settlor *cannot* revoke by will (must revoke by manner specified in trust doc)

(3) Held: Trust was not revoked by later will

b) **By Beneficiaries**

i) **CA** – Court can't terminate spendthrift trust (income is a material purpose)

ii) **NY** – Can't terminate unless settlor expressly makes trust non-spendthrift

(1) EPTL § 7-1.19 – Can terminate if continuation is not economically practicable

iii) **UTC § 401(e)** – If not all beneficiaries consent, terminate (1) if trust could be modified with unanimous consent and (2) interests of non-consenting are protected

iv) *Adams v. Link* (CT 1958)

(1) Requires (1) consent of all parties in interest, (2) all reasonable purposes of trust's existence are accomplished, (3) no fair restriction by testator will be disturbed

(2) T dies, trust to friends, remainder to charity, T's bro/sis challenge will/trust

(3) Held: Settlement agreement between parties revoked – T intended managed income to friend for life, abolishing would turn over principal to friend

(a) *i.e.* getting income to friend for life was a *material purpose*

**NOTE**: Support and spendthrift trusts are unlikely to be terminated because steady income is a material purpose to the trust!

v) *American National Bank of Cheyenne v. Miller*(WY 1995)

(1) Trust with income to son in law, and progressive payouts to grandkids til they're 35 – all kids are now over 35 and son in law swears off the income

(2) **RST § 337** – (1) If all beneficiaries consent, none is incapacitated, they can compel trust termination *unless* (2) continuance of trust is necessary to carry out a material purpose of the trust ("*Claflin* doctrine") (**RTT § 65** – (2) beneficiaries can compel if reason for termination outweighs the material purpose)

(3) Unlike *Adams*, beneficiary here didn't want any of the money

c) **Mistake** – Settlor creates trust with clear tax objective but fucks it up

i) **UTC § 415** – Court may reform, even if unambiguous, to conform to settlor's intent as proved with C&C if settlor's intent and trust terms are affected by mistake

ii) **RTT § 66** – Power to modify, unanticipated circumstances – Court may modify when unanticipated circumstances would frustrate settlor's intent

iii) **NY EPTL § 7-1.6(b)** – Court may modify if beneficiaries are not being adequately provided for whether or not they are entitled to invade principal, after hearing and notice to affected parties, to further settlor's intent

iv) *Walker v. Walker* (MA 2001)

(1) Attempted credit shelter trust, but gives wife, as trustee, full discretion to invade principal → modified to include an ascertainable standard

(2) Note: Court looks to extrinsic evidence of intent (lawyer's affidavit)

19) **FUTURE INTERESTS**

a) **Generally**

i) Interests held by grantor – Possibility of reverter, right of entry, reversion

ii) Interests held by transferee

(1) Remainder – Indefeasible vested, vested subject to partial divestment, vested subject to complete divestment, contingent

(2) Executory interest

iii) RTT – No distinctions, contingent remainder simply might not result in possession

iv) *Uchtorff v. Hanson* (IA 2005)

(1) Trust – Income to W for life, then to S "in the event that S shall survive me" else to S's ex-wife for S'd kids "in the event that S shall not survive me"

(2) Held: S had vested remainder after he survived T (and not W), so S's new wife gets the trust $ through S's will

b) **Statutes**

i) CL – Preference in favor of early vesting (*See In re Evans' Estate*)

(1) Note: To A/B, but if either die before W, to their issue – A dies, no issue → to A's estate because A's interest is vested

(2) Note: To W for life, remainder to my surviving children – *sometimes* contingent

(a) Really depends on jurisdiction

ii) **IA TC § 633A.4701(3)** – If beneficiary dies before possession, and no alternate, beneficiary's living issue receive the interest of the beneficiary

(1) **IA TC § 633A.4701(8)** – Doesn't count if there's express survivorship condition

iii) **UPC § 2-707**

(1) (b) – Future trust interests are contingent on beneficiary's surviving to distribution. If beneficiary fails to survive to distribution:

(a) (1) Interest is <u>not</u> class gift, and beneficiary leaves descendants, substitute gift to descendants by representation

(b) (2) Interest <u>is</u> a class gift, other than to "issue, descendants, heirs, next of kin, relatives or family" – substitute gift in surviving descendants by rep.

(c) (3) Words of survivorship alone are insufficient to opt out of this

(d) (4) Instrument can create alternative future interests which supersede the substitute gifts from (1) and (2)

**NOTE**: If beneficiary does not survive testator (*i.e.* dies before creation of the trust), beneficiary's gift lapses!

Note: Under UPC, "children" means "issue"

(2) (d) If no takers, <u>property passes under residuary clause</u> or to transferor's heirs

(a) (1) If non-residuary – passes to residuary, (2) if residuary → intestate

(3) (e) If no takers and interest is created by power of appointment

(a) (1) To gift-in-default, (2) or as in (d) and transferor = donor

(4) Note: Lesley says (d)/(e) mean if no issue, then alternative gift in estate

c) **Taxes**

i) Vested interests go through probate estate of vested testator

(1) Requires reopening probate years later and taxes beneficiary's estate accordingly

d) **Class Gifts**
   i) **Rule of Convenience (RTP § 15.1)** – When grantor makes class gift, membership in class can increase until one member is entitled to possession
      (1) Exception – If, when the interest becomes possessory, no member is born yet, the class-closing rule doesn't apply and you wait til it closes physiologically
      (2) UPC § 2-705(g) – Open for 45mo for children of assisted reproduction
   ii) **Gift to "heirs"**
      (1) CL determined at death of grantor
      (2) UPC § 2-711 – Determined at moment of distribution
   iii) *In re Evans' Estate* (WI 1957)
      (1) Trust to grandchildren, income of his share at 18, principal at 30
      (2) Issue: After T died, but before anyone was 30, 3 more grandkids are born
      (3) Held: Class closes when first grandkid reaches 30, prior to that it is a vested remainder subject to partial divestment
   iv) *Usry v. Farr* (GA 2001)
      (1) To W for life, then to children for life, remainder to grandchildren
         (a) U had 3 kids, last died in 2000, while U was alive, had grandson H who has 3 kids → issue: whether H's interest vested when U died
      (2) At W's death, goes to children who may survive W, with grandchildren taking part from deceased parent, on death of last child "vests" in grandchildren
      (3) Held: This is not a survivorship condition, H's interest vested
   v) *Marine Midland Bank*
      (1) To E for life, remainder split between L and R
         (a) If a brother predeceases E, to surviving children; if no issue, then to the other
      (2) L has J and D (D has W and 2 kids)
      (3) L and D pre-decease E – Issue: Did D's interest vest?
      (4) Majority – D's interest didn't vest til E died → all to J ("surviving children")
      (5) Dissent – Interpret "children" as "issue" – consistent with intent

20) **COORDINATING PROBATE AND NON-PROBATE ASSETS**

a) **POD/Totten Trust and other POD Designations**

i) **General will provision will not dispose of POD anywhere**

ii) **NY EPTL § 7-5.2(2)** – Explicit provision in will overrides beneficiary designation

(1) Absolves bank from liability, allows restitution claim against POD designee

iii) **UPC § 2-613 and CA** – May not alter POD by will

iv) **RTT** – Allow modification by express provision or necessary implication

v) *Araiza v. Younkin* (CA 2010)

(1) Mother names stepdaughter POD

(2) Establishes living trust listing "savings accounts" as trust property

(3) Rule – Totten trusts go to POD person unless C&C evidence of intent to do otherwise, and POD *cannot* be changed by will

(a) Can (1) close account and reopen, (2) present modification agreement signed by all parties, (3) or method provided in account agreement

(4) Held: Trust was a living trust (not testamentary), showed intent to move account into trust → Account does not go to stepdaughter

**NOTE**: NY requires that the will ID *both* the account and the beneficiary specifically (*i.e.* by name)

b) **Retirement Accounts (IRA)**

i) *Nunnenman v. Estate of Grubbs* (AK 2010)

(1) G names N POD on his IRA, gets lawyer when in hospital and makes will leaving all to mother – mother also "finds" handwritten will in bible

(2) Hospital will says "leave everything" to mom, bible will mentions IRA

(3) **Minority Rule** – Will provison that expressly IDs non-probate account can change beneficiary (NY approach WRT PODs)

(4) **Majority** – Insurance and IRA need to be changed by mechanism in K, NOT will

(5) **NY EPTL § 7-5.2(2)** – Explicit will provision can override designation for bank account trust, but not insurance designation

c) **ERISA**

i) Spouse has *statutory right* to proceeds of the account on death of beneficiary

(1) Unless spouse completes complex waiver process, or you have QDRO

ii) If beneficiary designates someone else, but dies with spouse, *spouse gets proceeds*

iii) If beneficiary makes no designation, and dies after divorce, then *spouse does not get proceeds* → trick then is to not name your spouse

iv) *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan* (2009)

(1) T had retirement plan covered under ERISA, made spouse POD, later divorced

(2) Executed new document naming his daughter POD, but wife did not do waiver and divorce settlement *is not a QDRO* (qualified domestic relations order)

(3) ERISA provisions preempt state law

d) **Life Insurance**

i) **Majority** – Changes in accordance with K (even NY)

ii) RTP – Intermediate rule (restitution claim against beneficiary)

21) **ELECTIVE SHARE**

a) **Policy** – Partnership theory, or care and maintenance theory

b) **Analysis (UPC)**

i) **Compute Augmented Estate**

(1) § 2-204 – Net probate estate

(2) § 2-205 – Non-probate transfers **to others**

(a) (1) Owned by decedent passing outside probate: (A) General power of appointment, (B) Held in joint tenancy, (C) POD account, (D) Life insurance

(b) (2) Transfers decedent retains right of enjoyment **created during marriage**: (A) Irrevocable trust retaining income for life (value of property that generates the income → whole usually), (B) Trust property that decedent creates power over income exercisable for decedent's benefit (value of *whole property*)

(c) (3) Outright transfers within 2y of death **made during marriage**: (A) Transfer as a result of termination of decedent's right, interest or power over property, (B) Transfers relating to life insurance policy if proceeds would have been included otherwise, (C) All other transfers made to non-spouse over excludable amount for taxable gifts ($13k)

(3) § 2-206 – Non-probate transfers to surviving spouse (§2-205(1), (2))

(4) § 2-207 – (1) Surviving spouse's property (excluding §§ 2-204/6) (2) including transfers that would be included if surviving spouse was testator

ii) **Compute Marital Property Portion (§ 2-203(b))**

| Years of Marriage | Percentage |
|---|---|
| <1 | 3% |
| 1-2 | 6% |
| 2-3 | 12% |
| 3-4 | 18% |
| 4-5 | 24% |
| 5-6 | 30% |
| 6-7 | 36% |
| 7-8 | 42% |
| 8-9 | 48% |
| 9-10 | 54% |
| 10-11 | 60% |
| 11-12 | 68% |
| 12-13 | 76% |
| 13-14 | 84% |
| 14-15 | 92% |
| >15 | 100% |

iii) **Elective Share is 50% of Marital Property portion (§ 2-202(a))**

(1) § 2-202(b) not less than $75k

iv) **Subtract** probate dispositions to spouse, § 2-206 dispositions and MP of § 2-207 property of spouse

v) § 2-209 gives order of abatement – First from probate estate then trusts, then gifts

(1) Abate ratably from AE amounts except § 2-205(3)(A) and (C)

vi) NOTE – All life interests in trust to surviving spouse are **disclaimed** for ES calcs.

c) **<u>Analysis (NY EPTL § 5-1.1A)</u>**
   i) **Value of Decedent's Estate**
      (1) Probate estate
      (2) "Testamentary Substitutes" (§ 5-1.1A)
         (a) (b)(1)
            (i) (A) Gifts *causa mortis* (because you're dying)
            (ii) (B) Gifts within 1y of death that exceed gift tax amount
            (iii) (C) Bank account in trust
            (iv) (D) Share of joint bank account (POD)
            (v) (E) Share of joint tenant with right of survivorship
            (vi) (F)(i) Trusts with life estate retained (*made after marriage*)
            (vii) (F)(ii) Revocable/invade-able trust-like arrangements – Exercisable unilaterally or with non-adverse co-trustee
            (viii) (G) Retirement assets or death benefits (**<u>not life insurance</u>**)(other PODs)
            (ix) (H) Property held by decedent with general power of appointment or released w/in 1y of death
         (b) **<u>DOES NOT INCLUDE</u>** – Life insurance, surviving spouse assets
      (3) (b)(2) For (D) and (E), look at how much of the $ in the account, or value of the property is the deceased's property – burden on surviving spouse
         (a) If surviving spouse is the other party to the transaction, <u>conclusive presumption of 50%</u>
      (4) NOTE – Only include interests *acquired after marriage* (except (G))
   ii) **(a)(2) Elective Share = 1/3 of Total Estate or $50k (Greater)**
   iii) **(a)(4) Satisfy**
      (1) Amount passing by testator's will
         (a) (a)(4)(A) Includes interests that pass absolutely, life estates are lost if elects
            (i) NOTE – Surviving spouse can fubar a QTIP trust w/ this mechanism
         (b) (a)(4)(B) Interest in property does not pass absolutely if it is in trust
      (2) Amounts passing by intestacy
      (3) Amounts passing by testamentary substitutes (non-probate transfers)
d) **<u>Differences Between UPC and NY EPTL</u>**
   i) Computing
      (1) Life insurance does not count for NY
      (2) Gift look back is 2y for UPC, but 1y for NY
      (3) Valuation of joint accounts
         (a) UPC – Fractional interest at death
         (b) NY – Surviving spouse must prove amount that belonged to deceased
      (4) Inclusion of surviving spouse assets in UPC but not NY
   ii) Length of marriage – No MPP for NY
   iii) Elective share amount – 50% UPC, 33% NY

e) **Cases and Statutes**
   i) *Sullivan v. Burkin* (MA 1984)
      (1) Only property passing through probate is part of elective share (1/3)
      (2) T dies with *inter vivos* trust, will indicated intent to exclude spouse
      (3) Π argues trust is invalid testamentary device (lack of formalities) → nope
      (4) Held: *Inter vivos* trusts will be included as estate assets for elective share if decedent retained the right to direct disposition of funds during life by appointment or revocation, but only for future cases
   ii) TN Code § 31-1-105 – Conveyance made fraudulently to others *with intent to defeat surviving spouse's elective share* is includable if other assets are insufficient

f) **Hypos**
   i) H/W married 20y, estate worth $150k, (will leaves $25k to W, $75k to W in trust remainder to S, $50k to S) house = $100k (joint tenancy), $100k POD to S, $50k insurance POD to W, irrevocable trust to H – $100k remainder to Cardozo
      (1) W has $250k
      (2) UPC
         (a) AE - $150k probate estate, $50k house (H), $50k house (W), $100k POD, $50k insurance (W), $100k trust (*if during marriage*), $250 (W's) = $750k
         (b) MP = 100% of $750k, ES = 50% of MP = $375k
         (c) W has 100% of ($250k + $50k house) + ($25k, disclaims trust, $50k house, $50k insurance) = $425k → W can't elect
      (3) NY
         (a) Calculate estate
            (i) (a) $150k
            (ii) (b)(1)(E) House – With SS, conclusively presume 50/50 → $50k
            (iii)(b)(1)(C) Totten trust = $100k
            (iv)(b)(1)(G) Life insurance does not count
            (v) (b)(1)(F)(i) Irrevocable trust = $100k
            (vi)Total = $400k
         (b) Calculate elective share = 1/3 of $400k = $133,333
         (c) Satisfy
            (i) $25k by will, don't count trust, no intestacy, $50k from house = $75k
            (ii) Spouse can elect $58,333 (but loses trust)

g) **Waiver of Elective Share**

i) **UPC § 2-213 – Waiver of Right to Elect**

(1) (a) May waive by written K, agreement, or waiver signed by spouse

(2) (b) Not enforceable if surviving spouse proves

(a) (1) it was involuntary (duress) or

(b) (2) Waiver was unconscionable and before execution of the waiver (s)he

(i) Wasn't provided reasonable property disclosure,

(ii) Didn't voluntarily/expressly waive, in writing, right to disclosure &

(iii)Didn't have an adequate knowledge of decedent's property

(3) (d) Unless evidence otherwise, "waiver of all rights" is a waiver of elective share

ii) *Gettings v. Geddings* (SC 1995)

(1) After married 10y, W signs waiver indicating she was appraised of H's finances

(2) Rule – Right of election may be waived by signed K after fair disclosure

(3) H was not open about finances, excluded W from corporate meetings with his kids from before the marriage

(4) Held: Sufficient to show there was no fair disclosure – consider: confidential relationship resulting from 10y marriage probably influenced this decision

22) **OMITTED SPOUSE AND/OR CHILDREN**

a) **Analysis (Omitted Spouse)**

i) Some states automatically revoke pre-marital wills (*Prestie*)

ii) Some states leave omitted spouse to elective share (NY)

iii) **UPC** – Leaves the will in effect WRT devises to children born before marriage and their descendants – then gives spouse the value she would have gotten through intestate succession

b) **UPC § 2-301 – Premarital Will**

i) (a) If spouse marries T after will is made, spouse gets intestate succession share as to any portion of the estate not devised to a pre-marriage child (or their descendant) who is not a child of the surviving spouse unless:

(1) (1) Will was made in contemplation of marriage, (2) will expresses intent that it be effective notwithstanding subsequent marriage or (3) T provides for spouse by transfer outside will + evidence of intent that this was all T wants spouse to have

c) *Prestie v. Prestie* (NV (2006))

i) Pour over will + *inter vivos* trust to son, T was sick, ex-wife helped him

(1) T changed trust to grant ex-wife life estate in his condo, later they remarried

ii) Statute – Revokes will as to the spouse unless provision is made by marriage K, will, or wife is specifically mentioned in the will showing intent not to provide for her

(1) Evidence re: change of the trust is inadmissible (overturned by legislation)

d) **Analysis (Omitted Children)**
   i) All states allow disinheriting kids (LA only allows if kids are over 24y/o)
   ii) Some states allow child intestate share if omitted
   iii) Some allow child to take unless extrinsic evidence shows omission is intentional
   iv) UPC only protects children born/adopted after execution of the will
      (1) § 2-301(1) – If after the will and no earlier kids, later born child gets intestate share unless will devises everything to other parent of the child
      (2) § 2-301(2) – Later born child shares proportionately in the part of the estate given to earlier born kids
   v) **NOTE** – NONE of this applies to non-probate assets/will substitutes

e) **UPC § 2-302 – Omitted Children**
   i) (a) If T doesn't provide for kid *born/adopted after execution of will*, omitted kid gets
      (1) (1) If no living kids when will is executed, share equal to intestate share, unless all property is devised to parent of the later-born kid
      (2) (2) if T had other kids when the will was executed, and will devised property to them, omitted kid gets
         (a) (i) to share in what is given to the other kids
         (b) (ii) where omitted kid gets what (s)he would have received had testator included all of them and given equally
         (c) (iii) same character of gift, (iv) abating ratably between the kids
   ii) (b) Does not apply if (1) omission is intentional, or (2) kid is provided for outside the will and intent that transfer be in lieu of testamentary provision is shown

f) *Estate of Glomset* (OK 1976)
   i) Reciprocal wills leaving everything to the other, to their son if both die, omitting daughter without mentioning her
   ii) Issue: Whether the omission was intentional
   iii) Held: Failure to mention daughter was unintentional, she gets intestate share
   iv) Dissent
      (1) **Mass.-Type** – Testator's intent – Extrinsic evidence allowed
      (2) **Missouri-Type** – Total/partial revocation if kid not named/provided for
      (3) Presumption that unnamed kid is inadvertently omitted is rebutted because the omitted kid is taking and the non-omitted one is not → against intent