

# Trusts & Wills Outline

- Course Purpose: What happens to your stuff when you die?
  - Will:
    - Direct transfer to a person
  - Trust:
    - Transfer your property to someone else (trustee) who holds it for a particular person or group or for a particular goal or purpose.
      - Need to have confidence in the trustee because he/she becomes legal owner of the property.
      - Trustee does have certain duties or obligations towards the beneficiaries.
- **The Right to Inherit and the Right to Convey**
  - Overview: The 3 Stages of Right to Pass on Property
    - No alienation; no testation
    - Alienation allowed; no testation
    - Alienation and testation allowed.
  - **Terminology**
    - **Right of Alienation:**
      - The right to transfer property after death
      - Historically: Difficult to pass on certain types of property. (interferes with equality)
        - ◆ If property escheats to the state, that that increases equity among the people and puts the money to better use.
      - Argument in favor:
        - ◆ Promotes people working harder and productivity knowing that it will go to their children.
        - ◆ People would just begin transferring *inter vivos*
        - ◆ General sense of respect for property rights.
        - ◆ Allowing people to inherit is good because it prevents them from becoming burdens on the state, as in cases with orphans/widows.
        - ◆ Promotes savings
        - ◆ Promotes respect for elders (in hopes of inheritance)
      - Estate Tax: Used to be a limitation
        - ◆ Acts as a limitation by taking a large chunk of large estates.
        - ◆ All estate taxes stopped 12/31/09.
        - ◆ Most predict that Congress will likely reenact an estate tax, but are not sure of what the exempt amount will be.
    - **Right of Testation:**
      - The right to choose to whom you pass on your property
      - Historically: Did NOT have the right of testation. Automatically passed on to eldest male / family.
      - Restrictions in certain jx:
        - ◆ Surviving spouse is generally protected
        - ◆ In Europe cannot disinherit minor children. Not so here.
    - **Right of Descent:**
      - Right of alienation (not testation) as to REAL property
      - Goes to next of kin automatically
    - **Right of Devise:**
      - Right of testation as to REAL property
      - Give land to someone by will

- **Rules**

- Descent, Devise, and 5<sup>th</sup> Amendment Takings.

- If a state completely abolishes the right of the owner of the property to pass it on by intestacy or will, descent and devise, then that is a taking and the state must justly compensate the owner for that taking.
      - ◆ Irving v. Hodel - Sioux tribe and allotment issues. Court: Government could not force property to escheat to the state, nor could they limit devise to just those who owned property in the same parcel
      - ◆ You need to have the right of alienation and you need to have a choice as to who you pass it on to. It does NOT, however, give potential recipients a right to receive. [i.e.: No complete abrogation of descent and devise]

- Due Process and Equal Protection

- The act of probating a will is not a state action, and, therefore, a will does not fail because its provisions violate the equal protection clause or the due process clause.
      - ◆ Shapira v. Union National Bank - Son's inheritance contingent upon marrying a Jewish girl within 7 years. Argument for *Loving v. Virginia* and *Shelly v. Kramer* *unsuccessful*, because the court was not involved in the discrimination

- Against Public Policy

- A will, or a portion thereof, is unenforceable if the will, or its portion, is against public policy.
      - ◆ Restraints on Marriage.
        - ◇ A total restraint on marriage is against public policy
          - Exception: conditioned on no second marriage and placed on marriage by deceased spouse.
        - ◇ A partial restraint on marriage will be allowed if the restraint is reasonable as to that particular person.
          - "A restraint unreasonably limits the transferee's opportunity to marry if a marriage permitted by the restraint is not likely to occur. The likelihood of marriage is a factual question to be answered by the circumstances of the particular case."
            - ▶ Condition to marry in 10 years placed on a 5 year old.
            - ▶ If gay its an unreasonable restraint
            - ▶ If already married it's unreasonable (because would be encouraging divorce)
      - ◇ Problems
        - With continuing restraints (as long as someone remains Catholic) the court may find it too difficult to administer.
    - ◆ Divorce
      - ◇ A gift encouraging divorce is against public policy.

- **Probate**

- Terminology.

- Transferring by will (testate)
      - "Devise": transferring real property to "devisee"
      - "Bequeath": transferring personal property to "legatee"
    - Transferring by intestacy
      - Real Property **descends** to heirs
      - Personal property is **distributed** to next of kin

- Basics

- Everything that is transferred by will or intestacy goes through probate.
    - Reasons for avoiding probate:
      - Takes time (assets can take up to a year to be distributed, or quite a bit longer if there's a contest of the will etc.)
      - Costs money (though cost generally exaggerated)

- ◆ Typical cost of going through probate [paying the lawyer] in CA is set by statute at 2-3% the value of the estate.
- ◆ 2-3% also goes to the administrator (unless it's a family member, who generally waives it)
- How to avoid probate:
  - Non-probate transfers:
    - ◆ Trusts
    - ◆ Inter vivos gift
    - ◆ Joint tenancy
    - ◆ Life insurance which designates a beneficiary (goes straight to beneficiary) instead of designating it to go into the estate
    - ◆ Contracts with Payable on Death (POD) provisions [like at a bank account - automatically goes to Mom]
  - Probate Exceptions exist for small estates; if the value is < \$10k you can distribute without going through probate.
  - Any assets transferred by will to Surviving spouse
- Function of Probate
  - To collect all the decedents assets in one place.
  - To pay off any creditor that has a legitimate claim.
  - To determine how to distribute the assets to whoever is entitled to receive them.
  - To resolve any contests or questions regarding the will or an interpretation thereof.
- Probate Procedure
  - i. Someone petitions for probate
    - Must be done in Jx where decedent was domiciled at time of death.
    - "Ancillary jx": Applies where decedent has real property in an additional jx beyond that of domicile; Need to open ancillary probate in that other state to see who is entitled to the real property under that state's law. Probably have to hire local lawyers, etc.
  - ii. Court sets hearing date and notifies any potential heirs by mail
  - iii. If no objections at the hearing, Court admits the will to probate
    - Will contests
      - Need to be brought within a certain statutory period or you will be barred. (typically 2-4 months).
      - Also need standing (A pecuniary interest: if the person's contest is successful, then the person would have been better off, in terms of money, than the person would have been otherwise.)
  - iv. Court appoints "personal representative"
    - "Executor"- Will appoints the person
    - "Administrator"- Court appoints the person
  - v. Administrator must:
    - Typically must post a bond
    - Locate and take charge of assets while in probate
      - ◆ "Letters testamentary" - A type of license or authorization which shows executor has the power to administer the estate. Then executor can go to the bank/DMV etc to transfer assets.
    - Need to pay off creditors (and taxes)
      - ◆ Two types of Nonclaim Statutes that may bar creditors from recovery
        - ◇ **Non Self Executing SOL** (short term; 1-4 mos.)
          - Started by opening probate (admission of will to probate)
          - US S.Ct.: This is state action and constitutional protections apply - subject to Due Process Clause.
            - ▶ Before barring a creditors claim, you must have given actual notice to all known or reasonable ascertainable creditors.

- ◇ **Self Executing SOL** (long term; ranges 1-5 years).
      - Starts ticking when the person dies.
      - No state action, so no need to notify the creditors
      - Run whether or not probate is opened
    - Figure out what to do with the assets
      - ◆ Need to prove the validity of the will if there is one (prevent against forgeries)
      - ◆ Distribute according to will or the laws of intestate succession.
    - Close the estate
- **Professional Responsibility of a Drafting Lawyer to Testator and Testator's Heirs**
  - Drafter has a duty to draft a will which accurately carries out the intentions as **expressed** to him by the testator.
    - Old rule: needed privity (but testator would already be dead)
    - **Modern trend:** Lawsuit for br of k can be brought under a 3rd party beneficiary theory by intended beneficiaries.
      - Case: Simpson v. Calivas (Does "Homestead" mean the house, or the entire farm?)
- **Intestate Succession**
  - **California Property Types**
    - *Community Property*
      - Any property that was acquired by a spouse or a domestic partner during marriage or partnership.
        - ◆ The spouses own and manage the property in common (undivided interest).
        - ◆ A spouse can devise/bequeath his 1/2.
    - *Quasi-Community Property*
      - Any personal property (NOT real property) that is acquired outside California and, if it were acquired in California, would have been characterized as community property.
        - ◆ Treated the same as CP but only at death (doesn't happen when you cross the border of the state).
          - ◇ 50% to surviving spouse, 50% to estate.
        - ◆ Real property remains whatever property type it was before death
    - *Separate Property*
      - Property that a spouse acquired through inheritance/gift or possessed before the marriage.
        - ◆ Has right to devise/bequeath off of it
        - ◆ Exception: Forced share / spousal share: Forces spouse to give a certain percentage to the surviving spouse (usually about 1/3) [All SP jx except GA]
- **Process:**
  - a. Determine how much the spouse gets
  - b. Determine what to do with the rest
  - **Spousal Rights in Intestacy**
    - CP & QCP
      - Upon death of one of the spouses, community property is split 50/50 between spouse and decedent's estate.
      - In intestacy, surviving spouse gets his/her share, PLUS decedent's share = 100%
    - SP
      - Spouse gets all if:
        - ◆ Decedent had no surviving issue (aka descendants: children, grandchildren, etc.), parent, sibling, or issue of a deceased sibling
      - Spouse gets HALF if:
        - ◆ The decedent leaves only one child or the issue of one deceased child.
        - ◆ The decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them

- Spouse gets ONE THIRD if:
      - ◆ The decedent leaves more than one child.
      - ◆ The decedent leaves one child and the issue of one or more deceased children.
      - ◆ The decedent leaves issue of two or more deceased children.
  - **Property that does not go to Spouse**
    - 6402: *Property passes in the following order* [note: this is called a parentilic structure]
      - To issue of the decedent (children/grandchildren)
        - ◆ Same degree, they take equally. If different degrees, then you go to section 240.
      - Then to decedents parent or parents equally.
      - Then to siblings or siblings' issue (brothers / sisters, nephews / nieces)
      - Then to one or more grandparents equally
      - Then to issue of grandparents (uncles and aunts & their issue [cousins])
      - Then to issue of a predeceased spouse (step children of person who died before decedent)
      - Next of kin: someone related by blood. Goes to the closest kin you have
        - ◆ Closest: how many degrees are they from the deceased
        - ◆ If two people are of equal degrees who claim through different ancestors, those who claim through the nearest ancestor are preferred. (5th degree through great grandparents gets preference over 5th degree of great-great grandparents.)
      - If no one else, it goes to parents of predeceased spouse (your former inlaws) or their issue.
- **Issue: Surviving the Decedent - Simultaneous death issue** (Applies to wills, intestacy, and nonprobate forms of transfer)
  - Person only takes if they are alive at the time of the decedent's death
  - Someone is dead if:
    - Common Law: Person is dead when there is an irreversible cessation of circulatory and respiratory function. (heart stops and cannot be restarted and you stop breathing)
    - If person is on life support, then you see whether they are brain dead
      - EEG, pupil dilation, etc.
      - Requires expert witness testimony - battle of the experts
  - Standard of proof:
    - For purposes of intestacy, a will, joint tenancy, or trust, there must be **clear and convincing evidence** that a beneficiary survived the decedent.
    - Time Frames:
      - Intestate succession - Heirs survived by 120 hours.
      - Wills - Heirs survived by a few minutes, or the length of time noted in the will (30, 60, 90 days etc.)
    - Joint Tenancy - If you can't prove it by clear and convincing evidence one survived longer, you split the JT and each estate gets their portion.
    - Insurance - If the insured and the beneficiary have died and cannot be established by c&c evidence, its distributed to the contingent
- **Systems of Representation** - What if the heir did not survive the decedent?
  - **Per-Capita** ("Share and Share alike") - Not really a system of representation
    - Everyone gets an equal share. The gift is divided equally among those who are living in the class, and those who are not living are excluded.
    - Depends on how its phrased in the intestate statute or the will.
      - e.g.) "To my Children per capita." Only living children get it. If no living, no one takes
      - e.g.) "To my descendents per capita" Split it equally amongst Children and dead child's descendents.

- PRESUMPTION:
      - There is a heavy presumption against per-capita. CPC 245 provides that if a will uses the term "per capita" and the living members of the designated class belong to different generations, a court must distribute the gift by using modern per stirpes. There needs to be an EXPLICIT written declaration otherwise.
  - **Classical Per Stirpes** (AKA By the Stocks)
    - Prune each branch that has no living heirs
    - At each generation, starting from the top, divide the estate into one share for each branch.
      - If a person is alive, she gets to keep her share.
      - If she is deceased, her share drops down to the next generation in the same manner.
  - **Modern Per Stirpes** CPC 240
    - Default provision under CA law. Applies to intestacy and wills (unless you state otherwise)
      - Drop to first level where someone's alive and give one share to every live person, and a provisional share to each deceased person with living issue.
  - **Per capita at each generation**(UPC approach)
    - Starts same as modern per stirpes; drop down to first level where someone's alive and divide it in equal shares. Then the remaining shares are combined and split equally with everyone on the next level.
- **Adoption**
  - **Child Adoption**
    - **Wills law**
      - Depends on testator's intent as to whether an adopted child inherits. (Most likely, yes)
    - **Intestacy**
      - **Basic Rule:**
        - ◆ When a child is adopted by parents, the link between the child and the natural parents are broken
      - **Step Parent Adoption:**
        - ◆ Under the basic rule this would cut off the link between both the father AND the mother who is married to the step-father. Instead, Courts hold that the link between the child and the natural parent who is married to the step parent remains.
          - ◇ UPC / CA: Child can STILL inherit via a link to divorced dad or deceased father's relatives. But divorced father CANNOT inherit through you.
  - **Adult Adoption**
    - Permissible, but once done, you cannot unadopt.
    - Can be used to reduce the possibility of a will contest.
      - Hypo: Wealthy oil tycoon is 90 years old. Caretaker takes him to a strip club. Tycoon falls for stripper. Leaves her everything in the will, even though he has collateral relatives (nieces etc.)
        - ◆ Collateral relatives will bring a suit arguing that the will was invalid. At the minimum the estate will have to spend a lot of money defending against the suit.
        - ◆ BUT, if he adopts the stripper, then the nieces and nephews would have no standing to bring a lawsuit, because even if the will WAS invalid, it would still pass to the stripper under intestate succession.
  - **Adoption of spouse**
    - Court's hesitant to accept this. Ask if the deceased would want the adopted person to be treated as an heir.

- e.g.: Minary v. Fidelity
        - ◆ When interpreting a will or trust, "heir" is not determined by what intestate succession means, you look to see what the mother's intention was. It matters that the mother would not have wanted the remainder of the trust to go to the wife of one of the sons. Court construes intent to be "genetic descendents."
        - ◆ NOTE: If this had been intestate succession, then the wife would probably get it.
    - Equitable Adoption
      - A child can inherit from his or her virtual-adoptive parents if:
        - ◆ There is an express or implied agreement between natural parents and quasi-adopted parents, AND
        - ◆ The parties perform
          - ◇ The natural parents give up custody of the child to the virtual-adoptive parents;
          - ◇ The virtual-adoptive parents treat the child as their own; and
          - ◇ The child lives with the virtual-adoptive parents as their child
      - Child is allowed to inherit through the foster parents, but they cannot inherit through her.
    - Inheritance by Non-marital children
      - Intermediate Scrutiny if state wants to discriminate between natural and non-natural children ("substantial justification serving an important state interest")
        - States cannot bar non-marital children from inheriting from their mother (because the mother is a matter of public record)
        - Courts held that states DO have the right to require reliable proof of paternity, because the state has an important interest in finding out whether the child is really related to the supposed father.
          - a. The discrimination must be restricted to the reasonable requirement of proving proof of paternity: Genetic testing / acknowledgement by father / subsequent marriage by the parents / adjudication during the life of the father.
- Reproductive Technology
  - Common law
    - As long as the baby was conceived during the life of the father, parent-child relationship exists.
    - If child is born within 300 days of the father's death, it is a rebuttable presumption that the husband is the child's father
  - Test tube babies
    - A child of the decedent, conceived post mortem, shall be deemed to have been born during the father's lifetime if:
      - Decedent consented in a signed and dated writing.
      - Notice needs to be given to the executor of the estate within 4 months of death that there is the possibility posthumously conceived children
      - Child must be in utero within 2 years of decedent's death
- Slayer Laws as a bars to intestate succession
  - If murder / voluntary manslaughter
    - Constructive trust. Slayer receives assets and is forced to convey them to proper heirs / next of kin
  - Involuntary manslaughter - Not barred.

- **Related Note: Disclaimers**

- Reasons for disclaiming an inheritance
  - Taxes - Sometimes you can reduce the estate tax by disclaiming. You never own that money
  - "Post mortem estate planning"
- How to disclaim:
  - Must be in writing
  - Must be filed with local probate within a certain period.

- **Will Contests**

- A person with standing can contest a will, or a part thereof, and have the will, or the part thereof, invalidated.
  - Burden of proof on person challenging will

- **Mental Capacity:**

A testator lacks capacity if

- The testator was less than 18 years of age when they made the will; or
- The testator did not understand the nature of the testamentary act; or
- The testator did not understand nor remember the nature of his or her property; or
  - Have a general sense of what your assets are
- The testator did not understand nor remember his or her relations to his or her family or the natural objects of his or her bounty.
  - Have to know who your spouse / parents, etc. are.

- If any of the above are not met, the entire will is invalid (unlike some other reasons for will contests)
- ***Washburn***: testator's last of three wills struck down because suffering from Alzheimer's
  - First two wills left bulk of estate to niece while final will gave bulk of estate to caretaker and only \$5K to niece
  - Niece presented evidence that decedent failed to recognize her, which prompted the court to strike down the third will and use previous will instead
- ***Wilson v. Lane***: testator had irrational fear of flooding, trouble dressing and bathing herself, and unnecessarily called fire department to report non-existent fire
  - Holding: mere eccentricity, old age, and pickiness do not constitute incapacity
- **Insane Delusion:**
  - Insane delusion is a belief not susceptible to correction by presenting the testator with evidence of the falsity of the belief.
  - Requirements:
    - You need to show they have this delusion
      - False belief that a rational person in the testator's position would not have believed had they known the true facts.
    - Causation:
      - Insane delusion causes testator to dispose of property in a way he would not have without the delusion
  - CA: probate code wording seems to strike down entire will
  - ***Strittmater***: testator left estate to National Women's Party, but struck down because displayed symptoms of paranoid schizophrenia/split personality. Tiersma: wrong result – failed to show causation
  - ***Breeden v. Stone***: drugs, alcohol, and delusions about FBI following him. Clearly delusional, but no causation to show it affected his disposition.



- **Mistake:**
    - Not a basis for will contest; cannot challenge a mistake or scrivener's error.
  
  - **Undue Influence** (no solid definition but similar to coercion)
    - The execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by undue influence.

- **Factors**
        - Testator susceptible to undue influence (the more, the better)
        - Influencer had opportunity to exert undue influence
          - Person constantly visiting, lived next door, constant communications, sexual relationship
        - Influencer had motive or disposition to exert undue influence
        - Causation: influence was cause of particular disposition or entire will

      - If it looks more like coercion or arm twisting or taking advantage, it may cross the line into undue influence.
      - Possible to strike down individual provision(s) of will and carry out the unaffected parts
      - In CA, no jury trials in undue influence cases - concerned about juries overturning the will frequently when money was not going to spouse or blood relatives.
  
  - **Shifting the Burden of proof - Presumptions of Undue Influence:**
    - Confidential Relationship: Placing trust in someone else (attorney/client, priest/penitent, doctor/patient, etc.)

**Requirements**

      - Person in confidential relationship must have actively participated in drafting of will, *and*
      - Received substantial amount in the will

      - Burden of proof shifts to influencer to show it was not due to undue influence
    - Rebutting the presumption
      - ◆ Mississippi (Moses case): Have to show independent counsel.
      - ◆ CA: Show the above factors were NOT met.
    - ***Moses***: decedent drafted will leaving a large portion of the estate to her younger lover (a lawyer). Court invalidated will because the lawyer needed to show the testator sought advice of independent counsel.
    - ***Lipper v. Weslow***: decedent disinherited daughter-in-law and grandchildren (deceased son by first husband) and instead left entire estate to children by second husband, including son who was attorney who drafted the will
      - Upheld because will explained how decedent did not like that daughter-in-law was unfriendly and failed to visit
      - Son/drafter should have referred decedent to independent attorney
- 
- **No Contest Clauses:**
  - Common Law: If Beneficiary who contests the will loses, they get nothing
  - In CA: Unenforceable if there is probable cause to bring the will contest, even if you lose
- 
- **Bequests to Attorneys:**
  - Invalid and violation of ethical conduct, unless attorney is related to testator by blood or marriage
    - Not an ethical violation to write will for family member , especially if estate is left to

“predictable” people. If there is an uneven disposition you should run it by independent counsel.

- CA: also invalidates gifts to caretakers, etc. (elder abuse laws)

○ **Fraud**

- When a testator is deceived by a deliberate misrepresentation and does that which he would not have done had the misrepresentation not been made.

Requirements

- Misrepresentation to testator (false statement or representation of fact)
- Intent to deceive testator
- Purpose to influence testamentary disposition
- Causation: misrepresentation caused disposition of estate in way that testator would not have otherwise disposed of it

- Remedy:

- Invalidation: The disposition caused by the fraud can be struck down if it doesn't affect the rest of the will. Otherwise the entire will may be struck down.

- ***Puckett v. Krida***: Nurses fraudulently tell woman with Alzheimer's that her family is squandering her money, so she changed her will to go to the caretakers. Will invalidated.

○ **Duress**: undue influence that becomes overtly coercive

- Typically involves use of force or threats to use force/violence
- Causation: duress must cause testator to dispose of estate in way that he would not have otherwise disposed of it
- ***Latham v. Father Divine***: Decedent had will leaving estate to religious leader and cult affiliates, but wanted to update it (she had the will, but never executed it). Family claimed that the cult threatened to kill her. Cousins wanted a constructive trust.

○ **Tortious Interference with Inheritance** (just need to know it's there)

• **Will Execution**:

- To bring the will into effect so it becomes a valid will.

○ Functions:

- Ritual Function: put testator on notice that his actions have legal consequence
- Evidentiary Function: provides strong evidence of testator's intentions
- Protective Function: help guarantee no duress, undue influence etc.
- Channeling Function: specific set of requirements gives assurance that testator's intentions will be carried out after death

California Probate Code § 6101

A will may dispose of the following property:

- (a) The testator's separate property.
- (b) The one-half of the community property that belongs to the testator
- (c) The one-half of the testator's quasi-community property

California Probate Code § 6110

- (a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.
- (b) The will shall be signed by one of the following:
  - (1) By the testator.
  - (2) In the testator's name by some other person in the testator's presence and by the testator's direction.
- (c) The will shall be witnessed by being signed by at least two persons each of whom
  - being present at the same time, witnessed either
    - the signing of the will or
    - the testator's acknowledgment of the signature or

- the testator's acknowledgment of the will
  - understand that the instrument they sign is the testator's will.

- Witnesses don't need to know what's in the will, just that it is the testator's will.
  - **Attestation Clauses:** Recites the legal requirements for properly executing a will and has the witness signatures.
  - **Self Proving Affidavits:** Sworn statement made under oath where the witnesses sign a statement where they swear they properly witnessed the will. They sign again in most cases and the notary authorizes the signatures.
- Out of state wills: If it was validly executed somewhere, it will be recognized in just about every case.
- Interested witnesses:
  - Will remains valid even with an interested witness; however it creates a presumption that places the burden of proof on the interested witness that the gift to them was not the result of duress, menace, fraud, or undue influence.
  - Even if you can't overcome it, if you would have been an intestate heir you are still entitled to your intestate share of the estate.

○ **Errors in Execution**

- Exam:
  - MC: Follow Strict compliance
  - Essay: First apply strict, then substantial compliance, then CPC 6110(c)(2), then dispensing power
- **Strict Compliance**
  - A formal will is valid only if the formality requirements are met with strict compliance.
  - Narrow Exception: Reciprocal wills
    - ◆ **Snide** case. Husband signs wife's will and vice versa. Held that will was valid. What occurred was obvious and what the testator intended was so clear that it would be wrong to nullify it.
- **Substantial Compliance** ("Near Miss" Standard): Adopted by CA.
  - Court may deem defectively executed will as being in accord with statutory formalities if it nonetheless fulfills the purposes of the formalities (ritual, evidentiary, etc.)
    - ◆ Does NOT allow major deviations (like doing away with an entire formality)
  - CA version: [CPC 6110(c)(2)]
    - ◆ Intent to make will
    - ◆ No modification or revocation
    - ◆ Only allows judge to dispense with witnessing requirement
    - ◆ Requires clear and convincing evidence that testator intended document to be his will

CPC 6110(c)(2):

If a will was not executed in compliance with [the witness requirement], the will shall be treated as if it was executed in compliance with that [requirement] if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will.

- ◆ Examples:
  - ◇ **Ranney:** "Witnesses" signed an affidavit saying they had signed the will, but not the will itself.
  - ◇ Will signed by testator but there's only one witness, but there was also a notary public who meets all other criteria for a witness.
  - ◇ Two witnesses sign it, but not jointly at the same time.

- **Harmless Error** (Dispensing Power) - UPC
  - Court may excuse noncompliance with statutory formalities if there is clear and convincing evidence that the decedent intended the document to be his will
    - ◆ Gives courts the right to dispense with certain formalities
    - ◆ Also extends to attempts to revoke or change a will.
  - **Hall**: husband and wife executed draft of joint will, notarized by attorney, but not signed by two witnesses as required. Would fail strict, and probably substantial compliance because it's a major deviation.

- **Holographic Wills** (Holographs): informal wills

§ 6111. Holographic will

(a) A will that does not comply with Section 6110 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

- You also need testamentary intent - This comes up a lot because they're often informally written; need to show they intended that to be his will.

- **Requirements**

- Material provision in the handwriting of the testator
  - Examples of material provisions include: appointing an executor or guardian, revoking a previous will, giving something, etc.
  - Nothing printed unless judge dispenses with requirement
  - No oral wills or video tapes
- Testator's signature in own handwriting
  - Informal signature generally sufficient if normally how testator would sign this type of document (*Kimmel*) [e.g.: Dad, initials, etc.]
- Testamentary intent (testator must intend document to be his will)
  - Use of legalese
  - Show testator thinking about death
  - **Kimmel**: Letter stating he wanted his son to have his property "if anything happens to me" = testamentary intent (shows how informal a will can be)
- No date or witnesses required

- **Fill-in-the-Blank Wills:**

- Most courts say you need to have the handwritten material provisions be able to stand alone, without the printing supplementing it in order to be a holographic will.
- CPC: You can look at the printed part to find testamentary intent, but you still need material provisions standing alone without the printed parts.
  - Cannot consider printed parts in determining whether material provision
  - Must be able to find material and understandable provision and only those parts will be carried out

- **Conditional Wills:** most courts ignore condition and consider the document a will, unless there is a clear expression otherwise.

- The condition can often be considered just to be the motivation for drafting instead of being a conditional will.

- **Revocation**

- A will, or any part thereof, can be revoked before testator has died by the following methods
  - **Express Revocation:**
    - Subsequent will expressly revokes previous will
      - e.g.: A subsequent will executed which says "I revoke any previous wills" or

similar.

- Subsequent will can be holographic, even if original was formal
- **Revocation by Inconsistency:**
  - A subsequent will executed which is partly or completely inconsistent with a previous will.
  - Entirely Inconsistent:
    - First will gives entire estate to A, but second gives entire estate to B.
  - Partly Inconsistent:
    - First will gives entire estate to A, but second gives his car to B.
      - ◇ Would revoke the gift of the Car in first will, gives it to B.
      - ◇ Where only partly inconsistent, second will is considered a **codicil**. The two wills get read together as one document.
- **Revocation by Physical Act:**
  - Being burned, torn, canceled, obliterated, or destroyed,
  - with the intent and for the purpose of revoking it, by either
    - the testator or
    - another person in the testator's presence and by the testator's direction.
  - Canceling - MUST deface part of the text. Cannot just write canceled in the margin.
    - ◇ Ex: put an "X" through the will writing or write "void" on the text of the will
- Duplicate Originals
  - "Duplicate originals" means both copies have been signed and executed. Lawyer usually keeps one.
  - If there are duplicate originals, destroying one revokes the other
    - ◇ Cannot probate duplicate original copy of revoked will
    - ◇ Simply tearing up unexecuted copy does not revoke will
- If will cannot be found; Rebuttable Presumption:
  - Court will presume that testator revoked a will if...
    - ◇ Testator had possession of the will, and
    - ◇ After death, will cannot be found among testator's personal effects
  - To Rebut: no clear rule. Would need disinterested witness to say they saw the will on the day of the person's death and that disinherited relatives had access subsequently.
  - ***Harrison v. Bird***: decedent drafted will leaving everything to Harrison, but subsequently advised attorney to revoke
    - ◇ Attorney tore will into four pieces and mailed them to decedent with letter of explanation. Letter found among decedent's belongings, but not pieces of will. Proper physical act performed with intent, but not by testator or in presence
    - ◇ Presumption that because the will was in her possession, and now could not be found, it had been destroyed
- Partial Revocation by Physical Act (CA):
  - Part of will can be revoked by physical act same as entire will
    - ◇ e.g.: "Rest of my estate to A & B" but B is crossed out.
  - Holographic wills - Testator can make informal changes as much as they want as long as it's in their own handwriting. (Judge would probably assume the X was in the testator's own handwriting.)
- **Effect of Revocation:**
  - Revocation of a codicil does not revoke the will, but revocation of a will revokes any

subsequent codicils

○ **Dependent Relative (Conditional) Revocation:**

- Where the revocation of Will #1 was dependent or conditional on the validity of Will #2. If you meet the requirements, the court will go back to Will #1.

▪ **Requirements**

- Testator must have revoked a will
- Testator was under a mistaken belief (of law or about some fact)
- Testator would not have revoked if knew the truth

- **Result:** Original reinstated

○ **Revival of Revoked Will:**

- Testator executes original will and executes subsequent will revoking original, but later revokes subsequent will without making replacement will
  - e.g.: Testator executes will #1. Subsequently, testator executes will #2, which revokes will #1 by an express clause or inconsistency. Later, testator revokes will #2.
- **Rule:** Will #1 is revived and valid only if
  - 1) Upon the revocation of will #2, the testator intended will #1 to be revived.
  - 2) The intention to be revived can be shown from the circumstances surrounding the revocation or from the testator's contemporaneous or subsequent oral declarations that will #1 is valid.
- This rule is based on the doctrine of relative revocation

○ **Revocation by Operation of Law** (testator does not have to do anything)

- **Revocation by Divorce:** provision gifting something to testator's spouse is void upon divorce or annulment *unless* will expressly states otherwise
  - Revokes gifts, powers of appointment, and any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian.
  - Same rules apply for dissolution of domestic partnership
  - Revived by testator's remarriage to former spouse
  - *Divorce does not revoke gifts made by will substitutes*
- **Pretermitted Spouse / Children:** omitted from will because not around at time of execution
  - Will that fails to provide for spouse and/or children will entitle them to intestate share of the estate (unless express declaration otherwise)

• **Components of a Will** The "testamentary text" can be broader than just the paper that says last will and testament.

○ **Codicils**

- Amendment or supplement to will
  - Must be validly executed with same formalities of formal or holographic will
- Doctrine of republication by codicil: Preexisting wills and codicils become a part of the same text (with inconsistencies being determined by the later text).
  - The date of execution becomes the date of the later document, unless it would frustrate the intention of the testator
  - Can republish an invalid will that was improperly executed or while lacking capacity, and make in valid
    - e.g.: **Johnson** case. Decedent typed will without signing, dating, or witnessing, but added handwritten provision at bottom with signature and date. Court considered typed part to be improperly executed will, and the handwritten part to be a validly executed holographic codicil, thus republishing the first will.

○ **Doctrine of integration**

- All papers present at time of execution and which testator intends to be part of his will, are

integrated into and considered part of the will

○ Incorporation by reference

- Requirements:
  - The writing to be incorporated must be in existence at the time that the will is executed.
    - Exception: if subsequent codicil republishes the will
  - The will must manifest an intent to incorporate
  - The will must describe the writing sufficiently to permit its identification
- Becomes part of the will
- e.g.: Journal in *Greenhalge* case documenting a list of property dispositions

○ Incorporation by acts of independent legal significance (aka non testamentary acts)

- Basic idea: if you have a testamentary document that the maker intended to be a will, it needs to be properly executed. You cannot make informal additions (e.g.: You have a type written will that says "Residue to Dick" but you add handwritten portion "and to Jane" without witnesses.)
- But say you anticipate you might have another child and you write "residue to my children." After you've executed the will, you have another child - essentially the will has changed, but this is ok.
  - If there is some non-testamentary act that changes your will, no problem.
    - e.g.: In his will, a testator bequeaths his car. A year later he changes his car. The bequeathing of the car is not now invalidated, because the act of buying a new car is an act of independent legal significance since the act is not testamentary in nature.
- Hypo:
  - T bequeaths "the contents of the right hand drawer" to A. In the drawer were a diamond ring and a bunch of stocks that were added after the will was executed. Most courts have held that what's in the drawer / safe deposit box is non-testamentary and should go to A. (Bothers Prof. because it seems too easy for A to stuff a whole bunch of possessions into the drawer).

• Contracts to Make or Not Make Wills

- Governed by contract law, not law of wills
  - Contracts can be entirely oral, but recent trend towards requiring writing (See CA rules below)
  - Contract not required to have same formalities as making a will because not a testamentary act, but contract rules apply (statute of frauds, etc.)
- Contract to Make a Will: commonly used as compensation for people for cannot afford to actually pay during lifetime
  - Remedy: failure to perform entitles beneficiary to sue for breach
    - If testator has not died, beneficiary can sue for specific performance
    - If testator has died, beneficiary can sue for constructive trust
- Contract Not to Revoke a Will: commonly used by married couples for when one spouse predeceases the other
  - There has to be written evidence, otherwise invalid
- **CA: (CPC 150)**
  - Contract to make a will, revoke a will, or die intestate requires one of the following writings:
    - Provision stating material terms of the agreement
    - Express statement in will indicating existence of agreement and extrinsic evidence proving terms of the agreement, *or*
    - Document signed by testator, proving existence of the agreement
    - Presumption: reciprocal or joint will does not create presumption of contract not to revoke the will(s)

- **Via v. Putnam:** decedent had mutual will with first wife that estate would pass to each other, then to children, but remarried after first wife died and failed to make new will
  - Children argued that decedent breach contract and they were contract creditors of his estate, entitled them to first dibs
  - Holding: second wife treated as pretermitted spouse (50%) and children get remainder as normal heirs (not as creditors )
- **Will Substitutes:** methods for avoiding probate
  - **Gifts:** give property away before death
    - Pro: can reduce possibility or lessen amount of estate tax
    - Con: giver can no longer enjoy the property
    - Gift Tax: if give more than \$13K to any one person in any one year, amount in excess is subject to gift tax
  - **Joint Tenancy:** right of survivorship
    - Pros
      - Upon death, remaining joint tenants receive property automatically
      - After death, cannot be reached by creditors
    - Cons
      - Property cannot be given away via will (your interest expires at death)
      - Cannot be completely revoked (converts to tenancy in common)
  - **Revocable Living (Inter Vivos) Trust:**
    - Hold property in trust for the benefit of those to whom testator wishes to give his property when he dies
    - Means you can no longer dispose of it, because it doesn't belong to you, it belongs to the trust with someone else as the beneficiary. You are the trustee while you are alive, and people usually make a successor trustee to administer the trust after death.
    - Requirements: all assets must be specified and any deeds must be re-recorded
    - Creation of trust requires much less formalities than creation of will
      - However, if trust has land, SoF applies and it needs to be in writing.
    - Trust only disposes of those assets placed in trust
    - Anything not included in trust or will passes by intestate succession
    - Revoking
      - If the trust specifies the only way a trust can be revoked, you need to follow the procedure in order to revoke it.
      - If the trust document doesn't specify, you can revoke by any method that shows an intent to revoke. EASIER THAN WILLS.
    - Pros and Cons:
      - Costs:
        - Trusts cost more money to set up, but could save money in probate.
      - Delays:
        - Living trust much faster than probate, because successor trustee takes over immediately.
        - Asking judge in probate for money to pay debts, employees, etc takes much more time.
      - Creditors
        - Better off using a will, because there's a short term statute of limitations (2-4 mos) where if it's in a trust they can go after you for 1-2 years.
      - Publicity
        - Living trust is private document and you keep it out of the public. A will



becomes part of the court record and anyone willing to pay the fees (reporters, etc.) can get a copy of the will.

- Ancillary Probate (Real property outside the jx - governed by law in that state)
      - If real property is in a living trust, you don't have to go through ancillary probate.
    - Choice of Law
      - Will: where you were domiciled at death
      - Living trust: you can choose the law of whatever state is best for you.
    - Lack of certainty in the law
      - Will: fairly clear
      - Living trust: not as clear.
    - Agreements to leave estate to certain ppl upon death; can be done via:
      - Contracts within will; or
      - Provision in a non revocable trust
  - Creditors: able to reach assets of revocable living trust to extent that settlor could reach while alive, but must first exhaust resources of settlor's estate.
    - If settlor can reach the assets, creditors can too
    - If its revocable, settlor can reach all assets, therefore creditors can reach all assets
      - ◆ Extended to even after the settlor dies.
- Pour-Over Wills
    - A pour-over will is a will in which the will puts the residue into a pour-over will trust.
      - Does not avoid probate (will still needs to be probated)
    - UTATA:
      - **Allows will to give money to a trust even if it does not yet exist, as long as it exists or is established at the testator's death.**
        - ◆ Traditionally it would have been invalid. Now it doesn't matter as long as the assets pour over into the trust at some point. "I give the residue of my estate to my living trust"
        - ◆ However, pour over trusts do NOT avoid probate. (Will needs to be probated).
      - **Allows informal changes to trusts**
        - ◆ Cannot informally change your will, but you can informally change your living trust (even orally)
        - ◆ The will just says put everything into the trust, and in the trust you can informally change beneficiaries.
    - Single Testamentary Scheme: laws of wills apply to trust if trust and will are integrally related components of single testamentary scheme
    - Clymer v. Mayo: decedent executed pour-over will designating husband as primary beneficiary, but failed to change upon divorce.
      - CA: Dispositions by will are automatically revoked upon divorce, but TRUST BENEFICIARIES ARE NOT.
        - Result: in CA you need to change the beneficiaries on trusts, pensions, bank accounts, etc.
  - Life Insurance / POD Provisions
    - Cannot change beneficiary by will. Have to go to the insurance company or bank.
      - Cook: decedent failed to remove ex-wife as beneficiary to life insurance policy, but specified new wife and son in holographic will
        - Presumption that ex-wife as beneficiary not revoked by subsequent divorce
        - Holding: must abide by policy procedures to change beneficiary
  - Pension / Retirement Accounts
    - Defined Benefit

- Typically a percentage of their last salary.
- Benefit: You get that amount for as long as you live.
- Drawback: Acts like an annuity, thus no death benefit.
- **Defined Contribution**
  - Employer puts a certain percentage of wages into pension plan every pay period, and so do you. Once you retire, you're entitled to however much was put in plus interest and other gains.
- **Planning for Incapacity / Death**
  - **Living Will or Advanced Directive**: states testator's desires for end of life treatment
    - Everyone has fundamental right to refuse medical treatment
    - You set up the conditions when you want to be kept alive and when they should pull the plug.
  - **Power of Attorney**: authority to make decision on someone else's behalf
    - **Durable Power of Attorney**: Appoints someone else to make the decision for you if you are no longer competent to make it yourself.
  - **Disposition of body**: Will governs. If will does not specify then there is a list of various family members who can make the decision for you.
- **Construction of Wills**
  - **Mistaken or Ambiguous Language**
    - For exam, start with plain meaning rule, integrate CA rules, but note that if before state S.Ct. one could argue Erickson, even though it goes against several hundred years of precedent.
  - **Plain Meaning Rule (aka 4 corners rule)**
    - If the meaning of a will is plain, then judges are not allowed to look at extrinsic (outside) evidence. It needs to be interpreted based solely on the text.
      - Allows you to look at the rest of the will (and probably codicils) in order to determine the meaning of the will. But you cannot look at what the testator told her lawyer, family, neighbors etc.
      - e.g.: ***Mahoney v. Grainger***: decedent left estate to "heirs at law" (which meant an aunt not the 25 first cousins she intended), but plain meaning enforced
    - NOTE: Court can still admit outside evidence to see whether it was properly executed, or if there was fraud, duress, etc.
    - **Exceptions:**
      - If the term is ambiguous, then courts will generally look to extrinsic evidence to clarify the ambiguity.
      - **Personal Usage Exception:**
        - ◇ You can consider the personal usage of someone (stepdaughter as "my daughter" and will leaves it to his daughters.)
        - ◇ e.g.: Testator gave 20k to Mrs. Mosley (the wife of the owner of a cigar shop he goes to). She claims he meant her.
          - Then evidence was introduced that the salesman at the cigar shop was named Mr. Trimble. But testator called him Mr. Mosley. The salesman's wife managed the apartment house where he lived and had been nice to him. He typically called HER Mrs. Mosley.
      - ***Falsa demonstratio non nocet*** (a false description doesn't matter)
        - ◇ Where a description of a thing or a person consists of several particulars and all of them do not fit one particular thing or person, then the less essential particulars may be rejected provided that the remainder of the description clearly fits.
          - Text cannot be added to the will; but, under the doctrine, text from the will can be removed.
        - ◇ If the will refers to personal property outside the will that does exist (123

smith street instead of 321), you can cross out the false part (smith street).

- ◇ Cannot add, just strike out the false part.
  - CA has not adopted scribner's error. Don't follow for MC; only essay
- **CA Version (follow on exam):**
  - ***Estate of Russell*** - Judge can look at extrinsic evidence to decide whether language is ambiguous in the first place.
  - **CA Court's 3 step approach to extrinsic evidence.**
    - ◇ Look at extrinsic evidence to decide whether the language is reasonably susceptible to 2 or more interpretations (IF SO; the language is ambiguous)
    - ◇ If yes, you admit the evidence
    - ◇ You decide what the term means in light of the extrinsic evidence and all the surrounding circumstances.

### **Summary**

#### **Plain Meaning Approach:**

1. Look at the text to see whether there is an ambiguity.
  - 1a. If not, do not admit the extrinsic evidence.
  - 1b. If so, admit the extrinsic evidence.
2. Interpret the text based on the language of the text. Consider the extrinsic evidence only if it has been admitted.

#### **Estate of Russell Approach:**

1. Look at the text, as well as the extrinsic evidence, to determine whether there is an ambiguity. (There is an ambiguity if the language of the text is "reasonably susceptible" to two or more interpretations claimed to have been intended by the testator).
  - 1a. If not, do not admit the extrinsic evidence
  - 1b. If so, admit the extrinsic evidence
2. Interpret the text based on the language of the text. Consider the extrinsic evidence only if it has been admitted.

- **Clear and Convincing Error Approach:**
  - Extrinsic evidence can be used to prove contents of will if...
    - Clear and convincing evidence of scrivener's error, *and*
    - Clear and convincing evidence of what testator wanted
  - ***Erickson***: decedent executed his will two days prior to marriage, leaving to his wife-to-be. But there was a state law statute that automatically revoked wills upon marriage. Court allowed the will to stand.
- **Lapsed Gifts:**
  - If the beneficiary dies before the testator, the gift "lapses."
  - **Rules**
    - If devisee does not survive testator, the devise lapses (fails) [remember they need survive only a few minutes longer by clear and convincing evidence]
    - If a specific (my watch) or general devise (\$10k) lapses, the devise falls into the residue

- Total Residue Lapses: Goes by Intestacy
- Partial Residue Lapses:
  - Common Law No residue of a residue rule:
    - ◇ If only a part of the residuary lapses, it still goes to heirs, not to other residuary devisees. **[not followed by Ca]**
  - CA Rule: Follow for MC
    - ◇ If part of the residue lapses, that part gets divided amongst remaining residuaries
- Devises to Classes of Persons
  - If the devise is to a class of persons (e.g.: Children of A) and one of those members dies, the surviving members of the class divide the gift.
- Where a devisee is already dead at the time the will was executed, or the devisee is an ineligible taker (dog/cat) the devise is void. Default rules apply.
  - **Russell**: testator left half of estate to her Airedale, Roxy, who predeceased her
    - Gift to dogs are void ☹ so goes to heir-at-law instead
- Anti-Lapse Statutes:
  - Antilapse statutes are made to avoid lapse in certain situations.
  - Rationale: Legislatures assume that most people would not always want the gift to lapse if the recipient does not survive them.
    - If the gift is to a relative of yours, then you would probably want that to go to their issue.
    - But if it was to someone who was not a relative, then you would want it to lapse.

**CPC 21110**

- (a) If a transferee is dead when the instrument is executed, or fails or is treated as failing to survive the transferor or until a future time required by the instrument, the issue of the deceased transferee take in the transferee's place [per Section 240 - per capita w/ representation]...
- (b) The issue of a deceased transferee **do not take** in the transferee's place if the instrument expresses a contrary intention or a substitute disposition. ..
- (c) As used in this section, "transferee" means a person who is kindred [related by blood] of the transferor or kindred of a surviving, deceased, or former spouse of the transferor.

- Contrary intention means the testator does NOT want antilapse to apply.
- Only applies to kindred of testator, or kindred of spouse, but does NOT include spouse.
- Exceptions: anti-lapse does not apply
  - Anti-lapse does not apply to spouses
  - Contrary disposition ("if A survives me") S
  - Substitute disposition ("if not to A, then to B")
- Class Gifts (Apply this if necessary after applying antilapse)
  - If a member of the class dies, then that share of the gift will be distributed to the surviving members of the class.
  - Procedure
    - Hypo: Farm to A and B, B does not survive
      - First, apply antilapse
      - If you cannot, see whether you can prevent it from lapsing by arguing the gift is a "class gift" and argue that A&B are a class.
  - In the vast majority of situations, if they have a group name, they are a class
    - e.g.: To my siblings, children, issue, cousins, members of my bingo club, etc.

- Natural classes
  - Many courts will decide you were group minded and intended to treat them as a class even though named individually.
    - If you list 3,4,5 people, and they all fall into a natural class. (i.e.: all are cousins), it makes a strong case.
    - On the other hand, if you mention just 2 of your 3 siblings, that will be very difficult to argue there is a class, and the gift will lapse.
  - For purposes of the exam, follow the above rationales.
- Changes in Property After Execution of Will
  - Gift Categories
    - Specific Gift:
      - Specific identifiable thing (ex: 1955 Chevy)
      - **Doctrine of Ademption by Extinction:** If the specific gift is not in the estate when testator dies, it is adeemed by extinction
        - Do not get the item, do not get the proceeds of sale
        - Applies only to specific bequests
        - EXCEPTIONS:
          1. CA requires intent to extinguish a gift. If testator did not intend to extinguish it, then ademption by extinction does not operate.
            - Presumably get proceeds from the sale.
          2. If property is sold by someone with a power of attorney and testator is incompetent, ademption does NOT apply.
            - **Estate of Anton** - Court essentially reversed the traditional rule by looking to intent; because testator is not competent, she couldn't change her will. She didn't sell the property, but it was involuntarily sold by someone who had a power of attorney.
              - ▶ **Result** - Sale of property, minus nursing expenses, goes to the devisees.
    - General Gift:
      - General benefit, not particular thing (ex: certain amount of money)
      - Not extinguished like specific.
      - You try to pay it off if there are other assets in the residue which can be sold (i.e. a piece of real estate)
    - Demonstrative Gift:
      - Hybrid – general bequest from specific source (ex: \$100K from sale of car collection)
      - CAN be extinguished, like specific gifts
  - Changes in Substance
    - Mere change of item's form insufficient to render it no longer in estate; Requires a big change
      - e.g.: 1955 Chevy is in an accident. Testator goes out and buys a new car.
        - This is a change in substance. Out of the estate.
      - e.g.: Give savings account at BofA to nephew. But then money is taken out and put in Wamu.
        - Most courts would say this is a change in form. Essentially it's still in the estate.
      - e.g.: Savings account is taken out and put in a new bank as a CD.
        - Courts are split. Some say its trivial, others say it's different because it turned from a savings account to a CD.
  - Ademption by Satisfaction
    - If you've already been given a specific gift inter vivos, any devise of that gift to you is extinguished.

- If you were given a gift of cash, then intent dictates as to whether a bequest of a general gift has been extinguished.
  - If testator intended that lifetime gift be in satisfaction of bequest in will, then no additional bequest at death.
  - There must be some written evidence for satisfaction to apply; if no written evidence then you still get the general gift.
- **Exoneration of a Lien or Mortgage**
  - Testator gives beneficiary property subject to lien or mortgage
  - General rule: Gifts which have liens or mortgages pass with the lien or mortgage in place. You inherit the item and the amount remaining to be paid.
- **Abatement:**
  - If the estate has insufficient assets to make all the bequests in the will, then some of the gifts will have to abet.
    - Certain gifts taken away if estate has insufficient assets to satisfy bequests
  - First reduce residue, then general, then specific and demonstrative pro rata.
  - **Review in class exercise**

## **TRUSTS OVERVIEW**

### **a. TYPES OF EXPRESS TRUSTS:**

- In terms of creation:
  - Testamentary (created by will; goes into effect at settlor's death)
  - Living (inter vivos; goes into effect during life of settlor)
    - Created by declaration (settlor makes self trustee)
    - Created by deed/transfer into trust (settlor is not trustee)
- In terms of discretion of trustee over distribution of income and principal:
  - Mandatory (also includes unitrusts)
  - Discretionary (also includes support trusts)
  - Hybrid (spray or sprinkle trusts)
  - [in addition, these trusts may have a disabling restraint, so they can also be called "spendthrift" trusts]
- In terms of purpose:
  - Private (also called noncharitable or benevolent trusts)
  - Charitable
- In terms of funding:
  - Independently funded (by putting property into trust, or via will)
  - Funded via pour-over clause in a will ("pour-over trusts")

### **b. TRUSTS IMPOSED BY LAW:**

- Resulting trusts (including purchase money resulting trusts)
- Constructive trusts

### **c. THINGS THAT LOOK LIKE TRUSTS, OR ARE CALLED TRUSTS, BUT ARE NOT:**

- Honorary trusts
- Secret or semisecret trusts
- Equitable charges

## **• Trust Basics**

- Person transfers assets to some other person / institution, and that other party promises to take care of those assets and use it for the benefit of a beneficiary, and then the assets are distributed to someone else (beneficiary or other)
- You ***split the legal and equitable ownership***

- Legal owner = Trustee
- Equitable owner = Beneficiaries
  - Right to distribution of income from the trust
  - Right to sue trustee if trustee does not take good care or distribute them in accordance with the trust instrument
- Way to maintain a fair amount of control over how assets are managed, who receives income, etc.
  - Device by which people are able to maintain control of their assets after their death.
  - CAN have choice of law provisions, unlike wills (allows you to create spendthrift trusts if you live in a state that doesn't allow it)
- **Terminology**
  - Settlor - Person who puts money into the trust
  - Res / property / corpus - The trust property
  - Trustee - Legal owner of trust and has fiduciary duties towards the beneficiaries
    - Makes decisions following trust instrument
    - Trust will not fail for lack of a trustee. Court will appoint one.
  - Beneficiary (aka Cestui que trust)
- **Different types of trusts**
  - a. **Living Trust (Inter vivos trust)** - Express trust
    - Trust is created by settlor while alive.
    - Two types:
      - 1) **By Declaration**
        - You can declare yourself to be the trustee of a particular piece of property.
          - ◇ Can be either oral or written
            - But note that with land, the statute of frauds applies and requires declaration to be in writing.
        - Must always declare yourself to be the trustee, and it's a good idea to appoint a successor.
        - Beneficiary makes himself the income beneficiary (or life beneficiary) and gets the income from the trust.
        - Can have successive life beneficiaries: "Upon my death the trust shall continue until all my children turn 21, at which point it will be distributed." Children will be income beneficiaries, as well as remainder beneficiaries.
        - Merger - If trustee and beneficiary are same person or the same set of people (complete overlap). Trustee and beneficiary have merged.
          - ◇ When merger occurs, the beneficiary owns the property outright, and the trust ends.
      - 2) **By Deed of trust or by Transfer**
        - For deed or transfer of trust to be valid, there needs to be delivery to the trustee (either delivery of the deed or the item). Deliver the deed or the property itself.
          - ◇ Transfer - Can be oral; Does not arise until property is delivered
          - ◇ Deed - Does not arise until deed is delivered
  - b. **Testamentary Trust** - Express trust
    - Created by settlor's will at the settlor's death. Language must be in the will and will not be effective unless the will is valid.
      - I transfer certain property into trust, and all terms are in the will itself.
    - Because created by will, it has to go through probate.
    - Under *fairly strict supervision* of the court.
      - Say Vineyard gets a disease and beneficiary needs to get money from the trust to fix it; need permission from court to do so.
    - **Difference between testamentary trust and pour over trust**
      - Testamentary: "I give residue in trust to A"

- Pour over: You have a will, AND you have a trust. Two separate documents.
  - Will: "I give residue to my trust." Notice the will does not have the terms of the trust in it. There has to be an existing trust (but see UTATA). If there is no living trust, the gift fails.

c. **Trusts made by application of law**

- Resulting Trust
  - Remedy imposed by application of law. It's a type of remedy.
  - If trust fails for any reason, conveys property back to estate to be divided by intestacy or will.
- Purchase Money Resulting Trust
  - I buy a piece of property and I take title made out to someone who is not a natural object of your bounty (not a natural family member or spouse - someone you would not normally make a gift to) the person has to reconvey it back to the estate.
    - This could happen if I was trying to create a trust at the bank but I did something wrong and bank got absolute title. Failed attempt to make a trust.
- Constructive Trusts
  - A wrongful holder of property is required to convey to its rightful owner.
  - This is usually a remedy for fraud or unjust enrichment.

**Requirements to make a trust**

**Overview**

- Settlor must INTEND to make a trust
- There must be trust property
- There must be Ascertainable Beneficiaries
- Settlor must have capacity

a. **Settlor must INTEND to make a trust.**

- Do not need to use the word "trust" as long as you intend to have that effect. (splitting the legal and equitable ownership)
  - If they intend for someone to take care of the property for someone else, that's generally sufficient.
- E.g.:
  - Lux: "I give devise and bequeath to my grandchildren. Any real estate shall be maintained for the benefit of my grandchildren and shall not be sold until the children reach age 21." Court holds this established a trust
  - Jimenez v. Lee: Lee gets a few cash gifts for his daughters for "their education needs" though neither used the word "trust." Court: There was a beneficial ownership by the daughter. Therefore the givers intended to split legal and equitable ownership and there is a trust, and father has fiduciary responsibility to take care of the money.

b. **There must be trust property**

- Limited exception - UTATA. Otherwise, requires property
- Contains only the property you have specifically put into it.
- Flexible as to type of property
  - Brainard - possible future earnings from trading. Court says no; doesn't arise until you actually have the property
  - Speelman - Earnings from a play; this is a gift case, not putting it into trust. Rules are different (intent + delivery [letter - symbolic, manual if you can, constructive])
    - You can GIVE future profits, but you cannot put them in trust until you've received them.
    - Gift Delivery Requirements: Delivery can be manual, symbolic, or constructive.
      - ◇ Manual delivery is when the donor hands over the gift to the beneficiary.
        - ▶ If a donor can make manual delivery, then the donor must make manual delivery.



- ◇ Constructive delivery is when the donor hands over access to the gift; the handing over of a key that gives access to a box that holds the corpus.
- ◇ Symbolic delivery is when the donor hands over something that represents the gift, like a deed.

**c. There must be Ascertainable Beneficiaries**

- i. Requirement that applies to private trusts : Settlor has to designate who the beneficiaries are. There needs to be someone who can enforce the terms of the trust.
  - e.g.: Clark v. Campbell
    - "I leave the residue of my estate to my trustees for the benefit of my friends." This establishes a testamentary trust. He has the intent to create a trust and he transfers property to them.
    - Problem: There are no ascertainable beneficiaries! "Friends" has no statutory definition. What does friends mean? It's too general.
      - ◇ Compare against "family members"
  - Must be a human being, but you can give money to a person to take care of a dog, or gravesite, or monument (honorary trust). If they don't - resulting trust

**d. Settlor must have capacity**

**• Oral Trust for Disposition at Death**

- Most jx allow transfer accompanied with oral instructions to create a trust (Usually requires Clear and Convincing evidence)
  - Exception: Where SoF applies (real property)
- e.g.: Estate of Fournier
  - Guy asked his friends to hold \$400,000 in cash for him until his death, and then give it to one of his sisters.
    - If the money was his at death, it would go through probate and be distributed through his will. (Under wills law, you cannot orally modify a will)
    - However, using trust principles, this could be saved
      - Settlor must have intention to create a trust.
        - ◇ Intended it for the benefit of someone else (division of legal & equitable ownership)
      - For this to be a trust by deed of trust, there needs to be delivery.
      - Settlor must have capacity
      - Must be a definite beneficiary

**• Things That are Not Trusts**

- Honorary Trust
  - Not a real trust.
    - Requires a definite purpose but no beneficiary.
    - Almost always limited to taking care of an animal, monument, or gravesite.
  - Distinguished from charitable trust
    - Charitable trusts are left broadly for the benefit of the community.
    - Honorary trusts are left specifically for the benefit of a dog, monument, etc.
  - As long as the recipient of the funds uses them for the intended purpose the honorary trust is fine. If not, then there will be a resulting trust (goes back into estate and distributed to heirs)
  - **Rule Against Perpetuities Issue:**
    - Any interest in a trust must vest if at all within 21 years of a life in being at the time of the creation of the trust.
    - Animals lives do not count, so the life in being must be a human life. Therefore this trust will violate the RAP if it goes on for more than 21 years. Is it possible for animals to live for more than 21 years? YES.
    - Court in *In re Seabright's Estate* solves the problem by looking at when the money

would run out (which was calculated to be 5 years)

- Testator left dog to friend along with \$1K that would pay her to care for dog

- **CA: Enacted "Pet Trust Law"**

- Deals with RAP. Says this is a real trust, and it can last as long as the domestic animal lives.

- **Oral Inter Vivos Trust in Land:**

- Real property agreements cannot be oral, because they violate statute of frauds.
- However, a constructive trust can be imposed IF there was a promise to convey the real property back to owner.
  - Constructive trust imposed if...
    - A fiduciary relationship between transferor and transferee
    - Transferee promised to return property (express or implied)
    - Transferor transferred property in reliance on promise, *and*
    - Transferee unjustly enriched
  - EXCEPTION: when the transferor has unclean hands (conveyed property to avoid legitimate creditors)

- **Secret / semi secret trusts**

- These are not trusts, they are gifts made in a will. These look like attempts to set up testamentary trust, but the terms of the trust are not in the will
- Semi-secret trust
  - e.g.: "I give \$10,000 to Reverend Wells for purposes we have discussed," or "for use as he has promised me."
  - Result: It becomes a resulting trust and it is given back to the estate. **Gift fails because beneficiary is not ascertainable.**
- Secret trust
  - Appears to be a regular gift via a will, but evidence is introduced that the gift was made pursuant to an agreement outside of the will (an "equitable charge").
  - Result: Recipient keeps the gift. Parties can later present extrinsic evidence and if there is clear and convincing evidence, a constructive trust could be imposed.
    - Rationale: avoid unjust enrichment of the recipient.

- **Right to beneficiaries to distribution under the trust**

- Look to the trust. It's the settlor who sets out the terms in the trust instrument, or creates the terms by what he/she says. Distinguish right to income and right to principal
  - Income beneficiaries - entitled to income resulting from the trust in their life.
    - MAY be entitled to certain dispositions of principal, depending on the trust.
  - UPIA - trustees do have a certain ability to reallocate under certain circumstances

- **Mandatory**

- Mandatory
  - Certain percent or amount of the income / corpus. Trustee has no say. Beneficiary is entitled to that amount
- Unitrust (type of mandatory trust)
  - A certain portion of the corpus must be paid to the income beneficiary each year. (Add income to corpus, then pay 4 %) Creates a much more even stream of income to the beneficiary.

- **Discretionary Trust**

- Gives trustee complete discretion over what to pay to the beneficiary.
- Support Trust (a type of discretionary trust)
  - A support trust is a discretionary trust that requires the trustee to provide to the beneficiary **as much income** as is needed for, and **no more than** is needed for, his or her support.

- The phrase “for the comfortable support of the beneficiary” does not create a support trust. Need to give just enough and not more.
- Beneficiary is entitled to sue trustee if not getting what they need for support, as well as creditors who provide support to the beneficiary.

- Common to be mandatory as to income and discretionary as to principle.
- **Marsman v. Nasca**: wealthy wife established support trust for husband to have income after her death, but trustee failed to inquire whether beneficiary needed additional funds to maintain his lifestyle
  - Even in a discretionary trust, the trustee is still held the same fiduciary standard as in a mandatory. Having discretion does not invalidate the duty of loyalty and of care.
  - Why might trustee be inclined to favor remainder beneficiaries over income beneficiaries (which is what happened here)?
    - If they error on the side of caution, there's less likely to be liability. If they get sued by income beneficiary, then they can always pay out. But if they give too much to income beneficiary and principal beneficiaries are pissed, then there's personal liability for the trustee.

- **Creditors Rights**

- ***General principle: Creditors of the beneficiary stand in the shoes of the beneficiary.***
  - **Mandatory Trusts and Unitrust**
    - A creditor of the beneficiary can reach the income of a trust if the trust is a mandatory trust or a unitrust because
      - the trustee has no discretion in paying out the income,
      - the beneficiary will receive the income, and
      - a creditor of the beneficiary stands in the shoes of the beneficiary.
  - **Discretionary Trusts.**
    - A creditor of the beneficiary cannot reach the income of a trust if the trust is a discretionary trust because
      - the beneficiary cannot force the trustee to pay out the income and
      - a creditor of the beneficiary stands in the shoes of the beneficiary.
    - **California** - A creditor of a beneficiary may be able to place a lien on the trust
  - **Support trusts**
    - Because support trust is supposed to pay as much as is necessary for the support and maintenance, it means that if the beneficiary doesn't have enough money for their support and maintenance, they can sue the trustee.
    - As a result, a creditor of a beneficiary of a support trust who provides necessities (landlord, etc.) then you probably could sue the trustee and force them to pay some or all the amount.
- **Spendthrift Provisions**
  - A spendthrift provision prevents a creditor of the beneficiary from reaching a mandatory trust.
    - Essentially limits the trust from being assigned or paying out to creditors
    - *Note: still cannot go after discretionary trusts.*
  - **A spendthrift provision is valid if the provision disables both voluntarily and involuntary alienation.**
    - Voluntary alienation means that a beneficiary cannot transfer his or her interest nor use his or her interest as collateral or security for a loan.
    - Involuntary alienation means that the creditors of a beneficiary cannot reach the trust.
  - **Note:** As a traditional rule, You cannot create a self-settled spendthrift provision (settlor makes him or herself the beneficiary then protects his assets using spendthrift provisions to protect themselves against liability to creditors etc.)

- Now a small minority of states allow it. But for it to work, it also has to be irrevocable, meaning you cannot reach the assets yourself and you may be limited in the extent you can force the trustee to pay them out to you.

- **Exceptions To Spendthrift Provision:**

- Creditor is beneficiary's child and has claim for child support
- Creditor is beneficiary's ex-spouse and has claim for alimony
- Creditor if provider of necessities (food and shelter)
- Creditor is state or government actor and has claim for taxes
- CA: creditor is tort victim of beneficiary and tort satisfies elements of a felony
  - Conviction of felony not required
  - Must prove elements in civil case (preponderance of evidence)

- **Trusts for the "State-Supported"**

- If someone is in a state-supported nursing home/mental facility, the government expects you to reimburse them with your assets before it will begin paying for care.
- The Government can reach trust assets as follows:

Mandatory trust	Yes, because the state is like a normal <u>creditor</u> .
Support trust	Yes, if the state is providing necessities.
○ Mandatory trust w/ Spendthrift provision	Yes, because the state is providing necessities.
Discretionary trust	No, because the beneficiary wouldn't have the right to those assets.

- **Supplemental Needs trust:**

- Basic idea - An ordinary trust that pays income to beneficiary as long as they are healthy/competent, but there is a clause that turns it into a supplemental needs trust if they are institutionalized etc.
- Supplemental trusts allow trustees to pay out for supplemental needs that are not being covered by the state (special medicine, have an attendant go with them on vacation, etc.)
  - Because it's discretionary, the state cannot reach the assets.

- **Modifying Trusts**

- **Before Settlor's Death.**

- A trust can be modified if, before the settlor dies, all of the beneficiaries and the settlor consent to the modification

- **After Settlor's Death (In re Stuchell)**

A trust can be modified if, after the settlor dies,

- All of the beneficiaries consent to the modification,
- There is an unforeseen change in circumstance,
  - Compliance with original terms of trust would defeat or substantially impair purpose of trust
- Because of that unforeseen change in circumstance, the trust can no longer carry out the settlor's intention.

- **In re Trust of Stuchell (2nd Restatement)**

- Trust had a life beneficiary (the mom) and when she died the corpus was to be distributed to children. Problem: one of the children was retarded. The moment he would get the money it would go right to the state. HELD: Petition denied. The only purpose is to make the trust more advantageous to the beneficiaries. You can only modify the trust if compliance would defeat or substantially impair the purpose of the trust, and this is not to the level of

defeating of substantially impairing the purpose.

- Changes in Tax Law
  - Some courts have decided they have the authority to modify a trust to take advantages of changes in the tax law.
  - Another area where courts have begun to allow modification
- Trust Protectors
  - Someone is appointed to be a trust protector. Usually a close family member or friend.
  - A trust company / bank will be appointed trustee, and the protector keeps an eye on the trustee.
    - ◆ Has ability to modify the terms of the trust or to terminate it completely.
    - ◆ Has power to remove trustee and appoint another one (otherwise beneficiaries would have to petition the court, and in that case there are very limited circumstances where it will be approved.)

- Terminating Trusts

- Before Settlor's Death.
  - A trust can be terminated if, before the settlor dies, all of the beneficiaries and the settlor consent to the termination (Same standard as modification)
- After Settlor's Death
  - A trust can be terminated, before the trust would normally come to an end, if, after the settlor dies,
    - All of the beneficiaries have to consent to the termination, and
    - There is no material purpose of the settlor that is remaining
      - ◆ All material provisions of the trust must have been carried out. If that applies, the court may likely terminate it.
      - ◆ ***Estate of Brown***: Court did not allow early termination of the trust, even though all beneficiaries agreed, because court determined the settlor intended another purpose - the assurance of a lifelong income for the Browns through the management and discretion of the trustee. The intention of the settlor to ensure lifelong income would be defeated if termination of the trust were allowed.
  - NOTE: Support, spendthrift, and discretionary trusts ALWAYS have a material provision remaining

- Fiduciary Duties

- A trustee has fiduciary duties to the beneficiaries of a trust, and, if the trustee breaches any of those duties, the beneficiaries can sue for damages caused by the breach.
- Come into force once you're a trustee (once you've accepted the position)
- Duties exist regardless of whether you get paid or do it for free

- Overview

- a. **Duty of loyalty**

- No self-dealing
- No conflicts of interest

- b. **Duty of care - A variety of negligence**

- Duty to administer the trust (carry out the terms & conditions of the trust instrument)
- Duty not to delegate
- Duty to keep and render accounts (Must keep an accounting)
- Duty to furnish information (Respond to requests from beneficiaries to see the trust, investigate an accounting, etc.)
- Duty to use reasonable care and skill in managing the investments of the trust (**prudent**)

***investor rule)***

- Duty to take and keep control of the trust property
- Duty to preserve the trust property (duty to protect the trust property - take good care of it)
- Duty to enforce any claims by the trust against 3rd parties - reasonable discretion must be used in determining when to file
- Duty to defend the trust against any claims brought against it
- Duty to keep the trust property separate from your own property and other people's property
  - Must earmark the property as belonging to the trust
  - Must not commingle with other property
- Duty with respect to bank deposits (must be in a safe bank - make sure there is deposit insurance)
- Duty to make the trust property productive. (Duty to pay income to the beneficiaries)
- Duty to use reasonable care in preventing a breach by a co-trustee
  - Refuse to vote, resign, petition court, etc. (Levine in Rothko)

• **Duty of Loyalty**

○ **Self Dealing**

- Usually involves the trustee buying property from the trust, or selling her own property to the trust.
- **No further inquiry rule:**
  - If there was self dealing, fairness and good faith of the trustee does not matter.
  - EXCEPTIONS:
    - ◆ If settlor authorized the transaction, and the transaction was fair and reasonable.
    - ◆ If trustee fully discloses to all beneficiaries and they consent, and the transaction is fair and reasonable.

○ **Conflicts of Interest**

- Trustee's duties towards trust cannot come into conflict with any other duty (usually trustee's personal interest)
  - Not *per se* breach – inquire further whether transaction fair and reasonable to beneficiaries and whether in good faith
- Note: Trustee cannot open a competing business to the trust after he is trustee.
  - ◆ If he's already competing it's basically a waiver
- **Damages:**
  - ◆ Have to give assets back if you received; if you sold you have to undo the transaction
  - ◆ Beneficiaries may also be entitled to receive appreciation damages (Rothcoe)
    - ◇ If trustee sells assets for too little money, but had the right to sell
      - ▶ Diff between what trust received for assets and the FMV at the time they were sold.
    - ◇ If trustee did not have the right to sell the assets, then they get appreciation damages
      - ▶ Diff between what trustee received and FMV of the assets at the time of decree of the case.

## Duty of Care - (Aka Duty of Prudence)

- **Duty to Use Reasonable Care and Skill in Managing Trust Investments**
  - **Uniform Prudent Investor Act** (modern approach to the prudent investor rule):
    - Trustee shall invest as a prudent investor would by considering the purposes, terms, distribution requirements, and other purposes of the trust.
      - ◆ **Special Skills:** trustee with a special skill or experience is held to higher standard of care and must use those special skills / experience (trustee is financial investor, or trust company, etc.)
    - Trustees encouraged to invest in assets that may involve certain amount of risk where it makes sense for the purposes of the trust and its objectives, especially since these investments tend to generate higher return
      - ◆ It is not a breach simply because an asset loses money
  - **Factors trustee must consider**
    - ◆ Specific needs of various beneficiaries
    - ◆ Intent of testator with respect to amount of risk and needs of beneficiaries
    - ◆ Whether intent of settlor was to provide more for income beneficiaries or principal beneficiaries
      - ◇ May need to take a certain amount of risk if you need income, but if it's main purpose is to take care of remainder beneficiaries then less risk.
    - ◆ Balancing need for risk vs. stability
    - ◆ General economic conditions
    - ◆ Possible effects of inflation or deflation
    - ◆ Tax consequences
  - **Portfolio Theory**
    - ◆ Courts used to look at every asset individually. Now they look at each investment in light of the overall strategy of the portfolio as a whole. (like 10% into a hedge fund to be aggressive because they need funds now, but the rest in safer investments.)
      - ◇ A single bad investment can still lead to breach. Need to look at that investment in light of the overall portfolio strategy.
  - **Diversification**
    - Diversification is very important to protect the assets and ensure there's enough income for the beneficiaries.
      - ◆ e.g.: **Estate of Jane** - Trust consisted of 50% Kodak stock. Stock price was dropping and dividends were only 1%. Not a prudent investment because it was not diversified.
      - ◆ **Social Investing:**
        - ◇ NO. A trustee's duties are to generate income and increase the corpus. If they're thinking of some social goal, it's almost like a conflict of interest.
    - A settlor can give a trustee the power to retain all trust assets. But that retention power is not a waiver of diversification and trustee can still be held liable for breach.
      - ◆ Settlor would need to explicitly state the trustee must keep the assets of the trust. See next point.
    - **Situations where you do NOT need to diversify**
      - ◆ Trustee reasonably determines because of special circumstances that the purposes of the trust would be better served by not diversifying. Special circumstances:

1. Express Language forbidding the sale of the assets. In the event that it is really hurting the trust, the trustee would need to petition the court for instructions on what to do.
  2. Asset is something like a family home, farm, or business (something of special value to beneficiaries)
- **Duty not to Delegate**
    - i. Traditional Rule.
      - A trustee cannot delegate a discretionary obligation to another individual.
        - ◆ Called "discretionary duties" because they required the trustee's discretion. What to do with the corpus, etc.
      - A trustee can delegate ministerial obligations
        - ◆ Accounting, administrative, etc.
      - A trustee must supervise any delegated obligations.
    - Modern Rule
      - A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances.
      - Trustee must exercise reasonable care, skill, and caution in...
        - ◆ Selecting an agent
        - ◆ Establishing scope of delegation
        - ◆ Monitoring agent's action to ensure reasonableness
      - The agent can be held liable, because he now has a fiduciary duty to the trust.
      - However, how to distribute income or principal still remains with the trustee, because he would be in the best situation to know what was needed.
- **Duty of impartiality**
  - Trustee cannot favor one class of beneficiaries over another class of beneficiaries (Income beneficiaries and remainder beneficiaries)
    - Exception: When trust instrument dictates preference for one or the other. But most trusts do not specify this.
      - ◆ LOOK to the trust instrument to try and discern intent. (e.g.: Wife's income preferred over children's remainder)
  - Over productive trusts
    - A trust that favors income beneficiaries over remaindermen (income is good, but principal is stagnant or decreasing)
    - Options:
      - ◆ Sell the asset and invest in another asset which doesn't have this problem
      - ◆ UPIA: Reallocation - Take some income and give to principal. Trust may not allow this, but you can petition the court.
        - ◇ If trustee is also a remainderman, they cannot reallocate. They can still create a unitrust.
      - ◆ UPIA: Gives trustee has the power to convert a trust into a unitrust
  - Under productive trusts
    - A trust that favors remaindermen over income beneficiaries
    - Can be difficult to reallocate, so only option may be to sell.
    - Investment in Gold / Raw land
      - ◆ Generally not allowed
      - ◆ Exception: if it's a small part of a portfolio which is well balanced.
  - Income or principal?
    - Bank interest / Government Bonds - Income
    - Stock dividends from same company - Principal



- Stock dividends from different company - Income
  - Shares of stock that issue stock as a dividend - Principal
  - Royalties & minerals (gas, gold) - because value of property drops or as the copyright moves towards expiring
    - ◆ 10% to income, 90% to principal
    - ◆ Can reallocate if unfair, or there is evidence settlor would have wanted a different allocation.
- **Duty to Collect and Protect Trust Property**
  - Trustee has duty to find out where all the assets are and gain control of them.
    - Obtain insurance
    - Earmark the trust property (identify trust property as belonging to the trust)
      - ◆ e.g.: Car title says it belongs to "J Ho as Trustee" or "Scarlet Trust"
      - ◆ Trustee is liable for losses that have failure to earmark as the proximate cause for the loss
    - No commingling of trust assets with personal assets
      - ◆ As above, need to show that commingling was the cause of the loss for trustee to be liable.
- **Duty to Inform**
  - Beneficiary needs to know these things to be able to enforce their rights. Accordingly, there is a duty on behalf of the trustees to inform the beneficiaries.

**UPC 813**

- ◇ A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.
- ◇ Shall provide trustee's name, address, etc.
- ◇ Shall furnish to the beneficiary a copy of the trust instrument
- ◇ Shall inform of any change in the trustee's compensation

- **Duty to Provide an Accounting**
  - Closely related to Duty to Inform.
  - Trustee supposed to provide an accounting to the beneficiaries to show what the income and expenses were, and how the income was distributed
    - When you make an accounting, you have to account to the beneficiaries on a periodic basis. It is up to the beneficiaries to object.
  - **Bars to Recovery**
    - **Testamentary trusts:** have fairly strict court supervision. Once you submit the accounting to the judge, if no one objects at the time of the hearing, it becomes final. It's like a statute of limitations and the beneficiaries cannot bring any additional claims.
      - ◆ Beneficiaries need to review the accounting before the court date, or else it will be allowed.
      - ◆ **EXCEPTION:** You can get around the finality of the accounting if you can show the trustee engaged in fraud or concealment.
        - ◇ If the accounting is fraudulent and doesn't put you on notice so you can object to it, maybe the accounting shouldn't be final.
    - **Living Trusts:** if no one objects after 3 years, then it becomes final.

- **Charitable Trusts**

- Charitable trusts differ from private trusts in three major ways

- 1. **Not limited by the rule against perpetuities**

- Thus, can go on for a very long time.
    - Side note: Possible to create a valid charitable trust which the IRS does not accept as charity for purposes of tax deductions. Similar principles, but not exactly the same.

- 2. **Does not require ascertainable beneficiaries, because it is not for the benefit of specific people, but the benefit of the community at large.**

- Must benefit the community, or a subset of the community.
    - Cannot be used for an individual, unless that individual is being trained, etc. for the benefit of the community at large (sending a local student to medical school to become a local doctor)

- 3. **Charitable trust must have a valid charitable purpose:**

- i. Relief of poverty
    - ii. Advancement of education
    - iii. Promoting religion
    - iv. Promoting health
    - v. Governmental or other municipal purposes
    - vi. Other purposes which are beneficial to the community.

- Charitable Purpose does Not mean a Benevolent Purpose.

- ◆ A benevolent trust is not a charitable trust; giving money directly to local schoolchildren, although benevolent, does not constitute an advancement of education. (Sherandoah Valley v. Taylor)

- ◇ Alternatives:

- Give it to the parents, distribute it right before school starts, give it to the teachers for class supplies
          - Set it up as a private trust to terminate in 21 years, so as not to violate RAP

- Hypos:

- ◆ What if parents set up a trust for you to go to law school? Two problems:
        - ◇ There's an ascertainable beneficiary
        - ◇ Doesn't benefit the community as a whole.
      - ◆ What if a town is in a remote location who needs doctors and sets up a trust for a specific person to go to medical school and return to work in the town for 10 years.
        - ◇ Cases have held that though it benefits a particular person, the purpose is to benefit the community as a whole.
      - ◆ Trust to promote legality of marijuana?
        - ◇ Governmental purpose
      - ◆ Trust to promote socialism?
        - ◇ Governmental purpose
      - ◆ Trust to a particular religious community
        - ◇ Promotes religion
      - ◆ Trust for dog shelters?
        - ◇ Benefits the community not to have a lot of stray dogs around, not to benefit the dogs themselves.

○ **Doctrine of Cy Pres**

- Way for a court to modify the purpose of a charitable trust

i. **Doctrine limited to valid charitable trusts**

- e.g.: Shenandoah Case - Could Cy Pres be applied here?
  - The trust was not charitable in the first place. The doctrine only applies to valid charitable trusts, not trusts which could not qualify as charitable trusts.

ii. **Must become impossible, impracticable, or illegal to carry out the purpose of the trust**

- Impracticable: Analogous to "frustration of purpose" in Ks
  - Buckman case (Marin County): Just because there is more efficient way of administering the trust does not make it impracticable
  - Neher case: Gift conditioned for a charitable hospital in Red Hook, but Red Hook didn't need it because there was one in the city next door.
- Illegal:
  - Sometimes courts will use Cy Pres to fight against discriminatory trusts by striking out discriminatory provision (Only where state action)

iii. **Settlor must have had a more general charitable intent**

- If the above requirements are met, the court can change the charitable purpose to a different charitable purpose, as long as it fits within the settlor's more general charitable intent.
- If the requirements are not met, the trust will end and revert back to the estate, family, etc.
- **A gift over generally defeats cy pres.**
  - ◆ e.g.: "In the event the trusts fails, it is to be distributed to x,y, and z."
  - ◆ This is because the trust instrument itself provides what happens when its invalid or no longer possible to carry out the terms of the trust.
- General principle: if trust cannot spend the income in a way the trust document provides, generally courts will apply cy pres.
  - e.g.: Charitable trust to provide loans for college tuition up to \$500, and had to be repaid in 5 years. But now 500 isn't worth much, and people aren't applying for the funds.
  - Court in this case applied cy pres: increased the loan amount because it was impracticable.
- Cy Pres in Discriminatory Trusts
  - e.g.: Trust to give a scholarship to the best male chemistry student in a public high school.
    - ◆ Not impossible or impracticable. But is it illegal?
      - ◇ This is private discrimination. But there still might be state action, depending on how involved the school is in carrying out the trust.
      - ◇ Many courts have decided there would be state action -> unconstitutional -> illegal, and they apply cy pres
    - ◆ Application of cy pres - strike "male" and give it to the best student in chemistry.
  - **Alternative approach: Administrative deviations**
    - ◆ Like cy pres. Power of the court to make changes to trusts in how it is administered. Applies to both private and charitable trusts.
      - ◇ Using example above, court will just make an administrative deviation and change the administrative procedures of the trust so that kids can apply directly to the trust without going to the school. Then the trust can be

carried out for its original purpose (males only)

- ◆ Most court would apply cy pres, but this is a different option when administrative procedures are at issue (such as state action).

- e.g.: Evans case

- Private park in Georgia; someone left land for a private park for whites only. SCOTUS says unconstitutional. Georgia courts then have to decide whether to apply cy pres or make an administrative deviations.
- The settlor was a huge segregationist and didn't have a more general charitable purpose, and so court didn't apply cy pres. Ended the trust. Its rare, but sometimes courts will do it.
- Administrative deviation wouldn't apply here, because it didn't have to do with the administrative procedures of the trust.

- **Supervision of Charitable Trusts**

Only people who have the power to enforce the terms is:

- the state attorney general,
- the settlor/donor if the reserve the right in the trust instrument,
- if you have a reversionary interest,
- if you have a special interest in the enforcement of the charitable trust,
- THE SETTLOR/DONOR (under the modern rule)
- Additional side note: If IRS believes the trust is not acting as a valid charitable trust, it can revoke their charitable status, thus indirectly enforcing the terms of the trust.

- Charitable trusts do not have ascertainable beneficiaries, so the "enforcement of rights" issue is different here. (No beneficiaries to sue the trustee)

- Settlor/Donor

- *Traditional Rule*

- The donor of the charitable gift does **NOT** have standing to enforce the provisions of the trust, unless they reserve the right to sue the trustee later.

- *Modern Rule*

- Donor or settlor of a charitable trust or gift **DOES** have standing to enforce the terms of the gift/trust.
  - ◆ Gradually moving towards becoming the majority rule. FOLLOW THIS RULE ON EXAM

- Someone with a "Special Interest" as a Beneficiary

- In order to fall under this provision, you have to be entitled to benefits beyond those that a member of the general public would have a right to obtain.
  - e.g.: Someone who is a parishioner at the church that has a trust to support the church.
  - e.g.: Where there is a charity set up to provide housing for a particular group of people, and you're actually living there (receiving benefits from that trust)