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# Introduction to Wills & Trusts

## The Power to Transfer Property at Death

### Introduction

The scope of one’s power to transfer property at death is generally considered to be a matter of civil law as opposed to a natural right. The power varies from society to society. While all US states recognize the power to transfer one’s property at death, the details of what constitutes a valid will, and to whom the property will if there is no valid will, vary greatly from state to state.

### Right of publicity

In the 1980s, a number of states statutorily recognized a descendible postmortem right of publicity. The courts have generally ruled that this new property right applies not only to parties alive at the time the statute was adopted, but also to deceased celebrities. The issue arising with deceased celebrities is whether the new property passes per their residuary clauses or per intestacy even if they died testate.

* *Shaw Family Archives v. CMG Worldwide (2007)*
  + The court (1) ruled that a will can devise only property owned by the testator at time of death, so any publicity rights created after Marilyn Monroe’s death were not devised as part of her will; and (2) construed the California and Indiana statutes being invoked by Monroe’s estate as not permitting the will of a deceased celebrity to devise the newly created right.

### Public policy debate

1. Pro – power to transfer property at death
2. Such a policy is consistent with a system of private property; encourages and rewards a life of hard work,
3. Consistent with and promotes family ties,
4. Encourages individuals to accumulate wealth for old age and to give to family (and not be wasteful) and;
5. Encourages family members to love, serve, and protect their elders
6. Con
7. Such a policy perpetuates economic disparity and discrimination
8. Constitutes an unearned windfall to those who happen to have wealthy relatives
   1. Such unearned wealth creates powers and privileges that are undeserved and denies equal opportunity to all children
9. Rebuttal
10. Inter vivos investments in “human capital” – health, education, “culture”, and connections – arguably account more for disparity in opportunities and wealth than inherited wealth.
11. Historic compromise – permit but tax: Historically, the US has tried to balance these competing public policy arguments by permitting wealth to be transferred upon death, but imposing an estate and gift tax at significantly higher rates than those applied to earned income.
12. Modern trend: Recent amendments to the federal estate and gift tax laws are increasing the tax exemption over the next several years and there has been a proposal to abolish the estate tax.

### State variations

While all states recognize the right to transfer one’s property at death, the details of what constitutes a valid will, and to whom the property will pass if there is no valid will, vary greatly from state to state.

### Shifting patterns

Most state inheritance schemes are built around the notion of a family. To the extent the traditional American family is undergoing change, pressure is growing to recognize nontraditional families and relationships within a state’s inheritance scheme (e.g., who qualifies as a spouse? who qualifies as a child?).

One prominent professor believes that the field of wills and trusts is a dying field. Rather than spending their lives accumulating wealth to transfer to their children at their death, he argues that the principal means of transferring wealth from one generation to the next will be by parents funding their children’s education.

## “Dead Hand” Control

“Dead hand” control arises where a decedent ***conditions a gift to a beneficiary upon a beneficiary behaving in a certain way***. By qualifying the testamentary gift, the decedent is attempting to exercise control over the beneficiary even after the transferor’s death.

* + 1. Arguments in support

1. It is the decedent’s property
2. Given that a decedent could have conditioned an inter vivos gift on a donee acting in a certain manner, the decedent should have the right to condition a testamentary gift in a beneficiary acting in a certain manner,
3. A beneficiary has no right to receive the property; and
4. Given that a decedent can completely disinherit a beneficiary, the decedent should be able to condition or restrict an intended beneficiary’s inheritance.
   * 1. Arguments against
5. Circumstances change, and where the donor is deceased, he or she no longer has the capacity or flexibility to take ever-changing circumstances into consideration in structuring his or her gifts, and
6. Some conditions are so contrary to fundamental rights or generally accepted public policy they should be considered invalid conditions.

### Restatement (Third) of Property

This favors freedom of disposition (one’s state of mind) and takes a very protective approach to a donor’s intent. It also acknowledges that a donor’s intent is invalid where it is “prohibited or restricted by an overriding rule of law.”

### Valid conditions

Testamentary conditional gifts (“dead hand” control) are valid unless they violate public policy, or judicial enforcement of the condition would constitute state action violating constitutionally protected fundamental rights.

The courts have been reluctant to find that upholding conditional terms of the gift constitutes sufficient state action to offend the Constitution, and courts have been very reluctant to hold conditional gifts as contrary to public policy.

### Invalid conditions

1. Absolute restraints on marriage

Gifts conditioned on the beneficiary not marrying anyone generally are considered to violate the fundamental right to marry

* 1. Exception – partial restraint

Partial restraints on marriage that impose ***only reasonable*** restrictions generally are not contrary to public policy and are valid. What constitutes a “reasonable” restriction and is fact sensitive – a restraint is reasonable if it is likely to happen; the more likely the condition is to happen, the more reasonable it is.

* 1. Exception – temporal/religion requirement

Gifts requiring a beneficiary to marry within a reasonable time period, even to someone of a particular religious background, have been held valid. Such gifts arguably do not restrict an individual’s right to marry; they merely encourage him or her to marry within a certain time frame and within a particular religion.

* *Shapira v. Union National Bank*
  + A father’s testamentary gifts to his sons required each to be married within 7 years of the father’s death to a Jewish girl whose both parents were Jewish.
  + The court ruled that (1) enforcing the conditions did not constitute sufficient state action to offend the Constitution, and (2) gifts conditioned on a beneficiary marrying within a particular class or religion constitute only a partial restraint on marriage, which is reasonable and valid and not against public policy.

1. Religion requirement

Gifts that require a beneficiary to remain faithful to a particular religion generally are held to violate the public policy concerning freedom of religion and are invalid.

1. Encouraging separation and/or divorce

Gifts that require a beneficiary to separate or divorce before receiving the gift generally are deemed against public policy and are invalid.

Exception

Gifts that provide for a beneficiary only in the event of separation and/or divorce are not necessarily deemed to encourage divorce. The controlling factor seems to be the decedent’s intent: to encourage the separation/divorce or merely to provide support in the event of separation/divorce

1. Promoting family strife

Gifts conditioned upon family members ostracizing and/or not communicating with other family members generally have been held to violate public policy and are void.

1. Property destruction directive

Although individuals generally are free to destroy property while they are alive, individuals generally are not free to destroy property upon their death, and such directives are invalid.

Destruction of property inter vivos carries with it an economic cost that deters owners. Destruction of property at death carries with it no meaningful economic cost for the decedent and deprives society of the opportunity to determine the best use of the property.

### Remedy

When a conditional gift violates public policy or the like, in order to determine a remedy, the will is checked for the presence of a “gift-over” clause. A gift-over clause provides where the gift is to go if the condition or restriction is not satisfied.

Gift-over clause: where a gift-over clause exists and the conditional gift violates public policy, courts will typically strike the condition as void and the property will be distributed to the alternative beneficiary under the clause.

No gift-over clause: Where no express gift-over clause exists, if there is a conditional gift that violates public policy or the like, most often courts will simply strike the void condition/restriction and permit the beneficiary subject to the condition to take the property free and clear of any condition.

## Who Takes Decedent’s Property: An Overview

The fundamental question of the course is: Who gets the decedent’s property when he or she dies? In order to answer this, we must determine what type of property is involved: probate or nonprobate property.

### Nonprobate property

The decedent has to take the affirmative steps for the property to qualify as nonprobate property. There are *types* of property arrangements that qualify as nonprobate:

1. Joint tenancy

Joint tenants hold the property in question concurrently. They own it in whole and in fractional shares. The key characteristic of joint tenancy is its *right of survivorship*. Upon the death of one joint tenant, his or her fractional share is extinguished, and the shares of the joint tenants are recalculated. Technically, no property interest “passes” upon the death of a joint tenant.

1. Life insurance

Life insurance proceeds are not probate property and are distributed directly to the beneficiaries from the insurance company without being subject to the probate process.

1. Legal life estates and remainders

When the party who holds a legal life estate dies, although the right to possession passes to the party holding the remainder, that transfer is the result of the original grantor’s division of the property between the life estate and remainder, not the result of the deceased life tenant passing a property interest.

1. Inter vivos trusts

A trust is an artificial legal entity that holds and manages the property placed in the trust. Property properly transferred to an inter vivos trust during the life of the party avoids passing through probate.

### Probate property

If the property in question does not qualify as nonprobate property, the property automatically falls to probate as the default system. A will disposes of the decedent’s probate property only.

#### Will v. intestacy

Who takes the decedent’s probate property depends on whether the decedent had a valid last will and testament. A properly executed will constitutes an expression of a person’s intent as to who should take his or her property when he or she dies. If a decedent does not have a will or if the will does not dispose of all the decedent’s property, the property passes via intestacy to the decedent’s heirs.

#### Intestacy as default

If a decedent takes no steps to opt out of intestacy, all of his or her property will pass through intestacy.

One may opt out of intestacy by properly executing a will or a will substitute (nonprobate methods).

## The Probate Process: An Overview

### Probate is the default

Nonprobate property passes pursuant to the terms of the instrument in question to the transferees identified in the instrument without passing through the probate system. Probate property must pass through the probate system.

### Terminology

* **Testate**: if the decedent dies with a valid last will and testament, the decedent is said to have died testate, and his property will be distributed pursuant to the terms of the will.
* **Intestate**: if the decedent dies without a valid will and testament, the decedent is said to have died intestate, and his property will be distributed pursuant to the state statute on descent and distribution.
* **Testator**: a male who executes a valid will (today this is gender neutral).
* **Testatrix**: a female who executes a valid will.
* **Devise**: a gift of real property under a will (today it describes gifts of real or personal property).
* **Devisee**: a beneficiary receiving real property under a will.
* **Bequest**: a gift of personal property under a will.
* **Legatee**: a gift of money under a will.
* **Personal representative**: the person appointed by the probate court to oversee the administrative process of wrapping up and probating the decedent’s affairs.
* **Executor**: what the personal representative is called if the decedent dies testate and the will names the personal representative.
* **Administrator**: what the personal representative is called if the decedent dies intestate or testate but the will fails to name a personal representative.
* **Probate court**: the state court with special jurisdiction over determining who is entitled to receive the decedent’s probate property.
* **Statute of descent and distribution**: if a decedent dies intestate as to some or all of his or her property, such property will be distributed to those individuals identified to receive such property under the state’s statute of descent and distribution
* **Heirs, or next-of-kin**: today, these are used to refer to anyone receiving property under a state’s intestate scheme

### The probate process

Probating a decedent’s estate is important because it:

* 1. provides for an orderly transfer of title for the decedent’s property;
  2. ensures that creditors receive notice, an opportunity to present their claims, and payment;
  3. extinguishes claims of creditors who do not present their claims to the probate court; and
  4. ensures that the decedent’s property is properly distributed to those who are entitled to receive it.

#### Will contests

If a party wishes to file a claim challenging the validity of a will offered for probate, the contest must be brought in a timely manner after probate is opened.

### Personal representative’s duties

The personal representative must first ascertain and take control of the decedent’s probate property. Second, the personal representative must give notice to and pay creditors that file a claim within the statutory period. Finally, whatever property is left after paying the creditors is distributed to those who entitled to take.

### Costs and delays of probate

The process is costly due to probate court fees, personal representative’s fees, attorney’s fees, etc. Probate typically takes between 1 and 2 years.

# Intestacy: The Default Distribution Scheme

## The Intestate Distribution Scheme

### Introduction

Any property not disposed of by nonprobate means falls to probate, and any probate property not disposed of by will falls to intestacy where it is distributed to the decedent’s heirs.

#### Heirs v. heirs apparent

To qualify as an heir (an intestate taker), the heir must survive the decedent. Because an heir must survive the decedent, a person who is alive has no heirs, only “heirs apparent.”

#### Expectancies

Most children expect to receive some property from their parents’ estate when a parent dies. Such an expectation by an heir apparent is called an *expectancy*.

An expectancy is not a property interest. The heir needs to survive the decedent to take anything, and even if the heir survives the decedent, the decedent can defeat the expectancy by transferring the property inter vivos or by executing a will that devises the property to others.

##### Transferability

Because an expectancy is not a property interest, the general rule is that it is not transferable. If, however, an heir apparent agrees to transfer his or her expectancy for valuable consideration and thereafter tries to avoid enforcement of the agreement on the grounds that an expectancy is nontransferable, a court of equity will enforce the agreement if it finds it fair and equitable under the circumstances.

#### \*\*Descent and distribution statute\*\*

1. Under intestacy, a decedent’s personal property is distributed according to the descent and distribution statute of the state where the decedent was domiciled at time of death, and
2. The decedent’s real property is distributed according to the law of descent and distribution of the state where the real property is located.

### Overview – a typical intestate scheme

The typical descent and distribution statute provides a list of ***who takes*** in the event an individual dies intestate, and ***how much*** each individual is entitled to take.

|  |  |
| --- | --- |
| **Who takes?** | **How much?** |
| Surviving spouse | 100% if no surviving issue, parents or issue of parents; 50% if 1 child, or issue of 1 deceased child; or 33% if > 1 one (alive or deceased with issue) |
| * Any property not passing to a surviving spouse passes as follows: | |
| Issue | Equally |
| Parents | Equally |
| Issue of parents | Equally |
| Grandparents | Equally |
| Issue of grandparents | Equally |
| Next-of-kin | By degree of relationship |
| Escheat to the state | 100% |

#### Tiered approach

The categories of possible takers are listed in order, in tiers. Any property not passing to the surviving spouse falls to the first tier where there is a live taker. Once that tier is determined, all the property that the surviving spouse did not take is distributed at that tier. No property falls to a lower tier.

#### Community property

If the jurisdiction recognizes community property, upon the first spouse’s death the community property is immediately divided: 50% to the surviving spouse outright and 50% to the deceased spouse. The deceased spouse may devise his or her half as he or she wishes. If, however, the deceased spouse dies intestate, typically all of the deceased spouse’s half of the community property goes to the surviving spouse.

### The UPC Approach

|  |  |
| --- | --- |
| **Who takes?** | **How much?** |
| Surviving spouse | 100% if no issue or parents; or  100% if all decedent’s issue are also issue of surviving spouse; or  $200,00 + 75% of rest if no issue but surviving parents; or  $150,000 + 50% of rest if all issue are also issue of surviving spouse and surviving spouse has other issue; or  $100,000 + 50% of rest if one or more issue not issue of surviving spouse |
| * Any property not passing to a surviving spouse passes as follows: | |
| Issue | Equally |
| Parents | Equally, or all to the survivor |
| Issue of parents | Equally |
| Grandparents/issue | 50% to paternal grandparent(s) or their issue; 50% to maternal grandparent(s or their issue;  If no surviving grandparents or issue on one side, all to the other side |
| Escheat to the state | 100% |

The UPC favors the surviving spouse and under the UPC, the decedent’s property escheats to the state much sooner than it would under most state statutes.

## Surviving Spouse: Who Qualifies

### Uniform Simultaneous Death Act

As initially adopted the USDA basically codified common law rule (prove by a preponderance of the evidence that the party survived the decedent by a millisecond). The act provided that where “there is no sufficient evidence” as to who survived whom, the party claiming a right to take it to be treated as having predeceased the decedent.

#### Criticism of common law and USDA

Under a typical intestate distribution scheme, if both spouses die intestate with no children, all of the couple’s probate property ends up on the second-to-die spouse’s side of the family. If both spouses die together, the issue becomes which spouse survived the other. Instead of the two families grieving together, they end up in court suing each other to see which family receives all of the couple’s property. The common law rule has been criticized (1) for its high costs of litigation in simultaneous or near simultaneous death instances, (2) for its unfairness, and (3) because it encourages families to sue each other.

* *Janus v. Tarasewicz*
  + The Januses unknowingly took Tylenol laced with cyanide. Stanley collapsed first, Theresa a short time later.
  + Although conflicting medical evidence, Stanley’s vital signs arguably disappeared during the ambulance ride and pronounced dead shortly thereafter. Theresa arguably had a pulse upon arrival, was put on a respirator for 48 hours before being removed and pronounced dead.
  + Stanley’s life insurance policy named Theresa as primary beneficiary; in the even she failed to survive him, his mother was named as contingent beneficiary. Stanley’s mother sued claiming insufficient evidence that Theresa survived him.
  + Applying the USDA, the court held that there was sufficient evidence to support the finding.

The USDA has been updated to now require “clear and convincing evidence” and that the spouse survives the other by 120 hours (5 days).

#### Determining time of death

To determine whether one person survived another, one needs to know when each party died.

Under the *common law approach*, a person is dead when there is irreversible cessation of circulatory and respiratory functions.

Under the *modern trend*, where circulatory or respiratory functions are maintained artificially, death occurs when there is irreversible cessation of total brain activity.

### UPC 120-hour approach

The UPC now requires that to qualify as a taker (surviving heir, devisee, or life insurance policy beneficiary), the taker must prove by clear and convincing evidence that he or she survived the decedent by 120 hours (5 days). The most recent version of the USDA requires the same.

## Surviving Spouse: Calculating Share

### Traditional intestate distribution scheme

Under the traditional intestate distribution scheme, a surviving spouse takes 100% of the deceased spouse’s intestate property only in the absence of any surviving issue, parents, or issue of parents.

***If surviving issue***: if the predeceased spouse had surviving issue, the surviving spouse’s share often depended on how many surviving “children” (alive or dead but survived by issue) survived the decedent.

* 1. If one surviving child: if the deceased spouse is survived by one child (alive or dead but survived by issue), typically the spouse takes 50% of the predeceased spouse’s intestate property.
  2. If more than one surviving child: if the deceased spouse is survived by more than one child (alive or dead survived by issue), typically the spouse takes 33%
  3. If surviving parent(s) or issue of parent(s): if the predeceased spouse has no surviving issue, but has surviving parent(s) or issue of parent(s), typically the surviving spouse takes 50%
  4. Small estates: some states give the surviving spouse the first $50,000 or $100,000 of the deceased spouse’s intestate estate and then the appropriate fraction of the rest of the deceased spouse’s probate intestate estate. The effect is to give the surviving spouse all of the deceased spouse’s intestate estate where the estate is small enough.

### UPC approach

A surviving spouse is better off under the UPC than under the typical intestate distribution scheme.

**If surviving issue**: Unlike most state statutes, the UPC gives the surviving spouse 100% of the property, even if the decedent has surviving issue, if (1) the surviving spouse is also the parent of the surviving issue, and (2) the surviving spouse has no other issue.

#### Rationale

The assumption is that most spouses trust the surviving spouse to determine how best to use the property for the benefit of the surviving issue, as opposed to giving the surviving issue their own shares outright.

#### Whose surviving issue

##### Not all issue are of surviving spouse

Where the deceased spouse has surviving issue, but some are from a different relationship, the surviving spouse takes the first $100,000 + 50% of the rest of the predeceased spouse’s intestate property. The remaining 50% is distributed equally among the deceased spouse’s issue.

##### Surviving spouse has own issue

Where the deceased spouse has surviving issue, and all of them are issue of the surviving spouse, but the surviving spouse has issue from a different relationship, the surviving spouse takes the first $150,000 + 50% of the rest. The remaining 50% if distributed among the deceased spouse’s issue.

#### No issue but surviving parent(s)

Where the deceased spouse has no issue but is survived by one or more parents, the UPC gives the surviving spouse the first $200,000 + 75% of the rest.

#### No surviving issue or parent(s), but surviving issue of parent(s)

The UPC gives the surviving spouse 100% if there are no surviving issue or parents. The UPC does not consider issue of parents when determining the surviving spouse’s share.

## Descendants/Issue: Calculating Shares

### Property to descendants/issue

If there is no surviving spouse, or there is a surviving spouse but he or she does not take all of the decedent’s property, both the typical intestate scheme and the UPC give the property to the decedent’s issue equally.

#### Descendants/issue v. children

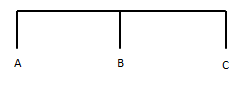
***Descendants/issue***: all of one’s offspring – one’s children, grandchildren, great grandchildren, etc.

***Children***: one’s immediate offspring; only the first generation of one’s issue

### Calculating shares – analytical steps

#### Taking equally

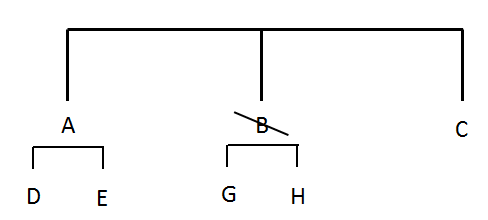
Where all of the decedent’s children survive the decedent, what constitutes taking “equally” is rather straightforward. The decedent’s property should be divided equally among his or her three children. Example, A, B, and C would receive 1/3 each.



#### Determining which issue take

##### Issue of predeceased children take in their place

If the decedent had a child who predeceased the decedent but is survived by issue, his or her issue will share in the distribution of the decedent’s property. It is often said that the surviving issue of the predeceased child take “by representation” – they step up and represent the predeceased relative. For example, if B predeceases the decedent but is survived by issue (G and H), G and H would represent B’s share.



##### If a person takes, his or her issue do not

In the example above, if A survives the decedent, A would receive a share but A’s issue (D and E) would not.

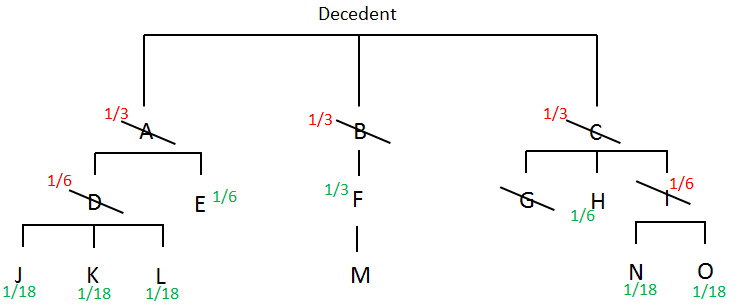
##### Absent adoption, only blood relatives qualifies as heirs

As a general rule, spouses of predeceased issue, sons-in-law, daughters-in-law, and stepchildren do not qualify as eligible takers under the intestate distribution scheme.

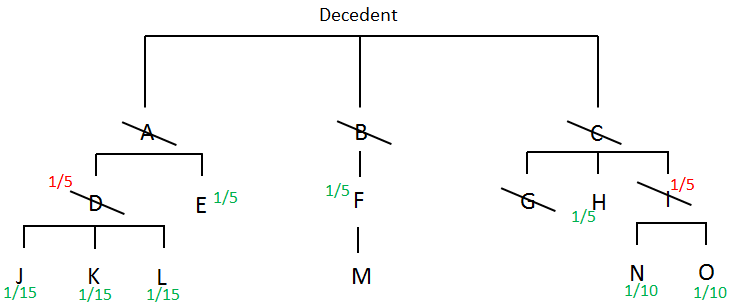
#### Taking equally where issue of unequal degree

|  |  |  |  |
| --- | --- | --- | --- |
|  | ***Per Stirpes Classic*** | ***Per Stirpes Modern*** | ***Per Capita at each Generation*** |
| Where is the estate divided first? | First generation always | First generation with live taker | First generation with live taker |
| How to treat dropping shares? | Drop by bloodline | Drop by bloodline | Drop by pooling |

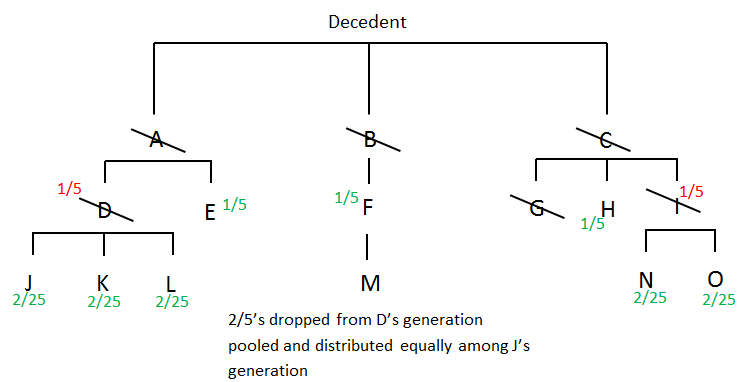
##### **Per stirpes classic**



##### **Per stirpes modern**



##### **Per capita at each generation**



## Shares of Ancestors and Remote Collaterals

When a decedent dies intestate, his or her property is distributed first to his or her immediate family. If, however, there is no surviving spouse or issue, the property flows “up” to the decedent’s ancestors and collateral relatives. There are three different major approaches to how the decedent’s property should be distributed when it flows “up” to ancestors and remote collaterals: (1) the parentelic approach, (2) the degree of relationship approach, and (3) the degree of relationship with parentelic tiebreaker approach.

*Collateral relatives*: the decedent, the decedent’s spouse, and the decedent’s issue are the decedent’s immediate family. All of the decedent’s other relatives are technically called “collateral relatives.”

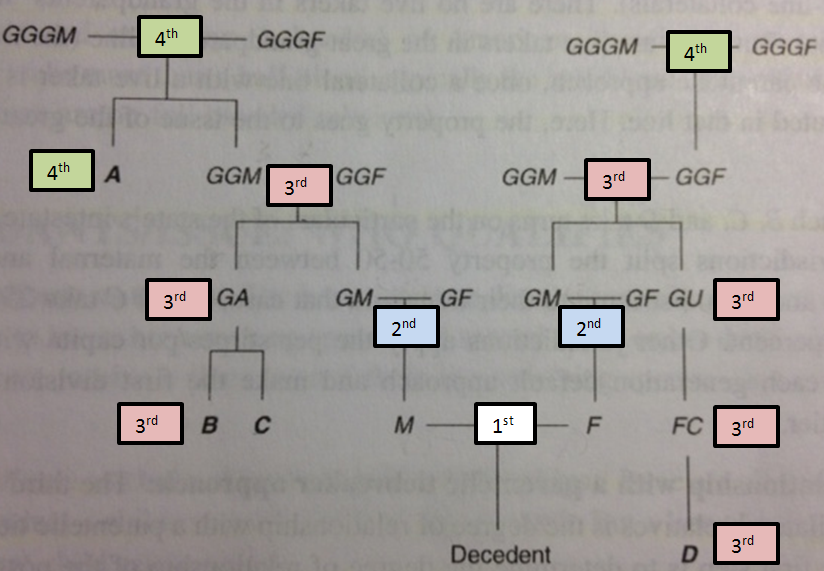
First line: mother, father, and siblings (brothers and sisters) and issue

Second line: grandparents, aunts, and uncles and cousins and issue

Third line: great-grandparents and grandparents’ siblings and issue

### Parentelic approach

Every intestate scheme starts with the decedent’s immediate family and then moves out along collateral lines – this is known as the parentelic approach. This distribution approach keeps going out by collateral lines until there is a line in which there is a live taker. The property is then distributed to the decedent’s relatives in that parentelic line. In distributing the property, the per stirpes (classic or modern) or the per capita at each generation doctrines apply, depending on the jurisdiction.



Under the parentelic approach, one simply keeps going out by parentelic lines until one finds the first collateral line with a live taker. The property is then distributed to the takers in that line. Here, there are no live takers is the parents’ line (the first-line collaterals). There are no live takers in the grandparents’ line (the second-line collaterals). But there are live takers in the great-grandparents’ line (the third-line collaterals – B, C, and D). Under this approach, once a collateral line with a live taker is found, the property is distributed in that line. Here, the property goes to the issue of the great-grandparents, B, C, and D to the exclusion of A.

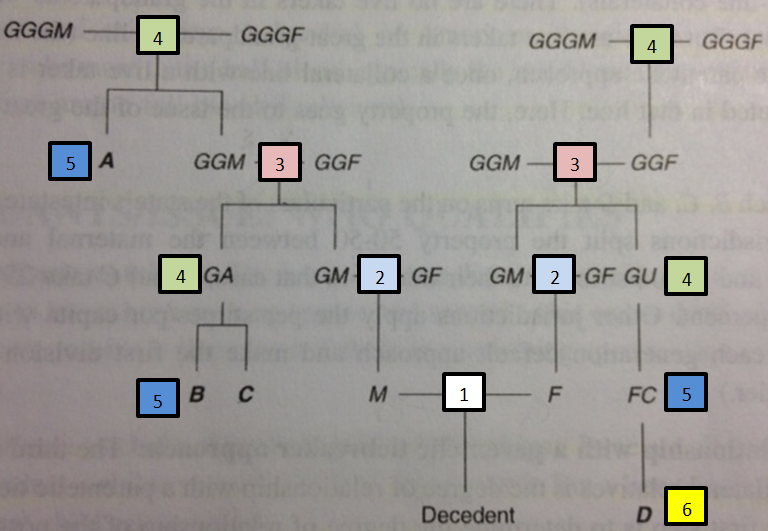
How much B, C, and D take turns on the particulars of the state’s intestate distribution scheme (per stirpes – modern or classic, or per capita at each generation).

### Degree of relationship approach

The degree of relationship approach focuses on the degree of relationship between the decedent and claiming relative, regardless of which parentelic line the taker is in. Under the degree of relationship approach, one simply counts the degrees of relationship between the decedent and the relative, and those relatives of the closest degree take to the exclusion of those of a more remote degree.

#### Determining the degree of relationship/kinship

To determine a person’s degree of relationship, count from the decedent up to the closest common ancestor and then down to the live relative.



To calculate the degree of relationship between A, B, C, and D to the decedent, the key is to identify the closest common ancestor (the closest grandparent) who both parties share. Count the steps from the decedent to that common ancestor and then down from the common ancestor to the party in question.

Under the degree of relationship approach, those relatives of a closer degree take to the exclusion of those of a more remote degree. Here, A, B, and C are of the fifth degree, and D is of the sixth degree. A, B, and C take to the exclusion of D. A, B, and C split the estate equally.

### Degree of relationship with parentelic tiebreaker approach

The first step is to determine the degree of relationship of the possible takers. Those of a closer degree take to the exclusion of those of a higher degree. Then, if there are multiple takers sharing the lowest degree of relationship, under the parentelic tiebreaker, those in the closer parentelic/collateral lines take to the exclusion of those in the more remote parentelic/collateral lines.

Application: Analyzing the above example under the degree of relationship with a parentelic tiebreaker, A, B, and C are of the fifth degree, and D is of the sixth degree. A, B, and C prevail initially. But because B and C are of a closer parentelic line (third-line collateral v. A in fourth-line collateral), B and C take to the exclusion of A. B and C split the estate evenly (50-50).

### Half-bloods

Half-bloods are relatives who share only one common parent as opposed to the traditional relationship where siblings share both parents.

At common law, only whole-blooded relatives are entitled to inherit. The UPC and the majority of the American jurisdictions have abolished the old common law rule and treat half-bloods the same as whole-bloods. A minority of American jurisdictions allow a whole-blooded relative to take more than a half-blood.

## Gifts to Children

### Advancements

The doctrine of advancement addresses the issue of whether inter vivos gifts a decedent made to an heir should count against the heir’s share of the decedent’s probate estate.

#### Common law

Under the common law approach, if a parent makes an inter vivos gift to a child, a rebuttable presumption arises that the gift constitutes an advancement that counts against the child’s share of the parent’s intestate estate.

##### Hotchpot

All inter vivos gifts to the child are added back (on paper, the child keeps the gift) into the parent’s probate intestate estate to create the “hotchpot.” Then the hotchpot is divided equally among the decedent’s heirs. Any advancement received by a child is counted against that child’s share of the hotchpot. The child actually receives from the parent’s intestate estate only their share of the hotchpot minus any advancement the child has received.

##### Rationale

Intestate property passes to one’s children equally because it is assumed the parent loved his or her children equally and wanted to treat them equally upon his or her death. The logic underlying the advancement doctrine is that only by including inter vivos gifts can it be said that the children were truly treated equally.

#### Modern trend/UPC approach

Inter vivos gifts do not constitute an advancement unless a writing indicates that the donor intended the gift to constitute an advancement.

##### Writing requirement

(a) If the *donor* creates the writing, the writing must be made *contemporaneously* with the inter vivos gift; (b) if the *donee* creates the writing, the writing may be made at *any time*.

##### Donee predeceases

Unlike the common law approach, if the donee predeceases the donor, and the inter vivos gift to the donee qualifies as an advancement, the advancement does not count against the share of the donor’s estate going to the donee’s issue unless the writing expressly provides so.

##### Valuation

If an inter vivos gift qualifies as an advancement, it is valued as of the time the donee receives possession or enjoyment of the property, whichever occurred first.

### Transfers to Minors

Under the intestate distribution scheme, if a decedent dies intestate and is survived by issue, there is a good chance that some of the property may be distributed to a minor. The problem is that minors lack the legal capacity to hold property.

#### Guardianship

One option for managing property for a minor is guardianship – also known as guardian of the property. The guardian’s job is exactly as its name implies: to guard and preserves the ward’s property until the minor reaches the age of capacity.

Traditionally, guardians have minimal powers over the property; must go to court for authorization to do anything; and account regularly to the probate court. However, the modern trend has modified guardianship and transformed it into a conservatorship. Under a conservatorship, the conservator takes title as trustee for the minor and has all the powers a trustee would have over the property. The conservator still has to account to the court, but usually only once a year. The result is a far more efficient arrangement for managing a minor’s property.

## Bars to Succession

### Homicide

Where a party who otherwise is entitled to take from a decedent kills the decedent, the equitable principle that one should not profit from one’s own wrongdoing argues against permitting the killer from taking.

#### Judicial approaches

If the jurisdiction does not have a statute addressing the issue, the courts are split over how to treat the issue:

1. The decedent’s property passes to the killer because the statutory probate scheme so instructs. If the court alters the scheme, the court is legislating.
2. The killer is barred from taking the decedent’s property because equity demands that one should not profit from one’s own wrongdoing.
3. Legal title to the decedent’s property passes to the killer, but a constructive trust is imposed to prevent unjust enrichment, and the court orders the property to be distributed to the next in line to take.

* *In re Estate of Mahoney*
  + The wife was convicted of manslaughter in the death of her husband. The husband died intestate, and the wife claimed her intestate share.
  + The jurisdiction had no homicide statute, yet the court said that it would be inequitable to permit the wife to profit from her own wrongdoing and adopted the constructive trust approach to the issue to ensure that the killer did not profit from her own wrongdoing.
  + The case was remanded to determine the degree of manslaughter: voluntary or involuntary.

#### Statutory/UPC approach

A majority of the jurisdictions and the UPC have an express statute that provides that a killer shall not take from his or her victim. Most of the statutes treat the killer as if he or she predeceased the decedent.

#### Intentional and felonious killing

The general rule, both judicially and statutorily, is that for the killing to bar (outright or through constructive trust) the killer from taking the decedent, the killing must be intentional and felonious.

##### Manslaughter

It is critical to distinguish the two types of manslaughter. ***Voluntary*** manslaughter is intentional killing and comes within the scope of the homicide doctrine – the killer is barred from taking. ***Involuntary*** manslaughter is unintentional killing and does not come within the scope of the homicide doctrine – the killer is not barred from taking.

##### Self-defense

Killing in self-defense is not felonious and does not trigger the homicide doctrine.

##### Assisted suicide

Mercy killings and assisted suicides technically are intentional and felonious killings and come within the scope of the homicide doctrine, though it’s debated whether they should be included.

#### Burden of proof

Whether a killer takes from his or her victim is a civil issue, not a criminal issue. A criminal conviction has res judicata effect upon the civil issue, but an acquittal is not the final word because the burden of proof in a criminal case is proof beyond reasonable doubt, while the burden of proof in a civil case is merely preponderance of the evidence. If the defendant is acquitted on homicide charges but civilly found liable for the decedent’s intentional and felonious wrongful death, the killer is barred from participating in the distribution of the victim’s estate.

#### Killer’s issue

The general rule is that application of the homicide doctrine means that the killer is treated as if he or she predeceased the victim. If a relative predeceases the decedent, and the relative is survived by issue, often the relative’s share passes to his or her issue. The jurisdictions are split over whether the homicide doctrine should apply to the killer’s issue to bar them from taking if they would otherwise take (assuming the killer predeceased the decedent).

##### UPC approach

The UPC treats the killer as if he or she had disclaimed the property, which arguably allows the killer’s issue to take the killer’s share under the anti-lapse and the per stirpes/per capita doctrines if they would otherwise qualify.

#### Joint tenancy

If the victim and the killer held property in joint tenancy, by operation of law the joint tenancy is converted into tenancy in common. The killer keeps his or her interest, and the victim’s interest is distributed as if the killer had predeceased the victim.

### Abandonment/elder abuse

A number of states have other doctrines that bar a taker from receiving if the taker is guilty of misconduct short of homicide. Some states bar a taker if he or she is guilty of abandonment (of a young child) or elder abuse (typically restricted to acts that amount to physical abuse).

### Disclaimers

A valid gift requires three elements: intent to make a gift, delivery, and acceptance. While acceptance is generally presumed, a disclaimer is simply a way of expressing one’s intent that he or she declines to accept a testamentary gift.

#### Treat as if predeceased

If a party disclaims, as a general rule the legal significance is that the party disclaiming is treated as if he or she predeceased the decedent. The property in question is then distributed as if the party who disclaimed predeceased the decedent. The property is distributed to the next eligible taker under the various rules governing who takes in the event a taker predeceases the decedent.

#### Benefits of disclaiming

##### Redistribute property

Disclaimers are often called a form of post-mortem estate planning. Disclaimers can be used to adjust who takes and how much they take after the death of the decedent.

Example: if a decedent dies intestate survived by a spouse and two children, in many states the children are entitled to take at least 50%. If the children are both adults, they may disclaim their interests to increase the share going to the surviving spouse. If both disclaim, they are treated as if they predeceased the decedent. As long as the children have no issue, the decedent is now treated as if he or she had no surviving issue, in which case more (or potentially all) of the decedent’s property passes to his or her surviving spouse.

##### Avoid gift tax consequences

One of the benefits of disclaiming is that it can avoid estate and gift tax consequences. If one accepts the property and then gives it to the next taker in line, gift tax consequences to the transfer may result. If, however, one disclaims and the legal effect is simply to pass the property in question to the next taker in line, the disclaimer has no gift tax consequence.

##### Avoid creditors

As a general rule, creditors are entitled to reach any transferable property that the debtor holds. If an heir or devisee is facing creditors’ claims, such that any inheritance or devise would go directly to the creditors, the heir or devisee can elect to disclaim the property in question to avoid such. If the taker disclaims, the legal significance is that the disclaimer never had a property interest so the creditors have no right to reach it.

Note: when the federal government is the creditor, the property disclaimed is often within reach of the federal government.

#### Scope

Pay careful attention to a disclaimer statute to see if it applies to only probate property (traditional approach) or if it also applies to nonprobate property (modern trend approach).

#### Execution requirements

Most statutes have technical requirements for execution; most, at least, require that the party disclaiming do so in writing within 9 months of the decedent’s death.

# Testamentary Capacity

## General Testamentary Capacity

### Introduction

The first requirement for a valid will is that the testator have the requisite testamentary capacity.

#### Policy justifications

1. A person who lacks such is not recognized as an individual for many purposes and consistency begs the same for executing a will.
2. We only want to give effect to the will if it actually represents the true intent and desires of the testator – promote testamentary freedom.\*\*\*\*
3. Ensures that the intent expressed when the testator has capacity will be protected from the risk that they may lose such later in life.
4. Protection of family members; most assume testators will provide for their families. If a testator fails to do so, that *may* be evidence of a lack of capacity – this has been criticized from elevating family protection above testamentary freedom.
5. Protection from unscrupulous third-parties who may try to take advantage of a testator with a weakened capacity.

#### Temporal application

The testator must have the requisite capacity ***at the time he or she performs a testamentary act*** – executes or revokes a will.

This means that a person who usually lacks testamentary capacity may execute a will during a *lucid moment* and the act will be valid. The testator’s condition immediately preceding and following the act will be taken into account in determining the testator’s capacity at the time the act was performed.

### Requirements

To execute or revoke a will, the testator must be ***at least 18 years old and of sound mind***.

1. Sound mind

Sound mind requires that the testator have the ***ability*** to know:

* + - 1. The nature and extent of his or her property,
      2. The natural objects of his or her bounty,
      3. The nature of the testamentary act he or she is performing, and
      4. How all of these relate together to constitute an orderly plan of disposing of his or her property

1. Ability to know:

The testator need only have the ability to know the information covered by the requirements. He or she need not actually know the information.

1. Low threshold:

When viewed from the perspective of the ability to know, it becomes readily apparent that the test for sound mind is extremely low. De facto, there is a strong presumption that one has testamentary capacity.

1. Burden of proof:
2. Majority view: once a proponent offers prima facie proof that a will was duly executed, it creates a rebuttable presumption the testator had testamentary capacity and the burden is on the contestant to prove a lack thereof [followed by CA and favored by Spitko because in the vast majority of instances, person is competent so it gets us to the right answer more often than not].

* *Wilson v. Lane*
  + The court held that the deceased had testamentary capacity and that the challengers presented no evidence to the contrary.
  + An older woman executed a will 3 years before her death including all blood-relatives and her care-taker as beneficiaries. Blood-relatives claimed testator lacked testamentary capacity at the time due to eccentric habits and absurd beliefs (fear of her house flooding and calling fire dept. about a made-up fire).
  + However, these beliefs and her inability to live alone did not interfere with her ability to form a certain rational desire to the disposition of her assets.
* *Breeden v. Stone*
  + See below

1. Minority view: the will proponent bears the burden of proving testamentary capacity.

* *In re Estate of Washburn*
  + The court found the testator lacked testamentary capacity while executing her final will which disposed of the majority of her property to her care-taker.
  + The court found she was suffering from Alzheimer’s at the time of the execution which resulted in her inability to recollect the property she wished to dispose of and understand the general nature, and resulted in her inability to make an election upon whom and how she would bestow the property by her will.
  + (1) sufficient evidence to rebut presumption of capacity through doctor’s testimony as well as that of knowledgeable laypersons
  + (2) testimony allows a reasonable trier of fact to find that the testator lacked testamentary capacity, also her intentions were unclear and the final 2 wills, executed 3 weeks apart were vastly different.
  + *Note: also an undue influence as well*.

1. Testamentary capacity v. contractual capacity

Contractual capacity is higher than testamentary capacity because contractual capacity is concerned with disposing of one’s assets during one’s lifetime. The risk is that the person may become destitute and therefore dependent on the state. Testamentary capacity deals with disposing of one’s assets at the time of death and the state has less of a concern because they will not have to care for the testator.

1. Testamentary capacity v. marriage capacity

Testamentary capacity is higher than the capacity necessary to marry. The right to marry is a fundamental right. It is accorded special status that limits that state’s ability to regulate it.

1. Defects in capacity

Even if a person has general testamentary capacity, a person may suffer from a defect in capacity that may invalidate part or all of the will.

* + - 1. Insane delusion
      2. Undue influence
      3. Fraud
      4. Duress

1. Remedy

If the testator suffers from a defect that causes him or her to dispose of his or her property in a way that the testator otherwise would not have, the general rule is the court will strike as much of the will as was caused by the defect.

## Insane Delusion

An insane delusion is a false sense of reality to which a person adheres despite all evidence to the contrary.

### Jurisdiction split

Two different approaches have evolved with respect to what constitutes an insane delusion.

#### Majority

A majority of jurisdictions apply the ***rational person test*** – if a rational person in the testator’s situation could not have reached the same conclusion, the belief is an insane delusion.

#### Minority

A minority of jurisdictions apply the ***any factual basis to support test*** – if there is any factual basis to support the testator’s belief, it is not an insane delusion.

* 1. Spitko does not believe this makes much sense

#### Protection of testator’s intent

* *In re Strittmater*
  + The court found the testator suffered from an insane delusion; even though she had been a member for the Woman’s Party for 11 years, the evidence did not show that she had taken great interest in it. The court therefore concluded that her paranoiac condition, especially her insane delusions about the male race, that induced her to transfer her estate to the Woman’s Party.
  + The cousins, who Strittmater had little contact with, challenged the will – they were her intestate heirs. They had standing because they had a pecuniary interest in the success of the contest.
  + Rule: An insane delusion is a legal, not a psychiatric, concept. A person may have testamentary capacity to execute a will but may be suffering from an insane delusion so as to cause a particular provision in a will or perhaps the entire will to fail for lack of testamentary capacity.
* *Breeden v. Stone*
  + The court found that the testator suffered from an insane delusion but that there was *not sufficient evidence that it materially affected the provisions of his will*.
  + The testator regularly abused alcohol and cocaine and suffered from delusions and paranoia. He was involved in a hit-and-run that killed a man. Two days later, police arrived at his house to question him. While using cocaine and alcohol, he barricaded himself in house, wrote a will, and then shot his dog and himself. The execution of a will created a presumption of testamentary capacity.
  + Majority approach – a rational person would not hold the delusions and paranoia that the gov’t, friends and family were out to get him – therefore they were insane delusions.

#### Dead man’s statutes

Historically, many states had “dead man’s statutes” that prohibited such testimony. Today only a minority of states still have such statutes. Some states have completely abolished them, while others permit such testimony if corroborated by other evidence or if the court finds such testimony reliable.

### Causation

Even if the testator suffers from an insane delusion, the insane delusion is irrelevant unless it is shown that the belief caused the testator to dispose of his or her property in a way that the testator would not have otherwise.

#### Majority

Most jurisdictions require *“but for” causation*: but for the insane delusion, the testator would not have disposed of his or her property as he or she did. Some courts soften the standard a bit, requiring that the insane delusion *materially affect* the will’s provision.

#### Minority

A minority of jurisdictions requires only that insane delusion *might have affected* the disposition of the testator’s property.

#### Religious or spiritual beliefs

Although not explicitly part of doctrine, the cases indicate that generally courts and juries are reluctant to apply the doctrine to religious or spiritual beliefs. In light of the principle of separation of church and state, many people are uncomfortable with the idea of courts and juries evaluating how “reasonable” a person’s religious or spiritual beliefs are.

## Undue Influence

### Definition

Undue influence is “substituted intent” – when one influences the testator to the extent that the will expresses the influencer’s intent, not the testator’s intent. Others have defined it as coercion, though not necessarily coercion of a physical nature, but more of a mental, emotional nature.

#### Proof

Rarely is there direct evidence of undue influence. At best, there is circumstantial evidence.

### Traditional rule statement

The prevailing view is that the traditional undue influence doctrine has four elements:

1. Susceptibility: was the testator susceptible to the undue influence?
2. Opportunity: did the defendant have the opportunity to exert undue influence?
3. Motive: did the defendant have a motive for exerting undue influence?
4. Causation: did the undue influence cause the testator to dispose of his or her property in a way that the testator would not have otherwise?

#### Burden of proof

Under this approach, the party challenging the will bears the burden of proof.

#### Causation

The first three elements of undue influence are factual. Invariably, the analysis comes down to the final requirement – causation. Rarely are there facts that go directly to it. The issue is whether the alleged facts combined to cause the testator to dispose of his or her property in a way that the testator would not have otherwise. Causation is usually the determining element.

### Burden-shifting approach

Because there is rarely evidence of undue influence, and the defendant is in the best position to present whatever evidence is available, most jurisdictions have a “burden-shifting approach” to undue influence. If the elements of the burden-shifting doctrine are satisfied, a presumption of undue influence arises, and the burden shifts to the defendant to rebut the presumption.

#### Rule statement

In many jurisdictions, the presumption of undue influence arises if:

1. There was a *confidential relationship* between the defendant and the testator;
2. The defendant *receives the bulk of the testator’s estate*; and
3. The testator was of a weakened state;
4. Whether the defendant was *active in the procurement or execution of the will* [sometimes].

* *Estate of Lakatosh*
  + The court used the burden-shifting approach to conclude that there was a presumption of undue influence and the defendant was unable to overcome the presumption.
  + A man, Roger, befriended an elderly woman, often taking care of her as she became dependent on him – he visited daily and took her on errands. She in turn gave him power of attorney and gave almost her entire estate to him in her will which was executed by a cousin of Roger.
  + Roger used the women’s money for his personal life, her living conditions eroded and she eventually revoked the power of attorney from him but did not change her will.
  + Burden-shifting elements: (1) confidential relationship as she trusted him to care for her and gave him power of attorney, (2) the women was elderly and had a weakened intellect, and (3) Roger received the bulk of her estate.

#### Restatement (Third) of Property, Donative Transfers

This provides that while a confidential relationship is not enough to raise a suspicion of undue influence, a confidential relationship coupled with suspicious circumstances are sufficient to raise an inference of abuse of the confidential relationship.

#### Burden of proof

If these requirements are satisfied, a presumption of undue influence arises and the burden shifts to the defendant to rebut the presumption.

#### Confidential relationship

There is no bright line for what constitutes a confidential relationship, but at a minimum the testator has to confide in the other party.

### Gifts to attorneys

Gifts to the client’s attorney, particularly if the attorney drafted the instrument, scream impropriety. Such gifts naturally raise questions as to whether it was truly the client’s wishes or whether the gift was a result of undue influence or fraud on the part of the attorney. The attorney owes a fiduciary duty to the client, and such gifts appear to conflict with that duty.

#### Majority approach

The general rule is that any time an attorney who drafts an instrument receives a substantial gift under it, a *presumption of undue influence* arises unless the attorney is related to or married to the client.

Most jurisdictions require a heightened burden of proof to overcome the presumption, requiring clear and convincing evidence that the gift was truly the testator’s intent.

#### Minority approach

Some jurisdictions are so concerned about gifts to the drafting attorney that they create an *irrebuttable presumption of undue influence*.

The attorney must come within one of two exceptions to the presumption:

1. The attorney is related to or married to the testator, or
2. The will was reviewed by an independent attorney who advised the testator about the potential for undue influence to make sure the gift was the free and voluntary act of the testator

* *In re Will of Moses*
  + Due to the fiduciary relationship between women and the beneficiary (her attorney), a presumption of undue influence arose even though he didn’t draft the will. Although the women went to an independent attorney to have the will executed, he did not advise her on undue influence therefore that act did not overcome the presumption of undue influence.
  + The testatrix, an older woman, was having sexual relations with her younger male attorney. She changed her will to leave the bulk of her estate to the attorney. An independent attorney drafted the will but the independent attorney did not investigate the women’s relationship with the beneficiary or inform her about potential undue influence.

#### Rationale for presumption for attorneys

##### The general presumption of undue influence doctrine

Under the general presumption of undue influence doctrine, the attorney-client relationship constitutes a confidential relationship. It is easy to argue that the testator is of weakened intellect, relative to the attorney, particularly if the client if elderly or physically debilitated. But the gift must constitute the bulk of the testator’s estate. A shrewd attorney could avoid application of the presumption of undue influence doctrine by making sure that the gift, while substantial, did not constitute the bulk of the estate.

##### Basic undue influence doctrine

Under the basic undue influence doctrine, it is relatively easy to prove susceptibility (testator confided in attorney), opportunity (attorney had access to client’s innermost thoughts and fiduciary relationship with client), and motive (money). As usual, the difficult element is causation. The attorney would argue there was no substituted intent.

* *Lipper v. Weslow*
  + The court held that although most of the elements of the traditional rule of undue influence were satisfied, there was no finding of causation and therefore, no undue influence.
  + The testatrix’s will left her estate to her two surviving children and disinherited the grandchildren of her predeceased son (who claim undue influence on the part of the attorney-son).
  + Traditional undue influence elements: (1) the women was *susceptible* as she was 81 years and died only 22 days after signing the will, (2) the son had the *opportunity* as he drafted the will, lived next door, and she was dependent on him for various activities, (3) he had *motive* as he disliked the disinherited half-brother and took more of the estate, and (4) *causation* was not found as for years the testatrix had told numerous people she was going to disinherit the grandchildren due to their behavior.
    - Presumption approach: It is unclear whether this would apply. There was a fiduciary relationship as the son was the attorney. We do not know if he took the “bulk” of the estate, he took roughly half. Although the testatrix was 81 years old, she may not have had a weakened intellect as she remained physically active until she died; however, she lived alone and was dependent on the son for various things. Also, she told others she planned to disinherit the grandchildren.
    - Interested drafter approach: The interested drafter approach does not apply if the attorney is related to the testator.

#### No contest clause

A no contest clause is a clause that says if a beneficiary under the instrument sues contesting the instrument, or a provision in the instrument, the beneficiary loses whatever he or she is taking under the instrument.

Jurisdictions are split as to when a no contest clause is unenforceable:

##### Majority/UPC approach

Most jurisdictions and the UPC refuse to enforce a no contest clause if there is a probable cause to support the will contest, whatever the nature of the contest.

##### Minority approach

In a minority of jurisdictions, a no contest clause is unenforceable, regardless of the amount of evidence supporting the claim, if the claim is one of forgery, revocation, or misconduct by one active in the procurement or execution of the will.

### Anticipating and deterring challenges

#### “Unnatural” disposition

Because these doctrines are so-fact sensitive, some have argued that it permits juries to substitute their intent for the testator’s intent. This is particularly true where the testator’s intent constitutes an “unnatural” disposition – that is, not what a typical person would do under the circumstances. Although an unnatural disposition does not itself constitute a defect in capacity, at a minimum it opens the disposition to attack.

In light of the inevitable costs of defending a will contest (money and potential embarrassment of the testator’s eccentric beliefs being made public), many beneficiaries are willing to settle.

#### Deterring will contests

Assuming one was anticipating a challenge, there are a number of estate planning tools one may consider to reduce the likelihood of such a suit.

##### Explanatory statement

The natural urge is to include a statement in the will explaining why the testator did what he or she did in the hope that such a statement would either deter a will contest or help convince the jury that the provisions in the will truly are the testator’s intent. However, this may increase the likelihood of a lawsuit:

* a statement portrays a family member poorly, the person may feel the need to contest the will to defend himself
* if the statement gives reasons, the testator needs to be absolutely sure that each reason is accurate, any inaccuracies may be used to raise issues of capacity and/or undue influence

Recommendation: if a statement is appropriate, the testator should write the statement in private and disclose it only to the lawyer so he may disclose it to the particular person during probate to explain the “unnatural” disposition.

##### Extra precautions

The lawyer may also wish to have the testator’s capacity assessed by a medical expert; have a third witness at the will execution ceremony; and/or include a no-contest clause.

###### Reasons for enforcing no-contest clauses

1. It tends to reduce the fraudulent challenges; we want to discourage meritless challenges

Example: disgruntled beneficiary wants more than what they were given and hopes that by bringing the suit, the other beneficiaries will settle, giving him more

1. Will contests tend to defame the deceased so no-contest clauses discourage people speaking poorly of the testator
2. Note: we only give effect to the no-contest clause if there was *no* *probable cause* for being the suit; otherwise, if there was probable cause (e.g., legitimate evidence of undue influence), the no-contest clause will not be enforced.

Note: Probable cause: a reasonable person would believe there is a reasonable likelihood

## Fraud

### Rule

Fraud occurs where someone intentionally misrepresents something to the testator, with the intent of influencing the testator’s testamentary scheme, and the misrepresentation causes the testator to dispose of his or her property in a way that he or she would not have otherwise.

Misrepresentation: a person must ***intentionally*** misrepresent something to the testator, knowing it to be false when he or she makes the misrepresentation.

### Fraud in the inducement

Fraud in the inducement occurs when the misrepresentation does not go to the terms of the will per se, but rather concerns a fact that is important to the testator and may induce the testator to dispose of his or her property differently in light of the misrepresentation.

### Fraud in the execution

Fraud in the execution occurs when either a person tricks another into signing a document that purports to be the signer’s will, but the signer does not realize it, or when the testator realizes he or she is signing his or her will, but the person misrepresents some of the contents of the will.

### Elements

#### Mens rea

The misrepresentation must be made ***knowingly*** and for the ***purpose of influencing the testator’s testamentary scheme***. If the misrepresentation is made a practical joke, with no purpose other than a joke, and the testator changes his or her will based on the misrepresentation, technically the fraud doctrine should not apply.

There rarely is direct evidence of the party’s intent at the time he or she makes the misrepresentation.

#### Causation

The fraud must cause the testator to dispose of his or her property in a way that he or she would not have otherwise.

#### Remedy

##### Fraudulent provisions

The remedy is to strike as much of the will as was affected by the fraud or, if necessary, to strike the whole will.

##### Fraudulent failure to revoke

If the fraud causes the testator not to revoke a will that would have otherwise been revoked, the remedy is to strike the will (or clause) that the testator would have revoked but for the misrepresentation.

##### Fraudulent failure to execute

If the fraud causes the decedent not to execute a will that he or she otherwise would have, although the court will not execute the will for the decedent, the court can impose a constructive trust on the parties who take the decedent’s probate property and order the property distributed to the parties who would have taken the property had the decedent executed the will that the misconduct prevented the decedent from executing.

Constructive trust: the practice effect of this remedy is to give effect to the will that the decedent did not execute. The purpose is to prevent unjust enrichment by those who would otherwise receive the decedent’s property.

## Duress

### Introduction

Duress occurs where a wrongdoer performs, or threatens to perform, a wrongful act that coerces the donor into making a donative transfer he or she would not have otherwise made. Transfers procured by duress are invalid.

* *Latham v. Father Divine*
  + Testatrix’s will left almost all of her estate to Father Divine. The plaintiffs alleged that the testatrix intended to revoke that will and execute a new will leaving her estate to them, but the testatrix was prevented due to Father Divine and his followers’ fraud, undue influence and physical force.
  + The Court ruled that the plaintiff’s complaint stated a case for relief in equity and, if proved, entitled them to a *constructive trust* ordering the beneficiaries under the testatrix’s will to transfer the property to the plaintiffs.

## Tortious Interference with an Expectancy

### Introduction

Where a third party has intentionally committed tortious conduct in the testamentary process (undue influence, fraud, or duress), those who would have taken but for the misconduct can also sue the third party for tortious interference with an expectancy.

### Rule statement

The plaintiff has to prove:

1. The existence of an expectancy;
2. A reasonable certainty that the expectancy would have been realized but for the interference;
3. Intentional inference with the expectancy;
4. Tortious conduct involved with the interference, such as fraud, duress or undue influence; and
5. Damages

### Advantages

#### Not a will contest

If a will contains a no contest clause, the beneficiary suing claiming tortious interference with an expectancy, does not challenge the validity of the will and thus does not trigger the no contest clause.

#### Punitive damages

By suing in tort, the plaintiff is eligible to claim punitive damages.

#### Longer statute of limitations

The tort statute of limitations does not begin to run until the party discovers or should have discovered the misconduct. As part of probate, notice is given to bring claims within a shortened statute of limitations.

# Wills Execution, Revocation, and Scope

## Executing a Valid Will

Whether a will has been properly executed is a function of two variables: (A) the jurisdiction’s statutory Wills Act formalities; and (B) the jurisdiction’s philosophy as to what degree of compliance with the Wills Act formalities is acceptable.

### Statutory requirements

Every jurisdiction has a statute that sets forth the requirements that an individual must comply with to execute a valid will (commonly known as Wills Act formalities). The requirements depend upon whether the will is a traditional attested (witnessed) will or a holographic (handwritten) will. A traditional attested will, at a minimum, includes a writing that is signed and witnessed.

#### Functions served

##### Evidentiary

The Wills Act formalities serve an evidentiary function by ensuring that the document offered for probate truly expresses the decedent’s final wishes and is the document the testator intends to be probated as her or her will.

##### Protective

The Wills Act formalities serve a protective function by making it more difficult for fraudulent claims to be brought and by protecting the testator’s intent as expressed in the properly executed will.

##### Ritualistic

The Wills Act formalities serve a ritualistic function by impressing upon the testator the finality of the act he or she is performing.

##### Channeling

The cumulative effect of the Wills Act formalities serve a channeling function by encouraging individuals to consult an attorney to draft and supervise the execution of their wills, thereby facilitating the probating of the will and decreasing administrative costs.

### Judicial philosophy

The jurisdictions are split over the degree of compliance required. Common law requires strict compliance with the Wills Act formalities, while the modern trend favors either substantial compliance or a harmless error/dispensing power approach.

## Common Law Approach to Attested Wills

The traditional common law approach to an attested will is (1) statutorily to have lots of detailed and technical Wills Act formalities; and (2) to require strict compliance with each and every one of those Wills Act formalities.

### Statutory requirements

An attested will is a will whose signing is witnessed; all states permit attested wills as valid wills. Other ancillary requirements exist – how many and what they are vary from state to state.

### Judicial approach

The common law judicial approach to the statutory Wills Act formalities is to require ***absolute*** strict compliance with each Wills Act requirement, no matter how clear the testator’s intent that this document be his or her last will. If there is ***any*** deficiency in the execution ceremony, the document is not a valid will.

* *In re Griffin (1968)*
  + Testator had his will prepared by an attorney but executed it on his own – asked two gentlemen friends to witness it. One followed him into another room, the testator attested to his signature and the first witness signed it, the first left and the second came in, signing the will after the testator acknowledged his signature.
  + The court acknowledged the testator intended the document to be his will. Yet the court ruled that the decedent did not acknowledge the signature in the presence of two witnesses present at the same time.
* *Steven v. Casdorph (1998)*
  + The testator took his will to a bank where he signed in the presence of a bank employee who was a notary, then took the will to two other bank employees in the same room who signed as a witness. The latter did not see the testator sign the will nor did the testator acknowledge his signature or will in their presence.
  + The WV statute required the testator to sign or acknowledge the will in the presence of two witnesses, present simultaneously, who must sign the will in the presence of the testator. The court applied strict compliance and invalidated the will.

### Typical formalities

Although the Wills Act formalities vary from jurisdiction to jurisdiction, a number of requirements are common to most of the statutes.

#### Writing

As a general rule, oral wills are not permitted. To have a valid will, there must be a writing.

#### Signature

The writing must be signed. A signature is anything the testator intends as his or her signature. There is no requirement that the individual sign her or her full name, but if a person intends to sign her or her full signature and does not complete it, the general rule (at least under the strict compliance approach) is that the potential signature does not qualify as the person’s signature.

Example: Any mark, even an “X,” may qualify as the testator’s signature if that is what the testator intends as her or her signature.

* *Taylor v. Holt*
  + All other Wills Act formalities satisfied, the testator typed his name in cursive font into a word processor containing his will. The testator did not sign it otherwise (however, the witnesses did).
  + Since the testator intended that to be his signature and all other requirements were fulfilled, the will was held as valid.

#### Signing by another

The will may be signed by someone other than the testator, as long as the person signs the testator’s name, in the testator’s presence and at the testator’s direction. The testator’s direction must be express, it cannot be implied.

#### Witnesses

Generally, at least ***two witnesses*** must be ***present at the same time***. The witnesses must sign the will, and in some jurisdictions, the witnesses must know that what they are signing is the testator’s will.

Under most statutes, the testator need not sign in front of the witnesses as long as the testator acknowledges, in front of the witnesses present at the same time, that the signature already present on the document is the testator’s signature.

#### Presence

The testator must sign or acknowledge in the *presence* of the witnesses, and, under the traditional approach, the witness must sign in the *presence* of the testator.

##### Line of sight test

The witness must either see or have the opportunity to see the act of the testator signing the will. The witness would have actually seen the specified act if he had looked. As applied to a typical statute, the witnesses, present at the same time, must see or have the opportunity of seeing the testator sign or acknowledge his or her signature, and the testator must see or have the opportunity of seeing the witnesses sign the will.

* *In re Groffman*
  + The testator acknowledged his signature to the first witness, the second witness was still in the lounge and could not see the signature being acknowledged. When the second witness made his way into the dining room and witnessed the testator acknowledge his signature, the first witness was back in the lounge and could not see the signature being acknowledged.
  + Under the line of sight approach, the testator did not acknowledge his signature in the presence of two witnesses present at the same time; therefore, the will was not valid.

##### Conscious presence test

Presence if defined by whether the party, in whose presence the act has to be performed, can tell from sight, sound and general awareness of the events that the required act is being performed.

##### Modern trend/UPC

The modern trend is to abolish the requirement that the witness sign in the presence of the testator. Here, it is only necessary that the testator sign or acknowledge the will in the presence of the witnesses.

#### Order of signing

##### Traditional approach

An implicit order exists such that the witnesses are required to witness the testator sign or acknowledge his or her signature: the testator has to therefore sign the will before the witness can sign.

##### Modern trend

The order of signing does not matter as long as all the parties sign the will as part of one ceremony. The UPC requires that the witness sign after the testator. However, if the jurisdiction has also adopted the UPC harmless error doctrine, as long as there is clear and convincing evidence that the decedent intended the document to be his or her will, the order of signing is irrelevant.

#### Writing below signature

With respect to attested wills, if writing appears physically below the testator’s signature, two variables must be analyzed: (1) whether the jurisdiction requires the will to be “subscribed” – that is, signed at the end; and (2) *temporally*, when was the writing added.

#### Delayed attestation

If the statute requires the witnesses to sign in the testator’s presence, the witnesses must sign the will at the same time as the testator, in the testator’s presence. However, the modern trend and UPC permit the witness to sign the will later (delayed attestation), even after the death of the testator, as long as the witnesses sign within a reasonable time period.

#### Videotaped wills

To date, no court has upheld a videotaped will. Worries include: idle comments that were caught on tape, it lacks any ritualistic function, it lacks direct evidence as to whether the person intended the taped statement to constitute his or her will, and has potential for high administrative costs.

#### Electronic wills

Nevada permits electronic wills executed under very strict requirements; otherwise, an electronic will not comply with the traditional Wills Act formalities. A jurisdiction applying either the substantial compliance or dispensing power approach may permit such a will.

### Interested witness

The witnessing requirement implicitly assumes that the witnesses assess the testator’s capacity at the time of execution, asses the execution ceremony, and protect the testator. These functions arguably require that the witness be “disinterested” – that they not take under the will. If a witness has a financial interest under the will, the witness has a conflict of interest in assessing whether the testator has the requisite capacity. Several approaches have arisen as how to handle such a situation:

#### Invalidate will

If the interested witness is one of the necessary witnesses to the will, the will will be invalidated as there are not a sufficient number of disinterested witnesses to testify.

#### Void interested witness’ gift

By voiding the gift to the interested witness, the witness’s ability to testify is restored, and therefore the will is valid.

#### Purging approach

The purging approach states that a witness has a conflict of interest only to the extent he or she stands to take more under the will than he or she would otherwise and purges the interested witness only of his or her excess interest under the will. This is the difference between how much the witness stands to take under the current will and how much he would take if the current will were not valid (i.e., what he would take under a previous will or through intestate).

#### Rebuttable presumption of misconduct - California

An interested witness gives rise only to a rebuttable presumption of undue influence, fraud or duress. If the interested witness rebuts the presumption, he or she keeps the gift. If the presumption is not rebutted, apply the purging approach.

#### Abolish the doctrine

The UPC and a substantial minority of states abolish the interested witness doctrine on the theory that it does more harm than good by trapping innocent interested witnesses.

* *Estate of Morea*
  + Of the three witnesses to the decedent’s will, two took under the will; because there were not two disinterested witnesses, an issue arose under the interested witness doctrine. One of the witnesses that took under the will was the testator’s son.
  + Under the New York interested witness statute, a party who is a witness and a beneficiary takes the lesser of his or her intestate share or her or her legacy under the will.
  + The son had nothing to gain under the will, the court declared him to be disinterested witness, thereby (1) satisfying the statutory requirement that the will be witnessed by two disinterested witnesses; and (2) permitting the other/third witness to keep his gift under the will.

### Swapped wills

* *In re Pavlinko’s Estate (1959)*
  + The Pavlinkos, a couple who speaks little English but the wills were drafted in English, had mirror wills (aka mutual or reciprocal wills) drafted for them. Each will left all the testator’s estate first to the surviving spouse, if there was one, and otherwise to Hellen’s brother. When it came time to execute the wills, they each signed the other’s will.
  + The problem was not discovered until both had died and the brother offered the wife’s will (she owned nothing but the husband had signed it and he owned everything) for probate. Applying strict compliance, the court held the document was not properly executed because it was not his will.
    - Applying harmless error: he did not actually intend the document he signed to be his will, he intended the document with his name on it to be his will
    - Applying substantial compliance: again, we don’t have the intent that the document he signed be his will
    - For thought: had he accidentally signed the phone book (or less extreme, his wife’s will that is slightly different than the one drafted for him), the court would not probate the phone book; therefore, the court won’t probate the document he signed because he didn’t intend it to be his will.
    - MUST have a document that substantially shows the testamentary intent.
* *In re Snide (1981)*
  + The Snide couple intended to execute mutual wills but accidentally executed the will prepared for the other. The wife offered the husband/decedent’s will for probate. A guardian ad litem appointed to represent a minor child objected to the probate of the will asserting that it lacked testamentary intent.
  + The court emphasized the obvious nature of the mistake, and noted that the two wills constituted reciprocal elements of a unified testamentary scheme which were executed as part of the same ceremony. The court held that the will had be properly admitted to probate.
  + SPITKO DOES NOT AGREE!

## Modern Trend Approach to Attested Wills

### Introduction

First, the modern trend approach, as typified by the UPC, reduces the number of requirements in the Wills Act. Second, it encourages courts not to require strict compliance, but rather to apply substantial compliance or harmless error/dispensing power as the judicial approach to the degree or compliance with the Wills Act formalities.

### UPC statutory provisions

The UPC has tried to simplify the execution process for attested wills by (1) reducing the number of requirements, and (2) loosening up on several of the requirements that remain.

UPC §2-502 requirements:

(1) A writing; (2) signed; (3) by the testator or (4) in the testator’s name by another (5) in the testator’s conscious presence and (6) by the testator’s direction; and (7) signed (8) by at least two individuals, each of whom (9) signed within a reasonable period after witnessing either (10) the signing of the will or (11) the testator’s acknowledgment of the will.

### UPC requirements

Several common law formalities were eliminated by the UPC:

#### Need not sign at the end

The UPC does not require that the testator sign the will at the end or foot of the will.

#### Signed by another

The UPC expressly provides that where another signs for the testator, in the testator’s presence and at the testator’s direction, the test for the requirement being in the testator’s presence is the conscious presence test.

#### Acknowledgment

The UPC loosens the acknowledgment option by providing that the testator may acknowledgment either his or her signature ***or the will***.

#### Separate witnesses

The UPC does not require the witnesses to be present at the same time for any reason, even when the testator signs or acknowledges.

#### Witnesses’ execution

The UPC provides that the witnesses need to sign within a reasonable time after witnessing the testator sign or acknowledge. This language implicitly rejects the requirement that the witnesses have to sign in the presence of the testator and arguably endorses the delayed attestation approach.

#### Witnesses’ presence

The UPC does not requirement the witnesses to sign the will in either the testator’s presence or the presence of each other.

### Curative doctrines – UPC judicial philosophy

#### Substantial compliance

Under substantial compliance, even if a will is not executed in strict compliance with the jurisdiction’s Wills Act formalities, the court is empowered to probate the will if (1) clear and convincing evidence shows that the testator intended this document to constitute his or her last will and testament, and (2) clear and convincing evidence shows that the will substantially complies with the statutory Wills Act formalities.

* *In re Will of Ranney*
  + The testator properly signed the will in front of two witnesses present together but the witnesses signed the self-proving affidavit instead of the will which is not technically part of the will.
  + If applying strict compliance, the court held that the will would not have been properly executed but the court adopted the substantial compliance doctrine and remanded the case for further determination if the testator substantially complied with the execution of the will (asking whether the purposes of the formalities were served?).
* *In re Estate of Hall*
  + The Halls went to their attorney’s office, modified a draft of their joint will, and then signed it on the advice of their attorney that it would constitute a valid will until they signed the final version. The Halls did so and the attorney signed it as a witness, and the Halls subsequently destroyed their original wills.
  + The court applied the harmless error doctrine to validate the will on the ground that there was clear and convincing evidence that the testator intended the document to be his will (the testator died before executing the final version).

#### Dispensing power/harmless error

Under the dispensing power/harmless error doctrine authorizes courts to “dispense” with those Wills Act formalities that they deem appropriate as long as there is clear and convincing evidence the decedent intended the document to be his or her will.

As applied to the three basic requirements (writing, signed, and witnessed), many have argued that (a) the witness requirement is the least important (easiest to dispense with), and (b) the writing requirement is the most important and the one that cannot be dispensed with under almost any scenario.

##### Pros and cons

Although strict compliance has weaknesses (occasionally frustrating the testator’s intent even where clear), it has its strengths (bright line test, easy to apply, lower administrative costs, less potential for fraud).

Substantial compliance and even more so than the dispensing power/harmless error doctrine has a strength (increases the power the courts to give effect to testator’s intent) but they have weaknesses as well (softer, more fact-sensitive, increase cost of administration, potential for fraud).

##### UPC scope

The UPC version of the harmless error doctrine applies to validate a writing as long as there is clear and convincing evidence the decedent intended the writing to constitute (i) the decedent’s will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival or his or her revoked will or a formerly revoked portion of the will.

## Notarized Wills

Pursuant to the 2008 revisions to the UPC, a will is valid if signed by two witnesses *or a notary*. The logic behind the new provision is that (1) a single notary can serve the functions underlying the Wills Act formalities (evidentiary, protective, ritualistic) as well as a pair of witnesses, and (2) under the harmless error doctrine, such a will would be valid even without the notarization.

## Holographic Wills

### Special feature

Holographic wills do not need to be witnessed; however, there are numerous other requirements, including that the will ***must*** be in the testator’s handwriting.

Note: a handwritten will is not necessarily a holographic will. A holographic will is a handwritten, ***not witnessed*** document. A handwritten, witnessed will is just a handwritten attested will.

#### Jurisdictional approach

About half of the states recognize holographic wills because the absence of witnesses raises a number of concerns:

1. Whether the testator had mental capacity;
2. Increased potential for fraud and undue influence;
3. Whether the decedent really intended for this writing to be his or her last will;
4. How to resolve conflicts between multiple wills; and
5. Higher administrative costs.

#### UPC approach

The UPC recognizes holographic wills.

### Requirements

#### Writing

As with attested wills, holographic wills must be in writing.

#### Signed

Holographic wills must be signed. Anything the testator intends as his or her signature qualifies. Unlike attested wills, only the testator can sign a holographic will.

#### Dated

Some states require that holographic wills be dated. The UPC does not require the holographic will to be dated in order to be valid.

#### Handwritten

To offset the lack of witnesses, holographic wills must be in the testator’s handwriting. Jurisdictions are split over how much must be in the testator’s handwriting. Some jurisdictions require that the *entire* document must be in the testator’s handwriting; most require only that the *material provisions* be in the testator’s handwriting.

##### Entirely

If the jurisdiction requires that the holographic will be entirely in the testator’s handwriting, any printing or other marks on the document may invalidate the whole will under a strict compliance approach to the requirements.

##### Material provision

The material provisions are those provisions that affect the disposition of testator’s property: the “who gets what,” any administrative (e.g., appointment of personal representative or guardian), and *maybe* testamentary intent.

##### UPC approach

The UPC requires only that the material provisions, not the entire instrument, be in the testator’s handwriting.

* *Kimmel’s Estate*
  + Decedent handwrote a letter to two of his children. The letter talked about some family matters and the weather. Near the end of the letter he wrote “*I have some very valuable paper I want you to keep fore me if enny thing happens all the scock money in the 3 Bank Liberty lones Post office stamps and my home on Horner St. goes to George Darl & Irvin Kepp this letter lock it up it may help you out….Father.*”
  + The decedent mailed the letter and died suddenly that afternoon. Some of his children offered the letter for probate. The court held the document qualified as a holographic will.

##### Conditional wills

Conditional wills are those that contain an express clause conditioning their being given effect upon some event occurring. Although conditional wills are valid and permitted, it is often unclear whether a clause in a will was intended to be an express condition precedent to the will being effect or merely an explanation for why the person got around to executing a will.

#### Testamentary intent

Because holographic wills are not witnessed, there is no ritualistic function. Therefore, we have to look to the document to ensure such intent in present. The key is the use of words that indicate that document is to have significance following the person’s death. Words such as “save this” support a finding of testamentary intent, though the word “estate,” standing alone, has been held too ambiguous to establish testamentary intent.

##### Material provisions

If the jurisdiction requires only that the material provisions be in the testator’s handwriting, a sub-issue is whether testamentary intent is a material provision.

The issue arises most often with commercially printed form wills where the decedent merely fills in the blanks indicating who is to get what, but does not write in his or her own handwriting any words that independently express the intent that the document serve as his or her will (because the preprinted words clearly express such an intent).

###### Strict compliance

The testator’s intent must be discernible exclusively from the testator’s handwriting, not the preprinted words.

###### UPC approach

Under the UPC, testamentary intent can be derived from the handwritten material, the non-handwritten provisions, or other extrinsic evidence.

* *Estate of Gonzalez*
  + The deceased purchased a commercially printed form will, filled in the blanks giving his estate to three of his five children, and then signed the form will. The decedent showed the document to his brother and his brother’s wife, and then told them he intended to re-write it more neatly on a second blank commercial printed form will. The brother, his wife and her mother signed the second form will but the decedent fell ill and died before copying the testamentary provisions over to the second form will or signing it. The first document was offered for probate.
  + The issue was whether the writing expressed the requisite testamentary intent. The court acknowledged the jurisdictions are split on how to treat the printed words on the commercially printed form will.
  + The court concluded that the printed words were incorporated by reference and should be considered when analyzing whether the document has testamentary intent. The court ruled the document was a valid holographic will.

Note: with attested wills, testamentary intent is a requirement. However, the typical execution ceremony for attested wills includes such a strong ritualistic component that it virtually guarantees that the executed document has testamentary intent.

### Judicial approach

The issue is what degree of compliance with holographic wills the court should demand; jurisdictions are split on how to handle it. On one hand, holographic wills eliminate the witness requirement, the remaining requirements are so important that absolute strict compliance should be required. On the other hand, because holographic wills are intended to permit the layperson to execute his or her will without an attorney, the courts arguably should apply a looser standard.

* *In re Estate of Kuralt*
  + Charles Kuralt was married to Petie but he also had a long-term and intimate relationship with Pat. In 1989, he executed a valid holographic will leaving all of his property in MT to Pat. In 1994, he executed an attested that left all of his property to his wife and children. In 1997, he began the process of transferring inter vivos the property in MT to Pat, only he was hospitalized and died before finishing the process.
  + In 1989, he executed a valid holographic will leaving all of his property in MT to Pat. In 1994, he executed an attested will that left all of his property to his wife and children. In 1997, he began the process of transferring inter vivos the property in MT to Pat, only he was hospitalized and died before finishing the process.
  + After Kuralt’s death, Pat offered the letter for probate. Kuralt’s estate opposed the letter on the grounds it expressed only a future intent to make a will. The court emphasized that the bedrock principle was to honor the testator’s intent, that Kuralt’s underlying word “inherit” indicated his intent to make a testamentary transfer of the property, and determined there was sufficient evidence to conclude that the document was a holographic codicil to his will.

## Revocation

### Revocability of wills

Wills are executed inter vivos but are not effective until death. If the testator changes his or her mind after executing a will, the testator can revoke it, replace it, or amend it at any time. A will may be revoked (1) by act, (2) by writing, (3) by presumption, and (4) by operation of law.

### Revocation by act

A will may be revoked by a ***physical*** act as long as the act is destructive in nature (burning, tearing, and so forth) and is performed with the intent to revoke. The act may be performed by the testator or by another, but, if by another, the act must be performed in the testator’s presence and at the testator’s direction.

#### Common law

The traditional and majority rule requires the destructive act to affect some part of the written portion of the will.

#### Modern trend/UPC approach

The UPC requires only that the destructive act affect some part of the will.

### Revocation by writing

A will may be revoked by a subsequent writing expressing the intent to revoke, but only if the subsequent writing qualifies as a valid will. The subsequent writing must be executed with Wills Acts formalities. The subsequent writing must qualify either as an attested will or a holographic will. A subsequent will can revoke a prior will expressly or implicitly by inconsistency.

#### Express revocation

Express revocation is when there is a clear and express statement of the intent to revoke the prior will. A properly executed instrument that does no more than express the intent to revoke a prior will is a valid will (e.g., “I hereby revoke my prior will”).

#### Revocation by inconsistency

Revocation by inconsistency occurs when the subsequent will disposes of the decedent’s property in a way that is inconsistent with the prior will. Because the later expression of the testator’s intent controls over the prior in time expression of intent, the prior will is deemed revoked to the extent of the inconsistencies.

#### Will v. codicil

If a subsequent will completely revokes the prior will, either expressly or by inconsistency, the subsequent will becomes the testator’s sole will. If the subsequent will only partially revokes or amends the prior will, either expressly or by inconsistency, the subsequent will is called a ***codicil***. The prior will still stands and is valid to the extent it is not revoked by the codicil.

##### Codicils – execution

A codicil is a will – therefore, it must be executed with the requisite Will Act formalities. A codicil is a will that merely amends an existing will rather than completely replacing it.

##### Exception – codicils to holographic wills

An important exception to the general rule that codicils must qualify as a valid will in their own right is that handwritten amendments to a holographic will constitute a valid holographic codicil even if the handwritten amendments do not qualify as a valid holographic will in their own right.

#### Revocation of codicil/will

Revocation of a codicil does not revoke the underlying will; however, revocation of a will revokes all codicils thereto.

#### Writing as revocation by act

The act of writing can qualify as revocation by act. If a testator takes out her typed, attested will and writes “VOID” across the first page of it but does not sign the document after doing so, the act of writing “VOID” does not qualify as a valid revocation by writing because it does not qualify as a valid will (neither attested nor holographic because not signed). But the act of writing “VOID” across the will does qualify as a destructive act. Assuming the testator had the intent to revoke at the time she performed the act, which is implicit in the nature of the act, the act of writing qualifies as a revocation by act.

When the act is a writing, the general rule is that any marks of revocation must be on the will.

* *Thompson v. Royall*
  + The attorney wrote on the back of the manuscript cover to the will, in the presence of the testator and another: “This will null and void.” The testatrix then signed the notation.
  + The will and codicil were offered for probate. The court held the writing did not qualify as ***revocation by writing*** because the notation did not qualify as a valid will (not attested because not witnessed and not holographic because the material provisions were not in the testator’s handwriting.
  + The court also held that the writing did not qualify as ***revocation by act*** because the handwriting did not touch any of the written portions of the will as required by the traditional common law approach.

Modern trend: the writing in *Thompson* may qualify as a valid *revocation by act* because the act arguably affected some portion of the will (if the manuscript cover were construed to be part of the will). The writing may also qualify as *revocation by writing*. The testatrix died three weeks after creating the writing in the presence of two witnesses. Under the modern trend, delayed attestation is permitted as long as it occurs within a reasonable time period. Most courts construe this period to be 6 months. Here, if the witnesses were brought in and signed the notation, it may qualify as a valid attested will under the modern trend.

### Revocation by presumption

***If a will is in the testator’s possession and cannot be found following the testator’s death, a rebuttable presumption arises that the testator revoked the will by act***. If the presumption is not overcome, the will is deemed revoked. If the presumption is rebutted, the will is deemed “lost,” and extrinsic evidence is admitted to prove its terms. If the terms are established the “lost” will is probated.

#### Rationale

Testators know that their will is a very important document. If the testator takes the will home with him or her, the presumption is that he or she will safeguard the will by keeping it in a safe place with other important papers. If the will is not found after the testator’s death, the more likely explanation is that the testator revoked it by act rather than that the testator lost it.

#### Weak presumption

The presumption that the testator revoked the will is a rather weak presumption. If those challenging the will offer a more plausible explanation for why the will is not found, the issue becomes one for the trier of fact.

#### Duplicate originals

Duplicate originals are multiple originals of the same will, each one properly executed. A photocopy of an executed will ***is not*** a duplicate original. ***The testator must properly execute each version of a duplicate original.*** Often the attorney keeps one duplicate original and the testator takes the other home.

##### Revocation by act or writing

##### Revocation by presumption

* *Harrison v. Bird*
  + Testatrix executed duplicate wills, leaving one with her attorney and taking the other home with her. Thereafter, at her request, the attorney ripped up his copy and mailed the pieces to her; the pieces were found after her death.
  + The act of ripping up the attorney’s copy did not constitute a valid revocation by act because it was not done in the presence of the testatrix. However, because the pieces that were mailed to her were not found after her death, the presumption doctrine applied. The court applied the approach that the presumption doctrine revokes all duplicate originals even if one or more are found following the testatrix’s death.

#### Partial revocation by physical act

A partial revocation intrinsically is also a new gift. By revoking only part of a will, the revoked part has to go somewhere. If it goes where else in the will, it arguably is a new gift. New gifts should be executed with Wills Act formalities – so the reasoning goes. Due to these concerns, not all jurisdictions recognize partial revocation by physical act.

##### Jurisdiction does not recognize

Those jurisdictions that do not recognize partial revocation by physical act simply ignore the act in question and give effect to the will as originally written.

##### Modern tread/UPC approach

Many states and the UPC recognize partial revocation by physical act, but states are split over how to treat the revoked gift. The majority permits the revoked gift to fall to the residuary and to increase the residuary, but the partial revocation cannot increase a gift outside the residuary. A few states hold that the revoked gift may pass intestacy only. The UPC provides that the will should be given effect as it reads with the partial revocation by act regardless of where that means the revoked gift goes.

### Revocation due to mistake of fact or law

Even if a will is validly revoked (in whole or in part), it may yet be possible to probate the will if the revocation was based upon a mistake (of fact or law) and if the testator would not have revoked if testator had known the truth. Courts tend to apply the doctrine only if (1) there is a failed alternative testamentary scheme, or (2) if the mistake is set forth in the writing that revoked the will and the mistake is beyond the testator’s knowledge.

#### Revocation by act

The classis dependent relative revocation scenario is where the testator revokes a gift by act (valid revocation) on the belief that a new will or codicil Is valid, but the new will or codicil is not (mistake of law). The intended beneficiary stands to take nothing because the original gift was validly revoked and the new gift fails due to the mistake of law. Dependent relative revocation reasons that it is better to save the original gift if that is what the testator would have wanted if he or she had known that the new will or codicil was invalid.

When there is a revocation by act, almost invariably the mistake is a mistake of law because the testator’s attempt at a new will or codicil fails for some legal reason.

#### Revocation by writing

Where the revocation is by writing, there cannot be a failed alternative testamentary scheme because the new will or codicil had to be valid for there to be a successful revocation by writing. Instead, where the revocation is by writing, almost invariably the mistake is a mistake of fact. For dependent relative revocation to apply, the courts require that the mistake be set forth in the writing and that the mistake be beyond the testator’s knowledge.

#### Tendencies

Almost invariably, where the revocation is by act, the mistake is a mistake of law in that the testator attempted a new will or codicil that is invalid. Almost invariably, where the revocation is by writing, the mistake is a mistake of fact that must then be set forth in the valid revoking instrument.

* *LaCroix v. Senecal*
  + Testatrix executed a valid will leaving the residue of her estate half to her nephew (identified by nickname) and half to Senecal, a friend. Thereafter, testatrix executed a codicil which revoked the residuary clause and substituted an almost identical clause except this time she referred to her nephew by both his nickname and his proper name.
  + The codicil, however, was witnessed by Senecal’s husband. Under the applicable interested witness statute, this voided the gift to Senecal. Dependent relative revocation was applied and gave effect to the gift under the original will:
    - There was a valid revocation (the codicil) based upon a mistake (the belief that the gift to Senecal in the codicil was valid), testatrix would not have revoked but for the mistake (as evinced by the void gift in the codicil), and because the revocation is by writing, the mistake must be set forth in the writing (the gift to Senecal as set forth in the codicil – evidencing the testatrix’s mistaken belief that the gift in the codicil was valid).

### Revival

Assuming a testator validly executes will #1, and thereafter validly executes will #2 that expressly or implicitly revokes will #1, and thereafter validly revokes will #2 intending to give effect to will #1, the jurisdictions are split over what the testator must to do “revive” will #1.

#### English approach

Under the English approach, will #1 was never really revoked so it could be probated. The English approach takes literally that statement that a will is not effective until the testator dies. Taken literally, will #2 would have revoked will #1 only if will #2 had remained in effect until the testator died. Because the testator revoked will #2 before he died, will #2 never became effective, so it never revoked will #1; therefore, there is no need to “revive” will #1.

#### American approach

Despite the general rule that a will is not effective until the testator dies, for purposes of revoking an existing will, the general American rule is that a will is effective the moment is it properly executed. The moment the testator properly executes will #2, will #1 is revoked – it is null and void. If thereafter the testator revokes will #2, unlike the English approach, revoking will #2 does not automatically give effect to will #1. The testator must do something to “revive” will #1. The jurisdictions are further split over what the testator must do.

#### Minority approach

A minority of states requires the testator to re-execute will #1 to revive it (or incorporate it by reference into a valid new will). Only by going through the Wills Act formalities again is testamentary life given to will #1.

#### Majority/UPC approach

All the testator has to do to revive will #1 is intend to do so; going through the Wills Act formalities is unnecessary.

##### Proving intent to revive

The key to proving the testator’s intent to revive is how the testator revoked will #2. If the testator revoked will #2 by act, the courts take almost any evidence of testator’s intent to revive will #1, even the testator’s own alleged statements. If, however, the testator revoked will #2 by writing a new will (will #3), the intent to revive will #1 must be set forth in the new will (will #3).

* *Estate of Alburn*
  + Testatrix executed a will while living in Milwaukee. Thereafter, she moved to Kankakee and executed a second will revoking the Milwaukee will. Finally, testatrix moved back to Milwaukee, destroyed her Kankakee will (validly revoked as it was ripped up) and stated she intended her property to be distributed according to her initial Milwaukee will. The beneficiaries had to prove the requirements of dependent relative revocation with respect to will #2 to avoid intestacy.
  + (1) the revocation was based upon a mistake as the testatrix had revoked the Kankakee will based on the belief that the Milwaukee will had been revived (mistake of law); (2) there was a failed alternative testamentary scheme – the Milwaukee will was not revived; and (3) the testatrix would not have revoked but for the mistake because comparing who took under the two wills and through intestacy, who took under the Milwaukee will was closer to the Kankakee will than intestacy.
  + The court applied dependent relative revocation and probated the Kankakee will.

#### Will #2 as will v. as codicil

##### Partial revocation of will #1 by will #2

Where will #2 only partially revokes will #1 (e.g., will #2 is a codicil), the UPC follows more the English approach. The part of will #1 that was revoked by will #2 is presumed to be automatically revived and the burden of proof is on the party trying to prove that the testator did *not* intend to revive the revoked provisions of will #1.

##### Complete revocation of will #1 by will #2

Where will #2 wholly revokes will #1, the UPC follows the majority American approach.

### Revocation by operation of law – divorce

The overwhelming majority rule is that divorce automatically and irrebuttably revokes all provisions in a testator’s will in favor of the ex-spouse, unless the will expressly provides otherwise.

#### Rationale

After a typical divorce, the law presumes that the ex-spouses no longer love each other, they no longer consider each other natural objects of their bounty, and they no longer wish to leave any of their property to each other.

#### Beneficiaries affected

The jurisdictions are split over which beneficiaries come within the scope of the revocation by operation of law doctrine – just the ex-spouse or also the ex-spouse’s relatives. The UPC revokes provisions in favor not only of the ex-spouse, but also revokes provisions in favor the ex-spouse’s relatives.

#### Domestic partners

Some states permit domestic partners to obtain inheritance rights by registering. Some of those states apply the revocation by operation of law doctrine to domestic partners.

If the domestic partners terminate their partnership, the termination automatically revokes all provisions in the testator’s will in favor of the ex-domestic partner.

#### Revocation by marriage, birth of child

These two events trigger special public policy concerns to make sure that the new spouse and/or child is provided for. The omitted spouse and omitted child doctrines cover these situations, and the effect of these doctrines is to give the new spouse or child a share of the testator’s property before giving effect to the will. To that extent, the doctrines indirectly act as a revocation by operation of law.

### Components of a Will

#### Integration

The scope of a will starts with the threshold issue of determining what constitutes the pages of the will. The doctrine of integration provides that those pieces of paper that are physically present at the time of execution and that the testator intends to be part of the will constitute pages of the will.

#### Republication by codicil

##### Republication by codicil

As a general rule, a codicil automatically redates the underlying will. The codicil can either redate the underlying will expressly (via an express clause expressing such an intent) or implicitly (in the absence of an express clause, the courts presume that the testator intended to redate the underlying will).

###### Exception

Parties can argue to the court that the testator must not have intended to redate the underlying will in light of the adverse consequences that would follow. Courts are generally receptive to this argument where there is no express republication clause in the will.

##### Preexisting will

Classifying a will as a codicil implicitly presumes a preexisting valid will. If the underlying will is not valid, however, the “codicil” is not a codicil, but rather is its own freestanding will (even if it does not dispose of the testator’s property). As a will, it does not automatically re-execute and republish the invalid will, but it may still be possible to use the valid will to give effect to the testamentary wishes expressed in the invalid will through incorporation by reference.

##### Curative powers

If there were potential problems with the original will execution ceremony that do not affect its validity in whole (for example, interested witness or undue influence claim as to part of the will), these problems may be cured by the republication by codicil doctrine. As long as the problem are not present when the codicil is executed, the codicil’s execution is deemed to re-execute and republish the underlying will, thereby curing the possible problem in the will.

#### Incorporation by reference

A valid will can incorporate by reference a document that was not executed with Wills Act formalities, thereby giving effect to the intent expressed in the incorporated document, as long as:

1. The will expresses the intent to incorporate the document;
2. The will describes the document with reasonable certainty; and
3. The document being incorporated was in existence when the will was executed.

##### Intent and describe requirements

This is a low threshold, if the will makes a reference to another document, arguably that is enough. If the will’s description of the document is not 100% accurate but the court is persuaded that this is the document to which the testator was referring, the court will find that the will describes the document with reasonable certainty.

##### Document in existence requirement

The courts strictly apply the requirement that the document has to have been in existence at the time that the will was executed. Exact dating is not necessary, but the plaintiff bears the burden of proving by a preponderance of the evidence that the document was in existence when the will was executed.

If the document changes over time, only the document as it existed at the time the will was executed is incorporated by reference (unless the will is re-executed under the republication by codicil).

* *Simon v. Grayson*
  + Testator’s will left $4,000 to those named in a letter that will be dated March 25, 1932. A letter was found where described naming the recipients but was dated July 3, 1933. Despite the discrepancy in the dates, the court concluded that this was the document the testator intended to incorporate by reference and that the will described the document with reasonable clarity.
  + Because the letter was created ***after*** the will was executed, the document could not have been incorporated into the will as initially executed.
  + However, on November 25, 1933, the testator executed a codicil to the will. The codicil automatically republished the underlying will and redated it to a date after the date of the letter, thereby satisfying the requirement that the document to be incorporated must be in existence when the will is executed.
* *Clark v. Greenhalge*
  + Testatrix’s 1977 will named Greenhalge as executor and principal beneficiary, and provided he was to receive all of her tangible personal property except for those items designated to be given to others “by a memorandum” she would create and make known to Greenhalge.
  + Thereafter, testrix created a memorandum ***and*** a notebook in which she made entries giving certain items of tangible personal property to others. The notebook was titled “List to be given [testatrix] 1979” and contained an entry of which she discussed her intent to the recipient.
  + Greenhalge refused to honor that particular entry claiming the will expressed the intent to incorporate ***only*** the memorandum. The court held the language of the will was broad enough to incorporate ***both*** and that the will described the notebook with reasonable certainty.
  + The court did not look into the specific date the entry was made in the will but noted two codicils in 1980 (this was apparently due to the court’s displeasure with the actions of the executor).

Note: The UPC’s tangible personal property list permits a testator to give away his or her tangible personal property via a list not executed with Wills Act formalities, even if the list is created ***after*** the will is executed, as long as the will expressly states such an intent. In essence, the doctrine modifies incorporation by reference by waiving the requirement that the document be in existence at the time the will is executed as long as the document only disposes of the testator’s tangible personal property.

* If the jurisdiction in *Greenhalge* had adopted the UPC’s tangible personal property list, the doctrine would have mooted the issue of whether the entry in the notebook had been made in the notebook at the time the will was republished by the codicil.
* *Johnson v. Johnson*
  + A single-page instrument was offered for probate as the decedent’s will. The instrument (which was not signed or witnessed) consisted of three typed paragraphs giving away property. At the bottom of the page, in the decedent’s handwriting, was: “To my brother James I give ten dollars. This will shall be complete…D.G. Johnson.”
  + The typed portion of the paper did not qualify as a will. The bottom, handwritten portion did qualify as a valid holographic will. The issue was whether the scope of the valid holographic will could be expanded to give effect to testamentary intent expressed in the typed paragraphs that did not qualify as a will. The following analysis discusses the possibilities:
    - ***Republication by codicil***

In light of the fact that the underlying will was never properly executed, the holographic will cannot be a codicil, and republication by codicil cannot be applied to give effect to the typed provisions of the paper. (Even in jurisdictions that do not recognize incorporation by reference, republication by codicil should not be stretched to save the typed material because the typed material was never executed.)

* + - ***Integration***

The general rule is that typed material cannot be integrated into a holographic will (because this violates the requirement that the material provisions must be in the testator’s handwriting), but typed material can be incorporated by reference into a holographic will (technically the incorporated material does not become part of the will; the incorporated documented is simply given effect as part of the probate process). Pursuant to the general rule, the typed material cannot be integrated into the holographic will at the bottom of the page.

* + - ***Incorporation by reference***

Incorporation by reference is the best argument if one is inclined to stretch the doctrine to give effect to the typed material under these facts. The reference to “This will shall be complete…” arguably constitutes an adequate reference to the typed portions of the page to satisfy the low threshold for the will expressing the intent to incorporate and describe the document (that is, treating the typed material as a separate document) with reasonable certainty. It is safe to assume that the typed portion of the page was in existence when the handwritten provisions were added, thus satisfying the requirements for incorporation by reference. (A strong dissent argued that this instrument was one will, that part of a will cannot be incorporated into another part of the same will, and that the typed material could be not given effect.)

* + - * Spitko believes the handwritten portion ***does not*** adequately reference the typed portions to satisfy the incorporation by reference element.

#### Acts of independent significance

Under the doctrine of acts of independent significance, a will may dispose of property by reference to acts outside of the will (the referenced act can control either who takes or how much a beneficiary takes) ***as long as the referenced act has significance independent of its effect upon the testator’s probate estate***.

In essence, it permits a testator to “change” the provisions of his or her will without having to execute a codicil.

Example:

The testatrix’s will provides: “I give $1,000 to each of my son-in-laws, I give everything in my garage to my brother and I $10,000 to each of the persons I will identify in a letter I will leave for my executor.” At the time the testatrix executed her will, she had two daughters, neither of whom were married. Thereafter, both daughters married, the testatrix bought a new lawnmower she stored in her garage, and the testatrix wrote a letter to her executor leaving $10,000 to C and K.

Analysis: One could argue that after each of the testatrix’s daughters got married, the testatrix should have executed a codicil expressly stating that the new son-in-law was to take $1,000 and naming the son-in-law. But the acts of independent significance doctrine provides that as long as the act referenced in the will has its own significance independent of its effect upon testator’s probate property, the referenced act can control who takes how much without the testator having to execute a codicil.

* + - First clause

The referenced act in the first clause is each daughter getting married. The act of getting married carries with it all sorts of ramifications. It is an act that has its own independent significance apart from the fact that it also permits the new son-in-law to receive $1,000 under the testatrix’s will. The gifts to the sons-in-law are valid without the testatrix having to execute a codicil.

* + - Second clause

The referenced act in the second clause is the act of putting things in and taking things out of the garage. Every time the testatrix puts something in the garage or takes something out, in essence she is changing her testamentary gift. As long as the referenced act has its own inter vivos significance, however, she need not execute a codicil. Storing items and using items are legitimate, inter vivos purposes that show that the referenced act has its own independent significance apart from its effect upon who takes what under the testatrix’s will. Bob would get the new lawnmower without testatrix having to execute a codicil.

* + - Third clause

The referenced act in the third clause that controls who will take $10,000 is the creation of a letter addressed to the executor. The letter does ***not*** have its own independent significance apart from its effect upon who takes under the will. The referenced act, the letter, is intended to and actually does serve only one purpose, to control who takes under the will. C and K do not take any money.

##### Writing as an independent act

The creation of a writing, even a testamentary writing (especially if it is someone else’s testamentary instrument), qualifies as an act of independent significance as long as the referenced writing has its own independent significance apart from its effect on the will.

Example: Testatrix’s will leaves $10,000 to each of the persons listed as beneficiaries in her brother’s will. Thereafter her brother creates a will. Each beneficiary in his will qualifies to take $10,000 under her will under acts of independent significance. The referenced act is the creation of her brother’s will. He created his will to dispose of his probate property. The brother’s will has its own significance (disposing of the brother’s property upon his death) independent of its effect upon the sister’s will.

#### Temporal perspectives

##### Backward looking

Republication by codicil and incorporation by reference look back in time.

Republication by codicil looks back in time by requiring that a valid will be executed ***before*** the codicil is executed. The codicil then republishes and redates the underlying will.

Incorporation by reference looks back in time by requiring that the document to be incorporated be created ***before*** the will was executed.

##### Forward looking

Although acts of independent significance can look back in time, typically the doctrine looks forward. With rare exception, the referenced act is an act to occur in the future, after the will is executed. Whenever a will references an act to occur in the future that affects who takes or how much they take, acts of independent significance is the only doctrine that can give effect to the gift.

# Construing Wills

## Changes in the Beneficiary

### Survival requirement

All jurisdictions require that anyone taking from a decedent must survive the decedent. Where a will exists, however, the will may expressly opt out of the survival requirement and permit the beneficiary to take even if he or she predeceases the testator.

#### Common law

At common law, a beneficiary under a will has to prove by only a preponderance of the evidence that he or she survived the decedent by a millisecond.

#### Modern trend/UPC approach

Under the modern trend/UPC approach, a beneficiary under a will or trust must prove by clear and convincing evidence that he or she survived the decent by a millisecond.

#### Transferor’s intent

Whatever approach the jurisdiction takes to the survival requirement, that approach is a default standard. If the will expressly imposes a longer survival requirement, the beneficiary must prove that he or she meets the survival requirement imposed by the express terms of the will.

### Lapse

If a beneficiary fails to survive the testator, the gift is said to lapse. A lapsed gift fails.

#### Rationale

It is presumed that the testator intended the beneficiary personally to benefit from the gift. If the beneficiary predeceases the testator and there is no lapse doctrine, the gift passes to the beneficiary’s estate to be distributed either to a beneficiary under the predeceased beneficiary’s will or to the predeceased beneficiary’s heirs – neither of whom the original testator may have met. The reasonable presumption is that if the named beneficiary predeceases the testator, the testator would prefer that the gift be revoked.

#### Void gift

***A gift is void if the beneficiary is dead when the will is executed; a gift lapses if a beneficiary is alive when the will is executed, but dies before the testator.*** A void gift is treated the same as a lapsed gift for most purposes under the modern trend.

### Failed/void gift – default takers

#### Specific gifts

A specific gift is a particular item that can be identified as part of the estate. For example, “My gold Timex watched inherited from my grandfather to…” is a specific gift.

If a specific gift fails, it falls to the residuary clause, if there is one, or otherwise to intestacy.

#### General gifts

A general gift is a gift of a certain amount (e.g., “$10,000”) or an item not specifically from the estate (e.g., “a Timex watch”).

If a specific gift fails, it falls to the residuary clause, if there is one, or otherwise to intestacy.

#### Demonstrative gifts

A demonstrative gift is a blend of a general and specific gift; it is a general gift (amount/quantity) obtained from a specific asset in the estate. For example, “$10,000 from the sale of my house to…” is a demonstrative gift.

#### Residuary gifts

##### Fails completely

If a residuary gift fails ***completely*** meaning, for example, the beneficiary that would have taken the residuary predeceased the testator, the residuary falls to intestacy.

##### Partially fails

A residuary gift partials fails if, for example, there are several beneficiaries assigned to split the residuary one or more has predeceased the testator such that there is at least one still available to take. Jurisdictions are split as to what happens to the part of the residuary clause that fails.

###### Common law

Under the “no residue of a residue” rule, if part of the residuary clause failed, that part falls to the intestacy.

* *Estate of Russell (1968)*
  + The testator’s holographic will provided in pertinent part: “I leave everything I own Real & Personal to Chester Quinn & Roxy Russell.” However, Roxy Russell was a dog.
  + The court held that dogs are not eligible beneficiaries, so the gift to Roxy failed.
  + The gift to Roxy was in the residuary and the court applied the no residue of a residue rule and held that Roxy’s half fell to intestacy.

###### Modern trend/UPC approach

The modern trend/UPC approach reasons that if the testator included a residuary clause, the testator’s intent was for ***all*** of the testator’s property to pass via the will and for nothing to pass through intestacy. As long as any part of the residuary clause is valid, that part catches whichever part of the residuary clause fails.

The portion of the residuary clause that failed is distributed evenly among the other beneficiaries in the residuary clause.

### Anti-lapse statutes

The presumption that the testator would prefer that the gift fail where the beneficiary predeceases the testator arguably does not apply where the beneficiary is sufficiently related to the testator and the beneficiary had issue who survive the testator. In that situation, anti-lapse statutes presume that the testator would prefer that the gift go to the predeceased beneficiary’s issue rather than fail.

Anti-lapse statutes provide that:

1. Where there is a lapse, and
2. The predeceased beneficiary meets the statutory degree of relationship to the testator, and
3. The predeceased beneficiary had issue who survive the testator, the lapsed gift goes to the issue of the predeceased beneficiary,
4. *Unless* the will expresses a contrary intent.

#### Lapse requirement

While the basic lapse doctrine arose to cover scenarios where the beneficiary ***actually*** predeceased, it has been expanded to cover scenarios where the beneficiary ***is treated as*** predeceasing the decedent; if the beneficiary disclaims the interest, if the will has an express survival requirement the beneficiary failed to meet, if the beneficiary feloniously and intentionally kills the testator, etc.

##### Common law

As originally developed, the anti-lapse doctrine applies to lapsed gifts only, not to void gifts.

##### Modern trend/UPC approach

The modern trend/UPC approach is to apply the anti-lapse doctrine to any qualifying beneficiary who predeceases the testator regardless of whether the beneficiary dies before or after execution of the will.

#### Requisite degree of relationship

Although virtually all states have adopted the anti-lapse doctrine, the scope of the doctrine varies from state to state depending on how closely related the predeceased beneficiary has to be to the testator. Some states limit the doctrine to devises to beneficiaries who are descendants of the testator, while other states define the requisite degree of relationship broadly to include a much larger pool of beneficiaries.

The UPC requires that the predeceased beneficiary be a grandparent or a lineal descendant of a grandparent to qualify for the anti-lapse doctrine. It also includes stepchildren.

#### Survived by issue

The predeceased beneficiary must have issue who survive not only the predeceased beneficiary, but also the testator. The UPC requires that the issue survives the testator by 120 hours.

#### Contrary intent

The anti-lapse doctrine is based on presumed intent. If the beneficiary is related closely enough to the testator and is survived by issue, the testator is presumed to have preferred that the gift go to the issue of the predeceased beneficiary rather than fail. This presumption is a rebuttable presumption, but the contrary intent ***must be expressed in the will*** under most anti-lapse statutes.

Most courts and/or statutes have created a very low threshold for what constitutes an express contrary intent. The general rule is that (1) ***any*** express words of survival or (2) any express gift-over in the will to another beneficiary in the event of the first beneficiary’s death constitutes a sufficient “express contrary intent” to bar application of the anti-lapse doctrine.

The UPC holds that mere words of survival (“if he survives me” or “my surviving issue”), without more, are not sufficient to constitute an express contrary intent barring application of anti-lapse.

* *Ruotolo v. Tietjen (2006)*
  + The testator devised half of his property “to Hazel…, if she survives me.” Hazel was his stepdaughter, a beneficiary covered by the state anti-lapse statute. She died 17 days before the testator, survived by a daughter. The issue was whether the language “if she survives me” constituted an express contrary intent to the application of anti-lapse.
  + The court expressed concern that such language is merely boilerplate language in many wills, that there was no express gift-over in the event the beneficiary predeceased, and the effect under the facts of the case would be the gift pass through intestacy. The court adopted the UPC approach and held that the bare words of survivorship are not sufficient, standing alone, to constitute an express contrary intent.
    - Spitko was not entirely convinced by this logic

#### Scope

The traditional and still majority approach applies the lapse and anti-lapse doctrines to wills only. Under the modern trend (minority), a few statutes apply the doctrines to most of the will substitutes – trusts, insurance policies, and contracts with payable-on-death clauses generally, but not joint tenancies.

#### Spouses

The general rule (and UPC approach) is that anti-lapse does ***not*** apply to spouses.

* *Jackson v. Schultz (1959)*
  + The testator’s will devised all of his property to his wife, Bessie – “to her and heirs and assigns forever.” Bessie died, survived by issue, none of whom were issue of the testator. Thereafter the testator died with no known surviving relatives. Although the state’s anti-lapse doctrine did not cover spouses, the court reasoned that the words *and* and *or* are interchangeable when construing wills.
  + Rather than the testator’s will devising his property to “Bessie *and* her heirs” (classic drafting language to indicate a fee simple absolute but no interest to her heirs), the court construed the express language to read “to Bessie *or* her heirs” (thereby giving Bessie’s heirs a gift-over in the event Bessie predeceased the testator). The court’s construction had the same effect as applying the anti-lapse to Bessie.
  + **NOTE**: the court’s opinion has been heavily criticized and not followed.

### Class gift

A class gift is a gift to more than one individual that intrinsically includes a right of survivorship. The right of survivorship means that if the gift fails as to one member of the class, his or her share does not “fall” out of the class, but rather the failed share is re-divided among the other members of the class.

#### Transferor’s intent

Whether a gift to multiple individuals is a class gift with a built-in right of survivorship or just a gift to multiple individuals is determined by testator’s intent. Ideally, the testator indicates clearly whether he or she intends the gift to multiple individuals to be a class gift. The testator is usually ambiguous – courts admit extrinsic evidence to help in the determination.

#### Analysis

Where it is not clear whether the testator intended a gift to multiple individuals to be a class gift, courts typically look to four factors to help construe the testator’s intent:

##### Description of beneficiaries

Typically a gift to multiple beneficiaries refers to them either collectively (as a group) or individually by name. Where the beneficiaries are referred to collectively, the reference argues in favor of finding an intention of a class gift. Conversely, where the testator identifies each beneficiary by name, that argues against finding an intention of a class gift.

##### Description of gift

Typically a gift to multiple beneficiaries describes the gift either in the aggregate or in separate shares. When it is described in the aggregate, it is likely there was an intention of a class gift. Where the gift is in distinct shares, it is likely not to be a class gift.

##### Common characteristic

Intrinsic to the notion of a class gift is that the class share a common characteristic that distinguishes them from everyone else. If they all share a common characteristic, that argues in favor of a class gift. Where there is no common characteristic, that argues against a class gift.

Consider whether there are others with the common characteristic but not included in the gift, this cuts against finding a class gift.

##### Overall testamentary scheme

This asks whether, in light of everything else the testator tried to do with his or her property, it makes more sense to apply a right of survivorship to the gift.

###### Express right of survivorship

A number of courts have held that if there is a gift in the will to multiple individuals that has an express right of survivorship in the gift, the failure to include an express right of survivorship in another gift to multiple individuals indicates that the testator did not intend for the latter gift to be a class gift.

However, one may argue that the testator thought it so obvious that the latter gift was a class gift that he or she thought there was no need to include an express right of survivorship.

###### Alternative takers

It is always important to determine who would take the failed gift if it were not a class gift. Whether there is anything about the testator’s overall testamentary scheme that indicates that the testator would not want that person to take the property in take the property (e.g., would be the only property to fall to intestacy).

#### Restatement (Third)

The Restatement (Third) of Property focuses on how the beneficiaries are described. If the gift describes the beneficiaries:

1. only by a group label, a rebuttable presumption arises that the gift is a class gift;
2. only by name, the gift it not a class gift; and
3. by both a group label and individual names, a rebuttable presumption arises that the gift is not a class gift – rebutted by language in the instrument or circumstances indicating the testator intended a class gift.

* *Dawson v. Yucas (1968)*
  + Clause two of the testatrix’s will stated that she wanted her 1/5 interest in a farm inherited from her husband, to revert to his side of the family. She devised her interest in the farm ½ each to two nephews on her husband’s side of the family. One nephew predeceased the testatrix.
  + Anti-lapse did not apply because the state required the predeceased beneficiary to be a descendant. The issue was whether the gift was a class gift:
    - The gift described two nephews by name, not collectively (cut against class gift);
    - The gift was made in separate shares, not collectively (cut against class gift);
    - The two shared a common characteristic but there were others not included that shared the characteristic (negates itself); and
    - An express right of survivorship appeared later regarding another gift to multiple members (cut against class gift).
  + The court held that it was not a class gift and the share to the deceased nephew lapsed and fell to the residuary.

#### Anti-lapse and class gifts

With anti-lapse, the saved gift goes to the issue of the predeceased beneficiary. With the class gift doctrine, the saved gift goes to the other members of the class. The overwhelming majority of states and the UPC apply the anti-lapse first to class gifts. If anti-lapse cannot save the gift, then apply the class gift doctrine.

## Changes in the Testator’s Property

### Ademption

The most common construction issue concerning the testator’s property arises when the testator makes a specific gift in his or her will and thereafter the item in question is transferred – should the beneficiary take anything?

#### Common law/identity approach

The common law doctrine of Ademption states that where the testator makes a specific gift, and thereafter the specific item that is the subject of the specific gift is transferred, an irrebuttable presumption arises that the testator intended to revoke the gift.

##### Identity approach

Under the traditional identity approach to Ademption, if the will makes ***a specific gift***, the executor is to go through the testator’s probate estate to see if he or she can “identify” that item in the estate. If he or she can, the beneficiary takes the item. If the executor cannot find the item, the gift is adeemed (revoked), and the court will not take any extrinsic evidence as to why the item cannot be found or what was (or might have been) the testator’s intent with respect to the item.

Under this approach, it does not matter why the property that was the subject of the specific gift is no longer in the testator’s probate estate (voluntary or involuntary – it does not matter).

##### General rule

The identity approach to the doctrine of Ademption is the traditional and still majority approach to the doctrine.

If any part of the specific gift remains in the testator’s estate when the testator dies, the beneficiary is entitled to receive whatever is left of the specific gift.

#### Modern trend/judicial “modified intent” approach

Under this approach, the jurisdiction still follows the identity approach but exempts property that was transferred through an act that is involuntary as to the testator, and/or that was made without the testator’s knowledge and consent. The beneficiary of the gift gets either the full pecuniary value of the gift, or whatever is left of it minus proceeds that were used to support the testator, depending on the jurisdiction.

* *In re Estate of Anton*
  + Gretchen Coy deeded a piece of real estate to her father, Herbert, and stepmother, Mary, who built a duplex on the property. After Herbert’s death, Mary became the sole owner and devised half to her stepdaughter, Gretchen and half to her son Robert.
  + Mary was in a bad accident, placed in a nursing home, and executed a durable power of attorney authorizing her daughter Nancy to run her affairs. Nancy was forced to sell the duplex to cover Mary’s living expenses; a balance on the duplex of over $100k remained when Mary died.
  + The court adopted a “modified intention” approach to exclude transfers through an act that is involuntary as to the testator. The court recognized exceptions to ademption where (1) the sale was by a guardian or conservator without the knowledge and consent of an incompetent testator, or (2) the property was destroyed contemporaneous with the testator’s death. The court extended the modified intention approach to include transfers by an attorney-in-fact without the knowledge of the testator.
  + The court held that where the proceeds are used for the testator’s support, the beneficiary is entitled to only half of the remaining proceeds (son received other half).

### Avoidance/softening doctrines to identity approach

Because Ademption is such a harsh doctrine, courts have developed a number of avoidance and softening doctrines to justify not applying Ademption where one might think it would otherwise apply.

#### Characterize gift as general, not specific

The Ademption doctrine applies only to specific gifts. Where the wording of a gift is ambiguous, if the beneficiary can convince the court that the gift is a general gift, the executor has a legal duty to go out and acquire the item to satisfy the gift, thereby avoiding ademption.

#### Change in form, not substance

The “change in form, not substance” doctrine provides that if the item that is the subject of the specific gift is in the estate but has suffered a change that goes to its form, but not its substance, the court should give the beneficiary the item.

If the change is not that significant, ademption should not apply because the item is arguably still in the estate. Moreover, where the change is merely one in form, not substance, the testator would not have thought it necessary to revise her or her will because he or she would have assumed that the “new” item was still the same old item subject to the specific gift.

Example: Testatrix’s will provides that she gives her “checking account at Bank1 to Alice.” Thereafter, testatrix moves the checking account to Bank2. Alice should take the checking account at Bank2 because moving the checking account from one bank to another is merely a change in form, not substance.

Example: Testatrix’s will provides that she gives her “checking account at Bank1 to Alice.” Thereafter, testatrix closes her checking account and puts the funds into a certificate of deposit. Most courts would hold that the gift is adeemed – the change is one of substance, not form.

#### Construe at time of death

The general rule is that a will should be construed relative to the circumstances surrounding the testator at time of execution. If testator’s will says, “I give my car to A,” the gift is construed to be a specific gift of the car that testator owned at the time he or she executed the will. If testator sold the car and purchased a new car, under a strict application of the ademption doctrine, the specific gift is adeemed. If, however, the beneficiary can persuade the court to construe the gift at time of death, the beneficiary would take the car that the testator owned at the time of death.

However, courts are reluctant to construe the will at time of death if the effect is to give the beneficiary a gift that is worth substantially more.

#### Conservatorship/durable power of attorney exception

Under the modern trend, states are increasingly providing by statute that if the property subject to the specific gift was transferred during conservatorship or by an agent acting under a durable power of attorney for an incapacitated principal, the ademption doctrine does not apply. The exception applies whether the transfer by the agent/conservator was voluntary or involuntary.

##### Effect

The effect of the exception for acts by conservators or agents acting under a durable power of attorney for an incapacitated principal is to convert all specific gifts into general gifts. The beneficiary is entitled to the general pecuniary value of the specific gift measured as of the moment it is transferred (note, that this only arises when the specific cannot be found in the estate).

##### Rationale

The identity approach believes it is better to put the burden on the testator to revise his or her will when a specific gift is transferred than to take extrinsic evidence on what the testator intended, the exception for transfers during conservatorship/agents acting for incapacitated principals implicitly recognizes that it is unfair to require a testator to revise her or her will under these circumstances. If a conservator has been appointed, there is a strong probability that the testator lacks the requisite testamentary capacity to revise her or her will.

#### Outstanding balance doctrine

A softening doctrine to ademption provides that (1) if the item that is the subject of the specific gift is transferred, voluntarily (sale/gift) or involuntarily (fire, theft, etc.), and (2) when the testator dies, there is still an outstanding balance due the testator as a result of the transfers, then (3) the beneficiary of the specific gift that was adeemed takes the outstanding balance in lieu of the specific item.

#### Jurisdictional differences

The identity approach to the ademption doctrine represents that traditional and still majority approach to the doctrine. Not all states, however, have adopted all of the modern trend avoidance, exception, and softening doctrines.

### UPC/intent approach

The UPC rejects the identity approach to ademption and instead adopts the intent approach. It accepts extrinsic evidence on what the testator intended, or would have intended, as to the specific gift in question. In addition, the UPC adopts a replacement property doctrine, along with the other modern trend avoidance and softening doctrines.

#### Replacement property exception

The UPC expressly provides that where a testator owns property at death that was acquired to replace property that was a specific gift in his or her will, the beneficiary of the specific gift gets the replacement property.

#### Outstanding balance doctrine

The UPC expressly adopts the outstanding balance doctrine. Whether the property is transferred voluntarily or involuntarily, if the testator is owed money at time of death as a result of the transfer, the outstanding balance is given to the beneficiary of the specific gift.

#### Testator’s intent approach

If neither the replacement property doctrine nor the outstanding balance doctrine apply, the UPC provides that the beneficiary of the specific gift is entitled to money equal to the value of the specifically devised property as of the date of its disposition if the beneficiary can establish (a) ademption would be inconsistent with the testator’s plan of distribution, or (b) that the testator did not intend for ademption to apply.

#### Conservatorship exception

The UPC also adopts the modern trend exception that if the property subject to the specific gift was transferred during conservatorship or by an agent acting under a durable power of attorney for an incapacitated principal, the ademption doctrine does not apply.

#### Extrinsic evidence

With the adoption of the replacement property doctrine and the testator’s intent doctrine, the UPC has opened the ademption doctrine up to extrinsic evidence to a much greater extent than the avoidance/exceptions/softening doctrines.

### Stocks

#### Common law

The traditional, common law approach focuses on whether the gift of stock is a specific or general gift. If the gift of stock is specific and the change is due to a stock split, the beneficiary takes the additional shares. If the gift of stock is a general gift, the beneficiary does not take the additional shares following a stock split.

#### Modern trend

The modern trend rejects the separate v. general gift analysis, reasoning that even if the gift of stock is a general gift, ***the intent was to give a percentage interest in the company. The only way to give the intended percentage is to take into consideration stock splits and to give the beneficiary the increased number of shares to achieve the desired percentage interest in the company.***

#### UPC

The UPC approach rejects the common law specific v. general gift distinction and instead focuses on whether at the time the testator executed the will he or she owned stock that matched the description of the gift of stock in the will. If so, and thereafter the testator acquired additional stock as a result of his or her ownership of the devised stock and action initiated by a corporate entity, the beneficiary gets the benefit of whatever changes occurred, even if the stock in the estate is stock of a completely different corporate entity.

### Miscellaneous construction doctrines

#### Satisfaction

If, after executing a will, the testator makes an inter vivos gift to a beneficiary under the will, the issue is whether the inter vivos transfer should count against the beneficiary’s testamentary share of the estate.

##### Common law

If the beneficiary is a child of the testator and the property transferred inter vivos were of “like kind” to that devised under the will, a rebuttable presumption arises that the testator wanted the inter vivos gift to count against the child’s share under the will.

##### Modern trend/UPC approach

The modern trend/UPC approach holds that inter vivos gifts to beneficiaries under a will (any beneficiary, not just to the testator’s children) are presumed ***not*** to be in satisfaction absent a writing expressing such an intent. The writing can be the will making the testamentary gift, a writing by the testator at the time of the inter vivos gift, or a writing created by the donee anytime.

##### Scope

***Satisfaction applies to general gifts only***. If the gift in question is a specific gift, where the testator gave the specific gift inter vivos to the beneficiary under the will, ademption applies.

##### Advancement v. Satisfaction

***Advancement deals with the issue where the decedent dies intestate; satisfaction deals with the issue where the decedent dies testate.***

#### Exoneration of liens

Where a will devises property that is burdened by debt (a mortgage or lien, typically), the issue that arises is whether the beneficiary should take the devised property free and clear of the debt (thereby reducing the gift to the residuary taker) or whether the beneficiary should take the gift subject to the debt – the issue if one of testator’s intent.

##### Common law

At common law, the presumption is that the beneficiary is to take the devised property free and clear of any debt.

##### Modern trend/UPC approach

Under the modern trend/UPC approach, the presumption is that the testator intended the beneficiary to take the property subject to the accompanying debt (that is, to receive only the testator’s equity in the devised property). A general clause in a will to pay all the testator’s debts is not enough to overcome the modern trend presumption. An express reference to the debt in question is necessary.

#### Abatement

If the testator gives away more in his or her will than he or she has to give, the doctrine of abatement provides for which gifts are to be reduced first.

##### General approach

The general approach, based on the testator’s presumed intent, is that the residuary clause is reduced first, then general gifts, and specific gifts last. This order is based on the assumption that the more precise the nature of the gift, the more important it must have been to the testator.

However, often the testator presumes that the residuary clause will be the biggest gift and saves it for the most important beneficiary (e.g., spouse). This approach does not always serve the testator’s intent.

##### Minority approach

Some states’ abatement statute and the UPC adopt the general approach but include a provision giving the courts the flexibility to alter the order of the abatement where it appears inconsistent with the testator’s overall testamentary wishes.

# Will Substitutes and Planning for Incapacity

Four types of legal arrangements passed property at time of death but were not subject to the Wills Act formalities: life insurance contracts, joint tenancies, certain possessory estates and future interests (legal life estates and remainders), and inter vivos trusts.

## Inter Vivos Trusts

A trust is nothing more than a way to make a gift.

Parties: while the traditional gift involves only two parties, a donor and a donee, a gift in trust involves three parties: a settlor, a trustee, and the beneficiaries. There are three parties because when a gift is made in trust, title to the property in question is bifurcated. Legal title is given to the trustee, who holds and administers the property for the benefit of the beneficiaries, who hold the equitable title. The donor is called the settlor.

### Theoretical perspective

There are several different types of inter vivos trust where some are clear inter vivos transfers and some look like testamentary in nature. However, revocable inter vivos trusts are widely recognized as valid will substitutes that do not have to comply with the Wills Act formalities, even there the settlor is also the trustee and life beneficiary. The following are some of the possibly types of inter vivos trust:

* Classic trust
* Settlor as trustee and life beneficiary
* Revocable trust & settlor as life beneficiary
* Revocable trust & settlor as trustee and life beneficiary

### Traditional doctrinal perspective

Revocable inter vivos trusts are widely recognized as valid will substitutes that do not have to comply with the Wills Act formalities, even there the settlor is also the trustee and life beneficiary.

* *Farkas v. Williams (BACKGROUND)*
  + Farkas purchased stock on four different occasions, each time taking title in his name “as trustee for Richard J. Williams.” Concurrently with each purchase, Farkas signed four declarations of trust where he conveyed himself the life interest, remainder to Williams, and retained the power to revoke by selling the stock. Farkas died intestate.
  + His heirs claimed the inter vivos trusts were invalid testamentary dispositions that failed to comply with the Wills Act formalities. The court upheld the inter vivos trusts, reasoning that some interest passed inter vivos to Williams even though the trusts were revocable, and in the alternative, the process Farkas went through in creating the inter vivos trusts adequately served the functions underlying the Wills Act formalities.

### UTC approach (Majority)

The Uniform Trust Code (UTC) provides that while a trust is revocable, the rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed *exclusively* to, the settlor.

Essentially, when you have a trust that is revocable (and the settlor has capacity to revoke), the beneficiaries have no rights and any duties the trustee owes are owed to the settler not the beneficiaries during the lifetime of the settlor.

* + If the settlor loses the capacity to revoke the trust, the beneficiaries now have a right to hold the trustee accountable (assuming trustee is different than the settlor). Also, if the settlor dies without knowing of abuse by the trustee (e.g., stealing money), the beneficiary has a claim against the trustee for the money the trustee stole.

Standing: consistent with the UTC/modern approach, courts have held beneficiaries under a revocable trust have no standing to contest amendments to the trust because a beneficiary’s interest is, at best, contingent and unenforceable during the settlor’s lifetime.

### Revocability

***The traditional and still general majority rule is that inter vivos trusts are presumed to be irrevocable unless the terms of the trust expressly state that the trust is revocable.***

#### UTC/modern trend

The UTC/modern trend provides that a settlor may revoke or amend an inter vivos trust unless the trust expressly states it is irrevocable.

### Revocation – particular method expressed

Where a trust sets forth an express, ***particular*** method of revocation, ***only*** that method of revocation is valid.

#### Rationale

A settlor’s intent controls and if the settlor sets forth a particular method of revoking a trust, it is presumed that the settlor intends that to be the exclusive method of revoking the trust.

* *In re Estate and Trust of Pilafas*
  + The decedent executed an inter vivos trust and a will. The trust expressly provided that is was revocable by instrument in writing delivered to the trustee. Thereafter, the decedent expressed to his attorney and to family members the intent to revise his estate planning documents (to provide for certain family members who previously had been omitted).
  + The decedent died before executing any new estate planning documents. Following his death, the will and trust that he took home with him could not be found. The omitted family members argued that the will and trust were revoked pursuant to the revocation by presumption doctrine.
  + The court held that the express terms of the trust set forth an exclusive method of revocation (by writing delivered to the trustee) that precluded application of the presumption doctrine. The court concluded that the will was revoked, but not the inter vivos trust.

#### UTC/modern trend

The UTC provides that where the trust sets forth a particular method of revocation, it should *not* be construed as the exclusive method *unless* the trust provision expressly makes it exclusive. Substantial compliance with the particular method is sufficient.

A will executed after the trust, which specifically refers to the trust or the power to revoke, can revoke a revocable trust if the trust terms do not specific an exclusive method or revocation and if the will is not thereafter revoked.

Moreover, where the trust is not revoked, if the settlor retained a life estate interest in the revocable trust, following the settlor’s death the settlor’s creditors can reach the assets in the trust if the probate estate is insufficient to pay off the creditors.

* *State Street Bank & Trust Co. v. Reiser (1979)*
  + Dunnebier created a revocable inter vivos trust and transferred to the trust the stock of five closely held corporations. Thereafter, Dunnebier obtained an unsecured loan for $75,000. During the loan application process, Dunnebier represented to the bank that he held controlling interest in the five closely held corporations. Shortly thereafter, Dunnebier died unexpectedly.
  + His probate assets were insufficient to pay his creditors. The bank sued to readh the assets in his revocable inter vivos trust. The court adopted the modern trend and held that to the extent Dunnebier had power over the assets in the revocable inter vivos trust during his lifetime, those assets should be available to creditors following the settlor’s death.
  + The court required the creditors to exhaust the decedent’s probate assets first.

### Revocation – no particular method expressed

If the trust is revocable, but silent as to the method of revocation, the power may be exercised in any manner that adequately expresses the intent to revoke. The trust can be revoked by writing (even if the writing does not qualify as a will), by act (destructive act coupled with intent), by presumption (arguably), and even orally (unless real property is involved).

#### Divorce

In many jurisdictions, an inter vivos revocable trust is not revoked by divorce, whole a will is automatically revoked by operation of law.

The modern trend is to treat inter vivos revocable trusts like wills and apply the revocation by operation of law doctrine and automatically revoke the provisions in the trust in favor of the ex-spouse. The UPC adopts this approach, and the UTC arguably has implicitly adopted it as well.

### Rights of creditors of the settlor

The general rule is that one should not be able to shield one’s assets from one’s creditors. If one has a property interest in a trust, one’s creditors should be able to reach that property interest.

#### Common law

At common law, the power to revoke is not a property interest – it is merely a “power.” As such, creditors of a settlor of a revocable trust cannot reach the power or force the settlor to exercise the power in their favor.

#### Modern trend

The modern trend expands creditors’ rights to permit creditors to reach a settlor’s power to revoke.

The rationale is, as a matter of public policy, the modern trend also thinks it unfair to permit one to shield all of one’s assets merely by putting them in a revocable trust that benefits others.

#### Creditors of settlors

Consistent with the principle that one should not be permitted to shield one’s assets from one’s creditors, during the settlor’s lifetime, regardless of the terms of the trust, creditors of the settlor can reach the trust property to the full extent the trustee ***could*** have used the property in the trust for the settlor’s benefit.

#### Post-death

Where a settlor retains a life estate in his or her revocable trust, the jurisdictions are split over whether settlor’s creditors can reach his or her interest in the trust following the settlor’s death.

##### Common law

Under the traditional common law approach, if a settlor retains a life estate, upon the settlor’s death, the life estate is extinguished. When the life estate ends, the settlor no life has an interest in the trust, so there is nothing for the settlor’s creditors to reach.

##### Modern trend

The modern trend analogizes the assets in a revocable inter vivos trust to the settlor’s other assets and reason that to the extent the settlor had the right to use and benefit from those assets during his or her lifetime, his or her creditors should have a right to reach those assets following the settlor’s death.

The settlor’s creditors are permitted to reach the property in the trust to the extent the settlor had the power to use those assets during his or her life. If the settlor retained the power to revoke the whole trust, all of the trust assets are subject to the claims of the settlor’s creditors.

* *State Street Bank & Trust Co. v. Reiser*
  + [*See above*]
  + After Dunnebier died unexpectedly, his probate assets were insufficient to pay his creditors. The court adopted the modern trend and held that to the extent Dunnebier had power over the assets in the revocable inter vivos trust during his lifetime, those assets should be available to creditors following the settlor’s death. The court required the creditors to exhaust the decedent’s probate assets first.

## Contracts with Payable-On-Death Clauses

Today, contracts with payable-on-death clauses are valid.

### Life insurance

The classic example of a contact with a payable-on-death (P.O.D.) clause is a life insurance policy. The insured enters into an agreement with an insurance company. The agreement provides that if the insured dies while covered by the policy, the company will pay the benefits under the policy to a beneficiary designated in the policy.

For all practice purposes, the agreement effectively transfers property from the insured to a designated beneficiary upon the insured’s death, but the written agreement between the insured and the insurance company need not be created with Wills Act formalities.

#### Whole life

Whole life insurance (also known as *ordinary* or *straight* insurance) is where the insured purchases coverage for his or her whole life at an up-front purchase price (with fixed payments typically spread over a number of years).

#### Term life

Term life insurance (also known as *pure* insurance) is where the insured purchases coverage for a fixed period of time (for a term of years typically). Premiums are usually fixed for the term, but upon the expiration of the term the premiums typically increase to reflect the increased risk of death with age.

### Common law

Under the common law approach, *only* the life insurance contracts are exempt from the Wills Act formalities.

* *In re Estate of Atkinson (1961)*
  + The decedent mad a deposit in a local bank and took the certificate of deposit as follows: “Walter S. Atkinson, P.O.D. Mrs. Patricia Burgeois.” He created two other accounts with the same language designating two other P.O.D. beneficiaries.
  + After his death, his wife claimed her statutory share of his probate estate and argued that the movies all three accounts should be included in his probate estate as invalid attempts at nonprobate transfers.
  + The court agreed that despite the decedent’s clear intent, that state did not recognize such payment on death accounts as valid nonprobate transfers.

### Modern trend/UPC approach

The modern trend/UPC approach expands the historical will substitute exemption for life insurance contracts and applies it to ***any and all*** contracts and instruments with P.O.D. clauses (employment contracts, promissory notes, deposit agreements, pension plans, retirement accounts, and so on).

In *Atkinson*, under the modern trend/UPC approach, the deposit agreement between the decedent and the bank would have been a valid will substitute and the money would have passed to the P.O.D. designees, even though each account was not a life insurance policy and was not executed with Wills Act formalities.

* *Estate of Hillowitz*
  + The husband was a member of an “investment club.” The terms of the written partnership agreement included an express P.O.D. clause that provided that upon his death, his share of the club was to go to his wife.
  + The executors of his estate challenged the validity of the P.O.D. clause, claiming it was an invalid testamentary transfer (invalid because it did not qualify as a life insurance policy nor was it executed with Wills Act formalities). The court applied the modern trend and held the clause valid as a valid contract with a P.O.D. clause.

### Revocability

Beneficiaries of a P.O.D. clause do not receive an irrevocable property interest inter vivos. The transferor who creates the P.O.D. clause is presumed to have the right to cancel or change the P.O.D. clause.

* *Cook v. Equitable Life Assurance Society*
  + Douglas Cook purchased a life insurance policy insurance policy and designated his then wife, Doris, as beneficiary. Thereafter, he and Doris divorced, and he married Margaret.
  + The insurance policy expressly provided that the owner of the policy may change the beneficiary by written notice to the company. Douglas never gave written notice to the company, but after his marriage to Margaret he executed a holographic will that expressly stated that he was giving the insurance policy to his wife Margaret and son.
  + The court held that the divorce did not revoke the contractual provisions in favor of Douglas’s ex-spouse and awarded the life insurance proceeds to Doris as the contractual beneficiary designation controlled.

#### Common law

The *Cook* case typifies the traditional approach. The revocation by operation of law (divorce) doctrine applies to ***wills only*.**

#### UPC/modern trend

Under the UPC and many jurisdictions, the revocation by operation of law doctrine applies to all will substitutes, including life insurance policies. Under this approach, in *Cook* Doris’ status as beneficiary would have been revoked upon their divorce and, absent a substitute beneficiary in the life insurance policy, the proceeds would have defaulted to his probate estate where his will provision in favor of Margaret would have been given effect.

#### UPC/modern trend – survival requirement

Although the modern trend/UPC approach is generally to apply the wills-related rules to the will substitutes, an exception to this trend is the survival requirement. While the UPC applies an express survival requirement to life insurance contracts, it is silent as to contracts with P.O.D. clauses generally.

### Transfer on death (T.O.D.) deeds

The modern trend nonprobate movement has led to the development of the transfer on death deed (TODD). About a dozen states have adopted statutes permitting TODDs.

The key characteristics of a TODD typically are (1) the deed must be executed and recorded inter vivos, but it does not become effective until the death of the grantor – i.e., absolutely no interest is transferred to the grantee until the grantor dies; (2) the deed is revocable during the grantor’s life (typically only by recording another deed that revokes the initial deed); and (3) the transfer is effective immediately upon the grantor’s death and avoids probate.

### Superwills

If a will is permitted to change the terms of a will substitute, such a will is known as a “superwill.” Under the modern trend, an individual might have a plethora of written instruments that could qualify as valid will substitutes. For example, the individual might have an insurance policy, a pension plan, and a bank account – all with P.O.D. clauses. Inasmuch as these written instruments constitute will substitutes, *the issue is* *whether a subsequently executed will should have the power to revise these instruments*.

#### General rule

For public policy reasons, most jurisdictions ***have rejected the idea of a superwill***.

##### Rationale

Will substitutes permit the quick and relatively easy transfer of property to the intended beneficiary. If the nonprobate instrument were subject to change by a superwill, the nonprobate transfer could not occur until after the party responsible for making the transfer was confident a superwill had not changed the gift or beneficiary.

##### Counterargument

The beneficiary could be required to post a letter of credit or be required to execute an indemnity agreement upon taking the gift in the will substitute.

#### Example

In *Cook*, after Douglas married Margaret, he was giving the insurance policy to his wife Margaret and his son. The court declined to adopt the superwill doctrine. Because Douglas failed to comply with the terms of the insurance policy for how the policy beneficiary could be changed, the original designation of Doris as beneficiary controlled.

#### UPC

The UPC adopts the superwill doctrine *only* if the contract permits the beneficiary of the policy to be changed by a subsequently executed will. So, the contract must expressly recognize superwills before the UPC will permit such.

### Pension plans

Pension plans vary greatly, so generalizations are difficult, but typically they involve the creation of a property right in a fund of money to be used by the individual upon retirement. If the benefits are not completely exhausted by the time the party dies, the party typically has a right to designate a third-party beneficiary who shall receive the remaining proceeds.

#### Defined benefits plan

Typically a defined benefits plan is funded by the employer, there is no individual account, and the employee is entitled to receive a fixed benefit (i.e., a percentage of their highest annual salary) for the remainder of his or her lifetime – an annuity.

##### Annuities

An annuity is a stream of income for the remainder of one’s lifetime, paid monthly at a fixed amount. Annuities can be purchased separately or are an option as to how one can receive benefits from a pension plan.

##### Joint and survivor annuity

Many couples purchase a joint and survivor annuity. It guarantees fixed payments not only for the life of the employee, but also for the life of his or her spouse.

#### Defined contribution plan

Under a defined contribution plan, each month the employer and employee will contribute a fixed percentage of the employee’s salary to an individual account set up for the individual. Upon retirement, the individual has rights to the funds in his or her account.

#### Federal regulation

Private pension plans are heavily regulated by federal statutes and regulations (e.g., Employee Retirement Income Security Act). As a general rule, federal law preempts state law on time-of-death issues.

* *Egelhoff v. Egelhoff*
  + David and Donna Egelhoff were married. David worked for Boeing and his employee benefits included a life insurance policy and a pension plan. Both plans were covered by ERISA. David designatd his wife as the beneficiary of both. Thereafter, they divorced and David died 4 months later without first changing his beneficiary designation.
  + Washington statute provided that divorce automatically revokes the beneficiary designation in favor of an ex-spouse. ERISA expressly preempts all state laws insofar as they relate to any employee benefit plan.
  + The court ruled that the Washington statute had an impermissible connection an ERISA plan and was preempted because it (1) would control who is to receive benefits under an ERISA plan and (2) interfered with the nationally unified plan of administration.

## Multiple Party Accounts

Multiple part accounts can take many forms – bank accounts, brokerage accounts, Totten trusts, etc.

### Common law and intent

At common law, courts would take extrinsic evidence to determine the depositor’s true intent and treat the property in the multiple party account consistent with the depositor’s true intent.

### Depositor’s intent

Three possible reasons explain why a depositor might open a multiple party account:

#### Joint tenancy account

A depositor may have intended to create a joint tenancy account. If so, the moment the account is opened, or the moment the other party’s name is added to an existing account, the other party takes a proportional interest in the account inter vivos, and upon death, a right of survivorship exists such that the property will pass nonprobate.

#### Convenience/agency account

A convenience or agency account is where a depositor adds a second party to an account as a convenience to the depositor, to facilitate paying bills, for example. As such, the second party is acting as an agent for the depositor. The depositor does not intend that the second party receive any interest in the account. Inter vivos, the second party can access the account, but only to use it for the benefit of the depositor, and upon death, there is no right of survivorship.

#### P.O.D. account

The depositor may intend a P.O.D. account to avoid probate. The depositor does not intend for the other party on the account to take any interest inter vivos, but at time of death the depositor intends any money in the account to go to the other party.

##### Common law

At common law P.O.D. accounts are an invalid attempt at a testamentary transfer without complying with Wills Act formalities. The assets remaining in the account upon the depositor’s death fall to probate and are distributed pursuant to the depositor’s will, if one exists, or otherwise to intestacy.

##### Modern trend/UPC approach

P.O.D. accounts are one of many possible P.O.D. arrangements permitted under the modern trend/UPC approach.

### Extrinsic evidence

Because the joint tenancy account may have been involuntarily created or it was not the intention of the depositor, the courts take extrinsic evidence to determine the depositor’s true intent and then treat the account accordingly.

#### Temporal focus

The key is to distinguish the ***depositor’s intent at the time the multiple party account was created*** (either at the time the account was opened if multiple names were put on the account from its inception, or at the time a second party’s name was added to an existing account).

#### Burden of proof

If the depositor executes paperwork that expressly states that the account is a joint tenancy account, the paperwork creates a presumption that the account is a “true” joint tenancy account. To overcome the presumption, most jurisdictions require clear and convincing evidence of a different intent.

* *Varela v. Bernachea (2005)*
  + Bernachea (B), a retired attorney, fell in love with Varela. After a year of traveling together, Varela (V) moved into his condo in Florida and he paid all of her expenses. B added V to his bank account as a joint tenant with a right of survivorship; V received a check card for the account.
  + B then suffered a heart attack, while B was in the hospital, V wrote a check that transferred the entire $280K in the joint account into an account in her name alone. B subsequently demanded the return of the money.
  + B alleged he did not have donative intent and that V had restricted access to the account because she only had a check card and not checks. The court held that when a joint bank account is established with the funds of one person, a true joint tenancy is presumed and may be rebutted only by clear and convincing evidence to the contrary.
  + The court determined that a check card with no limit on its withdrawal abilities had the same significance as a check so V’s access to the account was unrestricted. This, coupled with the fact B was an attorney of 30 years was claiming that did not understand the right of survivorship, was insufficient to provide clear and convincing evidence B did not have donative intent. V was entitled to half of the money.

### Criticism

The approach of allowing extrinsic evidence to determine the depositor’s intent has been criticized for promoting litigation. Some courts have gone as far as holding that the joint tenancy paperwork is conclusive and extrinsic evidence is inadmissible.

### UPC approach

The UPC provides that, inter vivos, it is presumed that the parties to a multiple party account own in proportion to their contributions, and that upon the death of any party, it is presumed that there is a right of survivorship. The presumptions control the distribution of the money in the account unless clear and convincing evidence of a contrary intent exists.

#### Survival requirement

The UPC imposes an express survival requirement for parties to a multiple party account. There is no express survival requirement for other contracts with P.O.D. clauses.

#### P.O.D. accounts

The UPC permits P.O.D. accounts. If the account is a P.O.D. account, the UPC applies the wills-related doctrines of lapse and anti-lapse to the beneficiary. In addition, if the account is a P.O.D. account, the beneficiary cannot be changed by will.

### Totten trusts

Although common law refuses to recognize P.O.D. bank accounts, most jurisdictions recognize “Totten trust savings accounts.” Totten trust accounts are similar to P.O.D. accounts. The depositor sets up a Totten account by depositing money in the account in the name of the depositor “for the benefit of” the beneficiary. Legal title is in the name of the depositor, but equitable title is in the name of the beneficiary. The bifurcation of the legal and equitable title constitutes an intent to create a trust.

#### Revocability

The trust is deemed revocable so that depositor withdrawals are permitted without constituting a breach of trust. Note that this is contrary to the traditional/majority approach for general trusts which creates a presumption of irrevocability; however, this resembles the modern/UPC approach for general trusts which creates a presumption of revocability.

#### Testamentary modification

An express clause in a will changing the beneficiary is permitted (though generally wills cannot change the terms of a will substitute, i.e., a superwill; the UPC adopts the idea of superwills if the document expressly recognizes it as a superwill).

#### Survival requirement

Most jurisdictions require the beneficiary of a Totten trust account to survive the depositor (though generally at common law there is no survival requirement for beneficiaries claiming under trusts or other will substitutes).

## Pour-Over Wills and Inter Vivos Trusts

### Introduction

The inter vivos trust and pour-over will combination is the most common estate planning scheme today. It is virtually impossible to put all of one’s assets in an inter vivos trust. People acquire and dispose of assets on such a rapid basis it is impossible to put all of one’s assets in an inter vivos trust. Therefore, they may use a pour-over will for newly acquired assets that they did not have time to put in the trust before they died.

### Pour-over wills

A pour-over will is a will that contains an express clause giving some or all of the decedent’s probate property to the trustee of the decedent’s inter vivos trust, to hold and distribute pursuant to the terms of the trust. Typically the pour-over clause is the residuary clause, but it need not be. The clause may transfer to the trust a specific gift or a general gift.

*Standard clause*: a typical clause reads something such as: “I give the rest, residue, and remainder of my estate to the trustee of my inter vivos trust, to hold and distribute pursuant to its terms.”

### Validity

The effect of a pour-over clause is that a document that was not executed with Wills Act formalities (the inter vivos trust) controls who takes some or all of the decedent’s probate property.

Before a pour-over clause can be given effect, the pour-over clause must be validated.

### Validity at common law

Two possible “will-expanding” doctrines are used to try to validate a pour-clause: (1) acts of independent significance, and (2) incorporation by reference.

#### Acts of independent significance

The doctrine of acts of significance provides that a will can reference an act outside of the will, and the act can control either who takes or how much they take, as long as the referenced act has its own significance apart from its effect upon the disposition of the decedent’s probate property.

##### Pour-over clause

As applied to a pour-over clause scenario, the “act” referenced in the will is the reference to the trust. ***As long as the trust is funded inter vivos and has some property in it at the time of the decedent’s death, the trust has its own significance – holding and managing of the property placed in the trust inter vivos.***

##### Temporal sequence

Under acts or independent significance, it does not matter when the inter vivos trust is created (before or after the execution of the will), as long as the trust is created inter vivos and has some property placed in it at the time of the decedent’s death.

##### Trust amendments

Under acts of independent significance, amendments to the trust are valid and can be given effect, regardless of when they are created.

#### Incorporation by reference

Incorporation by reference permits a will to incorporate and give effect to the provisions of a document that was not executed with Wills Act formalities as long as (1) the will expresses the intent to incorporate the document, (2) the will describes the document with reasonable certainty, and (3) the document was in existence at the time the will was executed.

##### Pour-over clause

As applied to a pour-over will scenario, incorporation by reference incorporates the inter vivos trust ***instrument*** into the will and gives effect to it, thereby permitting the terms of the inter vivos trust instrument control who takes the decedent’s probate property and how much they take.

##### Temporal sequence

Although there are three requirements for incorporation by reference, as applied to the pour-over will scenario, invariably the element at issue is whether the inter vivos trust ***instrument*** (as opposed to the trust itself) was in existence at the time the will was executed.

##### Funding

Incorporation by reference incorporates the trust ***instrument***, not the ***trust*** itself, so there does not have to be any funding in the trust. If there is property in the trust inter vivos, one should probably use acts of independent significance to validate the pour-over clause because it has more benefits associated with it.

##### Trust amendments

One of the disadvantages of using incorporation by reference to validate a pour-over clause is that the doctrine incorporates the trust instrument ***as it existed at the time the will was executed***. Any subsequent amendments to the inter vivos trust instrument cannot be incorporated and given effect (1) unless the will is re-executed or (2) a codicil is executed that redates the will under the republication by codicil.

### Validity by majority approach – UTATA

The Uniform Testamentary Additions to Trusts Act (UTATA) states that as long as the transferor meets the UTATA requirements, the transferor does not have to put a penny into his or her trust inter vivos; the pour-over clause is valid; all amendments to the trust are valid even if executed after the date of the will; and, after the probate property is poured over to the trust pursuant to the pour-over clause, the trust is treated as an inter vivos that is not subject to probate court supervision.

#### UTATA requirements – original version (majority approach)

The original version of the UTATA requires:

1. The will refer to the trust;
2. The terms of the trust be set forth in a writing separate from the will; and
3. The trust instrument be executed ***prior to or concurrently with*** the execution of the will.

The original UTATA requirements are basically the same as incorporation by reference, only with the added requirement that the trust instrument must be signed prior to or concurrently with the execution of the will.

##### Analysis

The key element typically is the requirement that the trust be executed (signed) prior to or concurrently with the execution of the will. The pour-over clause by its nature satisfies the first requirement, that the will refer to the trust. The requirement that the terms of the trust be set forth in a separate document provides a bright line between a testamentary trust and a UTATA/inter vivos trust. If the settlor wants the benefits of a trust but without the cost and administrative burdens of probate court supervision, the settlor has to put the terms of the trust in a document separate from the will.

##### UTATA benefits

If the settlor/testator meets the requirements of UTATA, the trust is deemed an inter vivos trust for purposes of probate court supervision, thereby saving the trust money and facilitating its administration, even though not a penny is put in the trust inter vivos. Also, all amendments to the trust are valid regardless of when they are executed.

#### Revised UTATA (UPC approach)

The revised version of UTATA eliminates the requirement that the trust instrument must be executed prior to or concurrently with the execution of the will, thereby making it even easier to validate a pour-over clause under UTATA. As long as the trust

#### UTATA trust – inter vivos v. testamentary trust

##### Divorce

***All jurisdictions have statutes that provide that upon divorce all provisions in each spouse’s will in favor of the ex-spouse are automatically revoked by operation of law.*** ***Most statutes only apply to the ex-spouse’s wills and do not to any will substitutes***. Because a testamentary trust is considered part of the will, the doctrine applies to testamentary trusts. Inasmuch as inter vivos trusts are all substitutes, the statute does not apply to inter vivos trusts. The issue is whether a UTATA trust should be treated like a testamentary trust, which is subject to the divorce doctrine, or an inter vivos trust, which is not.

* *Clymer v. Mayo*
  + Mayo (M) properly executed a will and inter vivos, revocable trust instrument. The will gave her personal property to her husband and the residue of her probate property to the trustee of her trust, to hold and distribute pursuant to the terms of the trust. M also changed her life insurance policy and pension plans to make the proceeds payable to the trustee, to hold and distribute pursuant to the terms of the trust.
  + Thereafter M and her husband divorced, and M died without revising her estate planning documents. M’s heirs at law claimed that the pour-over clause was invalid because the trust was wholly unfunded at time of death and therefore they were entitled to receive the property.
  + M’s ex-spouse admitted that he was not entitled to take under her will due to the revocation by operation of law doctrine, but claimed that he was still entitled to take under the terms of the trust because the revocation by operation of law doctrine only applied to wills in the jurisdiction.
  + The court applied the UTATA and held it proper to validate the pour-over clause and trust. The trust was executed concurrently with the will and did not have to be funded inter vivos.
  + Second, the court held that because the decedent considered the will and trust one integrated testamentary scheme, the UTATA trust should be treated like a testamentary trust – that is, subject to the revocation by operation of law doctrine, at least where the trust was wholly unfunded at the time of death.
    - This is on the merge of becoming the majority and will be shortly because not applying the doctrine of operation of law to revoke the clauses in favor of an ex-spouse to will substitutes but applying it to wills does not make sense. The same public policy for applying it to wills is valid for applying it to will substitutes.

#### Common law doctrines post-UTATA

UTATA does not render the common law validation doctrines meaningless. The key is to validate the pour-over clause to give effect to the testator’s intent that the property be distributed pursuant to the terms of the trust.

If the pour-over will cannot be validated under UTATA, the pour-over clause fails unless the clause can be validated using one of the common law doctrines. If the trust was funded inter vivos, use acts of independent significance. If the trust was not funded inter vivos, try incorporation by reference.

Example: T calls his attorney, A, and asks her to prepare an inter vivos trust and pour-over will. The pour-over clause gives the residue to his estate to his trustee to hold and distribute pursuant to the terms of the trust; A does as T requests. T properly executes the will but forgets to sing the trust instrument. Shortly thereafter T is killed in a car crash. Because the trust instrument was never signed, the pour-over clause cannot be validated under UTATA. Because T did not transfer any property to the trust inter vivos, the pour-over clause cannot be validated under acts independent significance. Because the will refers to the trust and the trust instrument is in existence, the pour-over clause can be validated under incorporation by reference. The trust is considered a testamentary trust subject to probate court supervision, but the probate property will be held and distributed pursuant to the terms of the trust.

#### Failure to validate pour-over clause

If the pour-over clause cannot be validated under UTATA, acts of independent significance, or incorporation by reference, the pour-over clause fails. If the pour-over clause fails, the property in question cannot be distributed pursuant to the terms of the trust. If the pour-clause is the residuary of the will, and it fails, the property falls to intestacy. In the pour-over clause is not the residuary clause, and it fails, the property falls to the residuary clause if there is one or, if not, to intestacy.

Example: T handwrites a valid, dated holographic will that gives all of his property to the trustee of his inter vivos trust, to hold and distribute pursuant to the terms of the trust. A week later, T types up a dated trust instrument, but he fails to sign it or to transfer any property to the trust. T dies without doing anything else. Because the trust instrument was never signed, the pour-over clause cannot be validated under UTATA. Because T did not transfer any property to the trust inter vivos, the pour-over clause cannot be validated under acts of independent significance. Because the trust instrument was not in existence when the will was executed, the pour-over clause cannot be validated under incorporation be reference. The pour-over clause fails, which means the residuary clause fails. The property passes via intestacy to T’s heirs.

### Revocable trusts

Pros and cons are associated with revocable inter vivos trusts.

#### Inter vivos

##### Professional management

A settlor may appoint him-or herself as trustee to hold and administer the trust property, a settlor may appoint a professional trustee. This allows the settlor to anticipate impending incapacity or if the settlor wants to transfers the property to a minor.

##### Segregating assets

Trusts are a good way of segregating assets to ensure that assets are not commingled.

##### Taxes

As long as the settlor retains the power to revoke the trust, for tax purposes the trust property is legally treated as if it were still the settlor’s property regardless of the terms of the trust.

#### Time of death

The principal benefit of using a revocable, inter vivos trust is that the property transferred to the trust inter vivos avoids probate.

##### Costs

Avoiding probate saves probate court costs, executor’s fees, and attorney’s fees, but offsetting these future savings are the present fees inherent in having the trust drafted, in transferring assets to the trust, and possibly in paying trustee’s fees to administer the trust.

##### Tying property up

Property passing through probate is tied up during the probate process. Property placed in an inter vivos trust avoids probate, thereby avoiding the hassles and delays associated with probate.

##### Creditors’ claims

If one anticipates a number of creditors’ claims against a decedent’s property, it may be better to have the decedent’s property pass through probate. The probate process requires to bring their claims within a fairly limited time frame or be forever barred. In contrast, if a decedent’s property is in a revocable inter vivos trust, there is no shortened time period within which creditors have to bring their claims; they retain their typical statute of limitations.

##### Privacy

When a decedent dies, an inventory of the decedent’s probate assets and creditor’s claims is public information. Moreover, when a will is offered for probate, it becomes a public document revealing the testator’s wishes as to “who got what” that anyone can access. Inter vivos trusts are private legal documents not subject to public inspection.

##### Ancillary probate

If the decedent owned real property in a jurisdiction other than the jurisdiction where probate is opened, “ancillary” probate in the jurisdiction where the real property is located necessary. By placing the real estate in question in a revocable inter vivos trust, ancillary probate can be avoided.

##### Family protection doctrines

A number of doctrines are designed to protect a decedent’s family members from intentionally or unintentionally being disinherited (elective share, pretermitted spouse, pretermitted child, overlooked child, etc.). In some jurisdictions, the protective doctrine applies only to the decedent’s probate property. There, an individual can shield his or her assets from such claims by putting the property in a revocable trust.

* + - * This rule typically isn’t followed anymore

##### Testamentary trusts

Testamentary trusts are typically created as part of the probate process. Probate courts usually maintain supervision over the trust, even after probate has otherwise closed, for the life of the trust, requiring the trustee to account to the court on a regular basis. Such probate court supervision adds costs and administrative burdens that are avoided by using an inter vivos trust.

##### Choice of law options

Where a settlor creates an inter vivos revocable trust of personal property, he or she has the power to choose which state’s law will govern the trust.

##### Challenges to testamentary scheme

Although an inter vivos trust can be challenged on the same capacity grounds as a will (lack of capacity generally, insane delusion, undue influence, fraud), as a practical matter it is much more difficult to challenge a trust. Challengers will have to face the settlor and the settlor can rebut the challenge.

##### “Dead hand” control

Using a trust facilitates “dead hand” control. A will typically devises property to the beneficiary in fee simple absolute. The beneficiary then is free to use the property as he or she sees fit. A trust, on the other hand, facilitates conditional gifts to beneficiaries. Beneficiaries may be entitled to receive property from the trust only as long as they behave in a certain manner.

## Joint Tenancies in Real Property

### Definition

A joint tenancy (or tenancy by the entirety) is a form of concurrent ownership where multiple parties own the property in question both in question in whole and in shares. The key characteristic is the right of survivorship. Under the right of survivorship, upon the death of one party, his or her share is ***extinguished*** and the shares of the surviving joint tenants are recalculated. In the case of a joint tenancy with more than two parties, this process of recalculating shares continues until only one party is surviving, at which time the concurrent ownership ends and the party owns it outright with no right of survivorship. When only one party remains, the property is no longer nonprobate property. Upon that party’s death, it falls into his or her probate estate, unless he or she takes the appropriate steps to create a new nonprobate arrangement.

### Probate avoidance

If a joint tenant (or tenant in the entirety) dies, his or her share is extinguished. His or her share was tantamount to a life estate. The deceased tenant has no interest in the property that can fall to probate. No interest ***passes*** when a joint tenant (or tenant by the entirety) dies. The surviving tenants shares are simply recalculated.

### Devisability

Although a joint tenancy can be severed inter vivos and converted into a tenancy in common (with inheritable and devisable shares), the mere execution of a will does not sever a joint tenancy (or tenancy by the entirety). Even if the will makes express reference to the deceased tenant’s interest in the property, execution of the will does not sever the joint tenancy. The right of survivorship extinguishes the joint tenant’s interest before a will has any effect upon the property.

### Creditor’s claims

Because a joint tenant’s interest in the property is extinguished upon his or her death, nothing is left for creditors of a deceased joint tenant to reach.

## Planning for the Possibility of Incapacity

### Asset management

There are several ways to plan for managing one’s assets during incapacity.

#### Inter vivos revocable trust

The settlor can appoint him- or herself as the initial trustee, and then expressly appoint a successor trustee in the vent the settlor is unable or unwilling to serve as a trustee.

#### Durable power of attorney

A power of attorney authorizes one to act for another. It creates a principal-agent relationship where the terms of the power dictate the scope of the agent’s power to act for the principal. The standard power of attorney automatically terminates upon the incapacity of the principal party. The durable power of attorney continues despite the incapacity of the principal. Note that most states require the durable power of attorney to be created in writing.

Unlike a trust, an agent’s power under a durable power of attorney automatically terminates upon the principal’s death. The property subject to the durable power of attorney does not avoid probate. And an agent does not have legal title to the property subject to the power.

* *In re Estate of Kurrelmeyer (2006)*
  + Louis (L) executed two durable general powers of attorney in favor of his wife, M, and his daughter, N. Pursuant to these powers of attorney, M transferred real estate owned by her husband, including the “Clearwater property,” into a trust she created. Later, L died and his will designated the Clearwater property would be given to M in life estate and would pass to L’s children upon M’s death.
  + M’s trust gave her additional rights in the property, including the ability to sell the house. L’s son objected to the exclusion of the Clearwater property from the inventory of L’s estate.
  + The court found the durable power of attorney did authorize the creation of a trust because the express words in the instrument included the conveyance of real estate (in an inter vivos trust) and a clause to “do and perform all and every act and thing whatsoever necessary to be done…as L could do.” The fact that the trust was created by an agent, attorney-in-fact, did not affect the trust’s legitimacy (note, trustees or those with power of attorney cannot create a will for the beneficiary).
  + The court remanded the case to determine whether M’s actions breached her fiduciary duty of loyalty to L or violated the power of attorney instrument.

### Health care management

#### Living wills

A living will (also known as an advance directive, an instructional directive or a medical directive) is a document that directs that no extraordinary medical treatment be undertaken when there is no reasonable expectation of recovery.

#### Durable power of attorney for health care decisions

The durable power of attorney for health care decisions appoints an agent to make health care decisions for one after on becomes incapacitated. The instrument can give general directives to the agent that must be followed.

#### Decision maker for incompetent

In the absence of a living will or a durable power of attorney, most states authorize an incompetent person’s immediate family to make health care decisions for him or her. Although the details vary from state to state, the typical order parallels the order of intestate takers – spouse, children, parents, etc.

#### Physician-assisted suicide

Only one state, Oregon, permits physician-assisted suicide.

#### Disposition of one’s body

All states have adopted some form of the Uniform Anatomical Gift Act, permitting one to give one’s body, or any part thereof, to any authorized health care provider for medical research or transplantation. The act permits the decedent to identify a specific individual who is to receive his or her body or any part thereof for transplantation.

# Limitations on the Testamentary Power to Transfer

## Spousal Protection Schemes: An Overview

### Introduction

There are two different types of spousal protection: (1) *support* for the rest of the surviving spouse’s life, and (2) an outright *share of the marital property*, regardless of who acquired the marital property.

#### Support

Through a combination of state and federal law, in virtually every state, a surviving spouse has rights for support under (1) the social security system, (2) ERISA (Employee Retirement Income Security Act), (3) the homestead exemption, (4) the personal property set-aside, and (5) the family allowance.

#### Share of martial property

There are basically two property approaches to marital property – the separate property approach (majority) and the community property approach (minority).

##### Separate property approach

Under the separate property approach, any property acquired by either spouse, including his or her earnings, are that spouse’s separate property. A spouse has no rights in the other spouse’s separate property absent divorce or death. ***The spousal protection doctrine that grants a surviving spouse a share of the marital property in separate property jurisdictions is called the elective share***. Upon the death of one spouse, under the elective share doctrine, the surviving spouse has a right to claim a share of the deceased spouse’s property regardless of the terms of the deceased’s spouse’s will.

##### Community property approach

Under the community property approach, while property acquired before marriage and gifts acquired during marriage by either spouse are his or her separate property, all earnings acquired (and any property acquired with such earnings) during the marriage by either spouse are community property. Each spouse has an undivided one-half interest in each community property asset. Upon one spouse’s death, each community property asset is divided in half. The surviving spouse’s half is his or hers immediately and outright, thereby insuring that each spouse has a share of the marital property regardless of which spouse acquired it. The deceased spouse’s half goes into probate where he or she can devise it to whomever he or she wishes.

## Surviving Spouse’s Right to Support

### Spousal support

All jurisdictions agree that surviving spouses, and maybe dependent children, are entitled to *support* from the deceased spouse. The surviving spouse is entitled to the following despite attempts by the deceased spouse to defeat such rights.

#### Social security

Only a surviving spouse can receive the worker’s survivor’s benefit. The worker spouse cannot transfer the benefit to anyone else.

#### Private pension plans

Under ERISA, a surviving spouse must have survivorship rights in the worker spouse’s retirement benefits, typically an annuity.

#### Homestead

The homestead right is to ensure that a surviving spouse has somewhere to live. Some states grant the surviving spouse a life estate (support) in the family home or farm, while other states merely grant the surviving spouse a sum of money to provide for housing. Some states require the decedent to claim the homestead exemption while alive by filing certain documents, while others permit the homestead exemption to be claimed as part of the probate process.

#### Personal property set-aside

The surviving spouse is entitled to claim certain tangible personal property items regardless of the deceased spouse’s attempts to devise them. Some states have a statutory list of tangible personal property to which the surviving spouse is entitled; other states have monetary limit on how much the surviving spouse may claim.

#### Family allowance

A surviving spouse (and minor children, depending on the jurisdiction) needs money to live on during probate. The surviving spouse has a right to receive a family allowance during probate (but not for life).

## Surviving Spouse’s Right to a Share of the Marital Property

If an unmarried individual acquires property, it is his or her separate property. If the individual marries, many argue that marriage is a partnership, and that by getting married the parties agree to share, to some degree, the burdens and benefits of marriage, including the property acquired by either spouse during the marriage.

### Traditional scenario

Because only women can give birth, historically this lead to couples to agree that the wife would focus more of her time within the home, while the husband would focus more of his time outside. The norm is for the husband to acquire more money and property than the wife.

### Temporal differences

Under community property, the spousal protection scheme attaches the moment the marital property is acquired. Under the elective share approach, the spousal protection doctrine does not arise until one of the spouse dies and the surviving spouse elects to claim his or her statutory amount instead of taking under the deceased spouse’s will.

### Fundamental differences

There are a number of fundamental differences between the two approaches.

#### Rights during marriage

Under the separate property approach, the non-wage-earning spouse is dependent upon the wage-earning spouse to share property, and if the wage-earning spouse does not, the non-wage-earning spouse’s only recourse is divorce. Under the community property approach, the moment each dollar is earned during the marriage, the non-wage-earning spouse enjoys an equal right to half of it.

#### Scope of property covered

Historically, the elective share applied to *all* of the deceased spouse’s property, not just to the spouse’s marital property. Community property, on the other hand, applies only to marital property acquired during the marriage, and not to either spouse’s separate property acquired before marriage or to any gifts acquired by either spouse during marriage.

#### Fractional shares

Historically, the elective share was limited to one-third of the deceased spouse’s property (though many states increased the share to one-half if there are no surviving issue). Community property, on the other hand, grants an immediate 50% interest in each marital asset to the non-wage-earning spouse the moment the community property asset is acquired.

## The Elective Share: Policy Considerations

### Jurisdictional variations

The jurisdictions vary over the exact details of their elective share doctrines. The differences can be in the amount that the surviving spouse is entitled to under the elective share doctrine, the variables that determine the amount (length of marriage, family situation, surviving spouse’s net worth, property subject to the elective share doctrine, etc.), or the property subject to the elective share.

### Recap

The elective share doctrine is the “at time of death spousal protection approach adopted by the separate property system. During the marriage, each spouse owns all of his or her earnings as his or her separate property. The separate property system assumes that the spouses will care for each other and treat each other properly, and it intervenes only when the marriage is terminated at divorce or death. The elective share typically gives the surviving spouse the right to claim one-third of the deceased spouse’s probate property (if that amount not left to the surviving spouse in the deceased spouse’s will). The elective share applies regardless of the length of the marriage.

### Personal right

The general rule, and UPC approach, is that only the surviving spouse can claim the elective share. If the surviving spouse dies before asserting the claim, the surviving spouse’s estate, heirs, and creditors have no standing to claim the share even if the time to assert the claim has not expired.

#### Incompetent spouse

If the surviving spouse lacks the capacity to decide whether to exercise the elective share, a guardian of the spouse can decide “in the best interests” of the surviving spouse, with the probate court’s approval. In some jurisdictions, what constitutes “the best interests” of the surviving spouse is a purely economic question – whether the spouse takes more under the elective share. In the majority however, the guardian is given greater discretion and is permitted to take the totality of the circumstances surrounding the deceased spouse and the surviving spouse into consideration.

#### UPC approach

The UPC authorized the probate court to claim the elective share for an incompetent spouse only necessary to provide adequate support for the surviving spouse for the rest of his or her life. The UPC was later amended to provide that if the elective share is exercised for an incompetent person, the share of the elective share that exceeds the share the spouse was taking under the deceased spouse’s will is placed in a custodial trust, with the surviving spouse having a life estate, and a remainder is the devisees under the will.

### Medicaid eligibility

The elective share and the property that satisfies the elective share are assets that may be included in determining an individual’s eligibility for Medicaid. Courts have ordered guardians of an incompetent spouse to claim the elective share so as not to jeopardize the spouse’s Medicaid eligibility.

### Same-sex couples

We are recognizing same-sex marriages in states that recognize same-sex marriages and civil unions in states that recognize those.

## The Elective Share: Doctrinal Considerations

### Traditional scope

The original formulation of the elective share, and the formulation still in effect in a number of states, provides that the surviving spouse is entitled to a share (typically 1/3) of the deceased’s spouse’s ***probate*** estate only.

### Nonprobate avoidance

The traditional approach to the elective share doctrine accepts that inter vivos transfers by the deceased spouse are not subject to the elective share, only the decedent’s testamentary transfers – property that the decedent owns at time of death.

#### Nonprobate transfers

Property placed in an inter vivos trust does not pass through probate, thus avoiding the elective share under the traditional approach. Yet the deceased spouse could retain a life estate interest in the trust and continue to benefit from the property until his or her death.

### Judicial responses

Courts have struggled with articulating a workable to pressure to change the elective share doctrine due to nonprobate avoidance arrangements. Different jurisdictions have articulated different approaches.

* *Sullivan v. Burkin*
  + The husband and wife separated but did not divorce. The husband created an inter vivos trust, to which he transferred his real estate (his principal asset). He retained a life estate interest in the income generated by the property in the trust, the right to withdraw principal upon written request to the trustee, and the right to revoke.
  + Upon his death, any and all property in the trust was to be distributed to two friends. His will likewise made no provision for his separated wife. The wife invoked her right to an elective share and argued that it included the property in the trust.
  + The court held that the trust was a valid inter vivos trust, nut announced that henceforth, asserts an inter vivos trust created during the marriage would be subject to the elective share if the deceased spouse retained a power to revoke or general power of appointment (exercisable by deed or will).

### Statutory/UPC response

In many states, the legislature addressed the problem by drafting legislation that expands the scope of the property subject to the elective share.

#### 1990 UPC marital property approach

In the 1990 version of the UPC elective share doctrine, the augmented estate combines the property of both spouses and gives the surviving spouse a share of the combined, ***“augmented” estate that depends on the duration of the marriage***. This calculation gives us what we think the surviving spouse should walk away with the goal being to promote the marital sharing theory such that the couple *share* the property, instead of the wage-earning spouse *supporting* the non-wage earning spouse.

##### Sliding scale

The 1990 version of the UPC abandons the fixed percentage elective share and provides instead a gradually increasing share depending on the length of the marriage. The surviving spouse starts at 3% and increases by 3% up to 50% after 15 years of marriage.

###### **Purpose of the sliding scale**

The purpose is to reflect the desire to implement the marital sharing theory and the belief is that when the marriage is initially formed, the percentage of the marital property is small (i.e., 3%) but as the duration of the marriage increases, the percentage of marital property grows (i.e., 50% after 15 years).

The UPC assumes that after 15 years ***all*** of the property is marital property.

#### Elective Share Calculation

1990 UPC elective share = [(Augmented estate) X (elective share %)] – survivor’s credits

* + - * Survivor’s credits = (property passing to survivor at D’s death) + [(property S already owned) X (double elective share %)]

#### 1990 UPC augmented estate

In general, the augmented estate consists of the couple’s combined assets. Specifically:

1. Decedent’s net probate estate = (probate estate) – (funeral and administrative expenses + homestead/family allowance + creditor’s claims);
2. Decedent’s nonprobate transfers to others than the surviving spouse =

(Property passing by will substitute (revocable trusts, interest in joint tenancy, P.O.D. accounts, and proceeds of life insurance))

+ (irrevocable transfers during the marriage if decedent retained a right to possession or income)

+ (inter vivos donative transfers exceeding $10,000 annually per donee during marriage and in the two years preceding death)

1. Decedent’s nonprobate transfers to the surviving spouse = all property that passed outside of probate to the surviving spouse; and
2. All property owned by the surviving spouse + (all property that would be included under (2) had the surviving spouse died first)

##### **Purpose of the augmented estate**

The purpose is to prevent the avoidance of the spousal protection doctrine by simply putting property in a revocable inter vivos trust which functions like a will.

#### The 1990 UPC elective share calculation

The calculation has three main steps:

1. Calculate the “augmented estate”;
2. Multiply the value of the augmented estate by the “elective share percentage”;
3. The survivor’s credits are subtracted from the product in (2)

##### Calculate the “augmented estate”

See above.

##### Multiply the value of the augmented estate by the “elective share percentage”

The “elective share percentage” is based on the duration of the marriage. Initially, this percentage is 3%. This increases annually until it reaches 50% after 15 years.

##### The survivor’s credits are subtracted from the product in 2)

This step is intended to ensure that the elective share awarded is based on the total assets of the marital unit.

The credits include:

* + 1. The amount passing to the surviving spouse by any means at the decedent’s death; and
    2. [The surviving spouse’s property and non-probate transfers to others; in the augmented estate calculation this is (4)] x [2 x (elective share percentage)]
       - ***Note: the purpose of multiplying the elective share percentage by 2 is to approximate the amount of property the survivor has in his/her name that was actually “marital” property***. This stems from if we assume after 10 years, 30% of the all of the couple’s assets are marital property entitled to one spouse, 60% of all of the couple’s combined assets are marital property

### Funding the elective share with a life estate

The general rule is that if the surviving spouse claims the elective share, the elective share is satisfied first by counting the property the deceased gave under his or her will to the surviving spouse. The rationale is to minimize the disruption the elective share causes to the deceased spouse’s overall estate plan. The rest of the property due to the surviving spouse under the elective share is taken pro rata from the other beneficiaries (a minority of jurisdictions take it from the residuary). The issue is whether permitting a life estate interest to count toward the elective share is incompatible with the principle of the elective share. A life estate is intrinsically “support” in nature, while the elective “share” is intended to ensure that the surviving spouse receives a fair, outright share of the marital property.

#### General rule and UPC

If the surviving spouse elects to claim the elective share and takes against the will, most jurisdictions ***do not*** permit any life estate interests left in the will to the surviving spouse to count against the elective share.

### Waiver

The general rule is that a surviving spouse may waive his or her right to an elective share (and to the homestead allowance, personal property exempt property, and the family allowance) at any time, as long as the waiver ***is in writing and signed by the waiving spouse***.

* *Reece v. Elliot*
  + Reece and Elliot signed a prenuptial agreement before marrying as both had children from a previous marriage and both wanted to ensure that their assets would pass to their children. Both parties had independent counsel and created a list of their assets. Reece listed all of his properties and bank accounts but values were not listed for every item, including Reece’s stock in his former employer’s company.
  + Elliot alleged the prenuptial agreement was invalid because she did not entire the agreement with “full knowledge” of the value of the deceased’s assets because she did not know the value of the stock. Elliot was not misled and was provided with the opportunity to ask questions and discover the extent of the other’s holdings but failed to do so. The prenuptial agreement was held valid.

## Community Property

### Overview

The essence of community property is that all marital property is owned by the community the moment it is acquired. Marital property is any property acquired during marriage as a result of the time, energy, or labor of either spouse. As a practical matter, community property is any earnings acquired by either spouse during the marriage (and any property purchased with community property earnings). Property acquired by gift, devise, or inheritance during marriage or by either spouse before marriage is separate property.

#### Commingled property

Commingled property arises when separate property is mixed with community property.

#### Transmutation

The spouses can convert the legal characterization of property by agreement. Separate property can be converted into community property and vice versa.

#### Death

Upon the death of one spouse, each community property asset is divided 50-50. The surviving spouse holds his or her share outright. The deceased spouse’s share goes into probate where the deceased spouse can devise it as he or her wishes.

### “Putting a spouse to an election”

This has no relation to an elective share. Putting a spouse to an election is simply a variation on the idea that a decedent can make a conditional gift. The deceased spouse conditions a device to the surviving spouse on the surviving spouse agreeing to the deceased spouse being permitted to give away some of the surviving spouse’s property. One of the principal issues is how clear the deceased spouse must be that he or she is putting the surviving spouse to an election.

Historically, spouses were put to an implied election anytime the deceased spouse’s will appeared to give away some of the surviving spouse’s property. Under the modern trend, the courts have tightened up the intent necessary to put the surviving spouse to an election, hold the intent must be clear.

### Migrating couples

A problem arises because (1) real property is governed by the laws of the state where it is located, (2) personal property is characterized at the time it is acquired as either separate or community property based on the laws of the spouses’ domicile at the time of acquisition, and (3) the “at time of death” spousal protection a surviving spouse is entitled to depends on the spouses’ domicile at the time of death of the first spouse.

#### Separate to community example

Assume a traditional relationship where all the couple’s marital property is acquired in the wage-earning spouse’s name. If the couple lives in a separate property jurisdiction, the property is the wage-earning spouse’s separate property. If the couple retires and moves to a community property state, and shortly thereafter the wage-earning spouse does, the spousal protection scheme is community property. The surviving spouse is entitled to 50 percent of their community property, but they have no community property. The characterization of their property is not changed because the couple moved to a community property jurisdiction.

##### Quasi-community property

Quasi-community property is separate property that would have been characterized as community property if the couple had been domiciled in a community property jurisdiction when the spouse acquired the property. When a spouse with quasi-community property dies, the quasi-community property is treated like community property for distribution purposes. The surviving spouse immediately receives a ½ interest is the quasi-community property that is her or hers outright. The deceased spouse can devise only half of the quasi-community property. Quasi-community protects the migrating couple but is only recognized in three states.

##### Order of deaths

Quasi-community property is not the same as community property. Quasi-community property applies only to the property owned at death by the deceased spouse, not but the surviving spouse. If the nonacquiring spouse dies first, he or she has no right to devise any of the surviving spouse’s property (even if the surviving spouse has property that would have been characterized as quasi-community property if he or she had died first). Quasi-community property gives the non-wage-earning spouse property rights in the property acquired during the marriage by the other spouse only if the wage-earning spouse dies first.

#### Community to separate example

Assume a traditional relationship where all of the couple’s marital property is acquired by and titled in the wage-earning spouse’s name. If the couple lives in a community property jurisdiction, the property is treated as community property. Each spouse owns an undivided ½ interest in the property regardless of how it is titled. If the couple retires and moves to a separate property jurisdiction, and shortly after the wage-earning spouse dies, the spousal protection scheme is the elective share. The non-wage-earning spouse receives his or her half of the community property outright (as its characterization hasn’t changed) and the deceased spouse’s half goes into probate. The surviving spouse can then claim an additional percentage interest in the deceased spouse’s probate. When moving from community property jurisdictions to separate property jurisdictions, the surviving spouse may be able to “double dip” in the spousal protection schemes.

##### Legislative reform

The Uniform Disposition of Community Property Rights at Death Act, adopted in many but not all separate property jurisdictions, provides that a deceased spouse’s community property that is brought into the state is not subject to the elective share doctrine.

## The Omitted Spouse

### Traditional scenario

The omitted spouse doctrine applies where a testator executes a will, thereafter gets married, and dies without revising or revoking his or her will. The issue that arises is whether the testator intended to disinherit his or her spouse, or whether the testator intended to revise her or her will to provide for his or her new spouse, but died before getting around to it.

#### Spousal v. non-spousal capacity

The classis omitted spouse scenario assumes that the testator’s will does not provide at all for the person who ends up being his or her spouse. But even if the will does provide for the person who ends up being the testator’s spouse, unless the testator thought the person was going to be his or her spouse when he or she executed the will, the gift in the will to the person who became the testator’s spouse does not defeat the doctrine.

### Omitted spouse presumption

The presumption that the testator accidentally disinherited his or her spouse arises where the testator (1) marries after executing his or her will and (2) dies without revising or revoking his or her will.

### Rebuttable presumption

The traditional omitted spouse doctrine provides that the presumption can be rebutted only by showing that: (1) the failure to provide for the new spouse was intentional and that intent appears from the will; (2) the testator provided for the spouse outside of the will and the intent that transfer outside of the will be in lieu of the spouse taking under the will is established by evidence, including oral statements by the testator and/or the amount of the transfer, or (3) the spouse validly waived the right to share in the testator’s estate.

#### Will evidences intent to omit

This exception is construed very narrowly. A general disinheritance clause, and even a general clause disinheriting any future spouse, is insufficient to defeat the presumption. The will must demonstrate the express intent to omit *this specific spouse*, and the clause *must have been executed when the testator was contemplating marrying this specific spouse*.

### Omitted spouse’s share

The typical omitted spouse statute gives the omitted spouse his or her intestate share of the testator’s probate estate.

### UPC

The UPC tracks the basic provisions of the traditional pretermitted spouse doctrine, but includes a few revisions.

#### Intent to omit

The UPC broadens the evidence that can be used to prove that the spouse’s omission from the will was intentional to include evidence (1) from the will, or (2) other evidence that the will was made in contemplation of the testator’s marriage to the surviving spouse, or (3) a general provision in the will that it is effective notwithstanding any subsequent marriage.

#### Omitted spouse’s share

The UPC grants an omitted spouse the right to receive no less than his or her intestate share of the deceased spouse’s estate from that portion of the testator’s estate, if any, that is not devised to a child of the testator or the child’s descendants (directly or through anti-lapse) if (1) the child is not a child of the surviving spouse, and (2) the child was born before the testator married the surviving spouse.

The effect of this provision is that if the testator devises all of his probate estate to his child or descendants from a prior relationship or marriage, the surviving spouse will not receive an omitted spouse’s share despite otherwise meeting the requirements of an omitted spouse.

### Modern trend

Some states recognize that increasingly the inter vivos revocable trust is being used much like a will. In those states, the omitted spouse doctrine arises only if the marriage occurs after execution of all the deceased spouse’s wills and revocable trusts, and the surviving spouse’s share is of the property included in the probate estate and revocable trusts.

* *In re Estate of Prestie*
  + The plaintiff (the son and primary beneficiary under the decedent’s estate plan) asked the court to expand the scope of the doctrine *judicially* to take into consideration the decedent’s revocable trust. The decedent amended his revocable trust just a few weeks before he married to grant his new spouse a life estate in his real property. The son argued that the new spouse should not qualify as an omitted spouse because the deceased spouse provided for her in his revocable trust.
  + The court refused to consider the gift in the revocable trust in applying the doctrine, however, because the state statute made express reference only to the decedent’s will.

## The Omitted Child

### Overview

The omitted child doctrine parallels the omitted spouse doctrine.

#### Louisiana approach

Louisiana only applies the omitted child protection to children under 23, the mentally infirm, and the disabled. This is the only state has does such.

#### Commonwealth approach – the family maintenance model

* *Lambeff v. Farmers Co-operative Executors & Trustees Ltd.*
  + George married in 1945 and had a daughter in 1946. Ten years later, he and his wife separated and George established a relationship with Barbara, his de facto wife, shortly thereafter. George and Barbara had two sons. George died and left his estate in trust to his two sons equally.
  + The daughter petitioned the court for a share of the estate as her maintenance share. She was significantly better off financially and professionally than the two sons but still received 10% of the estate while the sons each took 45%.

### Unintentional disinheritance of a child – traditional scenario

The omitted child doctrine applies where a testator executes a will, thereafter has a child, and dies without revising or revoking his or her will.

#### Gift

The class omitted child scenario assumes that the testator did not provide at all in his or her will for the child born after execution of the will. If the will contains a provision that gives a share to children born after the execution of the will, as a general rule that child does not qualify as an omitted child.

#### Children alive at execution

Some states extend the omitted child statute to include not only children born after execution of the will, but also children before the execution of the will but not named in the will.

Where the omitted child statute covers living children as well, most courts require affirmative disinheritance (specific reference to the child). A negative disinheritance (a blank statement that the testator has no children or that no children are to take under the will) is generally held not to be sufficient. Generic clauses giving a nominal amount to any child who might qualify to take are likewise generally insufficient to bar the doctrine.

### Omitted child presumption

The presumption that the testator meant to amend the will or provide for the new child arises where the testator (1) has a child after executing his or her will and (2) dies without revising or revoking his or her will.

### Rebuttable presumption

The presumption that the testator accidentally disinherited his or her child is rebuttable, but the traditional omitted child doctrine provides that the presumption can be rebutted only by showing that: (1) the failure to provide for the new child was intentional and that intent appears from the will; (2) the testator provided for the child outside of the will and the intent that the transfer outside of the will be in lieu of the child taking under the will is established by evidence, including the amount of the transfer; or (3) the testator had one or more children when the will was executed and devised substantially all of her or her estate to the other parent of the omitted child.

#### “Missouri” type statute

Under a “Missouri” type statute, the intent to omit the child must be determinable solely from the terms of the will. Extrinsic evidence is not admissible.

#### “Massachusetts” type statute

Under a “Massachusetts” type statute, extrinsic evidence is admissible to help determine whether the omission was intentional.

### Omitted child’s share

* *Gray v. Gray*
  + John executed a will while married to Mary, and although he had two children from a previous marriage, he left all of his estate to Mary. Three years later, John and Mary had a son, Jack. Five years later, John and Mary divorced. John died without changing his will.
  + Under the operation of law doctrine, Mary was treated as if she predeceased John due to the divorce and did not take. Jack petitioned the probate court to determine if he was entitled to a share of John’s estate under the omitted child doctrine.
  + The court said that although the presumption arise that the omission was accidental, it could be overcome by the exception that the testator had one or more children when the will was executed and he left substantially all of his estate of the other parents of the omitted child.
  + The court stated that it did not matter that John’s other children were from a prior marriage, Jack was excluded from a share of the estate.
    - Note: Jack would ***not*** take until a theory of anti-lapse as anti-lapse statutes do not apply to spouses (or ex-spouses)

### Overlooked child

A number of states have expanded the traditional omitted child doctrine to include a living child who is omitted if the child is omitted because (1) the testator does not know about the child, or (2) the testator mistakenly believed the child was dead.

### UPC

The UPC tracks the basic provisions of the traditional pretermitted child doctrine, but it was a few revisions.

#### Adopted children

The UPC expressly provides that it applies to children born or adopted after execution of the will.

#### Intent to omit

Unlike the UPC omitted spouse doctrine, the UPC omitted child doctrine does not broaden the scope of the evidence that can be used to prove the intent to omit a new child. The UPC sticks with the traditional rule that the evidence that the failure to provide for the child was intentional must come ***from the will***.

#### Other children

Under the traditional approach, if the presumption arises that a child was accidentally omitted, the presumption is overcome if the testator had one or more children when the will is executed and devised substantially all of the estate to the other parent of the omitted child. The UPC, however, does not permit such evidence to defeat the child’s claim to an omitted share, but rather uses it in calculating how much the child should receive.

#### Omitted child’s share

The omitted child’s share under the UPC depends on whether the testator has other children living at the time he or she executes the will.

##### No children

The omitted child receives his or her intestate share, unless the testator devised all or substantially all of the estate to the other parent of the omitted child and the other parent survives the testator, then the omitted child takes nothing.

##### One or more children

If the testator has one or more children living at the time he or she executes the will, and the will devised property to one or more of the following then-living children, the omitted child’s share (1) is taken out of the portion of the testator’s estate being devised to the then-living, and (2) should equal the share or interest the other children are receiving, had the testator included all omitted children with the children receiving shares and given each an equal share. (Gifts to the then-living children are to abate pro rata.)

#### Overlooked child

The UPC expressly includes a child who is overlooked in the will because the testator though the child was dead when he or she executed the will. The UPC does not extend omitted child status to the child overlooked because the testator does not know about the child.

### Omitted issue of deceased child

Most omitted child statutes cover omitted children only. Some statutes, however, expressly provide that they apply not only to omitted children, but also to the omitted issue of a child who died before the testator. The omitted issue of the child who died before the testator takes their intestate share.

### Modern trend

A few states have modified that omitted child doctrine to recognize that increasingly the inter vivos revocable trust is being used much like a will. In those states, the omitted child doctrine arises only if the birth occurs after execution of all the deceased spouse’s wills and revocable trusts, and the omitted child’s share is of the property included in the combined probate estate and revocable trusts.

* *Kidwell v. Rhew*
  + Irene Winchester created a revocable, inter vivos trust, transferred real property to the trust, and named her daughter, Margie Rhew, as successor trustee upon Irene’s death. Irene never executed a will and another daughter, Rhenda Kidwell, petitioned the court to apply the pretermitted-heir statute to the revocable trust.
  + Kidwell argued that the pretermitted-heir statute should apply to dispositions made by testamentary will substitutes, such as an inter vivos trust.
  + The court declined as the statute spoke only in terms of the execution of a will. Kidwell was not entitled to a share of the estate.

# Trusts: Overview and Creation

## Conceptual Overview

### Terminology

* Settlor: the party who creates the trust (also known as a trustor).
* Trustee: the party to whom the settlor transfers the trust property; the trustee holds legal title to the trust property and manages the property for the duration of the trust.
* Beneficiaries: the parties who hold the equitable interest in the trust; the parties to whom the trustee owes a fiduciary duty.
* Declaration of trust: if the settlor is also the trustee, the expression of the intent to create the trust, along with the terms of the trust, is called a declaration of trust. (Although the term *declaration of trust* implies the expression is oral, it must be in writing if the trust holds real property or is testamentary.)
* Deed of trust: if someone other than the settlor is the trustee, the expression of intent to create the trust, along with the terms of the trust, is called a deed of trust. (Although the term *deed of trust* implies the expression is written, at common law it can be oral if the trust is created inter vivos and involves only personal property.)
* Res/corpus: the trust property is often referred to as the trust res, or trust corpus, or more simply, the trust property.
* Inter vivos trust: if the trust is created while the settlor is alive, it is an inter vivos trust. A trust is created when it is funded – when property is transferred to the trust/trustee.
* Testamentary trust: if the trust is created when the settlor dies (either in the settlor’s will or funded via the settlor’s will), it is a testamentary trust.

### Trust Structure

The prototypical trust structure is that A transfers property to B for the benefit of C (and possibly others). That is a trust.

### Bifurcated Gift

A trust is merely another way of making a gift. A gift occurs when a donor transfers property to a donee. A trust is a “bifurcated gift.” The gift in trust is bifurcated in that legal title to the property is given tone party (the trustee), while the equitable interest is given to another party (the beneficiary). The equitable interest is the right to use and benefit from the property. The extent of the beneficiary’s equitable interest in the property is defined by the terms of the trust, and the terms of the trust are determined by the settlor when he or she sets up the trust.

The trustee holds and manages the trust property for the benefit of the trust beneficiaries. Once title is bifurcated between the legal and the equitable interests, the trustee owes the beneficiaries a whole host of fiduciary duties.

### Ongoing Gift

The statement that the trustee “holds and manages” the trust property implicitly indicates another difference between the class gift and a gift in trust. The moment the property is given to the donee, the gift is over, a gift has no “on-going” life.

The statement that a trustee “holds and manages” the trust property implicitly indicates that a trust has an on-going life after the settlor transfers the property to the trust. the trustee holds and manages the trust property during the life of the trust.

#### Bifurcate trust property

Because the trustee holds and manages the trust property over time, the trust property typically becomes bifurcated between the trust principal (the property the settlor transferred to the trust) and the trust income (the money generated by the trust principal while the trustee is holding and managing the trust). A beneficiary’s interest can be in the trust income and/or the trust principal.

#### Bifurcate equitable interests

In addition, at the equitable level, invariably the equitable title is bifurcated over time. The beneficiary who currently holds the right to benefit from the trust right now holds the possessory equitable interest. The party who currently holds the right to benefit from the trust in the future holds the future equitable interest. The simplest bifurcation is a life estate and remainder.

### Example – Gift v. Trust

A gives B $1,000. That is an inter vivos gift. B can do whatever she wants with the gift. On the other hand, if A gives B $1,000 to use for the benefit of C during C’s lifetime, and upon C’s death, any remaining principal is given to D, that is a trust. B cannot use the property for her own benefit. C has a life estate interest, and D has the remainder interest.

### Trust Purposes

A trust can be used to avoid probate; it can be used to hold property for a minor; it can be used for a variety of estate planning/tax purposes; it can be used to try and influence the beneficiaries’ behavior; etc.

#### Commercial trusts

Trusts are also used for commercial purposes: business trusts instead of incorporating; mutual funds to hold collective investments; pension funds; and asset securitization – sale of equitable interests in a stream of payments.

### Basic Trust Rules

#### Same party can wear all three hats

Although there are three distinct parties to a trust – settlor, trustee, and beneficiary – the same person can wear all three hates at the same time as long as there is another trustee or another beneficiary.

##### Merger

If the same party is both trustee and beneficiary, and there is no other trustee or beneficiary, the legal title and the equitable title are said to merge, and the trust is terminated (bifurcation of the legal and equitable titles is essential to a trust).

#### A trust is not created until it is funded

A trust is not created until it is funded. A trust is not funded until property is transferred to the trust/trustee. Funding is distinct from the expression of the intent to create a trust. Where the trustee is a third party (someone other than the settlor), property has to be transferred to the trustee, with the intent that the trustee hold and manage it for the benefit of someone else. Executing a deed of trust does not constitute funding.

#### A trust will not fail for want of a trustee

Where the settlor clearly expresses the intent to create a trust and provides for funding, a trust will not fail for want of a trustee. If the trustee declines to serve (a named trustee is not required to serve but rather must accept the appointment), dies, or is unable to continue, or if the settlor forgot to name a trustee, a court will appoint a successor trustee. (Once a trustee accepts the position, due to the fiduciary duties inherent in the office, the trustee can leave the position only with court approval, or the consent of all beneficiaries.) Where a will creates a trust but fails to name the trustee, the general rule is to appoint the executor as trustee.

#### Co-trustees must agree on action

If a private trust appoints co-trustees, the general rule is that all the trustees must consent to any proposed action. An individual trustee or subgroup cannot act alone. The trust instrument, however, can provide that the trust can act upon a vote of a majority of the trustees.

##### Uniform Trust Code

The Uniform Trust Code rejects the common law rule and permits action based on the vote of a majority of the co-trustees.

### Remedial Trusts

Remedial trusts arise by operation of law and thus are not subject to the requirements to create a valid trust. They are used as equitable remedies by courts to order one party who is currently holding property to transfer the property to another party whom the court concludes has a stronger equitable claim to the property.

#### Resulting trust

A resulting trust arises anytime a trust fails in whole or in part. The courts use it to require the party holding the property (typically the trustee) to return the property to the settlor (or the settlor’s estate if the settlor is dead).

#### Constructive trust

Constructive trusts are used to prevent unjust enrichment. Historically, the courts required (1) a confidential or fiduciary relationship between the transferor and the transferee, (2) a promise (express or implied) by the transferee, (3) that the transferor transferred the property to the transferee in reliance upon the trust, and (4) that the transferee refuses to honor the promise, thereby constituting unjust enrichment.

Under the modern trend, the courts tend not to emphasize the elements as much as the equitable notion that the constructive trust is used to prevent unjust enrichment.

## Requirements to Create a Valid Trust

There are four requirements to create a valid trust: (1) the settlor must have the intent to create a trust; (2) there must be funding – property transferred to the trust/trustee; (3) the beneficiaries must be ascertainable; and (4) ***possibly*** a writing.

### Trust requirements

#### Intent

To make a gift in trust, the settlor must have the intent to make a gift in trust. The intent must be that the gift in trust – a transfer to one person who holds and manages it for the use and benefit of another – as opposed to the intent to make an outright gift.

#### Delivery

To reflect the fact that a gift in trust is a bifurcated gift, the delivery requirement is that the property must be delivered to the trustee (i.e., funding). Where the property is delivered to the trustee with the intent that the gift be a trust, equitable title is automatically transferred to the beneficiaries by operation of law.

#### Ascertainable beneficiaries

The beneficiaries must be ascertainable so the court knows who has standing to enforce (1) terms of the trust, and (2) the fiduciary duties the trustee owes the beneficiaries.

#### Writing

The writing requirement is not really a trust requirement. If the trust involves real property, the Statute of Frauds requires that the trust be in writing. If the trust is a testamentary trust, the Wills Act requires that the terms of the trust be in writing. The writing requirement is no different than it is for an outright inter vivos gift of real property or any other testamentary gift.

### Intent

The intent to create a trust exists anytime one party transfers property to another party with the intent to vest the beneficial interest in a third party. No technical words are necessary, but if the settlor uses any of the basic terms (***in trust, trustee***) that is presumed indicative of the intent to create a trust.

* *Jimenez v. Lee*
  + A daughter sued her father for breach of trust claiming that two gifts to the father for the benefit of the daughter to be used for her education constituted trusts. Although the grantors did not use any technical terms or expressly state that the gifts were in trust, the grantors clearly indicated that the money being given to the father was to be used for the daughter’s educational needs.
  + The court held that because the grantors intended to vest the beneficial interest in the daughter, the grantors had the intent to create a trust and the father held the money question as a trustee. ***No specific words are necessary to create a trust – only intent***.

There are two scenarios where it is particularly difficult to draw the line between the intent to create a trust and the intent to create a gift: (1) precatory trusts, and (2) failed gifts.

#### Precatory trusts – NOT A TRUST

A precatory trust arises where there is an outright gift from a donor to a donee, but the donor includes some language that expresses the ***hope*** or ***wish*** – but ***no legal obligation*** – that the property be used for the benefit of another. A precatory trust is merely a “gift with a wish.”

The key is whether the language used in conjunction with the transfer indicates the intent to vest the beneficial interest in the third party (in which case the transfer is a trust) or whether the language expresses merely the ***hope or wish*** that the recipient of the property use it for a third party (in which case the transfer is a precatory trust). Where the language is ambiguous, the court will take into consideration all the circumstances surrounding the situation.

#### Failed gifts

Where a donor has the intent to make a gratuitous inter vivos gift, but the gift fails for want of delivery (typically the donor dies before making deliver), the donee may try to save the failed gift by recharacterizing the donor’s intent as the intent to create a trust (that the donor had the intent to create a trust, held himself as the trustee, thereby fulfilling the delivery requirement).

***Most courts reject the argument that an inter vivos gift that fails for want of delivery can be saved by recharacterizing the donor’s intent as an intent to declare a trust.***

* *Hebrew University Association v. Nye*
  + The Hebrew University Association claimed that Ethel Yahuda had effectively transferred a library of rare books and manuscripts to the Association. The court noted that Ethel clearly expressed the intent to make a gift of the books to the Association, but there was no evidence of delivery before Ethel died.
  + The court rejected the argument for recharacterizing the intent as a declaration of trust. ***Although one can create an oral trust of personal property and deliver the personal property to oneself as a trustee, the intent to create a trust, as opposed to make a gift must be present.***

### Funding

The second requirement for a valid trust is that the trust must be funded – some property must be transferred to the trust/trustee. There are two key components to the funding requirements: (1) the act of funding, and (2) what type of property interest will qualify as an adequate property interest for purposes of funding the trust.

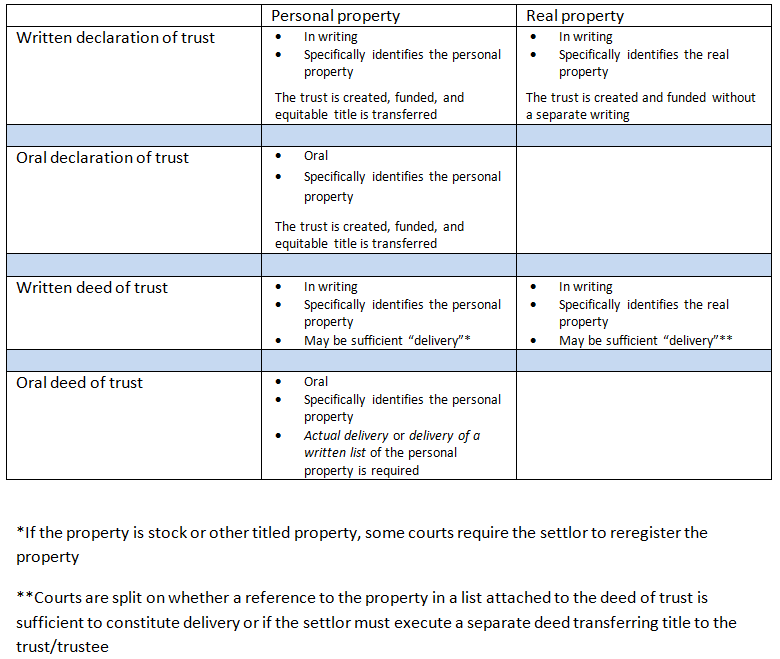
***A trust is not created until some property is transferred to the trust (trustee), and only property transferred to the trust is part of the trust.***

#### Modern trend approach – Majority

Under the modern trend approach, the creation of the trust and delivery requirements overlap and can be one and the same, depending on the facts. This is particularly true where the settlor is also the trustee. Most courts have concluded that it is impossible for a settlor to transfer property to himself, reasoning instead that the settlor-trustee retains legal title (not as settlor but as trustee) regardless of delivery, but equitable title must be transferred to a beneficiary.

Declaration of trust: settlor is trustee

Deed of trust: third party appointed as trustee



#### Adequate property interest

Funding requires that some property interest must be transferred to the trustee. Virtually anything one thinks of as property interest will qualify: real property, personal property, money (even a dollar or penny), leasehold interests, possessory estates, future interests (even contingent remainders), life insurance policies, etc.

Two interest that do not constitute an adequate property interest for purposes of funding a trust: expectancies and future profits.

* *Brainard v. Commissioner*
  + In 1927 Brainard orally declared a trust of his stock trading during the following year for the benefit of his family. Brainard did not own any stock at the time he declared the trust, and he had no property interest at that time in any possible future profits.
  + The court held that the declaration constituted nothing more than a gratuitous undertaking to create a trust in the future when the profits were realized and were coupled with the intent to create a trust.

### Ascertainable Beneficiaries

The third requirement for a valid trust is that there must be ascertainable beneficiaries. The moment a settlor intends to create a trust and transfers property to the trustee, the equitable interest is transferred to trust beneficiaries automatically, by operation of law. The trustee needs to know to whom he or she owes a fiduciary duty; the courts need to know who has standing to enforce the terms of the trust and the fiduciary duty.

#### Unborn children exception

Trusts created in favor of the settlor’s unborn children are upheld despite the fact that the settlor’s unborn children are not ascertainable when the trust is created.

#### Charitable trusts exception

The requirement that trust beneficiaries have to be ascertainable applies to private trusts, not to charitable trusts.

#### Ascertainable

Ascertainable means that you must be able to identify the beneficiaries by name. If their names are not expressly set forth in the trust, the trust must contain a formula or description of the beneficiaries that permits the court to determine by objective means who they are.

* *Clark v. Campbell*
  + The testator left his tangible personal property to his trustees, in trust, to give to his friends as his trustees shall select. The provision was challenged on the grounds that the trust failed for want of ascertainable beneficiaries.
  + The court ruled that the testator intended to create a trust but that “friends” was not an objectively ascertainable formula – the trust failed for want of ascertainable beneficiaries.

##### Familial terms

Courts routinely hold that familial terms such as “children, issue, nephews, nieces,” etc., are objectively ascertainable. Some courts have even held that the terms “relatives” and “relations” refer to one’s heirs under the state’s descent and distribution scheme and thus are objectively ascertainable.

#### Honorary trusts – NOT TRUSTS

Trusts for the benefits of a pet or trusts to maintain one’s gravesites, while honorable, technically fail for want of ascertainable beneficiaries. One of the principal purposes for the ascertainable beneficiaries requirement is to determine who has standing to come into court and hold the trustee accountable. Neither a pet nor a gravesite has standing to come into court and sue a trustee. If the beneficiary of a trust is not an ascertainable person, the trust fails for want of ascertainable beneficiaries.

##### Rule statement

Where the purpose of a trust is such that it is impossible to have ascertainable beneficiaries, if the purpose is specific and honorable, and not capricious or illegal, the trust may continue as long as the “trustee” is willing to honor the terms of the honorary trust. If the trustee stops honoring the terms, he or she is not permitted to keep the property. A resulting trust is imposed, and the property is ordered distributed to the proper takers.

* *In re Searight’s Estate*
  + The testator’s will left his dog to Florence and he directed the executor to deposit $1,000 in the bank to be used to pay Florence 75 cents a day to care for the dog for life. The money being paid to Florence was for the benefit of the dog, and as such the testator’s intent was to create a trust for the benefit of the dog.
  + Although technically the trust should fail for want of ascertainable beneficiaries, because the trust was for a specific purpose that was honorable and not capricious or illegal, the court held that the trust qualified as an honorary trust and could continue as long as Florence was willing to honor the terms of the trust – to use the money to care for the dog.

### Writing

Under the common law approach, whether a trust must be in writing is not a function of the law of trusts per se, but rather a function of the Statute of Frauds and the Wills Act formalities. Absent state statutes expressly requiring all trusts to be in writing, whether a trust has to be in writing to be valid is a function of (1) whether the trust is an inter vivos trust or a testamentary trust, and (2) what type of property the trust holds.

#### Inter vivos trusts

As a general rule, inter vivos trusts do not have to be in writing unless the trust holds real property. If the trust is to hold real property, under the Statute of Frauds, the declaration of trust or deed of trust must be in writing.

##### Common law

The common law strictly applies the Statute of Frauds regardless of the consequences. Under the Statute of Frauds, the terms of an *oral trust involving real property* cannot be enforced against the transferee because oral conditions are not permitted to vary the terms of a deed.

Example: If A conveys real property to B, for the benefit of C but (1) the agreement the property is for the benefit of C is oral and (2) the deed from A to B makes no mention of the agreement, there is no trust. B is a donee, free and clear of any trust.

##### Modern trend

The modern trend finds that the common law outcome constitutes unjust enrichment of the intended trustee. It corrects this by imposing a constructive trust and ordering the purported trustee to distribute the real property to the intended beneficiaries – not in trust, but outright.

#### Testamentary trusts

Testamentary trusts, which typically are created in a testator’s will, must be in writing pursuant to the Wills Act formalities. Where a testamentary trust fails for want of a writing, the issue is whether the relief should be a constructive trust or a resulting trust. The answer turns on whether the failed testamentary trust is deemed a secret trust or a semi-secret trust.

##### Versus inter vivos trust

A trust where the trustee is to deliver personal property at the settlor’s death, if funded inter vivos, is an inter vivos trust and does not have to be in writing.

##### Secret trust

A secret trust is a testamentary trust that fails because the terms of the trust are not set forth in the will. One the face of the will, the secret trust looks like an outright gift to a devisee. It is a “secret” because there is nothing on the face of the will that indicates that the testator intended the devisee to take the property as a trustee, not as a devisee, with the beneficial interest in some third party.

Inasmuch as the courts have to admit extrinsic evidence to determine that the devisee was supposed to take as a trustee, ***the courts use the extrinsic evidence to impose a constructive trust on the devisee, ordering the devisee to transfer the property to the intended beneficiaries***.

##### Semi-secret trust

A semi-secret trust is a testamentary trust that fails because the terms of the trust are not set forth in the will. It is a “semi-secret” trust because there is something in the express language of the will that indicates, or at least hints at, the fact that the devisee was not intended to take the property for his or her own benefit.

The courts do not need extrinsic evidence to realize that the devisee is not to take the beneficial interest, so the courts ***will not admit extrinsic evidence*** to identify the intended beneficiaries. The gift to the devisee as trustee fails. ***The courts impose a resulting trust and give the property back to the settlor/testator***. Typically the property then falls to the residuary clause or, if the failed testamentary trust was the residuary clause, to intestacy.

* *Oliffe v. Wells*
  + The testatrix devised her residuary estate to Rev. Wells “to distribute the same in in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him.”
  + Because the express language of the will indicated that Rev. Wells was to take the property not for himself, the “semi-secret” trust failed.
  + The court imposed a resulting trust on Rev. Wells. Because the failed testamentary trust was the residuary clause of the testatrix’s will, the property fell to intestacy where it was distributed to her heirs.

##### Modern trend

The modern trend, and Restatement, takes the position that a constructive trust in favor of the intended beneficiaries should be imposed in both the secret and semi-secret trust situation. The majority of the courts, however, still follows the old common law distinction, imposing a constructive trust on secret trusts and a failed gift/resulting trust analysis on semi-secret trusts.

# Trusts: Life and Termination

## Life of Trust – Extent of Beneficiaries’ Interests

When analyzing the beneficiaries’ interest in the trust, the trust property has to be bifurcated between the income and the principal (the latter being the property transferred to the trust, and the former being the money the principal generates). In assessing each beneficiary’s interest in the income and/or the principal, the beneficiary’s interest can be either mandatory or discretionary.

### Mandatory trust

A mandatory trust is one where the beneficiary’s interest in the income is mandatory – the trustee must distribute the income to the beneficiary (typically according to a fixed schedule set forth in the express terms of the trust).

### Discretionary trust

A discretionary trust is one where the beneficiary’s interest in the income and/or principal is discretionary. In a pure discretionary trust, the beneficiary has no right to receive payments of income and/or principal. Any such payments are at the discretion of the trustee. The trustee’s discretion also can be limited by coupling it with an express standard.

#### Duty to decide

Where a beneficiary’s interest in a trust is discretionary, it is, to a certain degree, at the mercy of the trustee. But the trustee must exercise his or her discretion pursuant to the terms of the trust, even if that decision is not to make a payment to the beneficiary.

#### Duty to inquire

Consistent with the fiduciary duty the trustee owes the beneficiary, before the trustee can exercise his or her discretion with respect to whether to make a payment to the beneficiary, the trustee has a duty to inquire as to the beneficiary’s status and needs. If the trustee fails to inquire, the trustee is deemed to have breached his or her fiduciary duty to the beneficiary.

##### Scope of duty

Under the duty of inquiry, the trustee must exercise due diligence in attempting to gather the relevant information, and where the initial attempts are unsuccessful or incomplete, the trustee as a duty to follow up. Where the trustee fails to do so, the trustee has failed to properly exercise his or her discretionary power.

#### Scope of discretion

After having gathered all the appropriate information about the beneficiary, in deciding whether to make a payment, the trustee has a duty to act reasonably and in good faith.

##### Duty to act reasonably

The duty to act reasonably is an *objective* standard – to act as a reasonable trustee would act.

##### Duty to act in good faith

The duty to act in good faith is a subjective standard. The trustee acts in good faith as long as he or she honestly thought that he or she was acting in the best interests of the beneficiaries and the trust in making his or her decision.

##### Duty to act

The duty to act just means that the trustee cannot neglect and ignore the trust

#### Absolute discretion

The trustee’s duty to act reasonably and in good faith in making a discretionary decision is a default standard. A settlor may modify the duty by express language in the trust instrument. It is not uncommon for the trust to authorize the trustee to act in his or her “sole discretion,” or “sole and absolute discretion.” The courts have construed such language as not granting truly absolute and uncontrolled discretion, for if such were the case, there would be nothing left of the trustee’s fiduciary duty; and without a fiduciary duty, there would be no trust, just a precatory trust. Instead, the courts have construed such language as virtually eliminating the duty to act reasonably, but the trustee still must act in good faith.

#### Settlor’s purpose

A settlor can also provide a purpose or standard that the trustee must keep in mind when exercising his or her discretion. The standard must be set forth in the express terms of the trust.

The phrase “comfortable support and maintenance” has become a term of art expressing the intent that the beneficiary is to be kept at the standard of living that he or she was accustomed to at the time that he or she became a beneficiary of the trust.

#### Beneficiary’s resources

Whether a trustee is to consider a beneficiary’s other resources in deciding whether to make a payment to the beneficiary is a question of settlor’s intent. In essence the issue is whether the settlor intended to provide a floor level of income for the beneficiary regardless of the beneficiary’s other resources or whether the settlor intended to provide a safety net only in the even the beneficiary’s other resources were inadequate.

Where the settlor’s intent is not clear, most courts hold that the presumption is that the settlor intended to provide for the beneficiary regardless of the beneficiary’s other resources – the trustee is ***not*** to take into account a beneficiary’s other resources unless the trust expressly authorizes it.

* *Marsman v. Nasca*
  + Sara created a testamentary trust that provided that the trustees were to pay the income to her husband (Cappy) as least quarterly, and “after having considered the various available sources of support for him, my trustees shall, if they deem it necessary or desirable, in their sole and uncontrolled discretion, pay over to him, such amount or amounts of the principal thereof as they deem advisable for his comfortable support and maintenance.”
  + Following Sara’s death, Cappy lost his employment and his standard of living fell substantially. Cappy brought this to the trustee’s attention, the trustee gave him $300 and ask him to explain the need in writing. He failed to do so and the trustee failed to follow up.
  + The court held the trustee breached his duty to inquire into Cappy’s situation and hard breached his duty in not disbursing more principal to Cappy.
    - Note: Spitko believes this was perfectly acceptable for the trustee to do

#### Exculpatory clauses

Exculpatory clauses protect the trustee against liability for breach of trust absent “willful neglect” or the like. They are a double-edged sword: they can deter frivolous lawsuits by frustrated beneficiaries who do not like a trustee’s decision under a discretionary trust; but they can also reduce a trustee’s incentive to pay attention to a beneficiary.

If a court concludes that an exculpatory clause was put in the trust because of the trustee’s overreaching or abuse of fiduciary or confidential relationship, the clause will be deemed null and void. Such clauses are also unenforceable if the breach of a trust was committed intentionally, in bad faith, or in reckless disregard for the beneficiary’s interest.

Under the traditional and majority rule, a beneficiary challenging the validity of an exculpatory clause bears the burden of proof.

Under the Uniform Trust Code (UTC), if the trustee drafted the exculpatory clause or caused it to be drafted, the clause is presumed to be invalid “unless the trustee proves the exculpatory clause is fair and under the circumstances and that its existence and contents were adequately communicated to the settlor.”

#### Mandatory arbitration clauses

In an attempt to minimize administrative fees and to expedite resolution of disputes, increasingly trusts contain mandatory arbitration clauses. The cases to date where the clause was challenged tend to invalidate the clause.

### Sprinkle/spray trust

A sprinkle/spray trust requires the trustee to distribute the property in question, but the payment is to be made to a group of individuals and the trustee has discretion as to whom to make the payments and how much each person is to receive.

Sprinkle/spray trusts are something of a hybrid: seem discretionary to a beneficiary as nothing is guaranteed; seem mandatory to a trustee as he must distribute the property, but to whom and how much is to his discretion.

### Unitrust

Under a unitrust, a life beneficiary is given a fixed annual percentage interest in the total worth of the trust, regardless of whether the property needed to satisfy that fixed interest comes from the income or principal. The trustee is free to pursue any investment that he thinks will produce the greatest benefit for the trust, regardless of the amount of income the investment produces.

### Perpetual Dynasty Trust

As jurisdictions abandon the Rule against Perpetuities, settlors can create a trust that will last forever for the benefit of one’s issue, the trust is typically called a perpetual dynasty trust. The standard distributive provisions of such trusts grant the trustee discretionary powers over both the income and the principal, thus granting the trustee flexibility to manage the trust to permit the corpus to remain intact.

## Life of Trust: Creditors’ Rights

### Introduction

A creditor’s ability to reach a beneficiary’s interest in a trust depends on whether the beneficiary is the settlor or someone other than the settlor. As a general rule, it is against public policy to use a trust to try to shield one’s assets from one’s creditors.

#### Creditor’s rights generally

As a general rule, a creditor can reach a debtor’s property as long as the property interest in question is transferable. As applied to trusts, absent special provisions in the trust, generally a beneficiary’s interest is freely transferable, whether the beneficiary’s interest is discretionary or mandatory.

#### Scope of creditors’ rights

***If the beneficiary’s interest is freely transferable, creditors of a beneficiary can reach the beneficiary’s interest in the trust.*** For all practical purposes, the creditor steps into the shoes of the beneficiary and receives whatever interest the beneficiary has in the trust – no more, and no less.

##### Mandatory trust

If the trust is a mandatory trust, the creditor can force the trustee to distribute the income to the creditor pursuant to the terms of the trust just as the beneficiary could have. The trustee must distribute the income to the creditor.

### Discretionary trust (Settlor *not* beneficiary)

In a discretionary trust, a beneficiary’s right to receive a distribution is subject to the trustee’s discretion.

#### Pure discretionary trust

If the trust is a pure discretionary trust, just as the beneficiary could not force a trustee to distribute property to the beneficiary, nor can a creditor of a beneficiary of a discretionary trust force a trustee to distribute property (absent a showing of abuse of discretion as applied to the beneficiary in question, not the creditor).

##### Court order

In some jurisdictions, a creditor of a beneficiary of a discretionary interest can get a court order directing that if and when the trustee decides to exercise his or her discretion in favor of making a payment to the beneficiary, the trustee must make the payment to the creditor.

##### Restatement

A creditor of a beneficiary of a discretionary trust is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of its discretion – ***cannot compel***.

##### Uniform Trust Code

Cannot compel *unless* (1) the trustee has not complied with a standard of distribution or there has been an abuse of discretion; and (2) the distribution is ordered to satisfy a judgment or court order against the beneficiary for support for maintenance of a child, spouse, or former spouse.

#### Support trust

A support trust is a trust that requires the trustee to pay as much income (and if *expressly provided* in the trust, principal as well) as necessary for the beneficiary’s support and education.

##### Transferability

The beneficiary ***does not*** have the ability to transfer his or her interest. The effect of saying that the interest is nontransferable is to limit a creditor’s right to reach the beneficiary’s interest in the trust.

##### Basic necessities

Because a support trust is to ensure that beneficiary receives support, creditors who provide basic necessities are not subject to the implied spendthrift clause and can reach the beneficiary’s interest in the support trust.

##### Construction

The key to classifying a trust as a support trust is the formula that controls how much the trustee can distribute to the beneficiary, not the use of the word support per se. It the trustee is required to distribute all of the income to the beneficiary for his or her support, the trust is not a support trust because the amount being paid is not limited to the amount necessary for the beneficiary’s support. ***Where the payment is limited to the amount necessary for the beneficiary’s support (and education), the trust qualifies as a support trust.***

#### Modern trend/UTC

The modern trend and UTC is to abolish the distinction between pure discretionary trusts and support trusts, giving creditors the same rights over all trusts where the trustee’s power to make distribution is discretionary regardless of the extent of the discretion.

The Restatement gives creditors the right to reach any distributions the trustee makes or is required to make in the exercise of discretion, while the UTC provides that other than claims for child support or alimony, a creditor cannot reach property subject to the trustee’s discretion even if the beneficiary could force a distribution.

#### Protective trust

A protective trust is a trust that is mandatory until a creditor attaches a beneficiary’s interest, at which point the beneficiary’s interest automatically becomes discretionary (to protect it against the claim of a creditor).

### Spendthrift trust (Settlor *not* beneficiary)

A settlor can modify a beneficiary’s ability to transfer his or her interest by including what is known as a spendthrift clause in the trust that expressly restricts the beneficiary’s power to transfer his or her interest. ***A standard spendthrift clause bars a beneficiary’s ability to transfer his or her interest voluntarily (by sale or gift) or involuntarily (creditors reaching)***.

A spend thrift clause does not have to restrict both voluntary and involuntary transfers by a beneficiary. A spendthrift clause that bars only voluntary transfers by a beneficiary but leaves open involuntary transfers, thereby permitting a beneficiary’s creditors to reach the property, is permitted. However, a spendthrift clause that bars only involuntary transfers by a beneficiary, but leaves open voluntary transfers, is deemed against public policy and is null and void.

#### General rule

The general rule is that spendthrift clauses are valid and enforceable, even as applied to remainder interests in trust.

#### Exceptions

##### Judicial exceptions

Certain categories of creditors are not subject to spendthrift clauses:

1. Ex-spouses entitled to alimony
2. Children entitled to child support
3. Creditors who provide basic necessities
4. Tax claims by the state or federal gov’t

A majority of jurisdictions still apply spendthrift clauses to tort creditors.

##### Uniform Trust Code

The Uniform Trust Code limits the exception to a spendthrift clause to:

1. Ex-spouses entitled to alimony
2. Children entitled to child support
3. Creditors who provide services for the protection of a beneficiary’s interest in the trust
4. Tax claims by the state or federal gov’t

* *Scheffel v. Krueger (intentional tort)*
  + Krueger’s grandmother set up a trust for his benefit with a mandatory interest in the income, discretionary to the principal (for maintenance, support, and education), and the trust had a spendthrift clause.
  + Kreuger was later criminally convicted and a tort judgment was also entered against him. The mother of the victim sought to reach Krueger’s interest in the trust to satisfy the judgment. Despite the equities of her claim, the court ruled that the spendthrift clause barred reaching Krueger’s interest in the trust.
* *Shelley v. Shelley (child support/alimony)*
  + The settlor created a trust for the benefit of his son; the interest in the income was mandatory and discretionary as to the principal. Disbursement of the principal was allowed in an emergency. There was a standard spendthrift clause.
  + The son owed child support and alimony; upon his disappearance, the children and former spouses were not subject to the spendthrift clause and entitled to reach the mandatory income.
  + Because the interest in the principal was not mandatory, the ex-spouses and children could not reach it as creditors. However, as beneficiaries of the principal (with disappearance of the son), they were entitled to payments of the principal.

##### Statutory limitations

A number of states have statutorily limited the amount of the beneficiary’s interest in the trust that can be protected against creditors’ claims by a spendthrift clause. These take one of three approaches:

1. Limit amount that can be shielded to the amount necessary for the beneficiary’s support and education;
2. Limit amount that can be shielded by a fixed percentage of the interest of the income
3. Limit amount that can be shielded with a fixed dollar amount cap

ERISA: an employee’s interest in a pension trust is non-transferable and therefore not reachable by creditors.

Bankruptcy creditors: a beneficiary’s interest in a trust passes to the bankruptcy trustee only if the beneficiary’s interest is transferable. If the trust has a spendthrift clause, the beneficiary’s interest is not reachable in bankruptcy.

### Settlor as beneficiary (“self-settled asset protection trusts”)

If the beneficiary is the settlor, creditors have greater rights to reach the beneficiary’s intent in the trust.

#### Mandatory interest

If the settlor retained a mandatory interest in the trust, creditors of the settlor can reach the mandatory interest.

#### Discretionary interest

The creditors can force the trustee to exercise his or her discretion to the full extent permitted under the terms of the trust for the benefit of the settlor.

#### Spendthrift clause

As a general rule, spendthrift clauses are null and void as applied to creditors of a beneficiary who is also the settlor.

#### Modern trend

A number of states have recently authorized self-settled discretionary trusts (self-settled spendthrift trusts) permitting asset protection trusts in favor of a beneficiary who is also the settlor if (1) the trust is irrevocable, (2) the trust interest is discretionary, and (3) the trust was not created to defraud creditors.

* *Federal Trade Commission v. Affordable Media, LLC*
  + An off-shore asset protection trust is a trust where in theory the settlor cannot get at it and the trustee is not under the jurisdiction where the trustee is not liable to US court (the trust must be irrevocable or else the court will order the settlor to revoke the trust).
  + Andersons organize a Ponzi scheme and the assets were moved off-shore. They claimed they were unable to move the assets back to the US and were held in contempt.
  + There was a problem with the off-shore asset protection trust. It did not work as it was designed to work because the Andersons were set up as trust protectors and co-trustees but the co-trustee Asia-City could remove the Andersons as co-trustee if they filed a duress claim.
    - Because the Andersons were the trust protector, they could overrule Asia-City’s duress claim, remove them and get at the money.
    - The case actually settled not long after the Andersons were put in contempt

#### Transfers in fraud of creditors

Asset transfers made with the intent to hinder or defraud a creditor’s claim (as opposed to transfers made before a creditor’s claim arises) constitute actual fraud and are recoverable under the widely adopted Uniform Fraudulent Transfer Act.

#### Child support and/or alimony

Those states that permit asset protection trusts are split over whether child support or alimony claims should be able to reach the assets in the trust.

## Trust Modification and Termination

### Introduction

A trust ends natural and pursuant to its terms. A trust ends when all of the trust res is (principal) completely disbursed. A trust’s terms will provide for when the trust res is to be disbursed.

Revocable trusts: if the settlor retains the power to revoke the trust, the settlor can single-handedly terminate the trust. The power to terminate implicitly includes the power to modify. The settlor can terminate or modify regardless of the objections of the beneficiaries and/or the trustee. The settlor must comply with the requirements for revoking the trust. ***An irrevocable trust is presumed*** unless otherwise stated.

### Party giving consent

A party which initially consents to the modification or termination of a trust will be estopped if they later try to sue any of the other parties.

### Settlor and beneficiaries consent

If the settlor and all the beneficiaries consent, even if the trustee objects, the trust can be modified or terminated. The trustee has no beneficial interest in the trust. At best, the trustee can assert the settlor’s intent, as expressed in the terms of the trust, as grounds for objecting to modification or termination. If the settlor is alive and consents, the trustee has no right to speak for the settlor.

### Trustee and beneficiaries consent

Assuming the settlor has no interest in the trust (an irrevocable trust), if all the beneficiaries consent and the trustee consents, the trust can be modified or terminated. The settlor has no interest in the trust and as such has no right to sue the trustee if the trustee consents with the beneficiaries to the termination of the trust.

### Beneficiaries consent – trustee objects

If all of the beneficiaries consent but the trustee objects and the settlor is dead, jurisdictions are split over whether the beneficiaries have the power to modify or terminate the trust over the trustee’s objections.

#### English approach

Under the English approach, “dead hand” control generally is not permitted. After the death of the settlor, the beneficiaries are deemed the owners of the trust property for purposes of modification and termination of the trust. If all of the beneficiaries consent, the trust is modified or terminated regardless of the terms in the trust or the trustee’s objections.

#### Traditional American approach

The traditional American approach is more protective of a settlor’s intent. Under the general American approach, the trustee has the right, and to some degree, the duty, to object to a modification or termination by invoking the settlor’s intent as expressed in the terms of the trust.

### Trust modification

At common law, even if the trustee objects, in an unforeseen change of circumstances defeats or substantially frustrates the settlor’s intent, and all the beneficiaries consent, the court will order modification of the trust.

#### Unforeseen change

The requirement that the change in circumstances must be “unforced” is a very soft, fact-sensitive inquiry.

##### Common law

At common law, the courts are generally more protective of settlor’s intent, even against attempts at modification. The courts tend to apply a rather high threshold for what constitutes an unforeseen change in circumstances.

##### Modern trend

Under the modern trend approach, there is a noticeable shift toward giving the beneficiaries greater control over the property in the trust after the settlor’s death. This translates into a law threshold for what constitutes an unforeseen change in circumstances.

Example: an unusually high rate of inflation of increased medical costs can be enough to an unforeseen change.

##### Beneficiary’s advantage

The mere fact that the proposed modification would be more advantageous to one or more beneficiaries is not enough to warrant modifying a trust even if all the beneficiaries agree.

#### Substantially impair

Whether an unforeseen change in circumstances “defeats or substantially impairs” the settlor’s intent is a very soft, fact-sensitive inquiry.

##### Common law

At common law, the courts are generally more protective of settlor’s intent. The courts tend to apply a rather high threshold before finding that the change “defeats or substantially impairs” settlor’s intent.

##### Modern trend/UTC approach

The modern trend favors granting beneficiaries greater power over the trust. The modern trend uses a rather low threshold for what constitutes “defeating or substantially impairing” settlor’s intent. The Uniform Trust Code authorizes a court to modify the administrative or dispositive provisions of a trust, if because of circumstances not anticipated by the settlor, modification would further the purposes of the trust. There is no requirement that the change in circumstances defeat or substantially impair the settlor’s intent.

#### Beneficiaries’ consent

As a general rule, even if an unforeseen change in circumstances defeats or substantially impairs the settlor’s intent, before a court directs or permits modification, ***all*** of the beneficiaries must consent. There are doctrines facilitating getting consent from beneficiaries who lack the capacity to consent or from future beneficiaries who might not even be born yet.

##### Guardian ad litem

One method of getting the consent of minors or unborn beneficiaries is to petition the court for an appointment of a guardian ad litem to represent the interests of the minor or unborn beneficiaries.

###### Traditional approach

Traditionally, guardians ad litem take a rather strict and conservative approach to representing the minor or unborn beneficiary, asking only whether the proposed modification would increase or decrease the economic value of the interest the guardian was appointed to protect. The guardian typically ignores the noneconomic family considerations.

###### Modern trend

The courts have encouraged guardians ad litem to take into consideration noneconomic factors, such as family harmony and the settlor’s apparent primary intent to take care of other family members.

##### Virtual representation

Some courts and the Uniform Trust Code have held that under the doctrine of virtual representation, if the interests of the minor or unborn beneficiaries are virtually identical to those of living adult beneficiaries, the living adult beneficiaries are deemed to speak for the interests of the minor or unborn beneficiaries by virtual representation.

##### Modern statutory trends

The Uniform Trust Code requires the consent of only “qualified beneficiaries” for the removal of a trustee. A qualified beneficiary is one who would be entitled to receive property if the trust was terminated on the day the petition was filed. The UTC also authorizes the court to order modification or termination *without requiring the consent of all the beneficiaries* if (1) the trust could have been modified if all the beneficiaries had consented, and (2) the interests of the non-consenting beneficiaries are adequately protected.

#### Administrative modification

As a general rule, courts are more willing to modify administrative provisions under the unforeseen change in circumstances doctrine than they are to modify distributive provisions.

The UTC authorizes a court to modify the administrative provisions of a trust if continuing the current administrative procedures would be impractical or wasteful or impair the trust’s administration.

* *In re Riddell*
  + George and Irene created trusts to benefit their only son Ralph and his wife Beverly, and upon the death of the latter of them, to provide benefits to Ralph’s children until they reach the age of 35 when the principal would be distributed outright to them.
  + Ralph had 2 children, D and N, both of whom are over age 35, so upon the death of the latter of R and B, the trust res would be distributed outright. N suffers from schizophrenia and lives in a state hospital. R filed for a special needs trust that would (1) manage N’s funds for her benefit, (2) avoid the state seizing the funds to be reimbursed for medical expenses, and (3) avoid N’s mismanagement of the money.
  + The court found that (1) N’s special needs constituted circumstances not anticipated by the settlors because G and I were unaware of them, (2) the special needs modification will further the purposes of the trust, and (3) the modification was not against public policy.
  + The court recognized special needs trusts allow disabled persons to continue to receive gov’t assistance for their care and ruled R, as trustee, should be able to modify the trusts.

#### Trust protector

A “trust protector” can be given powers and control over a trust similar to those held by the settlor of a revocable trust, thereby increasing trust administration flexibility in that the trust protector can terminate or modify the administrative or dispositive provisions of the trust in response to changed circumstances. Whether a trust protector owes the beneficiaries a fiduciary duty is still up for debate.

The UTC embraces the use of trust protectors but provides they constitute a fiduciary who has a duty to act in good faith.

### Trust termination

The courts developed the Claflin doctrine to discern when the trustee was objecting to the premature termination of the trust for legitimate reasons.

#### The Claflin doctrine

Consistent with the traditional American approach of being more protective of the settlor’s intent, under the Claflin doctrine the trustee can block premature termination of the trust, even if all of the beneficiaries consent, if the trust has an unfulfilled material purpose. If, however, there is no unfulfilled material purpose and all the beneficiaries consent to the premature termination of the trust, the trustee cannot block its termination.

#### Unfulfilled material purpose

Under the Claflin doctrine, what constitutes an unfulfilled material purpose is whatever the trustee can convince the court constitutes one. The test is very fact-sensitive, turning on the language and apparent purpose of each trust.

Virtually every court has held the trust intrinsically includes an unfulfilled material purpose for: (1) discretionary trusts, (2) spendthrift trusts, (3) support trusts, and (4) trusts where the property is not to be disbursed until the beneficiary reaches a certain age.

If the court determines that the dispositive provisions of the trust constitute merely a succession of interests that have no material purpose, premature termination is ordered if all the beneficiaries consent.

##### Settlor’s consent

Even if the trust expresses an unfulfilled material purpose that the trustee invokes to block premature termination of the trust, if the settlor is alive and consents with all the beneficiaries, the settlor’s consent controls over the trustee’s attempt to block. In essence, the settlor’s consent constitutes a waiver of the unfulfilled material purpose.

* *In re Estate of Brown –* ***COMPLETELY WRONG!***
  + The decedent’s trust authorized the trustee to use the income and principal to provide an education for the decedent’s nephew’s children. Upon completion of that purpose, the income and principal were to be used for the care, maintenance, and welfare of said nephew and his wife for the remainder of their lives. Upon the death of the survivor, the trust res was to be distributed to their then-living children equally.
  + When the education purpose had been fulfilled, all the beneficiaries petitioned to terminate the trust. The trustee objected. The court construed the trust as expressing a material purpose that the nephew and his wife be assured a life-long source of income through the trustee’s management of the trust property. The court declined to terminate the trust.

##### Modern trend/UTC

A number of states have statutes that facilitate premature termination of a trust, even where there is an unfulfilled material purpose, under a variety of conditions (e.g., good cause; where a court determines it is in the beneficiaries’ best interest; where a court determines unborn or unascertained beneficiaries not adversely affected; and/or where the changed circumstances would otherwise defeat settlor’s intent).

The Restatement agrees with the common law approach that the presence of a spendthrift clause constitutes an unfulfilled material purpose, but the UTC rejects the position. The Restatement permits premature termination of the trust over the objection of the trustee, even if there is an unfulfilled material purpose, as long as (1) all beneficiaries consent, and (2) the court determines *the reasons to terminate outweigh the unfulfilled material purpose*.

The UTC authorizes a court to order (1) termination if all beneficiaries consent and continuance is not necessary to achieve any material purpose of the trust; (2) modification if all the beneficiaries consent and modification *is not inconsistent* with a material purpose; (2) termination or modification *without requiring the consent of all the beneficiaries* as long as (a) the trust could have been terminated if all the beneficiaries had consented, and (b) the interests of the non-consenting beneficiaries are adequately protected.

##### Probate settlement

Where there is litigation during probate, and the heirs and trust beneficiaries reach a settlement that includes terminating the trust, most (but not all) courts enforce the settlement and terminate the testamentary trust despite its terms (even if there is an unfulfilled material purpose).

##### Trust revocability where trust silent

The majority rule is that a trust is irrevocable unless the trust expressly provides otherwise.

The UTC, and a minority of states, however, reverse the presumption and provide that the trust is revocable unless the trust expressly provides otherwise.

###### Revocation by will

The traditional rule is that a will cannot revoke an inter vivos trust unless the trust expressly authorizes it.

The UTC and Restatement expressly authorize a subsequent will (or codicil) to revoke a revocable trust, or a provision in a trust, either expressly or implicitly where the will expressly devises the property that otherwise would have passed under the trust, where the trust does not provide (1) for how it is to be revoked, or (2) that the method provided is to be exclusive.

### Trustee’s removal

#### Traditional law

The fact that the trustee is doing a really lousy job, as long as they are not breaching any duty, does not constitute grounds for removal.

#### Modern law/UTC approach

The modern law/UTC approach makes it easier to remove a trustee who hasn’t engaged in a breach of duty. If the trustee consistently underperforms, the trustee can be removed. Also, when there is a change of circumstances (e.g., trustee was previously a small hometown bank but merged with Bank of America), the trustee can be removed if all beneficiaries agree.

# Trust Administration and the Trustee’s Duties

## Introduction

### Risk management

The trustee holds the legal title and has the burden of managing the trust property. The beneficiaries hold the equitable title, and they bear the risk of the trustee’s actions.

#### Historical background

The trust evolved out of a property-based background, were funded primarily with real property and the primary duty of the trustee was to preserve the real property for those holding a future interest. The risk of mismanagement was regulated by granting that the trustee had no inherent powers and imposing strict liability on third parties dealing with the trust.

#### Modern trend

The modern trust typically is funded with an intangible fund of assets (stocks, bonds, mutual funds, pension plans, bank accounts, etc.). The primary duty of the trustee is to manage this fun of wealth. The trustee is granted by law all the powers a reasonable person would need to manage the trust, and third parties interested in dealing with a trustee have no duty to inquire absent suspicious circumstances. The risk of trustee mismanagement is regulated primarily by imposing a duty of loyalty and prudent administration on the trustee.

## Trustee’s Powers

### Common law

At common law, the office of trustee has no inherent powers. The trustee possesses only those powers either expressly granted in terms of the trust of those necessarily implied in light of the trust purposes.

### Judicial authorization

A trustee can petition a court of equity for authorization to undertake an action not expressly or implicitly authorized under the terms of the trust. The court may grant the trustee the requested additional power.

### Modern trend

The modern trend is to facilitate the granting of powers to the trustee. The modern trend takes two approaches toward this goal.

#### Statutory list

Under this approach, the jurisdiction adopts a statute that sets forth a long list of powers it is presumed a trustee would need, thereby permitting settlors to incorporate the statutory list of powers simply by referring to the statutory provisions (incorporation by reference).

#### Inherent powers

The alternative is statutorily to grant the trustee a broad set of powers unless the settlor expressly provides that the trustee is not to have one or more of the granted powers. Typically, the statute provides that a trustee is presumed to have all the powers a reasonable person would need to perform acts necessary in light of the purposes of the trust.

### Third parties’ liability

In light of the fact that third parties can be held liable for participating in a breach of trust, the protection accorded third parties who deal with a trustee affects the practical scope of the trustee’s powers.

#### Common law

At common law, it is generally presumed that the purpose of a trust is to preserve the trust property. Hence, the common law discourages third parties from dealing with a trustee by imposing virtually strict liability on third parties if the transaction constitutes a breach of trust. Although a third party who qualifies as a subsequent bona fide purchaser without notice is not liable if the transactions constitutes a breach of trust.

If the party knows or should know that he or she is dealing with a trustee, the party has a duty to inspect the trust instrument to see if the transaction is authorized and is charged with proper interpretation of the trust.

#### Modern trend

The modern trend presumes that the purpose of a trust is to hold and manage the trust property. To facilitate trust management, the modern trend grants the trustee broad powers and third parties dealing with a trustee greater protection to facilitate trust transactions. The Uniform Trustee’s Powers Act eliminates the duty to inquire into the terms of the trust and protects the third parties unless they have actual knowledge that the transaction constitutes a breach of trust.

The UTC requires third parties to act in good faith and give valuable consideration.

## Duty of Loyalty

### Scope

The trustee owes the trust beneficiaries the duty of absolute loyalty. Everything the trustee does must be done solely in the best interests of the beneficiaries.

In applying the duty of loyalty to a particular act undertaken by the trustee, the trustee has a duty (1) to act in good reasonably, and (2) to act in good faith.

The requirement to act reasonably is an *objective* standard that permits judicial review and supervision of a trustee’s actions even where the trustee acted in good faith.

The requirement to act in good faith is a subjective standard that addresses the trustee’s state of mind – the trustee must have thought that what he or she was doing was in the beneficiaries’ best interests.

### Duty against self-dealing

Self-dealing arises where the trust and the trustee engage in a transaction and the trustee has a conflict of interest – a personal interest in the transaction. The duty against self-dealing is usually construed broadly to include transactions involving other members of the trustee’s family (spouse, children, parents, etc.).

#### No further inquiry

***Where a trustee engages in self-dealing, an irrebuttable presumption of breach of the duty of loyalty arises. Once it is established that self-dealing has occurred, no further inquiry of the trustee’s reasonableness or good faith is necessary or appropriate – per se it constitutes a breach of the duty of loyalty***. The beneficiaries can hold the trustee liable for any loss the trust has sustained, compel the trustee to transfer any profit made to the trust, or undo the transaction.

* *Hartman v. Hartle*
  + Testatrix had five children. Her will appointed two of her sons-in-law executors of her estate and directed that her real property was to be sold and divided equally among the five children.
  + The land was sold at a public action to one of the testatrix’s sons who bought it for the spouse of the trustee. Thereafter, the spouse sold the land for a profit of $1,600.
  + The court ruled that the duty against self-dealing applied to the spouse of the fiduciary and absent court approval beforehand, the sale was inappropriate.
  + The sale by the spouse could not be rescinded because it was to a subsequent bona fide purchaser without notice of the breach of trust but the spouse had to turn over profits to the trust beneficiaries.

#### Traditional exceptions

The duty against self-dealing can be waived by either the settlor in the terms of the trust or by all of the beneficiaries, following a full disclosure of the proposed transaction.

Note: even where the self-dealing is authorized, the transaction must still be reasonable and fair. If it is not, the trustee is liable for breaching the duty of loyalty.

### Duty to avoid conflicts of interest

A conflict of interest arises where the trust deals with another party with whom the trustee has an interest that may affect the trustee’s assessment of the proposed transaction.

***If the transaction involves a possible conflict of interest, but not self-dealing, the “no further inquiry” rule does not apply. Instead, the transaction is assessed to see if it is reasonable and fair under the circumstances***.

* *In re Rothko*
  + Testator’s will appointed three friends executors of his estate (which consisted primarily of paintings). The executors contracted with an art gallery that agreed to buy some of the paintings and sell the rest on consignment. The court found two of the executors had a conflict of interest. One was a director and officer of the gallery and the contract resulted in the executor receiving greater financial remuneration and status. The second had a conflict of interest because he was seeking to curry favor with the gallery for his own paintings, which he did.
  + The court found that the contracts were neither fair nor in the beneficiaries’ best interests. The court found that the third executor was aware of the breaches of trust by the other executors and failed to act – a breach of trust, even though the third executor was acting on advice of counsel. The advice gave the executor good faith, but the transactions were not reasonable and the executor did not act reasonably in failing to properly assess the contracts.

#### Damages

Where a trustee is authorized to transfer trust property but improperly sells it for too a price, the trustee is liable for the difference in the actual sale price and the price that should have been realized.

Where a trustee sells property he or she was not authorized to sell, appreciation damages are appropriate. Appreciation damages constitute the difference between the sale price and the value of the property as of the date of the court’s decree (putting the beneficiary is in the position they would have been but for the sale). Transferees who take with notice of the breach of trust are liable for appreciation damages as well.

### Co-trustee liability

A trustee is liable for a breach of trust if the trustee (1) consents to the action that constitutes the breach, or (2) negligently fails to act to stop or try to stop the other trustees from engaging in the action that constitutes the breach.

A trustee’s fiduciary duties to the beneficiaries include monitoring the conduct of his or her fellow trustees. Failure to monitor the actions of one’s co-trustees or delegating one’s nonministerial responsibilities to co-trustees constitutes a breach of trust.

Co-trustees are jointly liable. A trustee generally has a right to contribution from co-trustees where he or she is found liable. The Restatement allows for the contribution to be limited if the trustee was either more at fault or benefited personally from the breach; and the right to contribution is eliminated if the trustee acted in bad faith.

## Duty of Prudence – Trust Investments

### Introduction

***The trustee has a duty to administer the trust with such skill and care as a person of ordinary prudence would use in dealing with his or her own property. The duty is an objective standard of care, focusing on what a reasonable person would do***, not the trustee’s subjective intention when acting. This was adopted by the UTC.

### Trust investments – overview

The rules limiting trust investments to “safe” investments have given way to permitting an acceptable level of risk to ensure an adequate return on the trust property.

#### Traditional approach - Investments analyzed independently

Under the traditional common law approach, each investment decision is viewed separately. If one investment decision out of a hundred is deemed inappropriate, the trustee is liable for any loss caused by the one inappropriate investment. The risk level of other investments and the profits generated by them are irrelevant in assessing the propriety of a particular investment. – ***Not followed today***

Jurisdictions had maintained statutory lists of appropriate investments. If a settlor expressly authorizes investments that are not on such a list, they were appropriate as long as otherwise reasonable and proper.

### Minority – Model Prudent Man Investment Act

*The Model Prudent Man Investment Act abolishes statutory lists and permits any investment that a prudent man would make,* *barring only “speculative” investments*.

This standard states that a trustee should invest with the same case as a prudent person would of his or her own property, taking into consideration the dual goals of preserving the principal while generating a stream of income. – ***Not followed today***

### Today’s rule in all states – Uniform Prudent Investor Act

The Uniform Prudent Investor Act builds on the prudent person approach. The Uniform Prudent Investor Act focuses on the actions that constitute a prudent investor and the duties that go hand in hand with those actions. The Restatement and Trustee Act have adopted the prudent investor standard.

* + This takes into account the goals of the trust, such that an investor must be aware if the trust is looking to be conservative (low risk/reward) or be aggressive (high risk/reward)

#### Duty to diversify

The prudent investor standard still requires the trustee to spread the risk of loss by diversifying the trust investments, unless it is prudent not to do so.

#### Pooling trust funds

The modern trend and majority rule permits pooling of trust funds with those of the trustee’s to achieve efficiencies of scale and to facilitate diversifying trust investments. The modern trend likewise permits investments in mutual funds.

#### Portfolio approach

The Uniform Prudent Investor Act expressly adopts the portfolio approach to investments – individual investments are no longer assessed in isolation, but rather the total performance of the trust’s investments is the standard. A well-diversified portfolio spreads the risk of loss across all the investments so that the aggregate level of risk is acceptable in light of the trust purpose.

Under the portfolio approach, an individual investment that might look speculative in isolation can be reasonable if offset by other safe investments with low levels of risk associated with them. One of the keys to assessing the propriety of an investment under the portfolio approach is whether it is a compensated or uncompensated risk.

##### Compensated risk

Compensated risks are investments that are riskier than others but that have a corresponding higher rate of possible return associated with them. Example: putting an appropriate amount of a trust’s funds into a start-up company with great growth potential is a compensated risk.

##### Uncompensated risk

Uncompensated risks are those investments that are risky and do not have a corresponding market-enhanced compensation to reward the investor for taking the risk. Example: Putting all of one’s investment in one stock, regardless of the level of risk associated with the stock, is an example of an uncompensated risk (i.e., the lack of diversification constitutes an uncompensated risk).

##### Investment decisions

Arguably the key considerations in assessing a trustee’s investments under the portfolio theory approach are (1) the trustee’s investigation and decision-making process in determining the trust’s acceptable level of compensated risk, and (2) how that level is achieved through the combination of trust investments.

##### Duty to delegate

The prudent investor approach assumes that expert assistance in the investing decision-making process is beneficial, if not required. Delegating the investment process to an expert is viewed with favor, though the trustee still has a duty to properly investigate to whom the power should be delegated, to consult with the agent to ensure that he or she properly understands the trust’s terms, purposes and acceptable level of compensable risk, and to monitor the activities and decisions of the investment agent.

#### Adequate diversification

This is a fact-sensitive issue to be determined on a trust-by-trust basis, taking into consideration the purpose of the trust and the particular investments in question.

* *In re Estate of Janes*
  + The testator died, leaving a probate estate of $3.5 million, $2.5 million of which was held in stock with 71% consisting of Kodak common stock. His wife and a trust company were appointed co-executors. The trust company met to determine how much of the stock needed to be sold to cover expenses and held the rest. The stock value started to decline rapidly; two years later the trust company met again.
  + The wife sought to surcharge the trust company for its imprudent retention of the high concentration of Kodak stock in violation of the prudent person rule of investment. The surrogate court found the trust company had acted imprudently for not divesting the stock and imposed a $6.1 million surcharge (including “lost profits” which would have been reinvested had there been proper divestment).
  + The appellate court upheld the finding of imprudent conduct for lack of diversification but removed the “lost profits” from the surcharge.
  + The appellate court stated***: no precise formula existed for determining the prudent person standard. Each case turns on its own facts and circumstances, with the trustee’s investment decisions to be measured in light of the business and economic circumstances at the time they were made in light of the circumstances of the trust itself rather than the integrity of the particular investment.***
  + The court held the trust company failed to exercise the due care and skill of a corporate fiduciary by: (1) failing to establish an investment plan upon funding; (2) failing to follow its own internal policies of special caution and attention to cases of portfolio concentration exceeding 20%; and failing to conduct more than routine reviews of the account in the face of declining values.
  + Finally, the court held: ***where the imprudent conduct is that the trustee negligently retained assets is should have sold, the measure of damages is limited to the lost capital (though the court noted that lost profits are appropriate where the deliberate self-dealing or faithless transfers are involved)***.

##### Exceptions to duty to diversify

The duty to diversify is not absolute. There are situations where a fiduciary arguably is justified in not diversifying:

* where the administrative costs of diversifying (including tax consequences) would outweigh the benefits;
* where there is a family-run business or diversifying would entail loss of a controlling interest;
* personal assets (family vacation home, personal home);

Potentially even if the trust is one piece of a large investment scheme and that scheme is diversified; likewise, investment in a single mutual fund may be OK if the mutual fund is diverse.

##### Inception assets

Many jurisdictions permit a trustee to have a preference for retaining the trust’s “inception assets” – the assets used to fund the trust that the settlor recommends the trustee retain. However, this is subject to the trustee’s more general fiduciary duty or prudent administration.

##### Authorization to retain v. duty to sell

Even where the trust instrument authorizes the trustee to retain the trust assets in question, where failure to diversify is inconsistent with the modern portfolio approach, the trustee has a duty to sell the trust property in a timely manner (within a reasonable time period).

##### Direction to retain v. duty to sell

The general rule is that the settlor’s intent controls when the trust terms express direct the trust to retain specific assets; some courts have ruled the trustee must comply with the terms. Other courts, consistent with the modern portfolio emphasis on diversification, have approved diversification if there are “changed circumstances,” thereby relieving the trustee of the duty to follow the settlor’s direction. (The trustee may even have a duty to petition the court for authorization to sell the asset under these circumstances – Restatement imposes such a duty, the UTC does not).

##### Calculating damages

Where there is a breach of trust, the trust beneficiaries are entitled to be made whole. There are three ways the beneficiaries can be made whole: (1) charge the trustee with any resulting loss, (2) charge the trustee with any profit made, or (3) charge the trustee with any profit that would have accrued but for the breach.

###### The total return damages approach- UTC

The “total return/make whole” damages approach favors including lost profits that would have been made if the proper actions had been taken in a timely manner, including profits on the prudent administration and any profits made by the trustee through the breach.

If there are several plausible investment strategies, the Restatement favors applying the most profitable unless the trustee can justify not doing so.

###### The capital loss plus interest approach

The “capital lost plus interest” approach does not punish the trustee for lost investment opportunities, awarding interest to the trust beneficiaries rather than possible profits from prudent investment of the lost capital. Under this approach, the rate of interest is critical. Different possible rates include the historic average rate of inflation, the annual return on long-term gov’t bonds, and the legal rate applied to money judgments.

###### Total return approach

The “total return” approach calculates damages by awarding the difference between how the particular, imprudently managed, portfolio actually performed versus how a hypothetical matching portfolio, prudently managed, would have performed, taking into consideration taxes, expenses, and distribution. This approach requires expert testimony and is speculative.

##### Duty to avoid unnecessary costs

Just as a reasonable person would take all appropriate steps to minimize the expenses associated with his or her own investments, so too a trustee must take all reasonable steps to minimize the expenses associated with the trust, including investment expenses, tax consequences, and inflation.

#### Settlor authorization

If a settlor expressly authorizes all investments, regardless of their legality, the courts tend to construe such provisions narrowly, granting a trustee some extra room for lapses in judgment, but not absolute immunity for improper investments under the prudent investor standard. Such exculpatory clauses also do not protect a trustee who acts in bad faith or recklessly in making trust investments.

* *Wood v. Firstar Bank (US Bank)*
  + Wood created a trust that named Firstar Bank as trustee and his wife as a beneficiary. When created 80% of the trust assets were in Firstar Bank stock. A provision in the trust allowed Firstar to retain “any securities in the same form as when received, including shares of a corporate Trustee…” Firstar did not diversify but instead unloaded non-Firstar stock to pay the debts of the estate in a much greater proportion so when Wood died 86% of the trust was comprised of Firstar stock.
  + The wife asked Firstar to diversify but they did not. A few months later, Firstar stocked plunged, costing the trust approx. $800,000.
  + The court stated that ***absent special circumstances where not diversifying would better serve the purpose of the trust, a trustee has a duty to diversify***. The court reasoned that while the boilerplate retention clause waived the duty of undivided loyalty with respect to the trustee’s stock, it did not address the trustee’s duty to act prudently and to diversify (the special circumstances here were tax consequences while Wood was alive, upon his death the duty to diversify kicked in).
  + ***A general authorization, like this one, does not abrogate the duty to diversify absent specific language authorizing the trustee to retain a larger percentage of one investment than would normally be prudent.***

##### Authorization v. mandate

Trust provisions that ***mandate*** asset retention should be distinguished from those that ***authorize*** asset retention. Authorizations do not excuse a trustee’s liability for failing to diversify absent good reasons not to, while mandates arguably do.

The power to retain an asset does not waive the duty to diversify.

Where the trust mandates asset retention, the law does not hold the trustee liable for following the settlor’s direction. The trustee may have a duty to petition the court for guidance if failure to diversify would harm the beneficiaries, which it typically does (Restatement imposes the duty to petition the court, the UTC requires the trustee to act prudently, and Spitko thinks this entails petitioning the court).

##### Trustee protection

Attempts at granting a trustee “absolute discretion” and complete protection with respect to investment decisions are analogous to similar clauses granting a trustee absolute discretion and complete protection with respect to discretionary trusts. Such provisions are inconsistent with the fiduciary nature of the trustee’s position and therefore are not given full effect.

##### ERISA

The prudent investor rule governs trustees managing pension funds regulated by ERISA. ERISA imposes an exclusive benefit rule on the trustee which is analogous to the duty of loyalty.

#### Delegation

At common law, a trustee cannot delegate any discretionary responsibilities.

##### Exception – ministerial responsibilities

Even at common law, there is an exception for ministerial responsibilities: duties that do not require the exercise of discretion (e.g., cutting the grass, making repairs, maintaining and cleaning the property).

##### Majority and modern trend – duty to delegate

The modern trend and majority recognize that some trustees are unqualified to undertake certain responsibilities inherent in holding and managing trust property – in particular, the duty to invest trust property properly. Under the Uniform Prudent Investor Act, the Restatement, and UTC, the trustee may have a duty to delegate those responsibilities if a prudent person would delegate under similar circumstances. The trustee must act in the best interests of the beneficiaries in deciding where to delegate discretionary responsibilities, including investment-making responsibilities, and to whom to delegate them.

###### Duty to supervise

Even where the trustee is authorized to delegate either ministerial or discretionary responsibilities, the trustee has an on-going duty of care in (1) selecting agent(s), (2) defining the agents’ role and giving proper instructions; and (3) monitoring and supervising the actions of the agents to whom the trustee delegates the responsibilities. There trustee cannot abdicate or delegate unreasonably.

* *Shriner Hospital v. Gardiner*
  + Settlor created a trust, income to her daughter, grandchildren, and daughter-in-law, and remainder upon death of the last income life beneficiary to Shriners Hospital. Settlor appointed her daughter trustee and grandson as successor trustee.
  + The daughter had no investment experience so the grandson, a stockbroker, made all of the investment decisions. The grandson embezzled $300,000 from the trust. The remainderman, Shriners Hospital, sued the daughter as trustee for breach of trust in delegating the responsibilities.
  + The court stated that while an inexperienced trustee has a duty to seek expert advice with respect to trust investments, the trustee cannot delegate the investment decisions completely, but rather must exercise his or her own judgment after receiving such advice.
  + Here, the daughter turned over the investment decision-making process completely to the grandson in breach of her duty. The court noted that it made no difference that the grandson was the successor trustee.

##### Directed v. delegated trusts

Under a deleted trust, the *trustee* decides which tasks should be delegated and to whom. The trustee is subject to the duties above in selecting, instructing, and supervising the agents.

In a directed trust, however, the *settlor*, through the terms of the trust, by directing the trustee to follow the instruction of others, selects the agent to whom certain tasks are to be delegated and the trustee must follow the third parties’ direction.

## Impartiality – Allocating Principal and Income

### Duty to be impartial

The trustee’s duty of loyalty extends to all beneficiaries, those holding the present interest (typically a life estate in the income) and those holding the future interest (typically a remainder in the principal). Because the beneficiaries have different property interests, their personal interests often conflict.

#### Rule

The trustee’s duty of loyalty to both present and future interests translates into a duty of impartiality between the competing interests.

#### Waiver

The duty to be impartial can be waived by the settlor where the trust instrument adequately expresses an intent to favor one beneficiary over another.

* *Howard v. Howard*
  + Illustrates that the trustee doesn’t have to treat each beneficiary equal, just have to be impartial and may have to abide by the settlor’s intent (through terms in the trust)
  + Husband and wife each created a trust (both spouses bring children from prior relationships); each trust states the property in the trust is that to go to the surviving spouse and then to each spouse’s children from previous relationships and not to their step-children.
  + The husband’s trust expressly states that the property is to go to the wife and her desires with no strings attached to provide for the children
    - The husband’s children wanted the trustee to take into account the wife’s other sources of income and provide for the children and not give it all to the wife which would go to the stepchildren eventually
  + The court held that the trustee did not have to do so because of the provision in the trust stated the husbands intent to favor the wife over his children, there were other provisions that required the trustee to be impartial and provide for the children (so leaving it out here was intentional).

#### Inception assets

Many jurisdictions permit a trustee to have a preference for retaining the trust’s “inception assets” – the assets used to fund the trust that the settlor recommends the trustee retain. Such preference is not an absolute right and is subject to the trustee’s duty to general fiduciary duty impartiality among the beneficiaries.

#### Duty to sell

Review - Even where the trust authorizes the trustee to retain the trust assets, where the failure to diversify is inconsistent with the modern portfolio approach, the trustee has a duty to sell the trust property in a timely manner.

##### Judicial authorization

Where one group of beneficiaries objects to the sale, of if a co-trustee blocks the sale, the duty to be impartial requires the trustee to petition the court for authority to sell.

#### Power to reallocate sale proceeds

If a trustee does not dispose of underperforming or overperforming property within a reasonable time, the trustee has a duty to re-allocate the sale proceeds so that the beneficiaries adversely affected by the delayed sale are compensated for the damage to their interest caused by the delay.

##### Underperforming property

Where underperforming property is not sold in a timely manner, the income beneficiaries are entitled to a share of the sale proceeds to reflect the income they lost during the delay when the property was not generating the income it should have been. The Restatement calculates their share by subtracting from the sale proceeds the income that would have been generated by that amount from the date the duty to sell arose.

The Revised Uniform Principal and Income Act provides that where underperforming trust property is sold, the proceeds must be apportioned between the income beneficiaries and the remaindermen to offset the loss sustained by the income beneficiaries, even if the duty to sell never arose.

##### Overperforming property

Where overperforming property is not sold in a timely manner, the remaindermen are entitled to a share of the income generated during the delay. The share is determined by calculating the value of the property on the date the duty arose, minus the actual sale price when finally sold, multiplied by a percentage to reflect the return on the properly invest principal for appreciation and inflation. If the trustee fails to withhold some of the income generated during the delay, the trustee may be liable for the difference.

### Allocating principal and income

The life beneficiaries of a trust are entitled to the income, and the remainder beneficiaries are entitled to the principal. The bifurcated interests mean that decisions concerning what constitutes income and what constitutes principal are critical to the interest of the different categories of beneficiaries.

#### Traditional approach

##### Income

The assumption is that money generated on a regular or irregular basis as a result of the trust property or trust investments constitutes an income. Class examples include interest, rent, cash dividends on stock, net profits from a business, and royalties (although a portion is allocated to the principal).

##### Principal

The assumption is that money generated as part of a conveyance of trust is considered principal (for example, sale proceeds, insurance proceeds). In addition, stock splits and stock dividends are considered principal because such property has to be retained to maintain the trust’s percentage interest in the company.

#### Modern trend portfolio approach

***Under the modern portfolio approach, the focus is on the total return of the trust portfolio***. As long as the trust achieves an acceptable rate of return on its investments, it is irrelevant whether that return is generated in the form of income or principal as traditionally defined (though the traditional classification schemes are retained).

The trustee has the power and discretion, the power of equitable adjustment, to reallocate the total return between the income and principal beneficiaries to ensure that the two groups are treated fairly while paying particular attention to the larger rate of return regardless of how the return is classified (income v. principal).

The settlor may provide that the trustee does not have the power to reallocate principal and income.

#### Unitrust

Under a unitrust, the life beneficiaries are entitled to a specified percentage of the value of the trust principal each year, so there is no need to distinguish income from principal. All property generated by the trust is assigned to principal, and at the appropriate intervals, the specified percentage of the trust principal is distributed to the appropriate beneficiaries.

The purpose of the unitrust is to permit the trustee to focus on investing the trust portfolio to maximize the total return as opposed to worrying investing to ensure an appropriate income stream for the income beneficiary.

#### Unitrust election

Many states have statutes authorizing a trustee to convert a traditional trust to a unitrust (called adjustment powers).

* *In re Matter of Heller*
* Jacob created testamentary trust for his wife and children of a previous marriage. The wife was to receive the income and upon her death, the principal was to go to his children; the wife’s income averaged $190,000 a year for a number of years.
* Two sons were co-trustees and opted to convert the trust to a unitrust and apply it retroactively, reducing the wife’s income to $70,000 a year. The sons were able to make investments that, although they produced a low dividend yields, which would outperform the alternative in the long-term, creating an overall better return.
* The court ruled that when an interested trustee elects a unitrust, it is not per se inconsistent with his or her fiduciary duties, and therefore, though the brothers were beneficiaries and trustees, they could elect unitrust treatment.
* Note: there was a ***huge*** conflict of interest when the brothers elected unitrust treatment.
* This is a conflict of interest and not self-dealing because the trustee is not acting in their personal capacity but instead as co-trustees because the decision results in a better overall yield for the trust.

## Duty to Inform and Account

### Duty to disclose

The beneficiaries are the equitable owners of the trust property. The trustee is merely holding and managing the trust assets. Accordingly, the trust beneficiaries are entitled to receive (1) enough information about the terms of the trust to be able to assess the extent of their rights and to determine if a breach of trust has occurred, and (2) complete and accurate information about the nature and extent of the trust property.

#### Settlor authorizes withholding information

Where the settlor expressly provides in the trust that the terms of the trust or information about the trust property are to be withheld from the beneficiary, the law is not clear. At a minimum, each beneficiary is arguably entitled to receive information about his or her interest in the trust, but it’s open to debate about receiving a complete copy of the trust.

##### Uniform Trust Code

The UTC provides that the default rule is that a trustee must promptly provide a copy of the trust instrument to the beneficiary if he or she requests a copy, unless the settlor provides otherwise.

##### California – right to receive

By statute, California provides that upon the death of a settlor of a revocable trust, all beneficiaries *and heirs* of the settlor have the right to request a complete copy of the trust instrument.

#### Duty to notify before acting

The trustee has a duty to give advance notice to the trust beneficiaries where the trustee proposes to sell a significant portion of the trust assets unless the value of the assets are readily ascertainable or disclosure is seriously detrimental to the beneficiaries’ interests.

* *Fletcher v. Fletcher*
  + Settler created a revocable inter vivos trust that provided that provided upon her death, a number of subtrusts (support trustees) would be created for her children, including one for her son James. Following the settlor’s death, one of the other sons was appointed co-trustee. James sued the trustees, alleging that they refused to provide him with enough information about the trust to permit him to determine her interests and rights.
  + The trustees alleged the settlor wanted the terms and dealings to be kept confidential, even from beneficiaries.
  + ***Rule: the beneficiary is entitled to see the terms of the entire trust and how the trustees have managed the entire trust.***
  + The court ordered the trustees to provide James with complete copies of the trust, because such information was necessary for the beneficiaries assess their interest and rights. The court rejected the trustee’s argument that the duty to disclose extend only to the provisions of the particular beneficiary’s subtrust, holding all parts of the trust were one single, cohesive trust.
  + Spitko argues:
    - That James should not have been able to see the other trusts and how they were managed because his trust was funded with $50,000 to provide, at the trustee’s discretion, for James’s medical insurance. This is because the terms of the other trust are not going to affect James’s trust.

### Duty to account

A trustee has a duty to account on a regular basis for the actions he or she has taken as a trustee so that his or her performance can be assessed relative to the terms and fiduciary duties created by the express terms of the of trust.

#### Testamentary trusts

Supervision is accorded to the probate court. Trustees have a duty to account to the probate court so that the court can assess the trustee’s performance. Some courts allow a provision in the trust releasing the trustee from accounting to the probate court if they report directly to the beneficiaries.

#### Inter vivos trusts

Inter vivos trusts aren’t natural subject to probate court accounting, though judicial accounting is still possible. Clauses waiving judicial accounting are typically held valid in inter vivos trusts but “absolutely immunity” from accounting to a court or the beneficiaries have not been held valid.

#### Uniform Trust Code

The UTC drops “accounting” and uses “reporting” for flexibility as to form and frequency. The UTC authorizes the settlor to waive the duty to report to the beneficiaries; and the beneficiaries may waive his or her right to all reports and information (though a beneficiary cannot ex ante and irrevocably waive this right).

Waiver does not relieve a trustee from liability for misconduct a report would have disclosed.

#### Duty to review accounting

When a trustee makes an accounting, either to the court or directly to the beneficiaries, the beneficiaries have a duty to check the accounting and to object in a timely manner. If the beneficiaries fail to object in a timely manner, they may be barred from complaining later.

#### Fraudulent accounting

Where a trustee files a fraudulent accounting and the beneficiaries later discover the fraud, the beneficiaries are not barred from reopening the accounting.

#### Constructive fraud

##### Investigation

The doctrine of constructive or technical fraud does not make trustees guarantors of all factual representations in an accounting. Where such representations are made in good faith and follow reasonable efforts to ascertain the accuracy of the representations, the trustee has fulfilled his or her duty.

##### Factual representations

The doctrine of constructive or technical fraud applies only to factual representations in the accounting. Statements of judgment or discretion are not factual representations.

##### Discoverability

If the factual falsehood is discoverable from an inspection of all of the trust accounts, the trust terms, and the law, the doctrine of constructive fraud does not apply.

#### Improper payments

Where an accounting reveals improper payments were made to one who is not entitled to receive such, the trustee is liable for breach of trust unless the court approves the accounting. Where the court’s approval is based upon a fraudulent accounting, reopening such accounting voids the court’s approval of the accounting.

* *National Academy of Sciences v. Cambridge Trust Co.*
  + The settlor created a trust for the benefit of his wife as long as she remained unmarried.
  + Upon the death or remarriage of the wife, the trusteeship was to be transferred to the National Research Council.
    - Review the beginning of class – note that complete restraints on marriage are invalid but that argument is not pursued in this case.
    - Look for provisions in the trust that require the court to assess the validity of the condition and whether there is a “gift-over” clause
  + The settlor dies in 1932, the wife remarried in 1945, but the trustee did not know it and continued making income payments to her until her death in 1967. It was then discovered she remarried in 1945.
  + The remainder sued the trustee for the improper payments. The trustee had accounted each year and although the statute of limitations had run on objecting, the court held that the trustee had never undertaken to verify that she was unmarried (the trustee could have just asked the wife each year whether she was unmarried) and therefore committed constructive fraud.
  + The court set aside the accountings due to the constructive fraud and held the trustee was liable for payments since the wife remarried and the interest those payments would have made.

# Powers of Appointment: Discretionary Flexibility

## Introduction

### Conceptual overview

In the context of a trust, the party who holds a power of appointment that ability to direct a trustee to distribute some or all of the trust property regardless of the distributive provisions of the trust. A power of appointment may be given to anyone in the world.

The power can be structured so as to limit to whom the property can be distributed (power exercised in someone’s favor) and when the power can be exercised (inter vivos or testamentary).

A power to appoint is purely discretionary; the holder owes no fiduciary duty to anyone.

#### Purposes

Powers of appointment add flexibility to an estate plan. When a settlor creates a trust and decides who should take what and when, the settlor is making assumptions about the future. Often the future does not go as one assumes. While the settlor is alive and retains the power to revoke, the settlor can revoke and/or amend the trust to change the trust to reflect the changed circumstances. But after the settlor dies or after the trust becomes irrevocable, this opportunity is lost.

By giving a beneficiary a power of appointment, the settlor gives the beneficiary the power to override the terms of the trust if change warrants it or if the holder deems it appropriate.

### Terminology

* Donor: the party who creates the power appointment
* Donee: the party who holds and has the right to exercise the power of appointment
* Appointive property: the property that is subject to a power of appointment; the property that the donee may appoint.
* Objects: the class of individuals to whom the property may be appointed; the group of eligible appointees in whose favor the power may be exercised.
* Appointee(s): the individual(s) to whom the property is actually appointed; the individual(s) in whose favor the power is actually exercised.
* Takers in default: the individuals who are identified in the instrument creating the power who are to take the property if the donee fails to exercise the power.

### Types of powers

There are two key variables with respect to each power of appointment that control the scope of the power.

#### General power

A general power of appointment is one that may be exercised in favor of the donee, the donee’s estate, creditors of the donee, or creditors of the donee’s estate.

A general power may be exercised in favor of anyone in the world, including in favor of the donee him- or herself.

#### Special power

A special power of appointment is one that the donee can exercise in favor of anyone except the donee, the donee’s estate, creditors of the donee, or creditors of the donee’s estate.

#### Inter vivos power

An inter vivos power is one that must be exercised by the donee inter vivos.

#### Testamentary power

A testamentary power of appointment is one that must be exercised by the donee at death, typically in his or her will.

### Creditors’ rights

Creditors cannot force the donee to use the power of appointment. However, creditors of a donee may be able to reach the appointive property if the power is exercised.

#### Special power

When given a special power of appointment, the donee is merely an agent for the donor, with the power to appoint the property for the benefit of others. Creditors of a donee of a special power have no right to reach the appointive property, either before it is appointed or after it has been appointed.

#### General power

The traditional common law view of a general power is that the donor is still considered the owner of the property until the power is exercised.

##### Failure to exercise

The appointive property is considered the donor’s property until the power is exercised. Under the traditional view, if the donee does not exercise the power, creditors of the donee cannot reach the property subject to the power of appointment.

##### Exercised

If the donee exercises the general power of appointment, the courts treat the exercise as if the property momentarily passes through the donee’s hands, and, during that instant, the creditors of the donee’s interest attach to the appointive property. If the donee exercises the power in favor of anyone, even if not him- or herself, creditors of the donee can reach the appointed property.

###### Modern statutory trend

Some states, the Restatement, and the UTC permit creditors of a donee of a general ***inter vivos*** power of appointment to reach the appointive property even absent an exercise of the power by the donee.

Also, most states following this trend permit the creditors of a donee of a general ***testamentary*** power to reach the appointive property even absent an appointment, but only upon the donee’s death.

The rationale is that holding a general power of appointment is equivalent to ownership of the assets, thereby subjecting them to creditors’ claims. Most states following this trend require creditors to exhaust all other property first.

* *Irwin Union Bank & Trust Co. v. Long*
  + As a result of a divorce judgment, Phillip owed Vic $15,000. Vic sued the trustee of a trust in which Phillip had an interest in attempt to satisfy her judgment. The trust granted Phillip the right to withdraw up to 4% of the principal per year.
  + The court ruled that the right to withdraw was a general power over 4% of the trust res per year. The court applied the traditional view that a donee of a general power has no property in the appointive property unless and until the power is exercised. Because Phillip did not exercise the power, Vic had no right to reach any of the property.

#### Tax consequences

##### General power

For tax purposes, the holder of a general power of appointment is generally treated as the owner of the property over which he or she holds the power (e.g., income tax, gift taxes upon appointment, estate tax upon death).

##### Special power

For tax purposes, the holder of a special is generally not treated as the owner of the property over which he or she holds the power.

## Creating a Power of Appointment

### Intent

The power of appointment is created as long as one has the intent to create a discretionary power in one party, over property held by another party, to direct the one holding the property to transfer the property. No technical words are necessary to create a power of appointment, only the intent to create a discretionary power.

### Donee

A power of appointment can be created only in a living person.

## Exercising a Power of Appointment

### Intent

The donor’s intent controls what is necessary to validly exercise a power of appointment (what requirements must be met by the donee for a valid exercise).

Assuming the donee complies with the requirements inherent in each type of power (general v. special; inter vivos v. testamentary), whether a donee has exercised a power of appointment is a question of the donee’s intent (whether the donee intended to fulfill all of the requirements for a valid exercise).

### Residuary clause *in donee’s will*

What happens when a donee has not expressly exercised the power but has a standard residuary clause in his or her will but it makes no mention of a power of appointment?

#### Majority rule – New York

The majority is that a standard residuary clause that does not make any reference to a power of appointment does ***not exercise*** either a general or a special power of appointment.

The courts following the majority are split over whether this constitutes sufficient ambiguity to permit courts to admit extrinsic evidence as to the decedent’s intent that her or her residuary clause exercises the power of appointment.

#### Minority rule – Massachusetts law

A small minority holds that a standard residuary clause adequately expresses the testator’s intent to exercise a general power of appointment that the testator held unless a contrary intent affirmatively appears, but not a special power that the testator held.

#### UPC approach

A residuary clause expresses the intent to exercise a power of appointment if only (1) the power is a general power and the creating instrument does not contain a gift-over clause in the event the power is not exercised, *or* (2) the testator’s will manifests an intention to include the property subject to the power.

#### Choice of law

##### Real property

The applicable law for interpreting a power and whether it has been exercised is the jurisdiction where the land is located.

##### Personal property

Where the donor and donee reside in different jurisdictions and the jurisdictions are split, the traditional approach and majority rule is the law of the donor’s domicile controls.

A minority and the Restatement apply the law of the jurisdiction of the donee.

* *Beals v. State Street Bank & Trust Co.*
  + The residuary clause of Authur’s will created a trust for the benefit of his wife for life, and upon her death, separate trusts for each of their daughters for life, and upon each daughter’s death, the principal in the daughter’s trust would be paid as appointed by the daughter’s will. In default of appointment, the property would be paid to that daughter’s heirs.
  + Daughter Isabella asked the trustees to distribute most of the principal in her trust to her husband’s office so he could manage it, which the trustees did. Thereafter, Isabella executed a partial release of her power, limiting her power to appoint the property to other than the descendants of Authur (***effecting converted the general power into a special power because she cannot appoint to herself as she will not survive herself***). Isabella made no express reference to the power of appointment but her residuary clause gave the rest of her property to the issue of her sister Margaret.
  + The court applied the law of the donor’s domicile, which followed the minority approach that a residuary clause is deemed to exercise a general power but not a special power.
  + However, the court ruled that although the power was a special power at the time of her death by virtue of her partial release, her actions with respect to the appointive property showed that Isabella treated the appointive property as if it were her own and that the rationale for the general power should be applied – her residuary clause exercised the power.

#### Specific reference required

To avoid unintentional exercise of a power of appointment, a donor can include in the power a requirement that exercise of the power must make specific reference to the instrument creating the power. This has been applied very narrowly.

#### Blended residuary clause

A “blended” residuary clause is one that includes within the residuary clause a generic reference to any power of appointment the testator may hold: “I hereby give the rest, residue, and remainder of my estate, including any property over which I hold a power of appointment, to…”

Under the UPC, such a generic reference is not enough, in and of itself, to exercise any power of appointment the testator may hold *that requires a specific reference* to the power. It may raise an issue of intent that may permit extrinsic evidence on the question of testator’s intent.

#### Lapse and anti-lapse

Where a donee exercises a testamentary power of appointment, but the appointee predeceases the donee, the issue arises whether lapse and anti-lapse should be applied to the appointment.

##### General power

As a general rule, the courts have applied lapse and anti-lapse where the appointee of a general power of appointment predeceases the donee and meets the necessary degree of relationship to the donee.

##### Special power

The appointee of a special power must be an eligible object as defined in the instrument creating the power. If the effect of applying anti-lapse would be that the appointive property would end up in the hands of issue who were not eligible takers under the express terms of the power, the traditional rule is that anti-lapse cannot be applied. The modern trend applies anti-lapse to objects of the special power class even if their issue are not express objects of the class.

##### UPC

Under the UPC, anti-lapse applies to appointees of a power of appointment.

### Limitations

A donee could appoint the property in trust or even a new power of appointment. Whether such conditional appointments are valid is a question of the original donor’s intent.

#### General power

The donee of a general power of appointment can appointment the property as he or she wishes: outright, in trust, or even subject to a new power or appointment.

#### Special power

Absent express authority in the instrument originally creating the special power, the general rule is that the donee is to appoint the property outright.

The modern trend permits the donee of a special power to appoint either in trust or even subject to a new power of appointment as long as both the donee and the objects of the new power are included in the original class of objects.

##### Restatement

The Restatement permits the donee to create either a general power in an appointee who was a member of the original class of objects, or to create a special power of appointment in anyone as long as the class of objects is the same as the original class of objects.

#### Appointments

Where the power is a special power and the class of objects is relatively small, the issue arises as to whether the donee can appoint all of the property to one member of the class.

##### Exclusive

If the power is exclusive, the donee can appoint all of the property to one member of the class.

##### Nonexclusive

If the power is nonexclusive, each member of the class must receive some distribution of the appointive property (and in some jurisdictions, the amount cannot be a “sham” amount).

##### Donor’s intent

In determining whether the power is exclusive or nonexclusive, the starting point in the donor’s intent. Particular attention is paid to the language used in creating the power. Words such as ***to one or more*** indicate an exclusive power, while ***among*** is usually held to constitute a nonexclusive power.

#### Fraud

A fraud on a special power occurs where the donee and an eligible appointee agree that the donee will exercise the power in favor of the class member on condition that he or she share some of the appointive property with a person who is not an eligible appointee.

Where the parties engage in fraud on a special power, the courts tend to hold that the entire appointment is void, even the portion that the eligible appointee was to retain.

### Attempted appointment that fails

#### Allocation/marshaling

If the donee of a special power express the intent to exercise the power, but inappropriately attempts to mix the appointive property with the donee’s own property in the distributive clause (typically occurs with a blended residuary clause), the doctrine of allocation “unblends” the property to ensure that only eligible objects receive the appointive property.

#### Capture

If the donee of a general power (1) expresses the intent to exercise the power, and (2) blends the exercise with the distributive provisions of his or her own will (typically occurs with a blended residuary clause), if any of the appointment gift fails for any reason, the donee is held to have appointed the failed gifts to him- or herself, and the failed appointive property is distributed as a part of the donee’s general assets.

## Release of a Power of Appointment

### Release

Because a power of appointment is a discretionary power, with no fiduciary duty attached to it, a donee has no duty to exercise it. Included within the right not to exercise the power, however, is the right to release the power at any time. The release may be complete or partial. If partial, it is important to note whether the release relates: (1) to *the property* that may be appointed; (2) to *whom* the property may be appointed, or (3) to *when* the power may be exercised.

### Testamentary power

A testamentary power is exercisable only upon the donee’s death. The primary purpose of making a power testamentary is to make sure that the donee waits as long as possible before exercising the power of appointment. Waiting until death forces the donee to take into consideration all the changes that occur during his or her lifetime before deciding whether, and how, to exercise the power.

##### Contract to exercise

If a donee of a testamentary power – or any other power not presently exercisable – enters into a contract, inter vivos, that promises to exercise the testamentary power in a certain way upon the donee’s death, the contract is null and void. The contract violates the donor’s intent in creating the testamentary power. The effect of the contract, if enforceable, would be to exercise the power inter vivos. Any attempt at exercising a testamentary power inter vivos is null and void. This rule applies to all powers that are not presently exercisable.

##### Release

Although the inter vivos contract to exercise a testamentary power is unenforceable, the contracting party does have a cause of action against the donee for restitution from the donee’s personal assets of the value given.

* *Seidel v. Werner*
  + The decedent held a testamentary power of appointment and contracted inter vivos to make, and not revoke, a will that exercised the power in favor of his children. Just four months later, the decedent executed a will exercising his testamentary power in favor of his new wife.
  + The court held the contract to be null and void. The children attempted to character the contract as a release of the testamentary power. The court declined to construe the contract as a release, but did hold that the children were entitled to restitution from the decedent’s probate estate.

## Failure to Exercise a Power of Appointment

### Donor’s intent

If a donee fails to exercise a power of appointment, the donor’s intent controls what should happen to the appointive property where the power is not exercised.

### Takers in default

If the instrument that created the power identifies one or more express takers in default if the power is not exercised, the expressly identified takers in default take if the power is not exercised.

### No takers in default – general power

If there are no express takers, the power is a general power, and it is not exercised, the traditional and general rule is that property reverts to the donor (or donor’s estate).

The Restatement provides that in the above situation, the property defaults to the donee (or donee’s estate) unless the donee expressly refrained from exercising the power.

### No takers in default – special power

If there are no express takers in default, the power is a special power, the class of possible objects is relatively small and ascertainable, the court may imply that the donor intended that the appointive property be distributed equally among the members of the appointive class rather than revert to the donor (or his or her estate).

* *Loring v. Marshall*
  + The testator created a trust for her brothers, sisters, and two nephews, with the income to be distributed to them. Upon the death of the last income beneficiary, the trustees were to divide the trust into as many parts as necessary for the benefit of the wife and issue of each nephew as the nephew may appoint by his will, and if neither left eligible appointees, to 3 charities/universities.
  + Although the trust gave the last surviving nephew the power to appoint to his “wife and issue,” the nephew gave his wife only a life estate in the income. When she died, the charities were not eligible to take the nephew was survived by his wife, an eligible appointee.
  + The court applied the general rule, that when a special power is not exercised and the instrument that created the power fails to specify an express default taker, the property not appointed goes in equal shares to the members of the class to whom the property could have been appointed.