ESTATES

INTRODUCTION TO ESTATE PLANNING

The Organizing Principle of American Law of Donative Transfers

Freedom of disposition; donor's intention

- Restatement (Third) of Property § 10.1: Donor's Intention Determines the Meaning of a Donative Document and Is Given Effect to the Maximum Extent Allowed by Law
    - The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.

    - Comment:
        - *a. Rationale*. The organzing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please. . . .
        - *c. Effect of a donative document*. Unless disallowed by law, the donor's intention not only determines the meaning but also the effect of a donative document. . . .

The Right to Inherit and the Right to Convey

Property as wholly usufruct (Jefferson)

- "The earth belongs in usufruct to the living; the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when he himself ceases to be, and reverts to society." *(1)*

Property & wills as creatures of law (Blackstone)

- "Wills, therefore, and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them . . . ." *(2)*

Inheritance as a right, divine in origin (Locke)

- "God Planted in Men a strong desire also of . . . continuing themselves in their Posterity, and this gives Children a Title, to share in the *Property* of their Parents, and a Right to Inherit their Possessions." *(2–3)*

The Policy of Passing Wealth at Death

Arguments for inheritance

- Brittain: Inheritance as socially valuable *(11)*

    - "[I]n a society based on private property, [inheritance] may be the least objectionable arrangement for dealing with property on the owner's death."
    - Expresses and reinforces family ties → "a healthy society and a good life"

- Bentham: Inheritance as incentive to young for care of elderly *(12)*

Arguments against inheritance

- Nozick: Inheritance as "a special kind of unearned benefit that produces unequal opportunities" *(13)*

- De Toqueville: dangers of inherited wealth becoming the basis of "enduring privilege"**—**"great fortunes should not remain in the same hands"

- "[T]he transfer of great fortunes perpetuates wide disparities in the distribution of wealth, concentrates inherited economic power in the hands of a few, and denies equality of opportunity to the poor." *(14)*

- "Children lucky enough to have been raised, acculturated, and educated by wealthy parents need not be allowed the additional good fortune of inheriting their parents' property." *(15)*
    - *Part of a longer article advocating a presumption against inheritance; broad applicability of escheat; and heavy gift taxes*

- "The primal nightmare of the democracy is the emergence of an oligarchy that would, through the power associated with wealth, perpetuate itself, and eventually constitute a kind of aristocracy." *(16)*

- "[N]o large fortune should outlast the lifetime of the man who made it . . . ."
    - *Part of a longer article advocating a strict $1m cap on any bequest or gift; donor would have absolute power to distribute property under this scheme; anything remaining → escheat*

Other forms of inheritance

- Day-to-day expenditures on kids as their "critical" inheritance *(18)*
- "Cultural inheritance" *(19)*
    - love, integrity, family morale . . .
- Investment in childrens' skills and education
    - "education more than property . . . advantages a child"

THE PROBLEM OF THE DEAD HAND

***Shapira v. Union National Bank*, Ohio 1974**

- **Reasonable partial restraints on marriage will be upheld.**

- † conditioned bequest to son (**π**) on son's marriage to a Jewish girl *(21)*
  - plaintiff said that this condition violated his constitutional right to marry
  - Court: restriction is on inheritance; only a partial restraint on marriage.
    - OH allows complete disinheritance of children
    - "[G]ifts conditioned upon the beneficiary's marrying within a particular religious class or faith are reasonable." *(23)*
      - *contra* conditioning gift on faith of beneficiary
      - bar against bequests conditioned on divorce inapplicable *(25)*
      - analogy to conditional living gifts or conveyances

More on partial restraints

- Rest. (2d) Property § 6.2: A restraint to induce a person to marry within a religious faith is valid "if, and only if, under the circumstances, the restraint does not unreasonably limit the transferee's opportunity to marry." *(27)*
  - Condition must be *reasonably likely to occur*

- Encouraging divorce usu invalid, unless †'s intent is to provide support in the event of divorce

- Conditions cannot disrupt the family

Destruction of property at death & waste

- One court held that "a well-ordered society tolerate" waste *(28)*
- Rest. (3d) Trusts § 29(c) invalidates trusts that are "contrary to public policy"

TRANSFER OF THE DECEDENT'S ESTATE

Probate property

- Probate property = property that passes under the decedent's will or by intestacy *(30)*
- most property transferred at death outside of probate

Nonprobate property

- Joint tenancy property (real and personal)
  - Decedent's interest vanishes at death
    - Whole property to survivor
    - No interest passes to survivor
  - Perfecting title to joint tenancy = filing death certificate for decedent

  - Bank accounts, brokerage & mutual fund accounts, real estate

- Life insurance
  - Beneficiary named in insurance contract
  - Insurance company pays upon receipt of death certificate

- P.O.D. (payable on death) contracts
  - Often with a bank or employer; may be with another person or corporation
  - Beneficiary named in the contract
  - Collect by filing death certificate with custodian

- Interests in trusts
  - Trust may have been inter vivos or testamentary
  - Trust may have been revocable or irrevocable
  - If decedent has testamentary power of appointment, will must be admitted to probate
    - Trust assets distributed directly to beneficiaries & don't go through probate

Terminology issues

- Traditional terminology *(32)*
  - Testator *devises* real property to *devisees* and *bequeaths* personal property to *legatees*
- Modern = "I give" instead of "devise" or "bequeath"
  - Rest. of Property usees "devise" for both real and personal property

Assigning a personal representative

- First step in probate = appointment of personal representative *(31)*
  - Duties of personal representative
    - (1) Inventory and collect assets of decedent
    - (2) Manage assets during administration
    - (3) Receive and pay claims of creditors & tax collectors
    - (4) Clear titles
    - (5) Distribute remaining assets to those entitled

  - Executor = personal representative named in will
    - Many states require a corporate fiduciary executor to post bond unless will waives bond, which is routinely done

  - Administrator = personal representative not named in will
    - Appointed by probate court; selected from statutory list
      - Typical order of statutory list = surviving spouse, children, parents, siblings, creditors
    - Must give bond

    - One advantage of writing will = appointing executor & being able to waive bond when required

Summary of probate procedure

- Functions of probate *(34)*
    - Provides evidence of transfer of title
    - Protects creditors
    - Distributes decedent's property to intended beneficiaries

- Probate should be in *primary* or *domiciliary* jurisdiction: jurisdiction where decedent domiciled at time of death
    - Real property in another jurisdiction requires *ancillary jurisdiction*
        - May impose additional costs (need for a local personal representative and attorney)

- Authorizing the personal representative to act on behalf of the estate
    - *Letters testamentary* to executor
    - *Letters of administration* to administrator

- English system
    - Probate *in common form* vs. *in solemn form*
        - Common form = no notice or process to anyone; ex parte
        - Solemn form = notice given to interested parties; greater court participation in estate administration

        - Some states recognize common form/ex parte procedure; most do not

- UPC system
    - Provides for both ex parte probate (*informal probate*) and notice probate (*formal probate*) *(34–35)*
        - Informal probate = modern equivalent of common probate
            - UPC § 3-301; § 3-303 *(35)*
                - no notice required
        - Formal probate = modern equivalent of solemn form
            - any interested party can demand formal probate
            - proceedings only after notice

    - 3-year limit on initiation of any probate proceedings (UPC § 3-108)
        - no filing within three years → intestacy
        - varies from common law, which allowed probate at any time

    - Will contests: time limit set by statute; when time passes, no contest possible
        - If will probated and evidence of revocation is found after contest period ends, will won't be set aside

        - UPC §§ 3-401–3-414

    - Nonclaim statutes
        - Require creditors of an estate to file claims against the estate within a specified period of time
            - Two forms
                - (1) bar claims not filed within a short time of start of probate proceedings
                    - usu. 2–6 months
                    - UPC § 3-803: 4 months
                    - Supreme Court held that "known or reasonably ascertainable creditors" must receive actual notice before they can be barred by a short-term statute *(35–36)*
                - (2) bar claims not filed within a longer period after a decedent's death, regardless of whether probate initiated *(35)*
                    - usu. 1–5 years
                    - UPC § 3-803: 1 year

- Supervising the representative
    - Some courts supervise closely *(36)*
    - Some courts allow representative to handle estate informally, without court order
        - If minors involved, judicial supervision usually necessary

    - UPC authorizes both supervised & unsupervised administration
        - Default = unsupervised
        - Any interested party may demand supervision, UPC § 3-502
        - Representative ≈ trustee, UPC § 3-715
        - Representative may close after giving sworn statement, UPC § 3-1003

- Closing the estate
    - Representative expected to be expedient
    - Things that may prolong administration:
        - paying creditors, clearing titles, paying taxes, sale of property *(37)*
    - Representative not personally liable except for fiduciary duties

Is probate necessary?

- Administrative costs of probate
    - Probate court fees, commission of personal representative, attorney's fee
        - atty's fees sometimes set by statute; otherwise by court based on a number of factors
        - personal representative's commission usu set by statute
    - Sometimes appraiser's and guardian ad litem's fees

    - Estate taxes
        - Exemption = \$3.5m in 2009
        - Unlimited exemption in 2010

    - Lawyer who serves as executor usu entitled to fees for both offices

- Avoiding probate
    - Is possible.
    - More difficult for a "rich person with a wide variety of assets" *(38)*
    - Will is useful "backup"

- Small estates
    - In some states, *collection statutes* allow close relatives of the decedent to file affidavits to gain *possession* (but not *title*) of small estates (ranging from \$5k to \$100k)

- Most decedents do manage to avoid probate

Universal Succession

- Used in Louisiana and continental Europe
- Heirs or residuary devisees succeed to the title of all of the decedent's property; no personal representative assigned by court *(39–40)*
    - *E.g.*, O dies intestate, leaving H as O's heir. H takes title to all of O's property and assumes liability for all of O's debts, taxes, etc.
        - Multiple heirs hold as tenants in common

- UPC §§ 312–322 authorize heirs or residuary devisees to petition the court for universal succession *(40)*
    - Standard:
      (1) all necessary parties included
      (2) estate no subject to any current contest or difficulty
    - No states have adopted

PROFESSIONAL RESPONSIBILITY

Duties to intended beneficiaries

- *Simpson v. Calivas,* N.H. 1994 *(49)*
    - **Intended beneficiary of a will does have a CoA against the drafting attorney because of the obvious forseeability of harm to the beneficiary.**
        - *Here, intended beneficiary sued drafter of will for negligence and breach of contract for failing to draft a will that reflected to actual intent of the testator. Trial court directed verdict for defendant; NH SCt reversed.*
        - Mirrors rule for third-party beneficiaries in contract law; intended beneficiary ≈ third-party beneficiary *(51)*

- Attorney owes **duty of reasonable care** to intended beneficiaries *(50)*
  - No privity requirement where risk is apparent ("obvious foreseeability of injury")
  - Extrinsic evidence admissible on this issue
    - *Trial court was inconsistent in its admission of relevant evidence to clarify ambiguity in one of the will's terms.*

- "Quite simply, the task of the probate court is a limited one: to determine the intent of the testator as expressed in the language of the will." *(52)*
  - Finding of actual intent not necessary for finding intent as expressed

- Most courts entertain malpractice claims agt atty-drafter under either tort or contract law *(52–53)*
  - *generally, probate court construes will; court of gen jx decides negligence issue; most gen jx courts reconsider question of testator's intent*

- Attorney isn't expected to know everything or guarantee perfection; attorney need know only "those plain and elementary principles of law which are commonly known by well formed attorneys" and what can be found by "standard research techniques." General practitioners have a duty to refer cases to specialists if they lack the requisite skill or knowledge. *(53–54)*

Conflicts of interest

- *Hotz v. Minyard*, S.C. 1991 *(54)*
  - Daughter of † sues drafting atty for breach of fiduciary duty (i.e., lying)
    - At trial: CoA dismissed on SJ; here: court said breach was a factual matter → no SJ; remanded

  - Atty had duty to client (†) not to disclose contents of will (as † had directed)
    - Atty also had a duty to daughter based on their prior dealings in him
      - → conflict
    - "A fiduciary relationship exists when one has a special confidence in another so that the latter, in equity and good conscience, is bound ti act in good faith." *(56)*
    - No duty to disclose contents of will against client's wishes, but there was a duty to avoid misrepresentation.

INTESTACY

Uses of wills

- Allow disposal of property *(59)*
  - designate recipients
- Designate guardians for children
- Select a trustworth fiduciary to administer estate
- Save probate fees: waive bond/surety on bond
- Tax savings

Usual procedure for review of probate-court decisions

- Superior court—trial de novo
- [Appellate]
- Supreme court

GENERAL INTESTACY SCHEME

Share of surviving spouse

Shares of descendants/half-bloods

- Representation
  - English/Classic
    -
  - American/Modern
  - UPC
- Adoption
- Step-children

Issues affecting intestacy and wills

- Simultaneous death
- Disclaimers
- Negative inheritance (disinheritance) *(77)*
  - A will may be wholly negative; if otherwise intestate, negative provisions in a will ensure that those disinherited receive nothing; intestacy (at least under the UPC)
  - Vermont § 551 arguably renders negative inheritance void

INTESTACY UNDER THE UPC

UPC § 2-101. Intestate estate

- Any part of estate not disposed of by will goes to decedent's heirs, except as modified by will

UPC § 2-102. Share of spouse

- Whole estate if:
  - No descendant or parent of decedent survives decedent
  - *or* All decedent's surviving descendants are descendants of surviving spouse (S.S.) & no other descendant of S.S. survives the decedent

- First $200k plus ¾ balance of intestate estate if:
  - No descendant of decedent surves decedent
  - But parent of decedent survives

- First $150k plus ½ balance of intestate estate if:
  - All decedent's surviving descendants also descendants of S.S.
  - and S.S. has ≥ 1 surviving descendant not a survivor of the decedent

- First $100k plus ½ balance if:
  - ≥1 of surviving descendants are not descendants of S.S.

UPC § 2-103. Shares of heir other than surviving spouse

- Anything left after § 2-102 or if no S.S. goes to:
  - descendants by representation
  - no descendants → parents equally
  - no parents → descendants of parents or either by representation
  - only grandparents or their descendants:
    - to grandparents equally
      - half to paternal, half maternal
        - or the surviving grandparent
    - no grandparents → half to each side by representation
      - if only one side → to that side.

INTESTACY IN VERMONT

14 V.S.A. § 401. Share of surviving spouse

- All wearing apparent of decedent
- At least 1/3 of personal property; probate judge may allocate more

14 V.S.A. § 403. Surviving spouse to receive household goods

- When decedent dies intestate without issue

14 V.S.A. § 461. Interest of widow in real estate

- Widow gets 1/3 of real estate
  - But is ½ if H has only one heir and is child of widow

14 V.S.A. § 474. Husband's interest

- Same as § 461

14 V.S.A. § 551. General rules of descent

- Property not otherwise disposed of:
  - (1) to children or their descendants by representation
  - (2) If no kids *and* spouse doesn't take 1/3 share:
    - First $25k plus ½ remainder
    - Decedent has no kindred → spouse takes all
  - (3) to father and mother of decedent
  - (4) to brothers and sisters or their descendants by representation
    - All siblings dead → § 551(5), *Hatch v. Hatch*, Vt. 1849 *(course pack 5)*
  - (5) to next of kin in equal degree (not representation)
    - see Table of Consanguinuity *(79)*
    - Vermont recognizes "laughing heirs" *(81)*

***In re Martin's Estate*, Vt. 1923**

- *Course pack p. 4*
- Those who take as a class take equally; those equally related to an intestate participate equally in his estate
  - Grandchildren, who alone survive the ancestor, take equally

SHARE OF SURVIVING SPOUSE

Policy issues

- Pages 62–64

DOMESTIC PARTNERS AND INTESTATE SUCCESSION

The ongoing debate

- Pages 65–67

SIMULTANEOUS DEATH

"Common disaster"

- Uniform Simultaneous Death Act: if "there is no sufficient evidence" of the order of deaths, beneficiary deemed to have predeceased the donor
  - Evidence of survivorship by 120 hours required *(73)*

TRANSFERS TO CHILDREN

Adoptions & adult adoptions

- Rules vary by jurisdiction
  - *Hall v. Valladingham*, Md. 1988 *(83, 86)*
    - Inheritance possible only through one bloodline

  - *Minary v. Citizens Fidelity Bank & Tr. Co.*, Ky. 1967 *(89)*
    - Can't adopt (adult) solely to make someone the beneficiary of a trust
      - can broaden to no adoptions solely for inheritance purposes(?)

  - UPC § 2-113—two bloodlines of relation → take only the larger
    - may be from natural parent

  - UPC § 2-114
    - Child is child of natural parents for intestacy purposes.
    - Adopted child is child of adoptive, not natural, parents.
    - Inheritance from or through child by natural parent or kindred only if parent has openly treated the child as his/hers
      - *"adopting" parent failed to perform—nonreciprocal because only the parent breached*

- In most states, anyone can be adopted except spouse *(88)*
  - Adoptions can be used to prevent will contests

- Adoptions irrevocable *(92)*

Equitable (virtual) adoption

- *O'Neal v. Wilkes*, Ga. 1994 *(94)*
  - Hattie born out of wedlock and raised by mother. Dad never acknowledged. Mom died when Hattie was 8. Winds up with one Estelle, who was not her legal custodian. Estelle gives Hattie to R. Cook. R. Cook dies and Hattie wants to inherit as a daughter.
    - Court says no—only a legal custodian can consent to adoption, and Estelle was not legal custodian when given to Cook.

  - Dissent
    - Contract theory & equity: child performed (love and care); inheritance as post facto payment
      - even though parent may not hve performed (i.e., breached) by failing to formally adopt

Which law applies for adoptions?

- Law when child adopted, or when decedent dies?
    - Argument for when adopted:
        - reliance
        - decedent presumably knew the law and acted accordingly; applying later-developed law would be a form of surprise
    - Argument for upon death:
        - applying law at time of adoption can result in inconsistent results even within a single family if >1 kid adopted and law was changing

Posthumous conception

- *Woodward v. Comm'r of Social Sec.*, Mass. 2002 *(102)*
    - Posthumously conceived children may enjoy inheritance rights when:
        - (1) Demonstrated genetic relationship between child and decedent
        - (2) Decedent consented to posthumous conception & support of resulting child(ren) *(108)*

Surrogate motherhood & married couples

- *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) *(111)*
    - Husband and wife were parents, not surrogate mother

- Many states prohibit surrocacy agreements or enforce only under limited conditions *(112)*

- *In re Marriage of Buzzanca*, Cal. 1998 *(112)*
    - Consent to artificial inseminiation of wife → husband is father, even if divorce occurs before birth

Advancements

- Advancement = counts as part of ultimate inheritance *(114)*

- UPC § 2-190: lifetime gift = inheritance only if
    - (1) heir acknowledges in writing that it's an advancement
    - *or* (2) decedent's contemporaneous writing indicates that it was an advancement

- 14 V.S.A. § 1723: gift is an advancement if
    - (1) "expressed to be"
    - *or* (2) "is for the consideration of love and affection"
    - *or* (3) deceased wrote it so
    - *or* (4) heir wrote it so
    - *or* (5) delivered as advancement & two witnesses

- CL: presumed advancement in absence of evidence of it being a gift or there being some special need

Guardianship and conservatorship of minors

- Guardians
  - Can be appointed by will; if both parents die, court selects a guardian *(117)*
  - A will can allow management of a child's property (otherwise guardians have no such authority)

- Conservatorship
  - more flexible and "streamlined" than guardianship *(118)*
  - more freedom to act and less need for court approval

- Custodianship
  - Simple to create: transfer property "to *X* as custodian for *A*"
  - Custodian = fiduciary; manages & invests minor's property.
  - Custodianship = ideal for small gifts; large = trust.

BARS TO SUCCESSION

Homicide

- *In re Estate of Mahoney*, Vt. 1966 *(126)*
  - Wife murdered husband & in prison. Husband's estate went to his mom & dad; wife challenged, saying she should inherent. No statute on point re: killing & inheriting.
    - Probate court didn't have authority to do other than follow the statute; case remanded so Administrator could go to chancery and keep the property out of wife's hands.

- Most states have statutes stating that killer is treated as predeceased *(129)*
  - *Estate of Covert*, N.Y. 2001—descendants of killer may still inherit

- UPC
  - conviction of felonious & intentional killing is conclusive
  - acquittal is not
    - may still be proven by preponderance that accused did it
  - if guilty, no inheritance

Disclaimer

- Refusal to accept property (in intestacy, in wills, in trust) *(132)*
  - Disclaimant treated as if he predeceased the decedent
    - See UPC §§ 2-1105, 2-1106
    - *CL intestacy: heir still takes title, but disclaimer passes it on*

    - Most states have 9-month limit on disclaimer
        - but UPC does not
        - (nor does UDPIA *(635)*)

- "Post-mortem estate planning" *(132)*
    - **Advantages**
        - **saving estate taxes** *(133)*
        - correct drafting error
        - avoiding creditors
            - disclaimer relates back to the time of distribution

- **Can't be used to avoid debts to the I.R.S.***,* *Drye v. U.S.*, U.S. 1999 *(134)*

- **Medicaid**
    - Can't disclaim inheritance to keep Medicaid benefits, *Troy v. Hart*, Md. 1997 (136)
        - disclaiming → lose Medicaid

WILLS: CAPACITY AND CONTESTS

MENTAL CAPACITY

The test of mental capacity

- Testator must be capable of knowing and understanding in a general way: *(141)*
    - (1) The nature and extent of his or her property
    - (2) The natural objects of his or her bounty
    - (3) Disposition he or she is making of the property
    - (4) Relating those elements to one another and forming an orderly desire regarding the disposition

    - test is for *capability*, not actual knowledge
        - cf. actual mistake
    - test stringency:
        - marriage (lowest) → wills → deeds/trusts (highest) *(145–46)*

- Lack of capacity can invalidate entire will

- *In re Estate of Wright*, Cal. 1936 *(141)*
    - Legal presumption of sanity *(142)*
        - "Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities, or departures from the normal unless they directly bear upon and have influenced the tetstamentary act." *(144*

    - What *would* have been evidence of lack of capacity
        - "settled insanity, hallucinations or delusions"
        - medical testimony
        - evidence rebutting presumption of testator's ability to deal for himself *(145)*

Why require mental capacity?

- (1) Will should represent testator's "true desires" *(146)*
- (2) Incompetents ≠ "persons"—must be sane
- (3) Requirement of capacity protects decedent's family
    - expectation of inheritance; general reciprocity *(147)*
    - inheritance as "delayed payment in reciprocity"
- (4) Public acceptance
    - legitimacy of law turns on reasonableness
- (5) Ensure sane wishes won't be frustrated by later insane dictates
- (6) protects society *(148)*
- (7) protects incompetent testators against exploitation

Insane delusion

- Testator has capacity but has a "false conception of reality" *(148)*
  - E.g., that all Irishmen have red hair
  - Legal, not psychiatric, concept
    - Majority view: delusion is insane even if there is some factual basis for it if a rational person in the testator's situation could not have drawn the conclusion reached by the testator.

- May invalidate part or all of will
  - Only part of will affected by insane delusion fails
  - Any provision that *might have been* affected fails, *In re Honigman*, N.Y. 1960 *(150)*

- *In re Strittmater*, N.J. 1947 *(149)*
  - Testatrix "regarded men as a class with an insane hatred" & left all her property to a feminist organization
    - will set aside
    - rather dated?

- *In re Honigman*, N.Y. 1960 *(150)*
  - Proponent of will introduces evidence of normal mental functioning → contestant must show evidence of insane delusion *(152)*
    - Once insane delusion established, any provision in will that *might have been* affected fails *(153)*
  - Dissent
    - Unjust or unfounded belief ≠ insane

- Wills can be reformed for insane delusion, but usually not simple factual mistake *(155 n. 2)*

UNDUE INFLUENCE

Undue influence is coercion

- Testator induced to go against his desires *(158)*
- "This is not my wish, but I must do it"

- Authorities are split on whether standards for undue influence apply also to lifetime gifts or other nonprobate transfers *(162)*
  - partial invalidation possible, *Williams v. Crickman*, Ill. 1980

Establishing undue influence

- Many courts presume undue influence when atty–drafter receives legacy, unless atty is related to drafter *(167)*

- *In re Henderson*, N.Y. 1992 *(168)*

- Contestant must show: *(159)*
  - (1) Testator was *susceptible* to undue influence
  - (2) Influencer had the *disposition* or *motive* to exercise undue influence
  - (3) Influencer had the *opportunity* to exercise undue influence
  - (4) Disposition is the *result* of the influence
- Proof may be "wholly inferential and circumstantial"

- **Vermont**
  - *In re Estate of Raedel*, Vt. 1989 *(course pack 9)*
    - **Presence of suspicious circumstances is question of law for the court, not for the jury**
      - **In the absence of fraud, *preponderance* proves undue influence**

    - Where undue influence presumed
      - when †–beneficiary relationship is "suspect"
        - "guardian and ward, atty and client . . . all relations of trust and confidence"

    - Where undue influence not presumed
      - when beneficiaries are children/grandchildren

    - Undue influence requires proof of coercion & overcoming †'s free will

- *Estate of Lakatosh*, Pa. 1994 *(159)*
  - Burden-shifting scheme in Penn.
    - Contestant has burden of showing undue influence
    - Contestant must prove by clear and convincing evidence:
      - (1) Confidential relationship
        - here, † depended on Roger, who took care of † and had power of attorney
      - (2) Person enjoying relationship received bulk of estate
      - (3) That the decedent's intellect was weakened
        - here, † was "elderly" and "helpless"; † "was living in filth . . . , with her bills not having been paid, and, after a house fire, it was discovered that her house was in shambles with trash throughout and dead cats found in her freezer and bathtub"
    - Burden may then shift to proponent to disprove by clear and convincing evidence

- *Lipper v. Weslow*, Tex. 1963 *(162)*

- Son, atty, wrote will for †; will disinherited family of her other son, **Δ**'s half-brother
  - will contained provision explaining disinheritance
  - possible motive = atty–son had malice towards his dead half-brother
- Evidence showed confidential relationship, opportunity, possible motive *(166)*
  - but this "simply sets the stage"
  - contestants must show "that the will as written resulted from **Δ** substituting his mind and will for that of the †"

- *In re Will of Moses*, Miss. 1969 *(170)*
  - † had three husbands; while married to second, † met atty Holland. After death of third husband, † & Holland became lovers; this continued for several years until † died. Three years before †'s death, † consulted another atty who drafted a will leaving most of †'s property to Holland. Holland never knew about the will. †'s closest relative was sister, who attacked will; probate court set it aside. Holland appealed.
    - Affirmed because atty–draftsman was just a "scrivener" and "[t]here was no meaningful independent advice or counsel"
      - that Holland didn't draft wasn't enough to overcome presumption of undue influence
      - sexual relationship warranted inference of undue influence
    - *Vigorous dissent (172)*

- *In re Kaufmann's Will*, N.Y. 1964 *(174)*
  - Kaufmann was multimillionaire by inheritance. Moved away from family and met a guy, Walter, who he wound up employing as financial consultant. They had a sexual relationship. Wills successively increased Walter's share of estate. Two jury trials found undue influence despite letter of explanation
    - CtApp aff'd, saying: "record indicates the † was pliable and easily taken advantage of, . . . there was a long and detailed history of dominance and subservience . . . , that † relied almost exclusively upon [Walter's] knowledge of judgment in the disposition of almost all of the material circumstances affecting the conduct of his life, and [Walter] is willed virtually the entire estate" → factual question of undue influence → deference to jury verdict

Restatement (3d) of Property § 8.3

- § 8.3. Undue influence, duress, or fraud *(160)*
  - (a) Donative transfers invalid to the extend procured by [...]
  - (b) A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it **overcame the donor's free will** and caused the donor to make a donative transfer that the donor would

not otherwise have made.

- *Id.* cmt. h. Suspicious circumstances
    - A confidential relationship does not raise a presumption of undue influence. There must also be suspicious circumstances. All relevant factors may be considered, including:
        - (1) extent to which donor was in weakened condition, physically, mentally, or both, and therefore susceptible to undue influence
        - (2) extent to which the alleged wrongdoer participated in the preparation of the will or will substitute
        - (3) whether donor received independent advice
        - (4) whether will procured in secrecy or in haste
        - (5) whether donor's attitude toward others changed by reason of the relationship with the alleged wrongdoer
        - (6) whether there is a decided discrepancy between a new and previous wills
        - (7) whether there was a continuity of purpose running through former wills indicating settled intent
        - (8) whether disposition is such that a reasonable person would regard it as unnatural, unjust, or unfair

Showing a lack of undue influence

- *Jackson v. Schrader*, Iowa 2003 *(161)*
    - Here, presumption of undue influence *did* arise from confidential relationship
    - Rebuttable by showing by "clear, satisfactory, and convincing evidence that the grantee acted in good faith throughout the transaction and the grantor acted freely, intelligently, and voluntarily"

No-contest clauses

- Usually enforced absent probable cause for contest *(167)*
    - minority rule = enforced unless contestant alleges forgery or subsequent revocation, or beneficiary is contesting a provision benefiting the drafter or a witness

FRAUD, DURESS, INTERFERENCE WITH EXPECTANCY

Text pp. 186–97; not discussed in class.

WILLS: FORMALITIES AND FORMS

EXECUTION OF WILLS

Recommended Method of Executing a Will

- *See* page 215

Testamentary intent

- Okay, so Willbanks (dba Smith) duly executes a will in front of the class for the sake of a class exercise
    - Then she suddenly dies
    - Is this actually her will!?!??#?!@#?!@$135981271230(*!@
        - Did she have TESTAMENTARY INTENT?!@?#!@#
            - *Not actually valid under 14 V.S.A. § 5; witnesses must actually be present for testator's signing. (Line of sight vs. conscious presence, p. 208)*

The function of formalities

- Ritual function *(200)*
    - Ensure actual intent
    - Need for ceremony
- Evidentiary function
    - Increase reliability of proof
    - Transferor—main actor and best source of evidence regarding intent—is usually dead *(201)*
- Protective function
    - Safeguard the testator against fraud, duress, etc.
        - Dated notion; *see* Mansfield: "In all my experience . . . I never knew a fraudulent will, but what was legally attested . . . ." (1757) (214)
- Channeling function *(201)*
    - Putting testator's wishes into an expected and standardized form leads to efficient and routine administration

Three basic requirements

- (1) writing *(202)*
- (2) signature
    - Some jx require *subscription*—signing at the end of the writing *(203)*
- (3) attestation
    - Presence *(208)*
        - Line-of-sight test

      - Testator must be able to see the witness's pen against paper, if the testator were to look (need not actually watch—just be able to)
      - *but see* 14 V.S.A. § 5 (requiring attestation and subscription "by two or more credible witnesses in the presence of the testator and each other")
    - Conscious-presence test
      - Must only be in the presence of the testator such that "if the testator, through sight, hearing, or general consciousness of events, comprehends that the witness is in the act of signing"

  - Timing
    - UPC § 2-502(3) requires attestation by signing witnesses "within a reasonable time" after witnessing signing, testator acknowledges signature, or testator acknowledges will
      - Eases formal requirements
      - *If testamentary intent is the concern, shouldn't matter when, after will was originally signed, a witness also signs, so long as the testator acknowledges signature/will at time of witnessing; acknowledgment indicates that the will still expresses the testator's intent.*

  - Attestation clause *(210; 217)*
    - Clause under which witnesses sign, which declares that the witnesses did in fact witness
    - Not actually required, but makes out prima facie case that the will was duly executed

- Substantial compliance is not enough
  - *Stevens v. Casdorph*, W.Va. 1998 *(205, 206)*

  - Disagreement over reformation of wills for mistake in execution
    - *In re Pavlinko's Estate*, Penn. 1959 *(220)*
      - Husband and wife accidentally signed each others' wills; court refused to read as intended because "almost the entire will would have to be rewritten" *(221)*
        - probate refused

      - Options:
        - (1) deny probate. end of story.
        - (2) reform the will.
          - remove descriptive language.
          - extrinsic evidence needed:
            - will that wife signed
            - testimony from drafting lawyer
            - testimony from witnesses

- (3) constructive trust
  - unjust enrichment of Vasil's bro & sis Hellen's bro?
  - give effect to †'s intent

- *In re Snide*, N.Y. 1981 *(223)*
  - Same issue; court found "a case of genuine mistake"
    - Formalities not strictly followed, but no danger of fraud here *(224)*
    - Court switched names

  - What other remedies were there?
    - (1) court actually reformed the will
    - (2) constructive trust
      - *constructive trust ≠ trust*
      - *constructive trust = equitable remedy to cure unjust enrichment;*
        no wrongdoing here. just mistake.
      - was this really an option anyway?
        - *no; don't know who the beneficiary would be. or the trustee, for that matter. and having the dead guy be the trustee for his wife wouldn't make any sense. dead people make lousy trustees. they do, however, tend to do a good job of upholding the duty of confidentiality.*
    - (3) malpractice
      - would be a worse remedy if:
        - atty was not present when wills were signed.
      - better remedy if:
        - atty actually was present
      - malpractice is a civil suit—intended beneficiary vs. attorney
        - i.b. gets $ from atty
        - actual beneficiary keeps $

Self-proving affidavits

- Typed at end of will, swearing before a notary that the will has been duly executed, signed by the testator and witnesses before the notary public, who signs and seals *(217)*

- Provides conclusive proof of due execution; no need for witnesses in court

- not recognized in Vermont

- UPC § 2-504(a): one-step affidavit
  - both will and affidavit signed at once *(218–19)*
- UPC § 2-504(b): two-step affidavit *(219)*
  - affidavit signed in front of notary after will executed
  - recognized in more jx than one-step

Purging statutes

- Kinds of purging statutes
  - (1) Witness loses entire bequest in all situations
  - (2) Witness loses the amount of the bequest that he would not otherwise have received *(215)*
  - (3) Witness doesn't lose if the witness is an heir at law
  - (4) Witness never loses (UPC)

- 14 V.S.A. § 10
  - purging clause for interested witnesses unless there are three[1] other competent witnesses
- UPC § 2-505(b): interested witnesses OK

- *Estate of Parsons*, Cal. 1980 *(211)*
  - **Witness must be disinterested at exact moment of signing** *(213)*
    - Disclaimer doesn't cure problem (court rejected argument that disclaimer "relates back"—relation back goes to creation of interest, which happened only after signing)

  - Effect of disclaimer
    - Person disclaiming treated as if predeceased
    - *But* can't use disclaimer to alter distributions based on taking by representation (*e.g.*, problem p. 134; *see* UPC § 2-1106(b)(3)(A) p. 86)

When a beneficiary predeceases a testator

- Distribution according to:
  - (1) language of the will
  - (2) apply anti-lapse statute
    - limited to certain relationships between † and beneficiary
  - (3) fall to residue
  - (4) intestacy

[1] The statute says three, but Willbanks says it's only two

Mutual will

- H leaves all to W
- W leaves all to H
- usually a common alternate beneficiary

Joint wills

- Single document executed by two parties; serves as will for both parties
- When first person dies, becomes irrevocable contract

EXECUTING A WILL IN VERMONT

14 V.S.A. § 5

- (1) in writing
- (2) signed by †
- (3) signed by ≥ 2 credible witnesses in presence of each other *and* the testator
  - credible = no financial interest in the will
  - presence = line of sight

- doesn't recognize holographic wills, *In re Estate of Cote*, Vt. 2004 *(course pack 12)*

- *In re Moon's Will*, Vt. 1935 *(course page 15)*
  - will may be signed for † by †'s instruction in †'s presence
    - requires "express direction" to write †'s name "with the intent, on the part of the testator, to give authenticity to the will"

- *See also 14 V.S.A. § 10, purging statute*

EXECUTING A WILL IN A UPC JURISDICTION

UPC § 2-502

- (a) (1) in writing
- (a) (2) signed by † or in †'s name in †'s presence at †'s direction
- (a) (3) signed by ≥ 2 witnesses within a "reasonable" time of (i) †'s signing *or* (ii) †'s acknowledgement of the will

- (b) holographic wills valid "if the signature and material portions . . . are in the testator's handwriting"

CURATIVE DOCTRINES

Dispensing power

- Allows a court to dispense with the formal requirements if there is clear and convincing evidence that the † intended the document to be his will
  - UPC § 2-503. Harmless error
    - clear or convincing evidence → document can be (i) will, (ii) partial or complete revocation, (iii) codicil, (iv) partial or complete revival

- *In re Estate of Hall*, Mt. 2002 *(231)*
  - Joint will; both testators signed; atty notarized; no witnesses
    - "original will" destroyed; H died; W offered joint will for probate

  - court found clear & convincing evidence that the joint will had been intended as †'s will, despite technical defects in execution *(dispensing power)*
    - had asked atty if it could be made will
    - was signed by testator
    - not witnesses but was notarized (some if not all formalities)
    - † was sure that the will was valid
      - only reason hadn't distributed: wanted to make some further refinements

- *In re Will of Ranney*, 226; *In re Groffman*, 204

Substantial compliance

- purpose of formalities served
  - protect against undue influence & fraud *(229–30)*
  - ensure †'s intent

- can be statutory or judicial

- meant to cue "harsh and relentless formalism" in execution of wills
  - "judicial gloss" that execution was "almost correct"

- *In re Will of Ranney*, N.J. 1991 *(226)*
  - Witnesses didn't sign will; only signed self-proving affidavit
    - Court found substantial compliance *(also cited UPC § 2-503)*
    - but required solemn probate (formal probate) *(231)*

Curative-doctrine koans

- Are the doctrines coextensive?
- Can you have substantial compliance without testamentary intent?
- Can you have dispensing power without substantial compliance?
  - How about, e.g., † sees atty, agrees on will, sends email, but dies before will execution?

Holographic Wills

Basic definition

- Will written in †'s own handwriting and signed
- no need for witnesses

First-generation holographic-will statutes

- Entire document must be in †'s handwriting *(241 n.1)*
- † must sign
- Some jx require a date
    - *date shows intent at a particular point in time*

- *Kimmel's Estate*, Penn. 1924 *(237)*
    - Letter from † → heir offered for probate
    - Q1. Letter testamentary in character?
        - Supporting evidence
            - Words "if enny thing happens" used to condition a gift
                - "strongly support[s] the idea of a testamentary intent" *(238)*
                - states exactly the purpose of a will
    - Q2. Signature complies with Wills Act?
        - Is the word "Father" an adequate signature?
            - Yes, because it "was intended as a completed signature to this particular character of paper" *(238–39)*

- Wills scratched into tractor fenders; written on a nurse's petticoat, on a chest of drawers, on a bedroom wall; tattooed on a person's back; inscribed on an eggshell—all have been offered as holographic wills *(240 n.4)*
    - tractor-fender will, at least, was valid

Second-generation statutes

- Material provisions must be in †'s handwriting *(241 n.2)*
- Signature of †

- *Estate of Johnson*, Ariz. 1981 *(242)*
    - Used a form will; went to a notary; will signed & notarized. No witnesses.
    - Used "material provisions" test—not a valid holographic will
        - Testamentary intent established in *printed words*, not the †'s handwriting—intent must be established in †'s hand
            - *all that was really missing was the verbs*

Third-generation statutes

- Material *portions* in †'s handwriting *(241 n.3)*

- Extrinsic evidence admissible

- *In re Estate of Kuralt*, Mt. 2000 *(245)*
    - Letter of 6/1997 held valid holographic codicil
        - Amended formal will of 5/1994

    - Argument for letter as will
        - Letter used the word "inherit"; † underlined, demonstrating intent
        - Sent beneficiary checks, indicating desire to support

    - Argument against letter as will
        - † knew formal requirements, but signature missing; wrote only his initial
        - Contrast with 5/1989 document (full name, etc.) *(247)*

How to Avoid Will Contests

Make a record

- Advise client
- Have client write out wishes in own words
- Possibly videotape client's statement or will execution

Deal with family issues while alive

- Have client talk with family

Leave something (not just $1) to every child

- It's as much about recognition and love as money

Use revocable trusts

- Must be funded during life
    - settlor can revoke at any time
- In existence during life → harder to disrupt after death
    - beneficiaries have a recognized legal interest; harder to contest as invalid

Use other nonprobate property to transfer wealth

- Joint tenancy with right of survivorship
- Life insurance
    - Payable on death (POD) or transfer on death (TOD)
- Annuities & other contracts
- Lifetime gifts or sales

Revocation of Wills

Methods of revocation

- (1) By subsequent writing (express or by implication)
  - May be holographic if recognized in jx
  - Subsequent will disposing of all †'s property revokes any prior will by inconsistency
  - May be partially revoked by codicil
    - revocation by inconsistency
    - codicil requires proper execution
    - codicil may be be handwritten and unsigned if will was holographic and codicil on same document *(262)*
  - Express revocations do not require making a new disposition

- (2) By physical act
  - burning, tearing, mutilation, defacement, etc.

- (3) By operation of law *(269)*
  - divorce
    - UPC
      - divorce revokes will with respect to ex-spouse
    - VSA
      - H.11 would have done it, but not there yet
  - marriage
    - does not revoke the will

  - children
    - less protection
    - CL: marriage + kids revokes pre-marriage will
      - small-minority rule
      - not included in UPC
    - omitted-children statutes

- UPC § 2-507
- 14 V.S.A. § 11

- No oral revocations

- Hypo
  - M.J. writes "canceled" on the back of her will. The will is found in her desk after her death. What result? Why?
    - Is this a revocation by writing?
      - Vermont—no (holographic wills not recognized)
      - UPC: probably valid as revocation by writing if in †'s handwriting, signed, dated

Lost wills

- *In the absence of a controlling statute*, can be proven by clear and convincing evidence of contents (e.g., copy in the atty–drafter's office) *(254)*

- *Harrison v. Bird*, Ala. 1993 *(253)*
    - † executed will 11/89; atty retained original & gave copy to †. In 3/91, † called atty and said she wanted to revoke. Atty or sec'y tore will into four pieces, wrote letter to † saying the will had been revoked, and stated therein that the torn-up will was enclosed.
        - Letter was found but will was not.
        - Atty's tearing not valid revocation because not in presence of †.
        - That four pieces not found among †'s belongings created presumption that † revoked will herself.

- Presumption of revocation
- Rebutting the presumption:
    - evidence that † never spoke of, or otherwise intended, revocation
    - whether † ever spoke of the existence of this will
    - whether † typically kept orderly records
        - not orderly → supports inference of loss
        - typically orderly → supports inference of destruction or revocation

- What if a disinherited descendant is the one who searches for the will, and reports that the will cannot be found? Does this alone overcome the presumption?
    - Not usually

- *Thompson v. Royall*, Va. 1934 *(255)*
    - Prevailing law then required revocation in same manner as execution of wills, if written *(256)*
        - requirements
            - (1) doing one of the acts specified
            - (2) intent to revoke
    - Revocation by cancellation = defacement or mutilation *(257)*

    - Will held not revoked despite clear evidence of intention of revocation—requirements strictly upheld

- *Warner v. Warner's Estate*, Vt. [<1934] *(256)*
    - Proof of intent + act = notation on same page as, and below the signature of, testator, reading "This will is hereby cancelled and annulled. [date]." Fourth page of foolscap paper: "Cancelled and is null and void. /s/." Sufficient to revoke.

Partial revocation by physical act

- Permissible under UPC § 2-507; not permissible in Vermont

- What happens to property the disposition of which is revoked?
    - residue; intestacy

- Partial revocation changes disposition of property → in some jx, this is considered a new disposition of property & so requires all formalities of will execution → partial revocation by physical act = invalid

- Some jx allow revocation of a complete devise, but cannot rearrange shares in a single devise to increase the other devisee's gift *(259)*
    - disapproved by Rest. (3d) Property § 4.1 cmt. i

Why fewer formalities to revoke?

- Already system of distribution in place—i.e., intestacy
- Important to enable † to change his mind up until the moment prior to death

Negative wills

- Valid under UPC, but not in Vermont
- † can disinherit others by a provision so saying

DEPENDENT RELATIVE REVOCATION

Revocation based on factual *or* legal mistake → no revocation

- If revocation is based on a mistaken assumption of law or fact, the revocation is ineffective if the † would not have revoked had the † known the truth. *(259)*
    - Usual: † destroys will, believing the new one valid, but it is not
- Court finds mistake + intent → revocation canceled; old will probated
    - *presumptive*, not *actual*, intent

- *LaCroix v. Senecal*, Conn. 1953 *(260)*
    - † executed will making bequests to nephew and friend in Item 5. † then made codicil updating name of nephew—original had listed him by his nickname. Sad, sad fact: friend's husband witnessed codicil execution → purging statute. *(260)*
        - *Codicil wasn't really needed; court would have admitted extrinsic evidence to identify the nephew.*
        - Codicil said: Item 5 (gift to nephew & friend) revoked; replaced with [same thing except nephew name fixed].

- Question: Does friend get anything, or is the new Item 5 bequest to friend null?
  - Friend does take; purpose of codicil was not to affect disposition of estate; purpose was only to make sure nephew's name was proper.
  - Mistake of law = having friend's husband as witness

- "[W]here the intention to revoke is conditional and where the condition is not fulfilled, the revocation is not effective." *(261)*
  - **Application of DRR requires evidence of *clear intent* that the old will was revoked because the new will was believed valid**

Limits on Dependent Relative Revocation

- DRR applies when:
  - (1) there is an alternative plan of disposition that fails *or*
  - (2) the mistake is recided in the terms of the revoking instrument
    - *or*, possibly, is established by clear and convincing evidence

- *Estate of Alburn*, Wis. 1963 ***(264)***
  - † had made two wills:
    - (1) Milwaukee will (1955)
    - (2) Kankakee will (1959)
      - † destroyed in the belief that the Milwaukee will would be revived

  - DRR applied
    - † would not have destroyed Kankakee will unless † believed that the Milwaukee will would then become effective → revocation of Kankakee will held ineffective.
      - "There is no evidence . . . that would indicate any reason why † should die intestate and nine tenths of her estate go to next-of-kin not named in either will." *(266)*
      - "[H]er failure to make a new will [shows] her evident belief that her Milwaukee will was still operative." *(267)*
    - Kankakee will held effective
    - couldn't revive the Milwaukee will because in Wisc., revocation → will is dead & revival requires reexecution

REVIVAL

Three doctrines of revocation & revival among the states

- (1) Will #1 not revoked unless will #2 remains in effect until †'s death *(267)*
  - minority view

- (2) Will #1 legally revoked at time will #2 executed; will #1 is revived, if † intends, when #2 revoked
  - majority view
- (3) revoked will cannot be revived unless formally reexecuted

- Question of intent

- UPC § 2-509. Revival of revoked will *(268)*
  - (a) Entire wills. Revival requires evidence of intent to revive:
    - circumstances of revocation *or* "subsequent declarations" of intent that the previous will be effective
  - (b) Revocation of will #2, which had partially revoked will #1. Presumption of revival:
    - partial revocation of previous will revoked → previous will presumed revived unless evidence to the contrary
  - (c) Will #3 revokes will #2 which revoked will #1:
    - will #1 remains revoked except to the extent that † intended will #1 to take effect.

COMPONENTS OF A WILL

Integration

- All papers present at the time of execution, intended to be part of the will, are integrated into the will *(271)*

- How to avoid integration issues:
  - (1) have a routine for executing wills and follow it each time
  - (2) number the pages of the will as 1 of 10, 2 of 10 . . .
  - (3) carryover language from one page to the next
  - (4) substantive language on page signed by †
  - (5) fasten all pages securely together
  - (6) † should sign and initial each page; might have witnesses initial each page too
  - (7) use the same font face throughout
  - (8) attestation clause on page with substantive provisions
  - (9) use self-proving affidavit (can be a separate page)

Republication by codicil

- A will is treated as reexecuted as of the date of the codicil *(272)*
  - E.g., † makes will #1, then will #2, which revokes #1. Executing codicil to will #1 reexecutes will #1 and revokes #2 by implication.
  - *See also* Case 1 *(272)*

- Republication applies *only to prior validly executed documents* (can republish documents faulty for reasons other than execution)
    - cf. incorporation by reference (can incorporate instruments that were never validily executed)

Incorporation by reference

- Requires a writing in existence at time of signing *(273)*
    - *not recognized in all jx, e.g., Conn., La., N.Y. (278)*

- **UPC § 2-513. Separate Writing Identifying Bequest of Tangible Property**
    - writing must:
        - be signed by †
        - describe items & devisees with reasonable certainty
    - **writing may:**
        - be referred to prospectively
        - **be written before or after will execution**
        - be altered after its preparation

- *Clark v. Greenhalge*, Mass. 1991 *(273)*
    - Facts
        - 1972: † wrote memorandum indicating dispositions of pers prop
        - 1977: † made will
            - will directed disposition of "tangible property to and among such persons *as I may designate by a memorandum left by me and known to* [*the executor*]*, or in accordance with my known wishes*"
        - 1979: wrote more dispositions in notebook
        - 1980: codicils
    - Holding
        - Notebook incorporated by reference as a memo *(275)*
            - 1980 codicil ratified notebook, which existed in 1980
            - notebook didn't need to be specified as memo
            - †'s intent clear & notebook was "known to" executor

- *Johnson v. Johnson*, Okla. 1954 *(279)*
    - Facts
        - Typewritten, unwitnessed, undated, unsigned will on single page. Below type was a handwritten provision reading: "To my brother James I give ten dollars only. This will shall be complete unless hereafter altered, changed, or rewritten. Witness my hand this April 6, 1947. . . . /s/"
    - Holding
        - Handwritten portion held a holographic codicil. *(281)*

    - Held that valid holographic codicil could validate an otherwise improperly executed will, no matter the defects *(this is an aberration of law).*
    - **Holographic codicil incorporated the typewritten portions by reference.** *(282)*
  - Etc.
    - The result in this case is strange and hard to reconcile with statutes and other cases. Hard not to be rather aware of the judge who wrote the opinion getting convicted of federal crimes and being accused by a fellow judge of taking bribes.

Acts of independent significance

- Beneficiary or property identified by acts or events that have a "lifetime motive" and significance apart from their effect on the will *(285)*
  - *nontestamentary acts*

  - I leave "my car" to my son. When my will is executed, I own a 2007 Subaru. When I die, I own a 2010 BMW. Does my son receive the 2010 BMW?
    - Yes; the purchase of a new car **has a purpose distinct from testamentary intent**

  - In 4/2006, Willbanks executes a will leaving $250k to be divided equally among "my Estates students." The residue goes to children. Willbanks dies 3/2009.
    - Has taught Estates every year since 1990.
    - 75 students in spring 2006 class.
    - 64 students in spring 2009 class.

    - Probate court will most likely hold that the bequest to "my Estates students" is too vague so the property will pass under the residuary clause of the will.

- **UPC § 2-512. Events of independent significance**
  - A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, **whether they occur before or after the execution of the will or before or after the testator's death.**

CONTRACTS RELATING TO WILLS

Chart of possible outcomes of a contract to make a will

	A performs	*A* does not perform
† performs	Valid will → ☺	Valid will →

		Constructive trust
† does not perform	Quantum meruit	*Nothing happens* ☹

- Whether a contract's terms were performed by one party or another has nothing to do with whether a will is invalid
  - Existence of a K informs a court's treatment of a validly executed will and determines whether an equitable remedy is necessary

- Statute of Frauds applies—K must be in writing *(287)*

Contracts not to revoke a will

- Often arise in H–W wills *(288)*
  - Joint wills
    - one will, two people
    - uncommon and generally undesirable
    - "notorious litigation breeders" *(289)*
  - Mutual wills *(288)*
    - two wills with reciprocal provisions
    - common; preferable to joint wills
  - Joint and mutual will (mirror wills)
    - Joint will in which the †s make similar or reciprocal provisions

- **Must be proven by clear & convincing evidence** *(289)*
  - execution of a joint/mutual will ≠ presumption of K not to revoke

- **UPC § 2-514. Contracts concerning succession**
  - Ks to make a will, not to revoke, or to die intestate may be established only by:
    - (i) provisions in the will stating material provisions in the K
    - (ii) express reference in the will to a K
      - *and* extrinsic evidence proving terms of K
    - *or* (iii) writing signed by decedent evidencing the K
  - joint/mutual will ≠ presumption of K

- **Breach**
  - Party dies leaving a will that does not comply with the K after the K became binding
    - Generally a writing evidencing the K is required

    - *Gorton*—Exception to writing requirement if:
      - *A* relied on the promise
      - † knew of reliance
      - *A*'s reliance was reasonable
      - *A* changed position in a way that damages would not repair

            - *course pack 24, 26*

        - If jurisdiction requires writing & there is none, & no exception based on reliance:
            - A can recover reasonable value of services via quantum meruit

        - If there's a writing, or no writing needed, or *Gorton* situation—constructive trust or specific performance

    - Will made, but *A* breaches
        - Parties left out of the will (namely family members) may challenge the will under traditional methods of attack—lack of due execution, mental capacity, undue influence, fraud, duress
            - If burden not satisfied, will stands
            - However, unless *A* is the natural object of †'s bounty, court will probably impose constructive trust
                - because *A* breached the K & would be unjust enrichment

- *Via v. Putnam*, Fla. 1995 *(290)*
    - Parents had an agreement not to revoke wills (kids = residuary beneficiaries); W_1 died; H remarried; W_2 claimed spousal share

    - Claim of children of as creditors vs. claim of W_2 as spouse
        - Wife wins
            - Policy of protecting surviving spouse trumps childrens' claim under the K; children not given creditor status
                - wife would otherwise get nothin'

    - **Minority rule**
        - kids would usually get creditor status
        - *See reasons for granting K beneficiaries priority (292)*

NONPROBATE TRANSFERS AND PLANNING FOR INCAPACITY

INTRODUCTION TO WILL SUBSTITUTES

Some will substitutes not effective until death; others effect lifetime transfers *(295)*

- To what extent should doctrines that apply to wills apply to various will substitutes?

Reasons for avoiding probate

- Cost
  - lawyers, notice, filing fees, executor
- Time-consuming
  - most estates take 12–18 months to settle
  - *but* expedited probate & small-estate probate
- Public proceedings
  - can "air the family laundry"
- No choice of law
  - domicile
  - real property
    - not in the jx of domicile → ancillary probate
      - joint tenancy
      - revocable trust
      - business entity

- *See p. 318—reasons for using a revocable trust*

Reasons for choosing probate

- Predictability
- Limit creditors' rights
  - once notice of probate filed, nonclaim statute begins running—usually 4–6 month limit on creditors making claims
- Big estates
  - formalities can be good
  - spousal and children's rights
  - will contests

Kinds of nonprobate transfers

- **Life insurance** *(296)*
  - Ambulatory
  - "functionally indistinguishable from a will"
  - beneficiary may be changed

- **Pension accounts**

    - beneficiaries designated in case owner dies before funds exhausted

- **Bank, brokerage, and mutual-fund accounts** *(297)*
    - *E.g.*, accounts over which owner retains explicit lifetime dominion & beneficiary named to take on owner's death
    - Joint accounts
        - cotenant may be named while depositor continues to treat the account as his own
    - Brokerage houses
        - on owner's death, cotenant gets securities or other account proceeds

- **Revocable inter vivos trust**
    - can be standard-form instruments with fill-in-the-blank beneficiary designations

- **"Imperfect" will substitutes** *(298)*
    - *E.g.*, joint tenancy—no longer revocable & ambulatory

- Most will substitutes are asset-specific

REVOCABLE TRUSTS

Requirements for creation of a trust

- A **settlor** (grantor) **intends** to create a **fiduciary relationship** in a **trustee** to hold and manage **property** for the benefit of others (**beneficiaries**) *(304)*
    - should be a written document (can but shouldn't be oral)
    - need not be witnessed

- Acquisition of property after creation of trust ok *(305)*

- **No tax benefits for a revocable trust** (income, gift, or estate)

***Farkas v. Williams*, Ill. 1955**

- Seminal case for revocable trusts *(299)*

- Bequeathment is not testamentary
    - Beneficiary acquires some quantum of interest, which settlor relinquishes
        - *Transfer of a present interest is crucial to a finding of nontestamentary character*
    - Settlor/trustee has fiduciary duties to beneficiary
        - Beneficiary can sue for breach *(303)*

- Here, Williams (beneficiary) had a *contingent remainder* because Farkas (settlor–trustee) could change or revoke the trust, and the trust would dissolve if Williams predeceased Farkas

Revoking a revocable trust

- *In re Estate & Tr. of Pilafas*, Ariz. 1992 *(307)*
    - No presumption of revocation when trust document lost
    - Trust can be revoked only by the terms of the trust
        - Unlike a will, trust creates present interest in the beneficiaries
        - Losing/destroying trust document ≠ revoke unless trust specified that the trust was revocable by physical destruction

- Problems arise when people try to revoke their revocable trusts in their wills
    - Permissibility turns on what was stated in the trust agreement to be sufficient to revoke
    - *Some courts say that where the settlor is the †, writing in will is sufficient*

Revocable trusts and creditors

- *State Street Bank & Tr. Co. v. Reiser*, Mass. 1979 *(308)*
    - **If probate estate is insufficient, creditors can reach the trust assets**[2]
        - majority view
        - "[I]t violates public policy for an individual to have an estate to live on, but not an estate to pay his debts with." *(309)*

Pour-over wills

- Basic thingy *(310)*
    - † has a revocable trust
    - † has a will
        - Residuary clause provides: "all the rest and residue of my property shall be distributed to XYZ Revocable Trust."
- Merges testamentary estate, etc. with the trust upon †'s death
    - important for disposition of property acquired after trust creation *(312)*

- Via incorporation by reference *(310)*
    - Trust must exist when will executed
    - Probate assets disposed of according to terms of the trust as it was at time of will execution; if contrary to †'s intent → intestacy

- Via independent significance

[2] "We are slowly eroding the difference between revocable trusts and wills." —Willbanks

- Trust instrument ≠ have to exist when will executed; trust must only have some assets in it before †'s death

- **UPC § 2-511. Testamentary additions to trusts**
  - validates pour-over provisions

- **14 V.S.A. § 2329**
  - validates

- *Clymer v. Mayo*, Mass. 1985 *(313)*
  - W names H beneficiary of life insurance & retirement plan. W executes will with pour-over provision to trust. W's trust set H as beneficiary.
    - Then: *divorce*. But ex-H left as beneficiary.
    - **Divorce revokes interest in trust in the absence of an expressed contrary intent.** *(314)*
      - *interest*, not *trust*, revoked

Using revocable trusts in estate planning

- Ways of creating revocable trust *(316)*
  - Declaration of trust: settlor becomes trustee
  - Deed of trust: third party becomes trustee

- Revocable trust can be used to unify control and disposition of all assets through one instrument

- Consequences during life of settlor
  - Property management by fiduciary relieves settlor of burdens of financial management
  - Keeps title clear *(317)*
  - Income taxable to settlor regardless of beneficiaries
  - Can be used to deal with incompetency
    - settlor may be co-trustee; other can act on behalf of trust
    - alternative = durable power of atty (see p. 346)
  - Avoidance of probate *(318)*

LIFE INSURANCE, PENSION ACCOUNTS, BANK ACCOUNTS, OTHER P.O.D.S

Life insurance

- "The principal purpose of life insurance is to shift the financial risk of dying young to an insurance company." *(322)*
  - Recommended amount for those with dependents = 6–10x annual income
  - effective way to replace lost income if one dies young

- Whole life insurance (ordinary/straight life insurance) *(323)*
    - insurance + savings
        - insured covered for whole life
    - usu. becomes "paid up" or "endowed" at some point → no further premiums owed
    - *more popular than term*

- Term life insurance
    - No savings feature
    - Death during term of policy (e.g., one or five years) → stated sum paid out

    - young couples can take out a 20-year term policy to cover their children's most vulnerable years *(324)*

    - some policies include conversion option to make insurance more permanent

Pension accounts

- "[D]eliberately designed to promote lifetime exhaustion of the accumulated capital" *(335)*
    - *annuitization*—payment every year for rest of beneficiary's life

- Advantanges *(334)*
    - (1) contributions are tax-deferred
    - (2) earnings accrue and compound on tax-deferred basis
    - (3) usu. lower income in retirement → pension income taxed at lower marginal rates

Joint bank accounts

- *Franklin v. Anna Nat'l Bank of Anna*, Ill. 1986 *(342)*
    - Court will not give account to joint account holder if there is clear and convincing evidence of †'s intent to do otherwise

Totten trusts (savings account trust)

- *In re Totten*, N.Y. 1904 *(343 n.2)*
    - *O* made deposits in savings account in the name of "*O* as trustee of *A*"
    - *A* is entitled to amount on deposit at *O*'s death
        - *A* is P.O.D. beneficiary of a "trust" savings account
    - not testamentary

- UPC authorizes P.O.D. designations *(343–44)*

Joint tenancies in realty

- Joint tenancy or tenancy by the entirety avoids probate *(344)*
- Joint tenants have equal interests upon creation
    - irrevocable
- Shares not devisable by will
    - Only devisable if joint tenancy converted to tenancy-in-common during life

PLANNING FOR INCAPACITY

Protection of Property

- **Conservator**
    - appointed by the court once there is a decision that someone is unable to handle their own property
        - appointed in absence of other estate-planning documents
    - makes decisions about financial matters
        - e.g., to buy or sell property
        - pays bills
    - powers vary by jurisdiction

- **Joint bank accounts**
    - agency account; convenience account
    - advantages
        - simple; client understands
        - easy; no docs or special forms
        - inexpensive
    - disadvantages
        - limited use
        - intent often unclear (can't always be sure how the deceased had intended the account to be disposed)

- **Revocable trust**
    - used to address peoples' disinclination to deal with/manage property
    - grantor = trustee, until incompetent
    - successor trustee named in trust
        - combined with durable power of attorney
    - determination of incompetency, specified in trust

- **Durable power of attorney** *(346)*
    - appoints attorney-in-fact
        - durable = does not end if principal becomes incompetent
    - written instrument needed
    - combine with revocable trust

        - to transfer assets into the revocable trust after settlor becomes incompetent
        - to manage property for grantor
        - to make gifts for grantor
            - needs explicit grant of authority
            - court may look for a pattern of giving during the principal's competency to see if gifts were really intended
    - no implied duties
    - ceases when principal *or* agent dies
        - courts won't appoint a successor agent
            - but one may be specified in writing
    - does not avoid probate
    - agent does not own property
    - agent has limited powers
    - third parties may be cautious about dealing with agents

- **Protection of the person** *(350)*
    - guardianship = least restrictive alternative = legal protection
        - control over living arrangements, medical decisions . . .
            - nonfinancial arrangements
    - alternative = health-care directive
        - appoints agent to make decisions
        - directions re: medical treatment
            - termination of medical treatment
        - different names by jx; maybe different purposes
            - "living will"
            - "durable power of attorney for health care"
            - know state-law requirements: 18 V.S.A. §§ 9700–20
    - *Schaivo* case *(354)*

- **Disposition of the body** *(360)*
    - organ donation
    - funeral
    - don't specify in will
        - by the time the family gets around to reading the will, the body is usually disposed of already and the funeral is over

CONSTRUCTION OF WILLS

MISTAKES OR AMBIGUOUS LANGUAGE IN WILLS

Traditional rule: no extrinsic evidence or reformation

- Plain-meaning rule (no extrinsic evidence): *(366)*
  - extrinsic evidence can resolve ambiguities
    - personal usage
    - patent (obvious) ambiguities
    - latent ambiguities
  - but plain meaning controls
    - no evidence that other meaning intended
- No-reformation rule
  - Court must interpret words *actually* used, not words that someone claims the † intended to use

- *Mahoney v. Grainger*, Mass. 1933 *(366)*
  - States trad'l plain-meaning rule
    - "The will must be construed as it came from the hands of the †." *(367)*
    - "Proof that the legatee actually designated was not the particular person intended by the one executing the will cannot be received to aid in the interpretation of a will."

  - Problem here
    - Property was left to "my heirs at law"—† meant to give to her 25 first cousins equally, but † had an aunt, who was heir & took first
      - → aunt took
      - should have been left to "my surviving first cousins"

- Policy
  - efficiency
  - †'s intent could be subverted
    - slippery-slope issues
  - concerns re: reliability of evidence
    - *but isn't that what the Rules of Evidence are for . . . ?*

- **Rest. (3d) of Property § 12.1: Reforming Donative Documents to Correct Mistakes** *(380)*
  - Unambiguous will written based on mistake of fact or law may have its terms reformed after a show of clear and convincing proof
    - must show (1) mistake and (2) donor's intention

Patent ambiguities

- Appears on face of will *(369 n.4)*
  - ambiguity is logically necessary? *see* 370 n.6.
- Some jurisdictions don't allow extrinsic evidence, saying it's unnecessary
  - e.g., will purporting to dispose of entire estate leaves ¼ to each of three beneficiaries; court may give 1/3 to each
- trend toward allowing extrinsic evidence

Latent ambiguities

- Two kinds *(369 n.5)*
  - (1) More than one person matches the description exactly (equivocation)
  - (2) No one person fits the description exactly, but multiple close matches
    - more common *(370)*

CORRECTING MISTAKES WITHOUT REFORMATION

Table of causes and effects of will defects

	Effect: Lack of Volition	*Effect: Mistaken Terms*
Cause: intentional wrongdoing	Undue influence; duress (relief granted)	Fraud (relief granted)
Cause: innocent acts	Lack of capacity, Insane Delusion (relief granted)	Mistake (no relief)

"Mere erroneous description does not vitiate"

- *Arnheiter v. Arnheiter*, N.J. 1956 *(372)*
  - Will mentioned 304 Harrison as property; † actually owned 317 Harrison.
  - Court applied the canon of *false demonstratio non nocet* (mere erroneous description does not vitiate).
    - Court disregarded the "304" as erroneous, reading the will to refer to the "Harrison" property, and since † only owned 317, that was sufficient to identify the property.

- *Estate of Gibbs*, Wis. 1961 *(374)*
  - Will gave property to Robert J. Krause. † was longtime friend of Robert W. Krause; didn't know Robert J.
    - Court fixed.
    - "[D]etails of identification, particuparly such matters as middle initials, street addresses, and the like" should not be enough to frustrate intent.

- “Where such details . . . are involved, courts . . . should disregard the details when the proof establishes to the highest degree of certainty that a mistake was, in fact, made.”

USING REFORMATION TO CORRECT MISTAKES

***Erickson v. Erickson*, Conn. 1998**

- Issue of whether † intended that his will not be automatically revoked by subsequent marriage *(375)*
    - Will made shortly before marriage
- Court said: will didn’t itself provide for contingency *(377)*
    - but trial court should have allowed evidence of scrivener’s mistake—that † did mean for the will to survive the marriage, but was misled by the scrivener’s mistake

Policy for allowing reformation based on mistake

- Reformation allowed in other circumstances; mistake is only situation not traditionally allowing reformation *(378; chart, supra)*
- Don’t want to subvert †’s intent *(378)*
- Presumption that signing a will makes the will †’s intent is rebuttable *(379)*
- “[P]reventing loss is better than compensating loss” *(383)*

Reformation possible for accidental omissions *(383)*

- E.g., computer error leads to leaving out certain lines of text, *see Estate of Herceg*, N.Y. 2002 (computer error led to omission of last line of residuary clause so no indication of beneficiary; three previous wills had named consistent beneficiary)

DEATH OF BENEFICIARY BEFORE DEATH OF TESTATOR

Concept of “lapse”

- If devisee predeceases †, devise lapses (fails) *(387)*
- Devisee must survive † unless † states otherwise
    - most jx have antilapse statutes that substitute another devisee

- *Estate of Russell*, Cal. 1968 *(388)*
    - Will gave estate to Q (human) & R (dog) plus etc. to T (**π** & sole heir)
        - T & Q want dog’s half
    - Trial court: Estate to Q; will just meant for Q to care for dog
    - Appellate court:
        - † really did want to give half of her estate to dog, which she can’t do (dog is property & can’t own property). Plus, dog is dead. Devise

lapses; Q is residuary beneficiary & no residue of a residue → dog's share goes by intestacy → **π** takes

At common law

- **Specific/general devise** → residue *(387)*
- **Residuary beneficiaries**
  - **single beneficiary** → residue goes by intestacy
  - **> 1 beneficiary & one dies** → share goes by intestacy
    - "no residue of a residue" rule (on its way out)
    - some jx treat residuary beneficiaries as a class
- **Demonstrative bequest** → provides specific way for bequest to be funded
  - may also come from residue
- **Class gift** → divided equally among surviving members

Antilapse statutes

- Create substitute devisees (usually issue of the intended devisee)
  - applies if devisee is *kindred* of †

  - majority rule: words of survivorship (e.g., "if he survives me") preclude application of antilapse statutes *(395 n.2)*
    - contrary to UPC (1990) *(396)*

  - most states apply antilapse statutes to class gifts *(404)*

- Basic policy: effectuate †'s intent

- *Allen v. Talley*, Tex. 1997 *(393)*
  - Will gave residue to †'s "living brothers and sisters"; treated as words of survivorship → members of a class → antilapse doesn't apply

- **UPC § 2-605 (1969). Antilapse; deceased devisee; class gifts** *(393)*
  - Applies to dead devisee who is grandparent or lineal descendant of
  - Issue of dead devisee take
    - equal degree of kinship = take equally
    - otherwise by representation
  - words of survivorship preclude application

- **UPC § 2-603 (1990).** *(course pack 73)*
  - really complicated mess *(see 396)*
  - words of survivorship don't mean anything unless alternative beneficiary named (e.g., "I leave to *X*; if *X* doesn't survive me, then to his child *Y*")
  - kids of dead siblings take by representation

        - § 2-707: all beneficiaries must survive until distribution
    - *not going to be on exam*

- **14 V.S.A. § 558. Devisee dying before testator; issue to take** *(course pack 96)*
    - Applies to devises made to child or kindred of †
    - Devise goes to issue of devisee unless will says otherwise (e.g., words of survivorship)

- *Jackson v. Schultz*, Del. 1959 *(398)*
    - † (no kids) married W (three kids). †'s will gave estate to W "and her heirs and assigns." W predeceased †. W dead → gift lapsed
        - estate to escheat unless "and her heirs and assigns" created substitute gift
        - "and" read as "or" to avoid escheat

Survivorship not required for many nonprobate transfers

- P.O.D. designations, revocable trusts *(397)*

Class gifts

- Test = whether † is "group-minded" *(399)*
    - most states apply antilapse statutes to class gifts *(404)*

- **Rest. (3d) of Property § 13.1. Class gift defined** *(399)*
    - Class gift = disposition to beneficiaries described by group label & intended to take as a group.

        - (1) class membership typically not static
            - not named individuals
                - Rest. (3d) Prop. § 13.2 *(400)*
                    - identified by group & name → take as indivs (rebuttable presumption)
                - *Dawson v. Yucus*, Ill. 1968 *(400)*

        - (2) equal distribution among members

Changes in Property After Execution of Will

Ademption by extinction

- Applies only to specific devises *(405)*

- if specific property (real or personal) not owned at time of †'s death, gift is subject to ademption by extinction → gift fails

- Identity theory (traditional doctrine) *(406)*
  - must be exactly as named
  - applied in *Wasserman v. Cohen*, Mass. 1993 *(406)*

- Intent theory
  - beneficiary may be entitled to cash value of item, depending on whether beneficiary can show that this is what † wanted

- Disfavored by courts

Judicial methods of avoiding ademption

- Classifying devise as general or demonstrative *(409 n.3)*
  - "*my* Exxon stock" → specific
  - *but* "100 shares of Exxon stock" → general → beneficiary gets *value*

- Classifying lifetime dispositions as a change in form rather than substance
  - stock dividends, mergers *(409, 412)*
    - "my Exxon stock," when Exxon purchased by Mobil, interpreted to include the Mobil shares acquired in exchange for Exxon shares

- Construe will at death rather than at time of execution
  - *McIntyre v. Kilbourn*, Mo. 1994 *(409 n.3(c))*
    - "I leave my Lincoln to my son"
      - At time of execution, † had 1984 Lincoln; at time of death, † had 1989 Lincoln
        - son got 1989 Lincoln
    - *cf.* acts of independent significance *(285–86)*

- Create other exceptions
  - E.g., conservator transfers item for incompent † → gift not adeemed because ademption requires voluntary act of † *(409–10)*

- **UPC § 2-608 (1969)** *(410)*
  - followed traditional identity theory

- **UPC § 2-606 (1990)**
  - follows intent theory but creates presumption of ademption
  - criticized for abandoning identity theory on grounds that it could increase litigation
    - creates ambiguity in distinction between a gift of "my diamond ring" and "my diamond ring or its equivalent value"

Ademption by satisfaction

- Applies when † makes a transfer to a devisee after executing will *(413)*
  - applies only to general monetary bequests
    - *cf. advancements, which apply under intestacy law*
  - UPC § 2-609 (1990): requires writing to adeem by satisfaction
    - *cf. UPC § 2-109 for advancements*
  - CL: rebuttable presumption that post-will gift is in satisfaction of gift in will
    - if † is parent of beneficiary

Exoneration of liens

- CL: title passes free of mortgage (mortgage paid by estate) *(413–14)*
  - (collect; homestead/allowances; creditors paid; elective share; distribute)
  - most mortgages: debt → mortgage accelerates (nobody gets "nonrecourse financing")

- UPC § 2-607 reverses CL rule
  - payment of mortgage would require specific direction by will (more than just "pay my debts")

Abatement

- † does not have sufficient property to pay debts, expenses, and bequests *(414)*
- Priority of abatement
  - residue abates first
  - general devises
  - specific & demonstrative devises reduced pro rata

- Doesn't always comport with †'s intent
  - Sometimes a will includes a clause like: "If my net probate estate is at least *X*, then I give . . ."
  - *See also* UPC § 3-902: "[I]f the testamentary plan . . . would be defeated by" the usual order of abatement, "the shares of the distributees abate as may be necessary to give effect" to †'s intent

PROTECTION OF THE SPOUSE AND CHILDREN

RIGHTS OF THE SURVIVING SPOUSE

Relevant questions

- (1) What is the purpose of the elective-share provisions?
- (2) What rights does the surviving spouse have in addition to the elective share?
- (3) What are the basic provisions of Vermont law and the UPC re: elective share?
    - compare to intestacy provisions
- (4) Who is entitled to make the election?
- (5) What property is subject to the election?
- (6) What is the effect of a waiver?
- (7) How can the testator avoid an election against the will?
- (8) Where does the property come from to satisfy the spouse's elective share?
- (9) What is an omitted spouse and to what property is such a spouse entitled?

Entitlements of surviving spouse

- Social security benefits *(419)*
    - based on earnings of deceased spouse

- Private pension plan benefits *(420)*
    - ERISA requires survivorship rights
        - preempts inconsistent state law *(421)*

- IRA benefits

- Homestead allowance *(421)*
    - life estate in family home
    - UPC § 2-402 (1990) recommends $15k *(422)*

- Personal property allowances
    - UPC § 2-403 (1990) sets limit of $10k

- Family allowance
    - for maintenance and support of surviving spouse

- Dower and curtesy (common law) *(422–23)*

- **Scheme in Vermont is same for intestacy as elective share**

Policy of elective share

- Primary policy *(425)*
    - S.S. contributed to decedent's acquisition of wealth and deserves to have a portion of it

        - partnership theory
        - support theory

- *In re Estate of Cross*, Ohio 1996 *(430)*
    - Old Q = whether better to take under will or to take elective share *(431)*
        - too mathematical (question of $ only)

    - New Q = holistic approach
        - consider other available resources, age, life expectancy, physical/mental condition, S.S.'s present & future needs
        - Medicaid requirements
            - *not taking share → no Medicaid!*
                - *(here will had left spouse $0)*

- *In re Estate of Cooper*, N.Y. 1993 *(433)*
    - spousal share for spouses only
        - not available for relationships approximating marriage

Property subject to the elective share

- Traditionally only probate estate *(438)*

- *Sullivan v. Berkin*, Mass. 1984 *(439)*
    - Trust is part of estate for elective share

- A bunch of judicially created tests to answer this Q *(444–45)*

- **UPC § 2-202(d)**
    - State of domicile determines elective-share rights *(445 n.4)*

- **UPC § 2-202 (1969)**
    - "augmented estate" *(447)*

- **UPC § 2-202 (1990)**
    - revamped to make more in line with community-property theory *(448)*

Waiver

- Agreement that S.S. cannot take elective share *(451)*
    - Most often occurs in premarital agreements

- Generally valid if valid under contract law (no fraud, duress, etc.)
    - independent counsel = good

- Post-marriage:
  - UPC: valid
    - UPC § 2-213 *(452)*
  - VT: not valid

- "[C]ourts are increasingly willing to enforce one-sided agreements if disclosure was adequate"

COMMUNITY PROPERTY

See pp. 455–62

- Not discussed in class

OMITTED SPOUSE

***Estate of Shannon*, Cal. 1990**

- Facts *(462)*
  - †'s will (1974) contained a disinheritance clause, leaving one beneficiary, saying all others were intentionally disinherited
  - † married 1986
  - † died 1988; will unchanged

- Widow seeks determination of heirship
  - appellate court said widow was a pretermitted (omitted) spouse
    - disinheritance requires **clear manifestation**
      - will would have to "contemplate[] . . . a future marriage" in order for widow to be disinherited
    - *widow was already dead at this point; her estate was pursuing her claim. Court's indulgence of this claim shows the court's emphasis on **partnership**—economic theory—rather than support.*
  - generic disinheritance doesn't work

- Will's no-contest clause didn't apply
  - Widow wasn't challenging will
    - only asserting statutory rights
    - *spouse's motivation may have in part been desire for recognition ("H wouldn't do this to me")*
  - policy favoring support of spouses

- Could decedent have avoided this result?
  - Statute said omitted-spouse provision didn't apply if:
    - (a) intent to disinherit "appears from the will"
      - e.g., name her specifically

        - (b) other provisions for the spouse outside the will
            - *†'s estate argued that † had done this; widow got †'s pension fund, but it was only $2k*
        - *or* (c) spouse agreed to waive right to a share
            - *†'s estate argued that keeping their property separate = agreement/waiver, but court said no*
    - prenuptial agreement would have been a good idea

- Strong public policy favoring revision of will upon marriage
    - *cf. divorces—e.g., UPC says that divorce revokes bequests to ex-spouses; in other cases, the bequest is to "my (beloved) spouse," so once divorce is final, the person is no longer the spouse and the gift lapses*

UPC: why choose § 2-301 rather than elective share?

- Elective share = sliding scale
    - if married only a short time, surviving spouse gets little
- Elective share considers spouse's assets
    - omitted spouse = intestate share; only decedent's assets

- § 2-301 will bar a spouse if:
    - will leaves to kids from before marriage
    - will was made in contemplation of marriage
        - probably need to mention spouse by name
    - will expresses intent that it be effective notwithstanding subsequent marriage

Differing policies of omitted-spouse vs. elective-share statutes

- Omitted spouse
    - average †'s probable intent
    - correct for negligence, forgetfulness, distraction . . .
        - † may just have been slow to get the will revised

- Elective share
    - upsets intent
    - provides support for spouse
    - partnership

Omitted spouse & elective share under UPC

- Spouse can claim both an elective share and as an omitted spouse
    - Omitted spouse takes from probate estate
    - Elective share takes from augmented estate

- Spouse can claim both under the will and an elective share

- Only time omitted + elective is likely to come up is when there's more property in the augmented estate and we're looking at how that share is satisfied under 2-209
    - 2-209a is designed to disrupt †'s scheme as little as possible

Where omitted-spouse share fits in to procedure

- 1. Read the will.
- 2. Is there a statute that trumps?
    - Elective share
    - Omitted spouse
    - Omitted child
    - . . .

RIGHTS OF CHILDREN

The domestic (non-UPC) approach

- † may disinherit children in any jx except Louisiana

- Omission = child that is born after will executed
    - most jx
    - some jx find a child omitted only if done so explicitly
        - e.g., "I deliberately disinherit my son John"

- Mistake = child that is "left out" of the will
    - some jx

    - UPC § 2-302(c)—because child mistakenly thought dead

    - 14 V.S.A. § 556—because of "mistake or accident"
        - need extrinsic evidence
        - → intestate share

- *Azcunce v. Estate of Azcunce*, Fla. 1991 *(475)*
    - Child born after will but before codicil → not pretermitted
        - statute only applied to children born after will
        - codicil republished will

- *In re Estate of Laura*, N.H. 1997 *(481)*
    - Intentional disinheritance of a child serves as intentional disinheritance of that child's issue *(483)*

UPC § 2-302. Omitted children.

- (a) (1) No child when will executed → child gets intestate share *unless* will gives all (or substantially all) of the estate to the surviving parent

- (a) (2) Children @ time of will plus afterborn → omitted child gets equal share of what is devised to the children as a whole (children treated as a class; bequests to children divided equally)

- (b) No share if
  - (1) "it appears from the will that the omission was intentional"
  - (2) children provided for outside the will

14 V.S.A. § 555. Share of after-born child.

- Child gets intestate share unless "it is apparent from the will" that † intentionally omitted the child

Other child-pretermission statutes

- "Missouri" type
  - Benefits children "not named or provided for" in the will; no extrinsic evidence *(480)*

- "Massachusetts" type
  - Benefits children "unless it appears that such omission was intentional and not occasioned by any mistake"; extrinsic evidence allowed *(481)*

TRUSTS: CREATION AND CHARACTERISTICS

GENERAL INFORMATION

Creation of interest: wills vs. trusts

- Will creates no interest until †'s death
- Trust creates interest at time of trust's creation

Five basic types of trusts

- Revocable trust *(487)*
  - *O* → *O* for life; on *O*'s death to pay principal to *O*'s children
  - *O* retains power to revoke
    - avoids delays, costs, and publicity of probate

- Testamentary marital trust
  - Gets marital deduction for S.S.
  - *H* → *X*, income to *W* for life; on *W*'s death, principal to *H*'s children

- Trust for incompetent person
  - *O* → *X* to pay the income to *A* (*O*'s incompetent child) for life, remainder to *A*'s issue; if no issue, to *B*, *A*'s sister

- Trust for minor *(488)*
  - *O* creates trust to pay income (up to tax-free gift amount, $11,000) to child *A* until *A* reaches 21; then principal to *A*

- Discretionary trust
  - *T* → *X* in trust; *X* retains discretion whether to pay income or principal to *A*
    - Can lessen tax burden by distributing income to lower tax bracket
    - Can prevent creditors from reaching the income or principal of trust

The parties to a trust

- **Settlor** *(489)*
  - Trust created during life = inter vivos
  - Trust created by will = testamentary

  - Settlor may also be trustee and beneficiary
    - but must owe equitable duties to at least one other party
      - else trust collapses (merger)
    - if settlor ≠ trustee, need *deed of trust* delivered to trustee

- **Trustee** *(490)*
  - One or several; individual or corporation
    - institutional trustees increasingly common
    - default commissions may be set by statute
  - Trustee unnamed → court will appoint
    - *A trust will not fail for want of a trustee*
      - . . . unless court finds that trust powers were personal to trustee.

  - Holds legal title (beneficiaries hold equitable title)
    - is fiduciary; owes duty of loyalty, prudence, etc.
    - if trustees have no duties, title → beneficiaries *(491)*
    - trustees must accept the position: can't force

  - Three distinct duties *(492)*
    - Investment
      - select securities, monitor investments, vote shares

        - Administration
            - accounting, reporting, tax filing
        - Distribution
            - anything from mechanical to entirely discretionary

- **Beneficiaries** *(493)*
    - Hold equitable interests

    - May make personal claim against trustee for breach of trust
        - other remedies also available—if trustee wrongfully disposes of trust property, beneficiaries can enforce trust against new property

    - Trusts usually create successive beneficial interests
        - equitable future interests + present interest in income
        - E.g., $O \rightarrow A$ for life, then to B for life

Trust vs. legal life estate

- Trust is almost always preferable *(494–95)*

Commercial uses of the trust

- Business trusts a successful method of pooling capital and dodging regulation *(496)*

- Good form of organization for mutual funds *(497)*
    - and for asset securitization, for pension funds

- 29 states have created statutory business trusts

CREATION OF A TRUST

Need for intent

- No magic words needed *(498)*
    - "trust" or "trustee" works
    - "for the use and benefit"
    - "shall be maintained for the benefit of"

- *Jimenez v. Lee*, Or. 1976 *(499)*
    - Daughter sued father (Lee) to compel accounting for alleged trust assets
        - Two separate bequests of bonds, sold for stocks, registered to "Lee, Custodian . . . for Betsy Lee (**π**)"
        - Defendant knew that he held the stocks in trust as evidenced by:

        - a letter to his mother (donor)
        - undisputed evidence that the gifts were for **π**'s educational needs

- If transferor intended to create only a moral obligation or has created only an equitable charge, no trust *(502 n.3)*

Precatory language

- † devises property expressing a "wish," "hope," or "recommendation" that the property be used in a certain way *(501)*
    - usually winds up being unenforceable (only creates a "moral" obligation)
    - but in some circumstances, courts do enforce

Equitable charge vs. trust

- If † transfers property subject to payment to a third party:
    - creates equitable charge, not trust *(502)*
    - equitable charge creates a security interest in the tranferred property
        - no fiduciary relationship

Recasting gifts as trusts

- Gifts require delivery *(503)*
    - constructive (means of obtaining property, e.g., key) *(504)*
    - symbolic (e.g., written instrument when manual delivery impossible)

- Undelivered gift may be recharacterized as trust
    - trust does not require delivery—just intent
        - may be oral (subject to Statute of Frauds)

Necessity of trust property

- Trust must have some *res* to exist *(509)*
    - *unless, under Uniform Testamentary Additions to Trusts Act, the trust is inter vivos and settlor executes a pour-over will*

- *Unthank v. Rippstein*, Tex. 1964 *(509)*
    - † wrote letter to R saying: "I herewith bind my estate to make $200 monthly payments for the next five years"

    - R argued that:
        - letter was holographic codicil
            - didn't work

        - † had effectively held his estate in trust to make these payments; portion of estate not used would then revert to †'s estate by way of a "resulting trust eo instante" *(510)*
            - Court didn't buy it
                - "not sufficient certainty in the language"
                - no designated trust *res*
                - "the writing was no more than a promise . . . and as such is unenforceable"

- *Brainard v. Comm'r*, 7th Cir. 1937 *(511)*
    - Brainard tried to make a trust for expected profits from stock trading
    - Court found no trust until profits actually realized: *res* hadn't come into being until then

Trusts vs. debts

- Q = whether recipient of funds is entitled to use as his own and commingle with his own monies *(511 n.2)*

Resulting trusts

- Equitable reversionary interest that arises by operation of law when: *(511)*
    - (1) Express trust fails or makes incomplete disposition
        - *O* to *X* in trust, income to *A* for life, then to *A*'s descendants. *A* dies without descendants. Remainder to *A*'s descendants fails; *X* holds the remainder on resulting trust for *O*'s heirs or devisees.

    - (2) When *A* pays the purchase price for property and *B*, not the natural object of *A*'s bounty, takes title
        - *B* purchases Blackacre with money supplied by *A*. Unless *B* can show that *A* intended to make a gift to *B*, *B* holds title to Blackacre on resulting trust for *A*, often called a *purchase money resulting trust.*

Taxation of grantor trusts

- Grantor trust = income taxable to grantor (settlor) because grantor retains substantial control over the trust assets *(516)*
    - e.g., revocable trust

- Spousal-attribution rule *(517)*
    - settlor treated as holding any power or interest held by settlor's spouse if the spouse is living with the settlor at the time the property is transferred into the trust

- If grantor has reversionary interest
    - in corpus or outcome
    - worth > 5% of value of corpus/income
    - → trust is grantor trust

    - exemption for trusts for a minor lineal descendant who has entire present interest

    - drafting moral:
        - when drafting irrevocable trust for shifting income taxes or assets, don't leave reversionary interest of any value in settlor

- If settlor or nonadverse party has discretionary power over income or principal
    - and no need for consent of adverse party
    - → trust is grantor trust

- Exceptions
    - (1) Discretionary power over income or corpus may be given to an independent trustee without adverse tax consequences to settlor
        - independent trustee:
            - one not related or subordinate to the settlor
        - nonadverse party:
            - one who lacks a substantial beneficial interest that would be adversely affected by exercise or nonexercise of that power

    - (2) something else about distributing corpus and income pursuant to a "reasonably definite standard"

Necessity of trust beneficiaries

- A trust must have one or more ascertainable beneficiaries *(518)*
    - Trustee must owe someone fiduciary duties
    - Someone must be able to call the trustee to account
- Exception for charitable trusts *(519)*

- *Clark v. Campbell*, N.H. 1926
    - bequest to "friends" too indefinite to create ascertainable beneficiaries
        - → trust failed

- Stuff about an indefinite class & transferees having power of appointment *(521)*

- *In re Searight's Estate*, Ohio 1950 *(522)*
    - Trust established for *F* to care for dog

        - Bequest upheld, although court declined to put it specifically in terms of an "honorary trust" or other terms

- **Honorary trusts** *(526)*
    - Often for care of pets, but not always
    - May be for "any specific, designated purpose that is not capricious"
        - Not legally enforceable, but if the transferee doesn't carry out the purpose → transferee holds in resulting trust for settlor or settlor's successors

- **Trusts for care of pets are valid for the life of the animal, UPC § 2-907 (1993)**

Necessity (or not) of a written instrument

- Statute of Frauds & Statute of Wills require inter vivos trusts of land to be in writing
    - Sometimes enforced if oral anyway

- **Oral inter vivos trusts of land**
    - enforceable under certain equitable circumstances
        - *Hieble v. Heible*, Conn. 1972 *(528)*
        - Rest. (2d) of Trusts § 44 *(529)*

- **Oral trusts for disposition at death** *(530)*
    - *Olliffe v. Wells*, Mass. 1881
        - Will devised residuary estate to Wells "to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him"
            - held too indefinite to be carried out *(531)*
            - → resulting trust for †'s next of kin

    - **Secret trusts** *(532)*
        - Bequest is absolute on its face; will does not indicate intent to create a trust
            - Extrinsic evidence admitted to prevent unjust enrichment
                - remedy: constructive trust

    - **Semisecret trusts**
        - Bequests indicates trust, but beneficiary not specified in will
            - No need for extrinsic evidence
            - bequest fails

RIGHTS OF BENEFICIARIES TO DISTRIBUTIONS FROM THE TRUST

Our focus = private express trusts *(cf. business trusts; charitable trusts)*
Creditors stand in the shoes of the beneficiaries

- can get only what the beneficiaries can get.

Beneficiaries may have different rights to income and principal

Methods of classifying trusts

- Private express or charitable trusts
- Inter vivos or testamentary trusts
- Revocable or irrevocable trusts

- Terms of the trust, along with state law, determine:
  - beneficiaries' rights to distributions
  - creditors' rights

Mandatory trusts

- Trustee must distribute all the income *(533)*
- *E.g.*, O transfers property to X in trust to distribute all the income to A

- Either or both income & principal; no discretion to trustee
- majority rule: creditor can reach
  - UTC § 501
  - Rest. § 56

Discretionary trusts

- Trustee has discretion of payment over income, or principal, or both[3]
  - trustee must act in good faith, but beyond that, beneficiary cannot compel
- *E.g.*, O transfers to X in trust to distribute income to A, B, or C in amounts that the trustee determines

- May or may not be subject to a standard

- **Support trusts**
  - Includes some ascertainable support standard
  - "health, education, and support" = *magic words*
    - trust provision would be equally effective whether it said *may distribute* or *shall distribute* for h, e, & s

- **Discretionary support trust**
  - Explicit statement of discretion plus stated support standard

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[3] Traditionally, if you wanted to protect trust assets, you put them in a discretionary trust. *U.S. v. O'Shaughnessy* (text 544): not even fed gov't can make claim on discretionary trust until trustee exercises discretion.

- Discretionary trusts offer greater flexibility as compared to mandatory trusts

RIGHTS OF THE BENEFICIARY'S CREDITORS

Discretionary trusts

- **Traditional rule: creditors can't compel a trustee of a discretionary trust to pay the beneficiary** *(544)*
  - Beneficiary has no right to a payment, so neither does the creditor
  - *Creditors stand in the shoes of the beneficiaries and have no more rights than they do*

- Some states allow a creditor to secure an order requiring that the trustee pay the creditor before the beneficiary
  - Creditor can deprive the beneficiary of trust income even though the creditor may not be paid
    - gives creditor leverage
  - When trustee "exercises discretion" to disburse funds/property, creditor's lien may attach, allowing the creditor to seize the property while still in the hands of the trustee *(545)*

- **Support trusts: discretionary + ascertainable standard → claims for child support & alimony enforceable**
  - Discretionary powers reviewable for abuse or bad faith *(546)*
  - Restatement of Trusts & Uniform Trust Code reject distinction between support & discretionary trusts
    - Rest. (3d) Trusts § 60: creditors can compel distribution
    - UTC § 504: creditors can compel distribution only for child support or alimony, and only if a trustee "has not complied with a standard of distribution or has abused a discretion"

Protective trusts

- Trustee must pay income to A; if A's creditors attach A's interest, A's mandatory interest ceases → discretionary trust → creditors cannot demand payment

Spendthrift trusts

- Settlor imposes a "disabling restraint" on beneficiaries and their creditors: beneficiary cannot voluntarily alienate interest.
  - Policy in favor of free transferability met in that the settlor's can condition the terms of the transfer

- *E.g.,* T to X in trust; income to A for life; upon A's death, property to A's children. Includes a clause that A cannot transfer the life estate and A's creditors may not reach.

- *Scheffel v. Krueger*, NH 2001 *(549)*
    - Plaintiff tried to attach **Δ**'s trust interest to pay a tort judgment arising from criminal conduct. Trust included a disabling restraint making the trust a spendthrift trust. Trial court dismissed **π**'s claim.

    - On appeal: **π** argued that the legislature intended tort creditors to be excepted from the spendthrift restraint.
        - Court: statute had only two inapplicable exceptions → **Tort creditors not excepted.**
        - Plaintiff countered with public-policy argument; court said statute controls.

- *Shelley v. Shelley*, Or. 1960 *(550)*
    - Grant = beneficiary of trust with spendthrift clause.[4] Grant married twice, had two kids with each wife, then disappeared. Wives & children came after trust assets.

    - *Cogswell* had held spendthrift provisions ineffective against claims of a beneficiary's former wife for alimony and child support; **Δ** trustee (bank) urged overruling; court declined. *(551)*
        - Testator's freedom of disposition ≠ absolute
        - Exceptions to bars on creditors' claims against spendthrift trusts may be judicially made

    - **Trust income reachable for child support & alimony.** (majority rule)
        - *Rest. § 59(a) not clear*
        - *UTC § 503 recognizes no exception*
    - Trust corpus not reachable for either.

    - Children may also claim directly as beneficiaries.

- Uniform Trust Code § 502 (2000): Spendthrift provision *(553)*
    - (a) valid only if restrains both voluntary and involuntary transfers of interest
    - (b) using phrase "spendthrift trust" or similar words restrains both
    - (c) beneficiary may not transfer interest in violation of a valid spendthrift provision; creditor/assignee of beneficiary may not reach interest/distribution before beneficiary

- Uniform Trust Code § 503 (2000): Exceptions to spendthrift provision

[4] Trust also stated that the trustee may distribute to Grant's children "in case of an emergency where unusual and extraordinary expenses were incurred for their support and care."

  - (b) beneficiary's child, spouse, or former spouse, or creditor who protected beneficiary's interest in the trust, may attach trust income
  - (c) spendthrift provisions unenforceable against a claim of the State or U.S. if the law so provides
  - *no exception for tort creditors (555)*

- **Furnishing necessary support**
  - Traditionally, one who has furnished "necessary services or support" can reach the beneficiary's interest in a spendthrift trust (e.g., physicians and grocers)
    - Followed in Rest. (3d) Trusts § 59(b)
    - Rejected in UTC § 503

- **Federal tax liens**
  - trump spendthrift rules *(556)*

- **Excess over amount needed for support**
  - **"station-in-life rule"**: creditors can reach only the amount in excess of what is needed to maintain the beneficiary in his station in life

- **Percentage levies and spendthrift caps**
  - Some states allow a creditor to reach a certain percentage of the trust income (usu. 10–30%; CA=25%) or cap the amount shielded (OK=$25k annual cap)

- **Pension trusts**
  - ERISA allows covered pension plans to be reached only for child support, alimony, or marital property rights

- **Bankruptcy**
  - Spendthrift-trust assets cannot be reached by creditors *(557)*

Self-settled asset protection trusts[5]

- Traditional rule: whole interest reachable by creditors in a self-settled trust.
  - Policy: distaste for allowing "property owners to be able to protect themselves against their own profligacy, at the expense of creditors"

- Some states allow these trusts anyway, in the hope of attracting trust funds to the state *(558)*

- A number of foreign jurisdictions also allow self-settled spendthrift trusts *(559)*

[5] self-settled trusts are not always spendthrift

- Increasing # of jurisdictions are allowing creditors to go after assets in a revocable trust after available funds from probate estate are exhausted

Trusts for the state-supported

- Medicaid eligibility issue *(569)*

- Q: whether resources are available for the support of the individual
    - **Self-settled trusts** *(570)*
        - trust considered created by the individual if:
            - "assets of the individual were used to form all or part of the corpus of the trust"
            - *and* trust established by:
                - individual
                - *or* individual's spouse
                - *or* person with legal authority to act on individual's behalf
        - if revocable by the individual:
            - corpus & all income = available resources
        - if irrevocable:
            - any income or corpus that could be paid *under any circumstances* = available resources
        - → *if discretionary trust, Medicaid applicant deemed to have resources in the maximum amount distributable to him*

        - deemed not available resources:
            - (1) if a discretionary trust created by *will* of one spouse for benefit of S.S.
            - *or* (2) if established for disabled individual from individual's property by:
                - parent, grandparent, guardian, or a court
                - *and* trust gives remainder to state upon individual's death, up to the amount of all medical costs paid by the state

    - **Trusts established by a third person**
        - Deemed available when:
            - (1) actually available
            - *or* (2) applicant or recipient has:
                - a legal interest in the liquidated sum
                - *and* the legal ability to make such sum available for support and maintenance

    - **Reimbursement for state-supported trust beneficiaries** *(571)*
        - Self-settled trusts

            - state can usually reach maximum amount that could be paid to settlor
        - Third-party trusts
            - state can reach to the extent that a beneficiary has a right to trust income or principal
            - state generally can't reach discretionary trusts

MODIFICATION AND TERMINATION OF TRUSTS

General rule

- If settlor and all beneficiaries agree, can modify or terminate trusts *(572)*
    - UTC § 411(e): can mod/terminate w/o consent of all beneficiaries if others' interests will be "adequately protected" *(584)*
- If settlor is dead, usually cannot modify
    - *Claflin* doctrine: no mod/termination if there is still a **material purpose** to be served *(upholds †'s rights) (573, 584)*
        - *if* the trust is irrevocable
        - most states: presumption of irrevocability *(584)*
        - UTC § 602(a): presumption of revocability

Modification

- Distributive provisions usually not modifiable
    - *but:*
        - **UTC § 412** *(577)*
            - court may modify administrative or dispositive terms of trust if:
                - circumstances unanticipated by settlor occur
                - *and* modification would further purposes of the trust

            - court may modify administrative terms if:
                - existing terms are impractical, wasteful, or impair trust administration
        - UTC § 105(b)(4): settlor may not opt out of law of mod/termination to make trust's terms immutable

- *In re Trust of Stuchell*, Or. 1990 *(574)*
    - Trust was to distribute corpus to descendants upon termination; one descendant, John, was mentally retarded & receiving public assistance
        - Petrs wanted to modify trust to continue trust's existence to keep John from being disqualified from public assistance
    - Modification disallowed *(575)*

- **Rest. (2d) Trusts § 167(1) cmt. b**: no modifying terms of trust solely to make more advantageous to beneficiaries

- Invading principal usually denied unless trust authorizes *(575 n.2)*

- More freedom to modify administrative directions, when circumstances change *(576 n.4)*

- **Reformation and modification for tax advantages** *(578)*
    - Increasingly common, but not universally allowed

    - **Reformation**
        - conforms instrument to what settlor intended at time of execution
            - e.g., correcting a lawyer's drafting error
            - UTC § 415: requires clear and convincing evidence

    - **Equitable deviation**
        - modification to achieve settlor's probable intent in light of changed circumstances *(579)*

Trust protectors

- Example
    - *T* devises property to *X*, a bank, in trust to pay income to *A* for life, then corpus distributed to *A*'s children. *T* names *P* as trust protector.
        - ***T* authorizes *P*, as trust protector, (1) to replace *X* with another corporate fiduciary, (2) to approve modifications to the trust's administrative and dispositive provisions (including increases to *A*'s lifetime share), (3) to terminate the trust, and (4) to select a successor trust protector.**

- Increases trust flexibility

- Approved by UTC § 808(b)–(d) (2000)

Termination

- *In re Estate of Brown*, Vt. 1987 *(580)*
    - Q: any remaining material purpose? *(yes)*
        - Remaining relevant provision of trust = income to be used "for the care, maintenance and welfare of my nephew and his wife so that they may live in the style and manner to which they are accustomed, for and during the remainder of their natural lives"

    - Active trusts cannot be terminated, even with consent of all beneficiaries, if there is any remaining material purpose of the settlor *(581)*

    - This is not:
        - a support trust; all income is to go to beneficiaries—not just what they need
        - a spendthrift trust; no disabling restraint *(582)*

    - Material purpose is unaccomplished: purpose = provide lifelong income

- UTC § 414 *(583)*
    - Allows mod/termination of small trusts in which the "value of the trust property is insufficient to justify the cost of administration"

Trustee removal

- Removal = remedy for breach of trust *(585)*
    - serious breaches of trust only
        - not just disagreements or minor breaches
        - beneficiaries' mere dissatisfaction not adequate
    - settlor-appointed trustees harder to remove than court-appointed

- UTC § 706. Removal of trustee *(586)*
    - relaxes traditional law
        - allows removal of trustees for longstanding mediocre performance

POWERS OF APPOINTMENT

INTRODUCTION

Purpose and definition of appointment powers

- Postpone and delegate decisions about who should receive future trust interests *(589)*
- Leave flexibility for dealing with changing circumstances

- Power of appointment = power to designate beneficial ownership
    - to appoint; designate; consume; withdraw
        - usually donor states whether power is cumulative or noncumulative (i.e., lapses at end of year if not exercised)
    - No magic words needed

- *Power of appointment is a personal right, not a property interest*

Terminology and types of powers

- donor = person who creates power of appointment
- donee = holds power
- objects = those in whose favor the power may be exercised
- appointee = person in whose favor power is exercised
- takers in default of appointment = those who take if power not exercised

- **General power**
    - exercisable in favor of:
        - the decedent [donee]
        - his estate
        - his creditors
        - or the creditors of his estate

    - creates a present interest

    - *see example p. 590*
    - only thing separating one holding a general power from having absolute ownership is writing on a piece of paper, "I hereby appoint to myself"

- **Special power = any power not a general power** *(590)*
    - e.g., life estate + power to appoint to issue
    - property still considered donor's

    - If donee does not exercise the power, court may distribute to objects of the power, if objects = limited and definite class. *Loring v. Marshall*, Mass. 1985 *(618)*
        - donee/power holder ≈ agent of donor *(620)*

- testamentary power = exercisable only by will *(591)*
- lifetime power = exercisable during life

Does the appointive property belong to the donor or the donee?

- Relation-back doctrine *(591)*
    - CL: donee viewed as having power to "fill in a blank on the donor's will": appointee receives property from donor, not donee

- *Irwin Union Bank & Tr. Co. v. Long*, Ind. 1974 *(592)*
    - Philip had a presently exercisable general power of appointment; allowed him to remove up to 4% of the trust corpus annually; power never exercised
        - Philip didn't own the property until he actually exercised power of appointment
            - until then, assets remained in control of the trust
        - *Could argue that since all Philip had to do was ask, he should be considered to have a property interest in that 4%*
        - *Also cf.* Shelley v. Shelley *(550)—court allowed recourse to funds in a spendthrift trust in order to satisfy claims for alimony and child support*

    - Analogy to discretionary trust: trustee retains discretion whether or not to distribute income

- Majority view: donee has no property interest until donee exercises power *(594)*
    - → creditor can't reach

    - UTC § 505(b) & Rest. (3d) Trusts § 56
        - creditors may reach appointive property when donee holds general power presently exercisable

Tax considerations for powers

- For federal tax purposes:
    - donee of general power treated as owner *(591)*
        - IRC §§ 2041, 2514 *(course pack 106)*
    - donee of special power not treated as owned by donee *(595)*
        - *GST tax may apply*

- **Estate tax**
  - Property over which the donee has a general power of appointment is in his/her gross estate
  - After 11/21/1942, doesn't matter whether exercised

  - *Exemption of $3.5m is high enough that most of us don't have to worry about estate taxes; affects only the richest 1–2%*

- **Gift tax**
  - Requires *present interest*
  - Property over which the donee has a general power of appointment, which, when exercised, effects a transfer of property, and thus a gift

  - General power of appointment **creates a present interest** in the power holder
    - → transfer to a trust will qualify for the gift-tax annual exclusion

  - **$13k excluded annually** (transferor is taxed)
  - **$1m lifetime exception** (transferor is taxed)
    - treated as an "advance" on the $3.5m estate-tax exemption
    - requires filing gift-tax return

- **Generation-skipping transfer tax (GST tax)**[6]
  - Property subject to a special power of appointment will be subject to the GST tax if donor, donee, and objects are in different generations
  - Triggered by:
    - (1) special power of appointment
    - (2) disclaimer[7]

  - *Q: Where is the property flowing from?*
    - Disclaimer: who is disclaiming and where does the property go?

  - *General theory: there should be a tax levied at every generation*

CREATION OF A POWER OF APPOINTMENT

Intent to create a power

- No magic words needed *(598)*
- Precatory words ≠ power of appointment

[6] Transfer tax = separate and distinct from income tax
[7] I.e., parent leaves property to child and child disclaims

Powers to consume

- Questions
    - Consumption of principal allowed?
    - If so, what standard governs?

- *Sterner v. Nelson*, Neb. 1982 *(598)*
    - Will gave property to W; but if left at death of W, to †'s heirs, not W's
    - W didn't leave property to †'s heirs

    - †'s foster daughter claimed under will, saying that W had life estate with power to consume
        - W had fee simple absolute based on *rule of repugnancy*
            - "[I]f a deed or will conveys an absolute title in fee simple, an inconsistent clause in the instrument attempting merely to limit that title or convey to the same person a limited title in the same land will be disregarded." *(600)*
                - "[H]aving once granted . . . an absolute conveyance, the balance of the limitations should be disregarded, regardless of the intent of the testator, on the basis that the intent is in conflict with the first grant." *(601)*

    - *Alternative method of drafting to avoid this problem:*
        - *Bank as trustee. Trustee shall distribute all income at least quarterly to Mary Viola. Trustee has discretion distribute trust corpus to Mary Viola. Any property remaining at the death of Mary Viola will go to Gladys.*

RELEASE OF POWERS OF APPOINTMENT

Release is a relinquishment of the power

- Donee gives up the right to exercise
- Partial release OK
    - can turn general into special power
    - can create a vested remainder

- must meet state-law requirements
- IRC § 2518: donee is not the transferor if release w/in 9 months of receiving

- Was power held? exercised? effectively exercised? if failed to exercise, where does property go?

Testamentary power

- Donee cannot enter into an enforceable K to make a future appointment *(602)*

    - Promisee may obtain restitution for value of unenforceable promise
        - based on unjust enrichment

- But donee can release power, fully or partially → may have same effect as a K

- *Seidel v. Werner*, N.Y. 1975 *(603)*
    - Steven had beneficial interest in trust w/ power of appt
    - Steven divorces 2nd wife; signs separation agreement
        - Agrees to exercise power in favor of their children
        - But then doesn't

    - *Cannot contract to exercise a testamentary power of appointment in a particular way*

    - Kids argue release
        - Court says no
        - K referred to a future exercise of the power, thus the K couldn't have been intended to release what was yet to be used

Exercise of Powers of Appointment

Generally

- Donee appoints property according to the power
- *Uses* the power
    - generally requires explicit statement of intent to exercise *(613 n.1)*
        - often strictly upheld

- A power is a *personal right*, not a *property interest*

Exercise by residuary clause in donee's will

- Does a residuary clause, without more, exercise a power of appointment?
    - **Majority rule: no**

    - *Beals v. State Street Bank & Tr. Co.*, Mass. 1975 *(607)*
        - † had general power presently exercisable; partial release → special power
            - will had general residuary clause that made no expression of intent re: exercise
            - court made **presumption of exercise** *(minority rule) (610)*

        - factors *(611)*
            - prior use and enjoyment of property
            - whether residuary clause is consistent with power retained

- **UPC § 2-608. Exercise of power of appointment** *(613)*
  - will contains expression of intent to exercise only if:
    - (1) power is a general power and there is no gift in default
    - *or* (2) will manifests intent to include property subject to power

- **UPC § 2-704. Power of appointment; meaning of specific reference requirement**
  - If instrument creating power expressly requires that exercise be by reference to the power or its source, presumed intention is to avoid inadvertent exercise of the power

Blending clause (blanket-exercise clause)

- Usually in residuary clause *(613)*
  - E.g., "All the rest and residue of my property, including property over which I have a power of appointment, I hereby appoint to *X*."

- Effective *unless* settlor required a *specific reference* to the power
  - strictness varies by jx

- UPC § 2-704 cmt.
  - blending clauses such as the above aren't effective
    - reference is not specific enough

Limitations on exercise of a power

- **General powers** *(614)*
  - donee can:
    - appoint outright
    - in further trust
    - create new powers of appointment

- **Special powers**
  - Some courts disallow appointment in further trust

  - Rest. (2d) Property § 19.4
    - Donee of special power can:
      - create general power in object of special power
      - create special power in any person to appoint to object of original special power

  - exclusive power
    - donee can exclude one or more objects of the power
  - nonexeclusive

        - donee must appoint some amount to each permissible object

    - Rest. (2d) Property § 21.1: presumptively exclusive

Fraud on a special power

- Appointments in favor of a person not an object are invalid *(615)*

- Appointments to an object for the purpose of avoiding limit on power = fraud on the power, void to the extent motivated by such a purpose

Ineffective exercise of a power

- **Allocation** (marshaling)
    - Donee uses a common dispositive instrument (will) *(616)*
        - usually combines (blending or blanket clause)
            - own property & property subject to power
        - Often an ineffective appointment
            - perhaps to someone not an object
            - or a RAP issue

    - → court attempts to allocate the appointive assets under different caluses in the will
        - does what donee could have or should have done

    - E.g.:
        - *A* has a special testamentary power over $100k assets; can appoint to *A*'s issue. *A* owns $350,000.
            - *A*'s will gives all property, including power over which *A* has power of appointment:
                - $100k to daughter-in-law *B*
                - All the rest to daughter *D*

        - Trust assets go to *D*; $100k of *A*'s own assets to *B*

- **Capture** *(617)*
    - General rule: if donee makes ineffective appointment, property passes in default of appointment or to donor's estate

    - *Capture* applies when donee of a **general** power "manifests an intent to assume control of the appointive property for all purposes"
        - usually occurs when will blends owned property with appointive property

    - Applies only to general powers & when attempted exercise is ineffective or incomplete

FAILURE TO EXERCISE A POWER OF APPOINTMENT

What was the power? How was it intended to be used? What was the donee's intent?

General rules

- General power → gift in default or donor/donor's estate *(618)*
- Special power + defined & limited class → gift in default or court gives to objects of power
    - donee as "agent" of donor: if donee fails to act, give effect to donor's intent

- *Hypo time*
    - David has trust: income to A for life, remainder as she appoints in will.
        - Ann has a general power.
        - She leaves all her property to VLS
            - but doesn't exercise the power.
        - Heirs at the time D died: Ann & Beth
            - ½ goes to Ann and thus to VLS
            - ½ goes to Beth and thus to (husband) Gary
    - *Illustrates issue: when to determine heirs?*

Gap in the trust provisions

- *Loring v. Marshall*, Mass. 1985 *(618)*
    - Marian died 1898; residue left in trust. Income to bro & sis for life; then to nephews for life.
        - Bro died 1900 → share of income to sister.
        - Sister died 1922 → all income to nephews.
        - Nephew 1 died 1928 → all income to Cabot.

    - Trust only allowed Cabot to appoint an *income* interest to his surviving spouse; Cabot does that.
        - Does not appoint trust property
            - didn't have the *power*

    - Gap in the trust = drafting lawyer didn't consider that one of the nephews wouldn't have appointed the trust interest
        - → Cabot Jr. (Marian's will had exhibited "intent to keep the assets within the family") *(621)*

        - Cabot had an *imperative power* (creating instrument manifested intent that the permissible appointees be benefited even if the donee fails to exercise) *(621 n.1)*—equivalent to implied gift in default

CONSTRUCTION OF TRUSTS: FUTURE INTERESTS

CLASSIFICATION OF FUTURE INTERESTS

Types of future interests

- Interests in the transferor *(624)*
    - Reversion
    - Possibility of reverter
    - Right of entry (power of termination)

- Interests in a transferee
    - Vested remainder
    - Contingent remainder
    - Executory interest

Reversion

- Retained by transferor
    - when transferor conveys a lesser estate than transferor had
- cannot be created in a transferee *(625)*

- E.g., "*O* to *A* for life"
    - *O* or *O*'s heirs retain reverter

- Rule of Reversions *(628)*
    - *O*, owner of a fee simple, will not have a reversion in fee simple if *O* transfers a possessory fee simple or a vested remainder in fee simple; in all other cases where *O* transfers a present possessory interest, *O* will have a reversion in fee simple.

Possibility of reverter *(625)*

- Future interest retained by grantor who conveys a fee simple determinable

- E.g., "*O* to School so long as used as a school"
    - School has fee simple determinable
    - *O* has possibility of reverter
        - possessory automatically upon expiration of determinable fee

Right of entry

- Future interest retained by grantor who conveys fee simple subject to condition subsequent

- E.g., "*O* to School, but if land ceases to be used for school purposes, *O* has a right to reenter."
    - School has fee simple subject to condition subsequent
    - *O* has a right of entry; may be exercised or not

Remainders

- Future interests in transferees that become possessory, if at all, upon the expiration of all prior interests simultaneously created *(626)*

- Either vested or contingent

- **Vested remainders**
    - Remainder is vested if:
        - (1) Given to a presently ascertained person *and*
        - (2) No condition precedent (other than termination of prior estates)

    - E.g., "*O* to *A* for life, then to *B*"
        - *B* has indefeasibly vested remainder

    - E.g., "*O* to *A* for life, then to *A*'s children"
        - No children → remainder contingent
        - ≥ 1 child →
            - vested remainder subject to partial divestment[8]
            - more children partially divests the prior children

    - **Vested remainders with payment postponed**
        - E.g., "*O* to *X* in trust for *A* for life, then to *B* to be paid when *B* is 30."
            - B's interest is a vested remainder with payment postponed.
                - If B dies at age 25 before A dies, the property will be distributed to B's estate when A dies.

        - E.g., "*O* to *A* at age 21 to be paid with interest."
            - *A*'s interest is a vested remainder with payment postponed (*Clobberie's case*, p. 642)

        - E.g., "*O* to *X* in trust for *A* at age 21."
            - *A*'s interest is a contingent remainder (*Clobberie's Case*)

[8] Also "vested remainder subject to open"

- *American courts are split*
    - *some say contingent; others say payment postponed*
    - *for our purposes = contingent*

- **Contingent remainders**
    - Remainder is contingent if:
        - (1) Not given to a presently ascertained person *or*
        - (2) Subject to a condition precedent

    - E.g., "*O* to *A* for life, then to *B* if *B* survives *A*"
        - *B* has contingent remainder

    - E.g., "*O* to *A* for life, then to *B* if *B* is married, otherwise to *C*"
        - *B* has contingent remainder, but must *B* be married at time of †'s death, at *A*'s death, or just at some point?
            - **Majority rule: C takes if B is unmarried at *O*'s death** *(641 n.4)*
                - *preference for early vesting*
        - *cf.* "*O* to *A* for life, then to *B*, but if *B* never marries, to *C*"
            - *B* has vested remainder subject to divestment

    - E.g., "*O* in trust to *A* for life, then to firstborn grandchild of *A*." A has three children but no grandchildren alive at the time that *O* dies.
        - *A*'s firstborn grandchild has a contingent remainder. *Must be alive to have a vested remainder.*

- **Contingent remainder vs. remainder vested subject to divestment**
    - E.g., "*O* to *A* for life, then to *B* if *B* survives *A*; if *B* does not survive *A*, to *C*"
        - *B* has contingent remainder
            - "if *B* survives *A*" incorporated into gift

            - *C* has alternate contingent remainder

    - E.g., "*O* to *A* for life, then to *B*, but if *B* does not survive *A*, to *C*"
        - *B* has vested remainder subject to divestment
            - between the commas setting off *B*'s gift, there are no words of condition
            - survival = condition subsequent
        - *C* has executory interest
            - which may divest *B*'s remainder

        - **If *A* dies before *B* or *C***, *A* cannot transfer interest by will. *A*'s interest will not be included in *A*'s gross estate for federal estate-tax purposes.

        - **If *B* dies before *A***, *B* cannot transfer interest by will. Not in *B*'s gross estate.

        - **If *C* dies before *A* or *B***, *C* **can** transfer interest by will. Is in *C*'s gross estate.

- **Condition subsequent vs. condition precedent**
    - If condition is incorporated into the gift of the remainder (comes "between the commas") → condition precedent

    - If remainder given, then words of divestment added → condition subsequent

Executory interests

- Executory interests are *divesting* interests *(628)*

- Shifting executory interest
    - May divest another transferee *(628–29)*

    - E.g., "*O* to *A*, but if *A* dies without surviving issue, to *B*"
        - *A* has fee simple subject to divestment by *B*'s shifting executory interest

- Springing exectuory interest
    - May divest the transferor *(629)*
    - rare these days

    - E.g., "*O* to *B* if *B* returns from Rome"
        - *B* has springing executory interest

Remainders in default of appointment

- Viewed as operating as a condition subsequent on the remainder in default *(630 n.4)*

Construction of Trust Instruments

Preference for early vesting (common law)

- Common law had strong preference for construing ambiguous instruments as creating vested interests *(630)*

- Vested remainder will accelerate into possession at termination of prior life estate
  - rule not important in modern times

- Only vested remainders were transferable during life
  - contingent remainders may now be transferable also

- Vested remainders do not require survival to time of possession
  - *note that this is different from the law of wills*
  - UPC § 2-707 changes this rule
  - *See First Nat'l Bank (638)*

  - **To *A* for life, remainder to *X***
    - *X* has vested remainder
    - if *X* dies before *A*, *X* can leave that vested remainder to anyone by will or it can pass by intestacy

Acceleration into possession

- CL: vested remainder accelerates into possession whenever and however the preceding life estate ends *(631)*
  - didn't always effectuate †'s intent *(632)*
    - → disclaimer statutes: disclaimant treated as predeceased; remainders take effect or fail accordingly

- *In re Estate of Gilbert*, N.Y. 1992 *(632)*
  - Lester wanted to disclaim his interest in a discretionary trust
    - *Executor:* Lester can't do that because he has no property interest to disclaim—cf. beneficiary's creditors' inability to reach assets of discretionary trust.
    - ***Court:*** Lester does have an interest—cf. beneficiary's right to sue to compel distribution on basis of bad-faith withholding.

  - **All the beneficiary needs to be able to disclaim is a right, not a property interest**
    - Does frustrate †'s intent, but you can't force a gift on someone *(633)*

  - **Remainder interest accelerated**
    - Lester's unborn kids get *nothing*
    - Lester treated as predeceased

Tax issues

- Note that wills create interests only at †'s death; trusts creat interest at time of trust creation.

- IRC § 2033
  - All property in which the decedent had an interest at the time of death is included in the gross estate for federal estate-tax purposes

- IRC § 2518(b)(2) *(635 n.4)*
  - Disclaimer treated as gift by disclaimant unless
    - disclaimer occcurs within 9 months after creation of interest
    - *or* disclaimer within 9 months after donee reaches 21
  - . . . whichever is later

- GST tax upon any transfer to grandchild or other person two or more generations removed from transferor *(635 n.5)*

- **Taxation of remainders** *(640)*
  - Any transmissible remainder is taxable
    - tax depends on value of interest
    - for defeasible interests, value is zero
      - if contingent on survival, GST tax may be applied if goes to grandchildren, etc.
  - GST tax removes any clear tax advantage from creating a remainder contingent upon survival rather than a remainder transferable at death

Transferability

- Common-law rule: only vested remainders transferable during life *(636)*
  - No longer true in all but 9 jurisdictions

- Reversions, remainders, executory interests are descendable and devisable
  - future interests contingent upon survivorship ≠ transfbl at death

Requiring survival to time of possession

- CL: survival not an implied condition; variable by † *(638)*
  - A vested remainder in a trust passes to the estate of the remainderman at his death unless the instrument provides expressely that the remainder is divested by death. *(639)*

- Ambiguity of † including word "survival" *(641 n.4)*
  - Not clear at what time donee must be surviving
    - could be testator, life tenant, preceding remainderman

        - **E.g., "† to *A* for life, then to *B*, but if *B* dies without issue surviving her, to *C*"**
            - **Majority rule: C takes only if B dies before A without issue**
                - *preference for early vesting*

- *First Nat'l Bank of Bar Harbor v. Anthony*, Me. 1989 *(638)*
    - Anthony made revocable inter vivos trust, income to self, then income to Ethel (widow); remainder to kids in equal shares.
        - Ethel dies 1982.
        - John (son) dies 1983 unmarried, leaving 3 children
        - Anthony dies 1984
            - will left 2/3 property to Peter (son) & 1/3 to Dencie (daughter).
            - John's children specifically omitted.
        - John's kids claim share of trust
            - court held for the kiddies
                - **Remainder beneficiaries need not survive life tenants; no survival requirement implied.**

    - Transmissible interest vs. antilapse *(639)*
        - John dies intestate, survived by wife and children
            - Transmissible interest
                - heirs (wife in UPC, maybe also kids)
            - Antilapse statute
                - children only
        - John's will devises all property to wife
            - Transmissible interest
                - wife
            - Antilapse statute
                - children only
        - John has no issue & his will devises all of his property to his wife.
            - Transmissible interest
                - Wife.
            - Antilapse
                - unclear

Multigenerational classes

- Survivorship requirement implied for bequests to, e.g., "issue" or "descendants" *(640)*
    - E.g., †'s will: "To *A* for life, then to *A*'s issue." A has son *B* and daughter *C*. *B* predeceases *A* and gives property to wife. *B* has a daughter *D*.
        - Requirement of survival → *B* cannot devise to wife.
            - *D* takes the share that *B* would have had.

- Cf. ". . . to *A*'s *children*"
    - single generational class gift → surviorship ≠ implied

UPC § 2-707. Future interests in trusts

- Major changes to longstanding common-law scheme *(643)*

    - All future interests in trust are contingent on the beneficiary's surviving to the date of distribution

    - If remainderman doesn't survive:
        - substitute gift in remainderman's descendants who survive to the date of distribution (≈ antilapse in law of wills)

    - If remainderman doesn't survive and leaves no descendants:
        - remainder fails
        - no alternative remainder, trust → settlor's residuary devisees or heirs

- Cmt.: Rationale = "to prevent cumbersome and costly distributions to and through the estates of deceased beneficiaries of future interests who may have died long before the distribution date" *(646)*

- Provisions may be avoidable by including in trust a clause stating that § 2-707 doesn't apply *(647)*

GIFTS TO CLASSES

Defining a class gift

- Class gift when donor is "group minded"
    - group usually subject to fluctuation
        - can add more
        - can substract some
    - individuals usually not named
    - shares usually not indicated

- Rest. (3d) Property (tentative draft no. 4)
    - § 13.1
        - described by group label and intended to take as group
        - membership is typically not static
    - § 13.2
        - if identified only by group label and either name or number:
            - presumption against class gift
            - may be rebutted

Gifts of income

- If a member of the group dies, presumption is that the deceased does not take
  - settlor should specify
  - in absence of clear language, look for intent

- *Dewire v. Haveles*, Mass. 1989 *(649)*
  - Here: **income**[9] of trust to widow, then to Jr., then to grandchildren
    - grandchild Thomas III died, leaving child Jennifer
      - court gave income to Jennifer
      - Jennifer would ultimately take remainder

  - *court looked to settlor's intent*

  - General rule: in the absence of a contrary intent expressed in the will or a controlling statute stating otherwise, members of a class are joint tenants with rights of survivorship
    - Here, † expressed intent contrary to this rule: without this construction, will would be read to require the trust interest to accumulate undistributed for 21 years, which is so unusual or improbable that such a construction should be avoided
    - Will generally pointed to "equal treatment of the testator's issue per stirpes"

Gifts to children, issue, or descendants

- **What are "children"?**
  - Meant as "issue" or "descendants"?
    - especially ambiguous if ≥ 1 of †'s children dies

  - Best practice is to define in the trust

  - Usually includes adopted children[10]
    - but law may be different for trusts than for intestacy or wills
    - what would settlor intend?—often not settlor's children
    - law may have been different when trust established
    - *equitable adoption*
      - intestacy
      - probably not applicable to will or trust

  - Does not include stepchildren or foster children

[9] this is significant (case doesn't apply other than to distributions of trust income)
[10] for the purposes of this class, we can assume adopted children are included

        - unless settlor specifies

- **What if a child dies?**
    - usually treated as a class
        - † bequeaths fund in trust "for my daughter *A* for life, then to *A*'s surviving children."
            - At †'s death, *A* has two children, *B* and *C*.
            - Then *C* dies, leaving a child *D*.
            - → *B* takes.
        - Same result if trust had been ". . . to *A*'s children."

    - gifts left to "issue" *(653)*
        - usually distributed per stirpes rather than per capita
            - *review of distributional systems (653–54)*

Gifts to heirs

- *Generally*
    - *Issue and descendants are the same.*
    - *Heirs are those who would take under intestacy laws.*
        - *includes spouse*
        - *may be parents, siblings, or others*
    - *Heirs of the body = issue, not heirs*
        - *Willbanks says don't use this term*

- When do you determine the heirs of a named individual?
    - **UPC § 2-711. Future interests in "heirs" and like *(660)***
        - Determine heirs at time disposition is to take effect in possession or enjoyment
        - If spouse of a designated individual has remarried, spouse is no longer an heir

    - *Remember!*
        - 1. Whose heirs are we talking about? Settlor's? Life-income beneficiary's? Someone else?
        - 2. At what time? Death of the named individual? At the moment of disposition?

        - vesting in *interest* vs. vesting in *possession*

    - *Estate of Woodworth*, Cal. 1993 *(655)*
        - Trust → Mamie for life, then to Plass, if she survives; otherwise to Plass's heirs at law
            - Plass died 1980
                - estate → husband

            - husband died 1988
                - estate → Regents
        - Mamie died 1991

    - Two choices for when to determine heirs
        - Plass's death
            - *argument = heirs determined when person dies*
        - *or* settlor's intent (death of Mamie?)
            - gift was to Plass if she survived; if not, to her heirs →
            - determine heirs when Plass would acquire possession

    - Plass's heirs (in intestacy)
        - 1980 (at her death): husband; niece & nephew
        - 1991 (Mamie's death): the "Woodworth heirs"

    - Preference for early vesting → court looked to 1980 heirs
        - husband's bequest to Regents of Cal. was valid

- **Doctrine of worthier title** *(660)*
    - English rule of law

    - When settlor transfers property in trust,
      with a life estate in the settlor or another,
      and purports to create a remainder in the settlor's heirs
        - → conclusive presumption that settlor intended to retain a reversion in himself

    - Recast as a rule of construction, *Doctor v. Hughes*, N.Y. 1919 *(661)*

    - Now mostly jettisoned by statute

- **The rule in *Shelley's Case***
    - Rule of law

    - If:
        - (1) one instrument (deed, will, or trust)
        - (2) creates a life estate in land in *A*, and
        - (3) purports to create a remainder in *A*'s heirs or issue,
        - *and* (4) the estates are both legal or both equitable,

      → remainder is in fee simple to *A*.

        - If no intervening life estate, *A* has fee simple.

    - Almost universally abolished by statute *(662)*

The class-closing rule

- **(1) Physiologically** *(662)*
  - when there cannot be any more class members

  - To *A* for life, then to *A*'s children
    - the class closes at *A*'s death
    - [ignores the problem of posthumously conceived children]

- **(2) Rule of convenience** *(663)*
  - When a class member can (or could) demand distribution[11]

  - To *A* for life, then to *B*'s children. When *A* dies, *B* is alive and has two children.
    - Class closes on *A*'s death because a child of *B* can claim.
    - Any of *B*'s children born later are not part of the class.

- **The class closes on the earlier of (1) or (2).**
  - *Preference for early vesting*

- **Immediate gifts** *(663)*
  - † bequeaths $15,000 to the children of *B* who reach 21.
    At †'s death, *B* has two children: *C* (age 7); *D* age (4).

    Three years later, *E* is born to *B*.

    Then *C* reaches 21.
    - *C* gets $5000.

    One year later, *F* is born to *B*.
    - The class was closed; *F* not in the class.

    D dies at age 20.
    - *D* did not reach 21 so *D*'s estate gets nothing.
    - Class shrinks to two members, *C* and *E*.
      - *C* gets $2500 (for $7500 total).

    Then *E* reaches 21.
    - *E* gets $7500.

- **Postponed gifts** *(665)*

[11] E.g., a gift is to be distributed when class members reach 21; if the eldest member dies before age 21, class closes when that class member would have been 21. *See* "Postponed gifts," *infra.*

- If the gift is postponed until a life tenant dies, the class will not close under the class-closing rule until the time for taking possession.

- † bequeaths a fund in trust to pay the income to *A* for life, then to distribute the principal to the children of *B* who reach 21. In the meantime, income to the children of *B* who are eligible to receive but have not yet received the property.
  - *B* has one child, *C*.
    Then *A* dies.
    - *C* is now entitled to income.

    Then *D* is born to *B*.
    - *D* is now entitled to income; *C* continues to receive.

    C reaches 21.
    - Class closes.
      - Class consists of *C* and *D*.
    - *C* gets ½ income.

    E is born to B.
    - *E* is not a member of the class.

    D reaches 21.
    - *D* gets the other ½.

    E reaches 21.
    - Nothing happens.

- † bequeaths a fund in trust to divide the fund among the children of *B*, payable to each at age 21, income in the meantime.
  - At †'s death, *B* is alive and has one child, *C* (age 5). *C* dies one year later.
    - *C*'s estate receives nothing at this time.
    - C*'s interest is vested subject to open with payment postponed.*

    B is alive, so *B* could have more children.
    - Class won't close until *C* would have been 21.
      - Until then, class is open and any of B's children born would be in the class.

    If *B* died before †:
    - Class would close at *C*'s death.
    - *C*'s estate would take all.

- † leaves a fund in trust to *A* for life, then to *A*'s children.

        - Class closes when *A* dies.

    - † leaves a fund in trust to *A*'s children.
        - *A* is alive but childless.
          If no children when † dies:
            - Restatement would leave class open until *A* dies
              . . . but little case law.

- **Gifts of specific sums** *(669)*
    - Class closes at death of † regardless of whether any members of the class are then alive

THE RULE AGAINST PERPETUITIES

Summary of the Rule

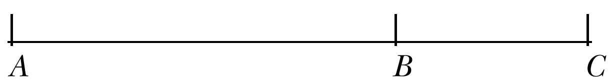
Classic formulation

- No interest *(in real or personal property)* is valid unless it must vest *(in possession or interest)* or fail within 21 years plus some life in being at the creation of the interest.

    - Two concerns *(674)*
        - Keep property marketable
        - Limit "dead hand" control *(mostly this)*

- Need some measuring (validating) life

- RAP in its classic form, illustrated



A = when interest was created.
- who are the lives in being at that time?
- must be in reference to the trust interests
    - if interest created by will:
        - *A* is †'s death
    - if interest created in an irrevocable inter vivos trust:
        - *A* is when trust was created
    - if interest created in a revocable trust:
        - *A* is when †/settlor dies

B = death of all individuals alive at time *A*
C = 21 years after *B*

RAP is a rule of proof

- What might possibly happen, not what will actually happen *(676)*
    - If there is any possibility that the rule will be violated, the interest is void

- Validity determined at time of creation of interest
    - unless applying "wait and see"

- Rule of law, not construction

- Concern is with *vesting*
    - only indirect concern with duration of trusts

Modern status

- All jx have adopted some measure of reform
- Many have abolished RAP entirely

"Wait and see" reform

- Wait for the lives that affect vesting *(698)*
- Wait until end of perpetuities period, then determine whether interests have actually vested

- *O* creates an irrevocable trust, income to *A* for life, then income to *O*'s children for life, remainder to *O*'s grandchilden.
    - Classic RAP: gift to children invalid
        - *O* could have afterborn child

    - Under wait and see: gift to children is valid
        - Class closes at *O*'s death; he was alive at time of creation; no conditions

THE FERTILE OCTOGENARIAN

Conclusive presumption of fertility

- † bequeaths a fund in trust for her sister "*A* (age 80) for life, then for *A*'s children for their lives, then to distribute the trust assets to *A*'s issue then living." *(679)*
    - *A* is deemed to be capable of having another child; the remainder might vest on the death of this afterborn child, which is too remote

THE UNBORN WIDOW

Bequests to a spouse not specifically named cause problems

- *Dickerson v. Union Nat'l Bank of Little Rock*, Ark. 1980 *(681)*
    - † left property in trust for two sons and Martin's widow (not otherwise named) until their deaths; to continue until the youngest child of either son had reached 25, then to bodily heirs of sons

    - Widow's interest is valid
        - Martin = alive & must get married, if at all, while he lives

    - Heirs' interest invalid

        - "Martin might marry an 18-year-old woman twenty years after his mother's death, have additional children by her, and then die." *(683)*

THE SLOTHFUL EXECUTOR

Possibility of remote distribution

- † devises property "to †'s issue upon distribution of †'s estate." †'s estate may wind up undistributed until many years after all of †'s surviving issue are dead → gift is void

RAP AND CLASS GIFTS

The basic rule: all-or-nothing

- All interests must be valid or none of them are *(686)*
    - The class must close within the RAP period
    - All conditions precedent must be satisfied within the RAP period

- A remainder that is vested subject to open is *not* vested for RAP purposes *(687)*
    - † bequeaths property in trust "for *A* for life, then for *A*'s children for life, then to distribute the property to *A*'s grandchildren."
        - Remainder to grandchildren is void because every member of the class will not be ascertained until the death of *A*'s children, some of whom might not be in being at †'s death.

    - *O* leaves a fund in trust to *A* for life, then to those of *A*'s childrn who reach 25.
        - Class closes when *A* dies.
        - Condition precedent: must reach 25.
            - → invalid under common-law RAP.
                - one or more of *A*'s children may not reach 25 within 21 years of *A*'s death.
            - Under wait-and-see, only invalid if, at *A*'s death, *A* actually has children who are under the age of 4.

- Rule of convenience may save the gift
    - *O* transfers property in an irrevocable trust "for my daughter *A* for life, then to distribute the principal to my grandchildren."
        - If at time of trust creation *O* has grandchildren living, the class closes at *A*'s death → gift is valid
        - *otherwise void.*

Exception: gifts to subclasses

- Subclasses treated as separate classes

- *Am. Sec. & Tr. Co. v. Cramer,* D.C. 1959 *(688)*
  - Will made a gift to each child's heirs upon the death of ***each*** child → each child's heirs treated as a subclass
    - validity of gift to each subclass of heirs did not turn on validity of all subclasses as a whole

  - *Under wait-and-see, interest in all four subclasses would have been valid*

Exception: specific sum to each class member

- † bequeaths $500 to each grandchild of his brothers, to be paid at age 21 *(689)*
  - Amount intended to be received by each member is ascertainable without reerence to the number of persons in the class
  - → gift validity determined separately for each member of the class

APPLICATION OF RAP TO POWERS OF APPOINTMENT

General powers presently exercisable

- General inter vivos power must become valid or fail within RAP period *(690)*
  - must be *able* to exercise
  - don't *have* to exercise

- Interests measured from time of exercise

General testamentary powers and special powers

- *Donee treated as agent of donor (691)*

- Validity
  - (1) Power must be valid
    - incapable of exercise beyond RAP period
  - *and* (2) interest created by power must be valid

  - both are measured from the time of creation of the power
    - exercise is read back into original gift creating power

  - **Second-look doctrine**
    - consider facts in existence at time power is exercised
    - *not a reform measure*

Hypotheticals

- Are the following powers valid?
    - (1) † creates a testamentary trust, income to *A* for life, remainder to those that *A* appoints in his will, in default of appointment to *A*'s issue.
        - Can't be exercised beyond RAP period because *A* = measuring life.

    - (2) † creates a testamentary trust, income to *A* for life, then income to *A*'s children for life. When each of *A*'s children die, his or her share shall be distributed to whomever such child appoints by will.
        - Validity of children's power depends . . .

        - Assume further that *A* has two children, *B* and *C*. After † dies, *A* has another child, *D*. Then *A* dies.
            - treat children as subclasses
                - → *B* and *C* have valid powers
                    - living when trust created
                - *D*'s power invalid

- Exercise of the following powers valid?
    - In (1) above, *A* appoints to grandchildren.
        - Gift becomes: Income to *A* for life, remainder to *A*'s grandchildren
        - Second-look doctrine
            - *Allows you to reference facts that existed when* A *exercised the power*
        - Class closes on the earlier of
            - (a) death of *A*'s children
            - (b) when a grandchild can demand
        - → if grandchildren alive at *A*'s death, class closed

        - If no grandkids alive at *A*'s death, need to know when *A*'s children were born & whether any were alive when † made original gift
            - valid *iff* all of *A*'s children were alive at †'s death

    - In (1) above, *A* appoints to children for life, and at death of last child, to grandchildren in fee simple.
        - Gift becomes: Income to *A* for life, then income to *A*'s children for life, then to *A*'s grandchildren
        - Second-look doctrine
            - Were all of *A*'s children alive at †'s death?
                - yes → gift valid
                - no → invalid

CHARITABLE TRUSTS

Distinguished from private trusts

- Not subject to RAP
- Don't need to have specific beneficiaries

- Attorney general can sue to enforce charitable trusts

NATURE OF CHARITABLE PURPOSES

Valid charitable purpose

- Charitable purposes include: *(731)*
  - relief of poverty
  - advancement of education
  - advancement of religion
  - promotion of health
  - govermental or municipal purposes
  - other purposes the accomplishment of which is beneficial to the community

- *Shenandoah Valley Na'tl Bank v. Taylor*, Va. 1951 *(729)*
  - Settlor said trust was for education

  - But court said not charitable
    - Mandatory distributions to a class of children → no way to ensure that they really went to education
      - *"candy trust"*

  - Could have given to the school as outright gift or gift in trust

- Miscellany on "charitable purpose"
  - A trust for the benefit of a class of persons isn't necessarily charitable *(735)*
  - A trust may be a valid charitable trust even if those who directly benefit are limited in number
  - Settlor may delegate selection of a charitable purpose to trustee

CY PRES (MODIFICATION OF CHARITABLE TRUSTS)

Definition

- If settlor's exact charitable purpose cannot be carried out, court may direct application of trust property to another charitable purpose that approximates the settlor's intention *(737–38)*

Requirements and doctrine

- (1) Specific charitable purpose
  (2) If settlor's exact/specific charitable purpose cannot be carried out
    - because impossible, illegal, impracticable
    - UTC allows cy pres if charitable purpose becomes *wasteful (741)*
  (3) General charitable purpose
    - *trust too narrowly drafted → fail*
    - UTC creates presumption of general charitable intent

  → reform trust to be as near to specific charitable purpose as possible

- *In re Neher*, N.Y. 1939 *(738)*
    - † left property to be used as a hospital, to be named after †'s husband
        - but village didn't have $ to make hospital
          → village turned property into administrative facilities

    - gift held to be a gift to the community
        - = general charitable purpose
        - *a bit of a stretch . . .*

- *The Buck Trust*, 1975ish *(743)*
    - † left estate to San Francisco Foundation
        - corpus suddenly increased posthumously from $9m to $300m
        - †'s will said to use corpus for benefit of the needy in Marin County
            - lol

    - Issue: should Foundation use funds beyond just Marin?
        - Foundation argued they should because the increase was a posthumous "surprise" *(744)*

    - Court wanted to replace the trustee (grounds = administrative deviation), but Foundation wound up resigning as trustee → cy pres issue dropped

    - narrow view of "impracticable"?

- *Barnes Foundation* case *(746)*
    - Trust to maintain art collection, exhibit artwork, teach aesthetic theories
    - Last trustee died → Lincoln U. became trustee → trust had too-small endowment

    - Court authorized a number of measures that violated the very strict rules of the original trust instrument

    - opening more often; charging small admission fee; world tour of parts of collection; 2004 relocation

- Charitable purpose = education; aesthetic theories?

- Administrative deviation?
    - opening more often ≠ change in specific charitable purpose
    - changing location = irrelevant
        - manner of display = most important thing from aesthetic-theory standpoint

DUTIES OF FIDUCIARIES: TRUSTEES AND EXECUTORS

ADMINISTRATIVE POWERS

Powers of an executor

- Inherent power to:
    - collect property
        - inventory
        - appraise
    - pay debts and expenses
    - distribute property

Powers of the trustee

- No inherent powers in the absence of legislation *(777)*
    - Purpose of a trustee is to carry out settlor's intent
        - powers specified in trust instrument
            - being specific about intent (e.g., "I want my trust to qualify for *X* tax exemption") can give trustees specific related powers (e.g., reformation to meet stated intent)

- Two general kinds of state statutory schemes
    - (1) settlor may incorporate by reference
    - (2) grants of basic powers; no need to incorporate

Trust distributions

- Look to terms of trust
    - mandatory distributions
        - income or principal or both
    - discretionary distributions
        - income or principal or both
        - may be
            - subject to a standard
            - absolute discretion
                - good faith still required of trustee
                - no arbitrary and capricious action

DUTY OF LOYALTY

Requirement of undivided loyalty

- Most fundamental fiduciary obligation
- Must act solely in interest of beneficiaries

        - No conflicts allowed
        - No self-dealing
            - self-dealing → "no further inquiry" *(see below)*
        - A trustee who violates a duty is personally liable

- *Hartman v. Hartle*, N.J. 1923 *(779)*
    - **Violation of duty of loyalty → violator accountable to beneficiaries for profits**

    - † dies. Executors = two sons-in-law. Real estate to be sold; profits to be distributed to †'s children.
        - Executors sell to †'s son Lewis, who bought property for sister Josephine, who was wife of an Executor, at price of $3900.
        - Josephine sells for $5500.

    - **Rule against self-dealing includes spouses**
        - → application of no-further-inquiry rule
        - property couldn't be recovered *(innocent purchaser)*
          → profit to children

- If executor wants to buy estate property:
    - (1) get consent of all beneficiaries
        - if needed, court will appoint guardian ad litem
    - (2) get consent of the court

- *In re Gleeson's Will*, Ill. 1955 *(780)*
    - † made tenant a trustee of certain property
        - tenant was already leasing the property
        - tenant–trustee held over the property for another year
            - but also increased his rent payment to the estate

    - Trustee argued good faith and honesty
        - unavailing
        - tenant or trustee, not both—dual role breaches duty of loyalty

    - → trustee had to pay profits from the year-long hold-over

- *In re Rothko*, N.Y. 1977 *(783)*
    - † = Rothko. Estate included 798 paintings. The three executors sold them within three weeks; 100 to MAG for $1.8m and the rest consigned to a gallery (MNY) with a 50% commission.
        - Surrogate court removed all three executors, set aside Ks for sale, allowed damages based on value of paintings at time of trial.
            - Executor1 liable for $6.46m.

            - not in a dual position; no self-interest or bad faith; but failed to exercise ordinary prudence.
        - Executor2 & 3 liable for $9.25m.
            - liability included *appreciation damages* (penalty)
    - AppDiv aff'd

- CtApp aff'd
    - decision not just based on "no further inquiry"
    - agreements were neither fair nor in estate's best interests
    - conflicts of interest were clear re: Executor2 &3
        - Executor1 knew co-executors were breaching trust
            - but failed to prevent & acceded to their actions

    - Appreciation damages appropriate for Executor2 & 3
        - not mere imprudence
        - serious conflicts of interest
        - not self-dealing, but close

Co-trustees

- Traditional rule: must act with unanimity *(790)*
    - unless trust instrument states otherwise
    - → liability for co-trustees' actions

- Modern trend: ≥ 3 trustees → act by majority
    - UTC
    - Restatement
    - duty to prevent serious breach of trust by co-trustees

No-further-inquiry rule

- Self-dealing is conclusively a breach of loyalty unless: *(781)*
    - traditional exceptions
        - (1) settlors authorized the self-dealing transaction
        - *or* (2) beneficiaries consented after full disclosure

    - modern exceptions
        - bank–trustee may deposit trust assets in its own banking department
        - institutional trustee may invest trust assets in funds that it operates
        - trustee can compensate self

- UTC § 802 (2000) *(782)*
    - Transaction by trustee with a close relative or his lawyer is presumptively voidable, not forbidden

Trust-pursuit rule

- If trustee, in wrongfully disposing of trust property, acquires other property:
  - the beneficiary is entitled to enforce a constructive trust on the property acquired *(782)*

- If trustee, in breach of trust:
  - transfers to a person with notice and payment:
    - transferee does not hold property free of trust.
  - transfers to a person without notice or payment
    - transferee does not hold property free of trust.

DUTY OF PRUDENCE

Basic components

- Collect and manage trust property *(see 791)*
- Earmark trust property
- No commingling trust property with own assets
- Make trust property productive
  - invest and manage

  - **Prudent person rule** (historical)
    - such care and skill as a person of ordinary prudence would exercise in dealing with his own property
      - preserve the trust property
      - produce a regular flow of income
    - no-delegation rule

  - **Prudent investor rule** (modern) *(796)*
    - increased sensitivity to trade-off between risk and return
    - diversification imperative
    - reversal of the no-delegation rule

  - objective standard of care

Delegation

- Traditionally disallowed *(818)*
  - *Shriners Hosps. for Crippled Children v. Gardiner*, Ariz. 1987 *(819)*
    - Trust: income to daughter & two grandkids; remainder to Shriners
      Daughter = trustee
      Grandchildren = 1st and 2nd alternate trustees

- Daughter not an experienced investor
  - left all decisions to son, an investment counselor
  - son embezzled from trust

- Shriners sues to surcharge daughter

- Court held daughter's delegation to son was breach of duty
  - cannot delegate responsibilities that she can reasonably be expected to perform herself
  - standard is that of a prudent person dealing with the property of another

- Trustee can seek advice, but must exercise own judgment
  - here, son was acting as a surrogate trustee, not merely an investment advisor

- Harm was embezzlement, not bad advice
  - court remands to determine existence of causal link between trustee's delegation of investment authority to the son and his embezzlement of trust funds

- **Modern rule: delegation OK**
  - Uniform Prudent Investor Act § 9 *(820)*
    - (a)
      - can delegate functions that a prudent trustee of comparable skills could delegate under the circumstances
      - requires reasonable care, skill, and caution in:
        - selecting an agent
        - establishing scope and terms of delegation
        - monitoring
    - (b)
      - agent owes duty of reasonable care
    - (c)
      - a trustee complying with (a) is not liable for agent's decisions

DUTY OF IMPARTIALITY

Trustee must strike fair balance between beneficiaries

- Must give due regard to respective interests *(821)*
  - income beneficiaries
  - *and* remaindermen

- *Dennis v. R.I. Hosp. Tr. Co.*, 1st Cir. 1984 *(821)*
  - Settlor's will created trust 1920

- income to living issue
- trust to terminate 21 years after death of last surviving child → 1991

- Plaintiffs = sole surviving issue & remaindermen (settlor's grt g-kids)
- Trust assets = three buildings in downtown Providence
  - sold in 1945, 1970, 1979

- Court held that trustees should have sold buildings (trust prop) by 1950
  - ordered surcharge of $365k
    - *math was funny (see 826)*
  - breach of duty of impartiality
    - not imprudent, but unfair

- Trustee not only failed to sell the buildings (duty re: investments)
  - but failed to inform itself about condition of buildings, value, etc.
  - lack of accounting, didn't diversify, renovate, modernize

- **Trustee can't be passive**
  - must be active!
    - inform selves
    - protect assets
    - keep assets productive

SUBRULES RELATING TO TRUST PROPERTY

Duty to collect and protect trust property

- Must obtain possession of the trust assets without unnecessary delay *(830)*
  - context-sensitive
- Once obtained, must manage prudently

Duty to earmark trust property

- Designate as trust property rather than the trustee's own
  - modern rule: trustee liable only for losses directly from failure to earmark

Duty not to commingle funds with trustee's own

- Commingling = breach of trust *(831)*
  - commingling makes tracing harder → easier for trustee's personal creditors to reach

- Modern trend: partial abrogation

- allow corporate fiduciary to hold and invest in a common trust fund

DUTY TO INFORM AND ACCOUNT TO THE BENEFICIARIES

Duty to provide complete and accurate information

- *Fletcher v. Fletcher*, Va. 1997 *(832)*
    - Husband & wife accumulated substantial assets
    - Husband died → wife creates revocable trust
        - all of her assets
        - she was trustee
        - at her death, successor trustees appointed three trusts
            - one for son James
            - two for James' two children

    - James sued, requesting info
        - trustees refused to give him a copy of the trust agreement, claiming confidentiality

    - Court held that the beneficiary had a right to a copy of the trust agreement
        - *duty to provide complete and accurate information*