

# Trusts & Wills - OUTLINE

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3:20 PM

- I. Intro
  - a. Terminology
    - i. **Testate** - die w/ will in place; designate **beneficiaries**
      - 1) **Executor** - handles distribution of will
    - ii. **Intestate** - die w/out will; estate distributed via probate code to **heirs at law**
      - 1) **Administrator/trix** - handles distribution of estate
  - b. Non-probate transfers
    - i. **Joint tenancy** - supersedes a will, property passes to other joint tenant
    - ii. **Beneficiary designations** - life insurance, bank account, retirement plan, supersedes will
    - iii. **Intervivos trust** - created during lifetime
  - c. Policy
    - i. **Hodel v Irving** - right to distribute property at death regardless of worth
    - ii. **Shapira v Union National Bank** - requirement that beneficiary marry Jewish girl w/in 7 years upheld, does not violate right to marry, no right to receive property
- II. Intestacy - always the "fallback", estate liquidated into shares and split among heirs at law
  - a. Basic Scheme
    - i. Surviving Spouse/registered domestic partner (**6401**)
      - 1) **Community property (6401(a))** - property acquired while domiciled in CA during valid marriage, owed 50/50 by spouses, passes to surviving spouse automatically
      - 2) **Separate Property (6401(b))** - property acquired before or after marriage, or through gift, bequest, devise, or dissent, passes to surviving spouse if no issue
        - a) Issue (child, issue of deceased child) - separate property 1/2 to issue, 1/2 to surviving spouse
        - b) Parents (no issue) - 1/2 to parents (split equally if 2), 1/2 to surviving spouse
        - c) Brothers/Sisters (no issue, no parents) - 1/2 to siblings, 1/2 to surviving spouse
        - d) 2 or more issue - 1/3 to surviving spouse, 2/3 to issue
      - 3) **Quasi-Community Property** - personal and real property acquired during marriage while domiciled outside of CA that would have been characterized as community property if domiciled in CA at the time of acquisition
        - a) Same-sex couple note - may not apply b/c other states don't have registered domestic partnerships
    - ii. No spouse (**6402**)
      - 1) Hierarchy:
        - a) Issues - split equally amount issues if all the same degree
        - b) Parents - if no issue, estate goes to parents equally
        - c) Siblings - if no issue or parents, split equally among siblings
        - d) Grandparents, aunts & uncles, 1st cousins (once, twice, thrice removed) - split equally
        - e) Step-child - if none above, then to issue of deceased spouse
        - f) "next of kin" - columns 4-5 on "bloodline" chart (great-grandparents - third cousins thrice removed)
        - g) In-laws - parent of deceased spouse if no one else alive
        - h) State of California - if none above alive, estate goes to state (**escheat**)
      - 2) Shares for unequal degrees
        - a) **Per Capita With Representation** - count up number of issue on 1st generational line with someone alive, only count deceased if they have issue, assign each a share, and deceased issue split deceased share equally
        - b) **Classic Approach** - division of shares made at 1st generational line regardless, only count deceased if they have issue

- iii. Children:
    - 1) Half-Bloods - inherit the same way as "whole bloods" from biological parent
    - 2) Posthumous - conceived before death, but born after inherit as if they were born in lifetime of decedent
    - 3) Adopted - general rule: inherit same was as natural born children
      - a) Whether or no adoptive child can inherit from natural parent: Condition 1
        - i) Natural parent & adopted person lived together as parent and child
        - ii) OR natural parent was married or cohabitating w/ other natural parent at time person was conceived and died before person's birth
      - b) Condition 2
        - i) Adoption by either spouse of natural parent or after death of either natural parent
    - 4) Foster/step children
      - a) Foster
        - i) Relationship began during child's minority and continued throughout lifetime AND
        - ii) Established by clear & convincing evidence that person would have adopted child but for legal barrier to adoption
          - **Estate of Joseph** - Evidence up **until death** (not just @ time of adoption), narrowed statute
    - 5) Non-marital - parent/child relationship exists if they are your child, focus on how to prove paternity
      - a) Presumptions of Maternity & Paternity
        - i) Mother - proof established by giving birth
        - ii) Father - several ways:
          - During marriage + 300 days - rebuttable presumption of paternity
          - Attempted marriage (annulled) before child's birth and birth during attempted marriage or 300 days after = rebuttable presumption
          - Attempted marriage after birth + father consented to being named father OR father required to pay child support
          - Father receives child into home and openly represents as his child
          - After death - court order entered during father's lifetime OR clear and convincing evidence that father openly held out child as his
    - 6) Conceived after death (frozen sperm case) - can't inherit
    - 7) Giving money to minors:
      - a) **Guardian of estate** - legally appointed to handle assets for minor, court accounting required
      - b) **Uniform Transfer to Minors Act** - money into custodial account in name of minor, no court accounting required, through will or during lifetime
      - c) **Trust** - most control over funds by trustee
  - iv. Survival Period for Heirs - 120 hours (5 days), must outlive the decedent by 5 days to be considered heir at law, also applies to community property
- b. Advancements - treated as advancement on estate if:
  - i. Decedent declares in contemporaneous writing that gift is advancement OR to be deducted from value of shares in estate
  - ii. OR heir acknowledges in writing it is advancement or value to be deducted from shares of estate
- c. Bars to Succession
  - i. Homicide (**250**) - intentional killing of decedent, not entitled to property interest or benefit under will or trust or through intestate succession, cannot be appointed executor, trustee, guardian, custodian, or conservator
    - 1) Designated as pre-deceased, anti-lapse DOES NOT APPLY
    - 2) Intentional killing - 1st degree murder, general intent to kill, voluntary manslaughter
    - 3) Joint tenancy (**251**) - severed by intentional killing, interest does not pass to killer

- 4) Life Insurance (252) - killer cannot inherit, policy payable as if killer pre-deceased decedent
- 5) Killer (254) - criminal conviction, or civil (preponderance of the evidence standard) can determine
- ii. Disclaimer - have a right to disclaim any gift/intestate succession, 9 month time limit to do so
- d. Simultaneous Death - ALL subject to **clear and convincing** standard
  - i. Joint tenant - if 1 died first, other will take, otherwise property split evenly
  - ii. Will - if testator died first, beneficiary will take, unless will dictates other terms, if indeterminable, then beneficiary deemed to predecease testator
  - iii. Life insurance - if 1 died first, other can collect, otherwise 2ndary beneficiary or estate
  - iv. Intestate - 5 day rule

### III. Wills

- a. **Requirements:** (required for will + codicil)
  - i. **Metal Capacity** - required at time of execution
    - 1) Elements:
      - a) Understand nature of testamentary act?
      - b) Did you know what property you owned?
      - c) Did you know who your general beneficiaries were?
        - Attorney 2-steps - capacity to have attorney draft, capacity to sign once will drafted
        - **State of Wright** - testamentary capacity can't be destroyed by a few incidents unless they go directly to testamentary act
    - 2) Insane Delusion (6100.5) - will fails (all or part) if testator suffering insane delusion as it applies to particular individual
      - a) **Elements:**
        - i) False and unfounded belief
        - ii) No reasonable basis for testator to believe this way based on facts he knows
        - iii) Insane delusion has effect upon will
    - 3) Legal Capacity - must be at least 18 yrs old
  - ii. **Present Testimonial Intent** - did the testator intend for will to take effect immediately, look for words of testamentary meaning (designating gifts, beneficiaries, executors, words of revocation)
    - 1) **Undue Influence** - substitutes another's intent for that of testator, independent witnesses usually necessary to refute
      - a) **Categories used to prove:**
        - i) Motive
        - ii) Unnatural distribution
        - iii) Opportunity & access
        - iv) Susceptibility - physical & mental
        - v) Confidential relationship
        - vi) Active participation
    - 2) **Fraud**
      - a) **Execution** - preparation of will by another individual (either whole or partial)
      - b) **Inducement** - 3rd party makes false statement relied on by testator
      - c) **Prevention** - testator prevented from drafting or changing a will
    - 3) **Mistake**
      - a) **Mistaken execution** - signed wrong document, will fails
      - b) **Mistaken inducement** - testator relies on wrong fact, court will not rewrite unless the mistake and what testator would have done but for mistake are both on face of will
      - c) **Mistaken description** (terms or property)
        - i) Plain Meaning Rule (majority) - where words of will are clear on their face,

extrinsic evidence NOT allowed to prove different meaning

- ii) Estate of Russell (CA Rule) - extrinsic evidence IS admissible to show different meaning

4) **Duress**

- **Conditional gifts** - if condition is satisfied, then testator had testamentary intent, can take out condition if not satisfied, will still valid

iii. **Formalities**

1) Types of wills:

a) **Attested Wills (6110)**

- i) In writing (no oral wills)
- ii) Signed by testator OR by someone else in testator's presence by testator's direction
  - Signature? Whatever testator intends to be signature counts except electronic signature
- iii) Witness - 2 required (notary doesn't count)
  - Must witness testator signing, or acknowledgement of signature by testator + know they are witnessing a will
    - ▶ **Joint Presence** - for both witnesses
      - Conscious Presence Test (majority + CA) - witnesses so near at hand that they are within the range of testator's senses, physical presence required
      - Line of Vision Test (minority) - must be within the line of each other's sight during signing or acknowledging
    - Signatures - must be during testator's lifetime, no requirement witnesses need to sign in front of testator or each other
    - Financially interested witnesses (**6112**) - anyone competent to be witness can, rebuttable presumption of fraud, menace, or undue influence of interested witness
      - ▶ Common law rule - interested witness invalidated will
      - ▶ "**PURGING statute**" - If presumption not rebutted, interested witness gets what they would have gotten had they not been witness if it is LESS (gift amount in 1st will, or intestate succession amount)
- iv) **Harmless Error Rule** (enacted 2009)
  - Will does not fail for lack of witnesses, or failing conscious presence test if there is *clear and convincing evidence* testator intended for document to be will
  - Only applies to WILLS, not codicils or words of revocation

b) **Holographic Wills (6111)**

- i) Requirements:
  1. Material provisions - testamentary intent language (gifts, beneficiaries, etc)
  2. Signature
  3. Handwriting of testator
    - Can be handwriting of testator or part of commercially printed form (fill-in-the-blanks)
- ii) Later in time controls (**6111(b)**) - no date required
  1. Consistent provisions - no problem, both docs read together
  2. Inconsistent provisions - extrinsic evidence required to determine later in time, if indeterminable, gifts cancel out, go into residue
- iii) Capacity Challenges (**6111(b)(2)**) - can challenge capacity if no date, proponent has BoP to establish testator had capacity on date will executed

2) Types of gifts:

- a) **Specific** - particular item of property distinct from all others in household
  - b) **General** - general economic benefit payable out of assets of estate
  - c) **Residual** - balance of assets on hand after satisfying general and specific gifts
    - i) If no residual clause in will, whatever is left over goes intestate
- b. Revocation of Wills
- i. Types:
    - 1) **Subsequent written instrument (6120)**
      - a) **Express** - words themselves accomplish revocation, present intent required
        - i) Partial - "I revoke paragraph 2 of my will dated X"
        - ii) Total - "I revoke my will dated X"
      - b) **Implied** - terms of later will are inconsistent with earlier will, 2nd instrument treated as codicil and only revokes inconsistent provisions from earlier will
        - i) Partial - "I give gift A to person Y" (earlier will gave to person X)
        - ii) Total - "I give the entirety of my estate to R" (earlier will divided estate)
      - Subsequent instrument must comply w/ formalities (6110 or 6111), Harmless Error Rule inapplicable (can argue if NEW WILL created by total revocation)
    - 2) **Writing or Physical Act** - act of revocation + intent to revoke required (either testator or 3rd party in testator's presence and at their direction)
      - a) Ways to revoke:
        - i) Burning - any scorching w/ intent to revoke is enough
        - ii) Tearing - must hit words on document
        - iii) Obliteration - mass markings on entire document, must touch words
        - iv) Cancellation - partial or total using inking, must touch words
          - 1. Line through gift & attempt to change - Analysis:
            - Valid revocation? Yes if done w/ intent to revoke
            - Valid knew gift?
              - Attested Wills:
                - ♦ **Estate of Phifer** - take writing off face of will and look for testamentary intent on its own
              - Holographic Wills - becomes holographic codicil on top of holographic will, change is valid
      - v) Signature - taking out signature considered total revocation
        - Applies to "duplicate originals" but not copies
    - b) Complete
      - i) Copy
      - ii) Codicil - doesn't exist w/out will, revoking codicil doesn't change will, revoking will DOES revoke codicil
      - iii) Lost Will - creates rebuttable presumption of revocation if last known in testator's presence and lost at time of death
    - c) Partial
- 3) **Revocation by Operation of Law**
  - a) Omitted Spouse
    - i) Forgotten - see below
    - ii) Divorce (6122) - deems divorced spouse predeceased, takes them out of will if will predated divorce or annulment, unless expressly deemed otherwise, applies to domestic partnerships as well, but not separation
      - 1. Joint tenancy - severed if divorced at time of death
      - 2. Beneficiary designation - ex-spouse barred, except life-insurance
  - b) Omitted Child - see below
- ii. Dependent Relative Revocation & Revival
  - 1) **DRR** - revocation upon mistaken belief that another disposition is valid
    - a) **External DRR** (revoked will #1 thinking will #2 was valid): Look to probable intent of testator, weigh options (cancelling revocation, or intestate succession) and figure out what testator wanted, compare beneficiaries under all scenarios

- b) **Internal DRR** (crossed off gift): option to either let revocation stand (gift canceled), or cancel revocation, look to intent of testator (applies to attested wills only)
  - 2) **Revival (6123)** - proper revocation, but allows later actions of testator to bring 1st will "back"; 2 scenarios:
    - a) 2 wills - 1st will revoked by 2nd, 2nd destroyed by physical act
      - i) Look to probable intent of testator, did they intend to bring back will #1?
        - 1. Extrinsic evidence allowed
    - b) 3 wills - 1st will revoked by 2nd, 2nd revoked by 3rd
      - i) Look to probable intent of testator if they intended to bring back #1, both #1 & #3 would be in effect, later in time controls
        - 1. Extrinsic evidence NOT allowed
- c. Components of Wills - other docs that can be brought in to interpret will
  - i. **Integration**
    - 1) Internal - look @ will and determine what pages make it up, are they all valid? Protects against tampering
    - 2) External - all other docs + will brought together, interpret all to determine distribution
  - ii. **Republication by Codicil** - republishes will to the last date of codicil (can cure omitted spouse problems)
  - iii. **Incorporation by Reference** - outside writing w/out testamentary formalities can be incorporated into will
    - 1) BEFORE EXECUTION - Requirements (6130):
      - a) Document referenced in will must be in *existence* at time will was executed
      - b) Doc must be *sufficiently described* so identification is clear
      - c) *Intent* by testator to incorporate document
    - 2) AFTER EXECUTION - Requirements (6132):
      - a) Unrevoked will refers to writing
      - b) Writing to be incorporated must be ***dated*** and is in ***handwriting*** of testator
      - c) Writing describes BOTH ***items*** and ***recipients*** of property with reasonable certainty
      - d) Can only refer to ***tangible personal property*** (furniture, jewelry, precious metals, NOT real estate or monetary features)
  - iv. **Acts of Independent Significance (6131)** - acts and events during testator's lifetime that have a primarily non-testamentary purpose (ex: "I leave \$X to everyone employed at my store at my death")
  - v. **Contracts relating to wills** - to make, devise, or not to revoke a will
    - 1) Established by any:
      - a) Provisions of will state material provisions of K
      - b) Express reference to K in will + extrinsic evidence proving terms of K
      - c) Writing signed by decedent evidencing K
      - d) Clear & convincing evidence of K or promise by decedent that is enforceable in equity
      - e) Clear & convincing evidence between decedent & another person for benefit of claimant (3rd party K)
    - 2) Joint or mutual wills DO NOT create presumption that there was agreement not to revoke
- d. Changes w/in Will
  - i. **Lapse/Anti-Lapse**
    - 1) **Lapse** (fallback)- when beneficiary predeceases testator, gift fails unless alternate beneficiary named (common law)
      - a) Failed specific & general gifts - go to RESIDUE
      - b) Failed residual gift - goes to other residual beneficiaries or intestate
    - 2) **Anti-Lapse**
      - a) Was the beneficiary kindred of testator or of testator's current, former, or

- deceased spouse?
  - b) Does the beneficiary have issue?
    - i) If yes, issue of beneficiary is substituted, split equally if more than 1
    - ii) If no, go to common-law lapse rules
  - c) Blocking:
    - i) Substitute disposition - alternate taker
    - ii) Contrary intent - survival clause on a gift
- ii. **Class Gifts** - group of beneficiaries not designated by name ("to X's grandchildren)
  - 1) Class opens at time of execution of will and closes at death of testator
  - 2) Pre-deceased class members - apply anti-lapse rule, if they don't apply shares split among remaining class members (class gifts prevent common law lapse)
- iii. **Ademption by Extinction** - failure of specific gift b/c property not in estate at death
  - 1) Majority - "identity theory" - if specific gift not in estate at time of death, beneficiary entitled to nothing
  - 2) Minority (CA) - "intent view" - beneficiary gets some value in place of missing specific gift, otherwise go to majority rule if this cannot be accomplished
    - a) Balance of purchase price owed on promissory note to deceased (for sale of home)
    - b) Eminent domain award unpaid balance
    - c) Insurance in place of missing item - unpaid proceeds only
  - 3) *Tracing arg* - failure of form, not substance, for interchangeable goods (account switched to different bank, etc)
- iv. **Ademption by satisfaction** - property given to beneficiary during lifetime treated as at-death satisfaction of that gift if it's in writing, or you're getting what you were going to get under will
- v. **Securities Stock** - beneficiary may get additional shares of stock then what was named in will
  - 1) Stock split - company gives additional shares based on initial purchase of stock
  - 2) Merger or consolidation
  - 3) Company gives dividend
- vi. **Abatement** - paying off creditors, taxes, expenses, & obligations of estate
  - 1) Order of Abatement (**21402**)
    - a) Property not disposed of by the instrument (part of will fails)
    - b) Residuary gifts
    - c) General gifts to persons other than testator's relatives
    - d) General gifts to testator's relatives
    - e) Specific gifts to persons other than testator's relatives
    - f) Specific gifts to testator's relatives
  - 2) Abatement w/in Classes (**21403**) - beneficiaries abate pro rata w/in each class
  - 3) Order of creditors:
    - a) IRS - income tax + federal estate tax
    - b) State of CA
    - c) Costs of Administration (attorney, court, executor, appraisers)
    - d) Funeral Costs
    - e) Medical Bills w/ respect to last illness
    - f) Unsecured debts (credit cards)
  - 4) Exoneration - right to have lien on specific gift paid off by estate
    - a) **21131** - no right unless testator specifies, then use residual, general, then specific
- e. Protection of Spouse & Children - proportion taken from everyone's share
  - i. Omitted Spouses - if decedent fails to provide for spouse, married after execution of testamentary instruments
    - 1) Omitted spouse will receive:
      - a) 1/2 of community property belonging to decedent
      - b) 1/2 of quasi-community property

- c) Share of separate property that they would have received if decedent died intestate, no more than 1/2
    - 2) How to avoid:
      - a) Omission was intentional and appears on face of document (tough - doc written before marriage)
      - b) Decedent provided for spouse by transfer outside of estate + meant in lieu of transfer by will
      - c) Spouse made valid agreement waiving right to share in decedent's estate
    - ii. Omitted Child - failed to provide for child after execution of testamentary instruments, child receives share equal to what they would have received intestate
      - 1) How to cure:
        - a) Intentional failure to provide appears on face of testamentary instrument
        - b) Decedent had 1 or more children and entire estate given to other parent (potentially to care for child)
        - c) Decedent provided for child outside of estate
  - f. Will Substitutes - non-probate transfers, anti-lapse does NOT apply, overrides will
    - i. **Contracts w/ payable on death provisions** - life insurance (term, whole)
    - ii. **Joint Tenancies** - bank account, real property, etc; automatically passes to surviving joint tenant
    - iii. **Inter-vivos Trusts** - takes property out of your name and puts it in trust's name
- III. Trusts - fiduciary relationship whereby a trustee holds legal title to property and manages it for the beneficiary
- a. Types
    - i. Express - *inter vivos* & *testamentary*
      - 1) Private - most fall into this category
      - 2) Charitable - must have charitable purpose
    - ii. Trusts that Arise by Operation of Law
      - 1) Resulting Trusts - trust created that fails for various reasons, left with resulting trust
      - 2) Constructive Trusts - equitable remedy to prevent unjust enrichment
      - 3) Purchase Money Trusts - real estate; only applies to real estate, considered a gift if supplier of purchase money & 3rd party are related, rebuttable presumption
    - iii. Other Types:
      - 1) Honorary Trusts - usually for animals, someone on their honor to fulfill, trust as specific purpose, but no ascertainable beneficiary
      - 2) Secret/Semi-Secret Trusts - cross-over question w/in will
  - b. Creation
    - i. Validity Requirements:
      - 1) **Intent to Create** - present intent required, look at language used, timing
        - a) Precatory words - give the court doubt over whether or not you intended to create trust relationship
      - 2) **Identifiable Corpus** - specific property designated
        - a) Current assets required - cannot declare trust over FUTURE assets (profits from 1928 stock ex)
      - 3) **Ascertainable Beneficiaries** - by name or class (can't be too vague - "my friends")
      - 4) **Proper Purpose** - cannot be prohibited by public policy or illegal
      - 5) **Mechanisms of Creation** - must be split of title accomplished
        - a) Oral? Can meet all criteria, but difficult to sustain in "real world" scenario
          - i) Real estate trust - writing required
        - b) Transfer asset to Trustee required - acceptance by trustee is NOT required to complete trust formation
          - i) Delivery can be accomplished by:
            - i) Actual
            - ii) Constructive
            - iii) Symbolic

- c) Testamentary - terms are spelled out w/in will, split of title occurs at death, will must be valid, if will fails, trust fails
  - d) **Revocable Living Trust** - individual is both trustor, trustee, & beneficiary w/ contingent beneficiary upon death (required for proper title split)
    - i) POUR OVER WILL - trust created w/ no assets, will transfers all assets to trust upon death
  - e) **Doctrine of Merger** - title split between trustee X & beneficiary X + Y, Y dies, legal & equitable title merges to X, trust terminated
- c. Constructive trusts
- i. **Oral inter vivos trusts in land** - statute of frauds requires writing, court may use constructive trust remedy to fix, must have "clean hands"
    - 1) **Heeble v Heeble** - mom conveyed land to son & daughter, thought she was dying of cancer, oral agreement to transfer property back, daughter reconveyed property, son didn't, court created constructive trust to remedy
  - ii. **Oral trusts for disposition at death** - partially contained in will, partially in oral agreement
    - 1) **Secret** - bequest to X, with oral agreement to hold in trust for Y, court allowed parol evidence to be admitted to prevent unjust enrichment, constructive trust created
    - 2) **Semi-secret** - bequest to X to use "as discussed"; no parol evidence admitted b/c no danger of unjust enrichment, trust fails for lack of beneficiary
      - a) CA Statute (**6111.5**) - allows extrinsic evidence, semi-secret same result as secret trust in CA
- d. Trustee Power - did trustee follow the "plan" laid out by trustor
- i. Distribution types:
    - 1) Mandatory - ex: "income payable on 1st of each month, principal 1/2 at 25, 1/2 at 30"
      - a) *Forced decision* - instructions require trustee to make payment of income or principal, creditor can attach, beneficiary can assign at this point
    - 2) Discretionary - ex: "income and principal payable as needed"
      - a) More discretion = more power for trustee = harder for creditors to get at trust
    - 3) Combination - ex: "income at end of each quarter, principal as needed, then 1/2 at 30, 1/2 at 40"
  - ii. **Support provisions** - subject to objective and ascertainable standard, tells trustee how to use discretion and for what purpose (health, education support = food clothing, & shelter)
    - 1) Way to protect corpus - creditors cannot collect unless it is part of trust purpose
  - iii. Beneficiary interest - freely assignable & reachable by creditors absent statutory provision or trust provision to the contrary
  - iv. **Spendthrift Provisions** - clause in trust saying no one can get at it, limits ALL creditors (except IRS, state, spouse/child support, & necessities of life) & prevents all assignments
- e. Modification & Termination - trustee cannot modify substantive provisions of trust
- i. **Doctrine of Changed Circumstances** - trustee can petition the court to modify administrative terms of trust to better administer (apt building in bad neighborhood ex)
    - 1) Requirements:
      - a) Compliance w/ terms of trust would defeat or substantially impair the accomplishment of trust purpose AND
      - b) Trustor did not know or anticipate these circumstances
  - ii. Termination
    - 1) 2 ways:
      - a) Trust purpose accomplished
      - b) Trust ends on its own terms
    - 2) Early termination:
      - a) Trust is too uneconomical to continue
      - b) Trust no longer operational (beneficiaries die, no contingency)
  - iii. **Clafin Doctrine** - can beneficiary modify or terminate trust?
    - 1) Requirements:
      - a) All beneficiaries must agree to termination AND

- b) Modification or termination will not interfere with material purpose of trust
        - 2) Waiver possible IF trustor is alive & petitions court w/ beneficiaries
  - f. Charitable Trusts - exempt from RAP
    - i. Requirements:
      - 1) Intent to Create
      - 2) Identifiable Corpus
      - 3) Indefinite beneficiaries (opposite of private trusts) - no one should hold equitable title, trust is to benefit PUBLIC
      - 4) Charitable purpose - broad discretion to determine, generally accepted standard
        - a) Advancement of education
        - b) Relief of poverty
        - c) Promotion of health
        - d) Governmental trusts
        - e) Advancement of religion
      - 5) Mechanisms of Creation (same as private trust)
        - If charitable trust fails, will not work as private trust b/c it violates RAP
          - ◆ Uniform Statutory Rule Against Perpetuities - allows private trusts not to violate RAP at their inception, check if title vests at some point in the future
    - ii. Modification
      - 1) **Cypres** - "as near as possible" - court can alter charitable purpose when purpose is accomplished or impossible to carry out,
        - a) GENERAL CHARITABLE INTENT required on part of trustor
- g. Trust Administration
  - i. Fiduciary Duties - **Uniform Trustee Powers Act (16200 - 16229)**
    - 1) **Duty of Inquiry** - affirmative duty to find out what needs of beneficiary are
    - 2) **Duty of Care to follow trust directions**
    - 3) **Duty of Loyalty** - trustee must be completely unselfish and undivided in loyalties to the beneficiaries of trust
      - a) *Avoid self-dealing* - no person gain from trust except what you are entitled to as trustee, can't keep profits, must pay back losses
        - i) Specific Prohibitions:
          - i) Cannot sell own property to trust or purchase trust assets
          - ii) Cannot loan or borrow money from trust
        - ii) No Further Inquiry Rule - don't look beyond self-dealing, SL standard
        - iii) Permitted self-dealing:
          - i) If provisions of trust allow (rare)
          - ii) Petition court after all beneficiaries informed and agree
      - b) *Avoid conflicts of interest* - no further inquire rule does not apply, can justify conflict situations, must give back profit
    - 4) **Duties Relating to Care of Trust Property** - must got the "extra mile"
      - a) Rules:
        - i) Must record docs that need to be recorded
        - ii) Deposit jewelry and valuables in safe location
        - iii) Deposit cash and commercial instruments in bank that is FDIC insured
        - iv) Securing financial liability and other insurance on property
      - b) *Duty to properly title trust assets* - if you don't, have breach, but no damages
      - c) *Duty not to co-mingle assets* - "shrinkage" - trust assets diminished b/c of co-mingling
    - 5) **Duty not to delegate** - can't delegate if it requires trustee judgment
      - a) Ministerial functions - can be delegated (record keeping, collection of rent, etc)
        - i) Can delegate to money manager for investments
    - 6) **Duty of impartiality** - can't favor one beneficiary over another, or primary from 2ndary
    - 7) **Duty to keep and render accounts** - to beneficiaries yearly (asset value, income,

- expenses), beneficiaries have 3 years to object to accounting
- 8) **Duty to properly invest assets** - judged by Uniform Prudent Investor Act, subject to PRUDENT INVESTOR STANDARD at time of investment (no hindsight bias)
    - a) **Due Diligence** - can invest in any asset as long as it's done w/ due diligence
      - i) Factors to consider:
        - i) What the expected rate of return of income might be, should be *reasonable yield*
        - ii) Appreciation in the asset (stock vs CD)
        - iii) Any resources other than trust available to beneficiary
        - iv) Risk tolerance of beneficiary
      - b) **Diversification** - to spread the risk
      - c) **Total Asset Management** - look at investments of trustee as a whole
    - Surcharge - if trustee liable for any of the above breaches, court will surcharge
  - ii. Grounds for Removal
    - 1) Physical or mental incapacity to perform trustee duties
    - 2) Unfit for position (multiple breaches of duties, convicted of dishonest crime)
    - 3) Existence of serious conflict of interest
    - 4) Insolvency on part of trustee (declared bankruptcy at some point)
    - 5) Extreme hostility and/or friction between trustee and beneficiaries
  - iii. Trustee Liability
    - 1) Liability of successors of trustees - not liable for acts of predecessors
    - 2) Co-trustees liable under the following circumstances:
      - a) Participating in or approving alleged misconduct
      - b) Improperly delegating authority to breaching trustee
      - c) Concealing breach of co-trustee or failing to take action
    - 3) Liability to 3rd parties - 3rd party must seek damages from trust unless trustee at fault (intentional torts only)