

FIRST CONCEPT: INTENT

4 Issues:

1. Capacity
2. Insane delusion
3. Fraud
4. Undue influence

[I] CAPACITY

[A] The capacity to make a will is the lowest capacity recognized in law.

[B] **At the time of execution, testator must satisfy four elements:**

[1] *Testator must be at least 18 years of age*

[2] *Testator must be able to understand the extent of her property.*

[3] *Testator must know the natural objects of her bounty.*

[a] Spouse or domestic partner

[b] Issue.

[c] Parents.

[d] And those whose interests are affected by the will.

[4] Testator must know the nature of her act:

[a] Testator must know that she is executing a will.

[b] However, testator does not have to know all of the legal technicalities of the will.

[c] Example: Testator does not have to know the Rule Against Perpetuities.

[C] **Consequences of incapacity:**

[1] The entire will is invalid.

[2] Property, therefore, will pass by intestate succession.

[3] **Exception:** If testator had a valid prior will that was purportedly revoked by a second will, (the one for which testator did not have capacity), then the first instrument will be probated if testator did not have capacity, the second will could in no way have revoked the first.

[D] **Bar exam tip:** Hypo's that will trigger a capacity issue:

[1] T who has a conservator appointed

[2] T who is diagnosed w/ a mental disorder.

[3] Note that the mere appointment of a conservator or diagnosis of mental disorder is not alone sufficient to show incapacity; go through the 4-prong test.

[4] Example: "T/e testator was diagnosed w/ a mental disorder, this is *relevant to establish* that at the time of execution, testator did not know the natural objects of her bounty b/c [now apply the facts]."

[II] INSANE DELUSION

[A] A will can also be attacked if *at the time of execution* the testator was suffering from an insane delusion.

[B] **Four elements to establish testator was suffering from an insane delusion:**

[1] *T had a "false belief"*

[2] *That belief was the product of a "sick mind"*

[3] *There is no evidence to support the belief, not even a scintilla of evidence.*

[4] *Delusion must have affected testator's will.*

[C] **Consequences of finding an insane delusion:**

[1] Only that part of the will that was affected by the delusion is invalid.

[2] As to that part, it will go to the residuary devisee, or if none, or if the residue itself was infected by the delusion, by intestate succession.

[III] **FRAUD**

[A] **Elements: 5 elements to fraud:**

[1] *There must be a representation;*

[2] *Of material fact;*

[3] *Known to be false by the wrongdoer;*

[4] *For the purpose of inducing action or inaction, and*

[5] *In fact induces the action or inaction desired.*

[C] **Fraud in the execution**

[1] **Defined:**

[a] Someone forges T's signature to a will or

[b] Testator is given a document to sign that purportedly is non-testamentary in nature, but in fact it is, & testator signs it.

[2] **Consequence of finding fraud in the execution:**

[a] The entire will is invalid.

[b] Thus, the property passes by intestate succession, unless there is prior will that was validly executed.

[c] If there was a prior will that was validly executed, the instant will, as a consequence of the fraud, could in no way have revoked the prior valid will.

[D] **Fraud in the inducement**

[1] The wrongdoer's representations affect the contents of T's will.

[3] **Consequence of finding fraud in the inducement:**

[a] Only that part of the will affected by the fraud is invalid.

[b] As to that part, the court has 3 options:

[1] Give the property to the residuary devisees, if any; or

[2] If there is no residue, to the heirs at law by intestate succession; or

[3] Probate the will as is, giving the property to the wrongdoer, but simultaneously with the probate decree also decree that the wrongdoer is a constructive trustee. A constructive trust is a remedy to prevent fraud or unjust enrichment. A constructive trustee has only one obligation: to transfer the property to the intended beneficiary as determined by the court.

[4] **Distinguish fraud in the execution from fraud in the inducement:**

[a] In fraud in the execution: T does not intend the document to be his will.

[b] In fraud in the inducement: Testator intends the document to be his will, however, the contents are affected by misrepresentation.

[E] **Fraud in preventing testator from revoking**

[1] This is a variation of fraud in the inducement.

[2] Example: Testator's will leaves everything to son, but testator later changes her mind & wants to leave everything to charity. Due to son's fraud (the lie that the charity is being investigated by the FBI) testator does not revoke the will. B/c of the fraud, there is no revocation.

[3] **Consequence of fraud in preventing testator from revoking:**

[a] The court will not probate the will & thus the property will go to the heirs.

- [b] Simultaneously, the court also will decree that the wrongdoer is a constructive trustee.

[IV] UNDUE INFLUENCE

[A] T's free agency is subjugated.

[C] **Prima Facie Case: 4 elements:**

[1] ***Susceptibility:*** Testator has a weakness such that he is able to have his free will subjugated. The weakness can be anything:

- [a] Psychological,
- [b] Financial,
- [c] Physical, or
- [d] Any weakness of the testator.

[2] ***Opportunity:*** the wrongdoer had access to the testator. If the wrongdoer is testator's friend, business associate, etc. there is always access. On the bar exam, opportunity just needs to be stated as part of the rule, but it is never an element in dispute.

[3] ***Active participation*** (sometimes referred to as the wrongdoer having a "disposition" to exert influence): the wrongful act that gets the gift. Active participation can be the wrongdoer's use of force, or threat of force, or blackmail, or dragging the 90-year-old testator to the wrongdoer's attorney.

[4] ***An unnatural result:*** the wrongdoer is taking a devise and this person ordinarily would not be expected to take a devise. Typically, it is one who has no relationship to the testator.

[D] **Presumption: 3 elements**

[1] ***A confidential relationship exists b/w testator & the wrongdoer.***

[a] CA recognizes all of the common law confidential relationships:

- [1] Attorney-client,
- [2] Doctor-patient,
- [3] Guardian-ward,
- [4] Clergy-person penitent,
- [5] Trustee-beneficiary.

[b] In addition, in CA, a confidential relationship arises whenever a person reposes trust in another. Thus, a confidential relationship can exist b/w two close friends.

[2] ***Active participation. See above.***

[3] ***An unnatural result. See above.***

[E] **Consequences of finding undue influence (by prima facie case or by presumption):**

[1] Only that part of the will affected by the undue influence is invalid.

[2] The part so affected goes to:

- [a] The residuary devisees if any, or, if none;
- [b] To the heirs at law by intestate succession; or
- [c] To a constructive trustee via a constructive trust remedy

[G] **Statutory Undue Influence (Designed to Prevent Abuse by the Drafting Lawyer)**

[1] CA law generally invalidates a donative transfer (will or trust) from a testator to:

- [a] A person who drafted the instrument; or
- [b] A person who is related to, married to, cohabitates with, or is an employee of the drafter; or
- [c] A person who is in a fiduciary relationship w/ the transferor & who transcribes the instrument or causes it to be transcribed.
- [d] A care custodian of a dependent adult who is the transferor (nurse or friend taking care of the transferor) – dependent adult: one who is over 64 or a young person who has a disability.

- [2] **These rules do not apply if:**
- [a] The transferor is related to, married to, or cohabitates w/ the drafter; or
 - [b] Is in a domestic partnership w/ the drafter; or
 - [c] If the instrument is reviewed by an independent attorney who counsels the transferor.
 - [d] Court determines by clear & convincing evidence that the gift was not product of wrongdoing.
- [3] **Consequences of finding statutory undue influence:**
- [a] Devisee does not take the gift, but only to the extent that the gift exceeds that person's intestate share.
 - [b] As to the portion that does not pass to the wrongdoer, it passes to the residuary devisee if any, or by intestate succession, or via a constructive trust remedy: the court will use whichever gets the best result.
- [H] **Bar Exam Hypo:** T's lawyer drafts the will & a devisee is the L or the lawyer's family.
- [1] Invalidate the gift on 3 theories of undue influence:
 - [a] Prima facie case
 - [b] Presumption
 - [c] Statutory
 - [2] **Discuss all three on the bar exam**

SECOND CONCEPT: MISTAKE

6 issues:

1. Mistake in content
2. Mistake in execution
3. Mistake in inducement
4. Mistake in description (ambiguity)
5. Mistake in the validity of a subsequent testamentary instrument (Dependent Relative Revocation)
6. Mistake involving living children (pretermisison)

[I] MISTAKE IN CONTENT

- [A] The wrong beneficiary is named or the wrong gift is made.
- [B] Whether relief is given depends on the type of mistake: omission or addition.
 - [1] **Mistake in omission: words are accidentally left out.**
 - [a] Example: Testator's will states, "Blackacre to John." But testator actually wanted Blackacre to go to "John & Mary."
 - [b] No remedy is given: Mary's name is not added.
 - [c] Reason: Courts do not rewrite wills, but see below for possible relief under DRR.
 - [2] **Mistake in addition: words are accidentally added.**
 - [a] Example: Testator wants to execute a will that says, "Blackacre to John," but the will actually reads, "Blackacre to John & Mary." This is an accidental addition.
 - [b] Remedy may be given: The court may strike out Mary's name.
 - [c] Reason: The Court is not rewriting the will, just excising a part of it.

[II] MISTAKE IN EXECUTION

- [A] The testator signs the wrong document.
- [B] This occurs in one of two situations.

- [1] **First situation: Testator mistakenly signs his will believing it is a non-testamentary instrument.**
- [a] Example: T signs his will thinking it is a power of attorney.
- [b] Consequence: Will is not probated b/c testator did not intend the document to be a will.
- [2] **Second situation: Reciprocal wills or mutual wills: a reciprocal will or mutual will is when you have 2 testators, each w/ his or her own will & each leaves everything to the other.**
- [a] Example: Husband's will leaves everything to wife, & vice versa. Husband mistakenly signs Wife's will & Wife mistakenly signs Husband's will. Husband dies.
- [b] Consequence: the court may reform the will in this unique situation of reciprocal wills, especially if the testators are Husband & Wife or domestic partners. Thus, for example, where Husband's name appears, the court will substitute the Wife's name, & vice-versa.
- [c] Reasoning: It is equitable.

[III] MISTAKE IN INDUCEMENT

- [A] **A particular gift is made or not made on the basis of testator's erroneous beliefs.**
- [1] Example: Testator would like to leave John \$1000, but does not do so b/c testator erroneously thinks John is dead. In fact, John is alive.
- [2] **Rule: No relief is given; John takes NOTHING.**
- [3] Reasoning is based on maintaining the integrity of the Statute of Wills (Cal. Probate Code).
- [4] **Exception: Relief will be given in one narrow exception.**
- [5] Example: Testator's will reads: "I leave John nothing w/ John is dead. But were John not dead, I would leave John \$1,000. **Here, both the mistake (John is dead) & what testator would have done but for the mistake (leave John \$1,000) appear on the face of the will. Thus, John will take \$1,000. Has shown up 3 times on the exam.**

[IV] MISTAKE IN DESCRIPTION (ambiguity)

- [A] **No one or nothing fits the description OR 2 or more persons or things fit the description.**
- [B] **Consequences of a Mistake in Description**
- [1] **Distinguish w/ latent & patent ambiguities.**
- [a] ***Latent ambiguity:*** On the face of the will there is no problem. You introduce parol evidence to establish the ambiguity, then you introduce the evidence a second time to determine testator's intent (which cousin John testator meant).
- [b] ***Patent ambiguity:*** The ambiguity is apparent on the face of the will: For example, testator's will reads: "I have two cousins by the name of John; I leave \$1,000 to my cousin John." Some older cases stated that no remedy is given in the case of a patent ambiguity.
- [2] **Modernly, in California, by statute:**
- [a] We introduce parol evidence for *any type* of ambiguity—latent or patent—to determine what testator's intent was.
- [b] So now, we would introduce parol evidence to ascertain which cousin John testator meant in the last hypothetical dealing w/ a patent ambiguity.

[V] **MISTAKE IN THE VALIDITY OF A SUBSEQUENT TESTAMENTARY INSTRUMENT (DEPENDENT RELATIVE REVOCATION)**

- [B] The basis of DRR: To allow a court to disregard a revocation caused by mistake.

- [C] A preliminary foundation to understanding DRR requires that you understand two fundamental principles:
- [a] Revocation by Physical Act: A will can be revoked by physical act. A physical act includes burning, tearing, destroying or canceling (crossing out or lining out w/ a pen or pencil).
 - [b] Revocation by Express Subsequent Statement: A will also can be revoked by a subsequently executed will.
- [D] The heart of DRR is that [i] testator executes Will #1, [ii] then executes Will #2 & [iii] subsequently revokes Will #1, thinking that Will #2 effectuates his intent. But T is *mistaken*. Will #2 either is invalid as a will, or, if it is valid as a will, fails to effectuate testator's intent. DRR allows the court to ignore the revocation of Will #1 on the grounds that testator revoked Will #1 b/c T *mistakenly* believed Will #2 effectuated his intent.
- [E] Example:
- [1] T executes Will #1, a valid will. Thereafter, T executes Will #2, which is *virtually identical* to #1 (changes executor or makes small change in a large estate). But #2 is invalid as a will (b/c, for example, there is only 1 witness instead of 2). T mistakenly believing #2 is valid revokes #1 by physical act (e.g. by destroying it). T thereafter dies.
 - [2] **Consequences:**
 - [a] Will #1 cannot be probated b/c it was revoked by physical act.
 - [b] Will #2 cannot be probated b/w it is not a will.
 - [c] Consequently, in our initial analysis, testator dies intestate.
 - [d] But Will #1, in fact, can be probated under DRR.
 - [e] *Rationale for DRR* is that [i] T simply made a mistake in the revocation of Will #1 & [ii] notwithstanding the mistake, we know what T's intent is b/c T stated his testamentary plan, not once, but twice (the two wills are very similar, if not identical). As b/w intestacy or Will #1, T would want Will #1 probated (remember it is virtually identical to Will #2).
- [F] **Rule for Dependent Relative Revocation:**
- [1] *If testator revokes her will, or a portion thereof,*
 - [2] *In the mistaken belief that a substantially identical will or codicil effectuates her intent,*
 - [3] *Then, by operation of law,*
 - [4] *The revocation of the first will be deemed conditional, dependent, & relative to the 2nd effectuating testator's intent.*
 - [5] *If the second does not effectuate testator's intent, the first (by pure legal fiction) was never revoked.*
- [G] **Two situations of DRR for the bar:**
- [1] (Most Common) Will #1 was revoked by physical act.
 - [a] Two substantially identical wills, #1 & #2 & #1 is revoked by physical act.
 - [b] Look to DRR to probate Will #1.
 - [2] Will #1 was revoked by a subsequent instrument.
 - [a] Testator executes Will #1 & subsequently executes Will #2 (or a codicil), which is *valid & substantially the same* as #1 & revokes #1, but #2 (or the codicil), although valid, cannot effectuate testator's intent (b/c, for example, of the interested witness rule) or b/c there was a mistake/omission under Will #2.
 - [b] Look to DRR to probate Will #1.
- [H] Miscellaneous Matters
- [1] Remember that Will #1 & Will #2 must be *substantially the same* (in the case in mistake/omission in case #2 – but for the mistake/omission, the wills are substantially the same).

- [2] If Will #1 is revoked by physical act by being destroyed (thus, Will #1 no longer exists), Will #1 can still be probated under California's lost will provisions:
 - [a] These provisions state that a lost will or accidentally destroyed will can be probated if at least one witness testifies as to the terms of the will.
 - [b] The witness does not necessarily have to be one of the attesting witnesses.
 - [c] For example: The witness can be the attorney who drafted the will.

[VI] MISTAKE REGARDING LIVING CHILDREN (PRETERMISSION)

- [A] This is a type of pretermission problem regarding children.
- [B] Pretermission defined:
 - [1] An accidental omission.
 - [2] **A child is pretermitted if born or adopted after all testamentary instruments are executed & not provided for in any testamentary instrument.**
 - [c] A pretermitted child takes an intestate share of the estate (which includes, the assets in testator's inter-vivos trust).
 - [3] **Corollary:** A child born or adopted before all testamentary instruments are executed & not provided for in any instrument is not pretermitted. Of course, such a child takes nothing.
 - [4] **Exception to corollary:** A child born or adopted b/f all testamentary instruments are executed & not provided for in any of the instruments is treated as if pretermitted if *the only reason* the child was not provided for in the will is b/c testator erroneously thought the child to be dead or not existent—i.e. testator made a *mistake*.

THIRD CONCEPT: THE COMPONENTS OF THE WILL (WHAT MAKES UP THE WILL?)

4 issues:

1. Integration
2. Incorporation by reference
3. Facts of independent significance
4. Pour-over wills

[I] INTEGRATION

- [A] **Two elements required for papers to be integrated:**
 - [1] **Intent:** Testator must have intended for the papers in question to be part of the will; *and*
 - [2] **Presence:** The paper must have been actually or physically present at the time of execution.
- [4] Proving integration: 2 different ways:
 - [a] Establish a physical connection among all the pages: If the papers are stapled together, it is inferred that testator intended the papers to be part of the will & were physically present at the time of execution.
 - [b] Establish a logical connection: Does the last word on page 1 make sense in relation to the first word on page 2? If so, integration is inferred.

[II] INCORPORATION BY REFERENCE

- [A] The theory of incorporation by reference is that a non-integrated writing is given testamentary effect & becomes part of the will. As such, it is now admitted into probate.
 - [1] Example: Testator's will states, "I leave my property to the grantee named on the ABC deed."
- [B] **Elements to incorporation by reference: Four Elements:**
 - [1] *A document or a writing;*

- [2] *The document or writing must have been in existence when the will was executed;*
- [3] *The document must be clearly identified in the will; and*
- [4] *Testator must have intended to incorporate the document into the will.*
- [5] *If you establish 1-3, 4 typically will be implied by the court.*

[D] Problem: What if in the hypo above (devising property to the grantee named on the ABC deed) the deed to be incorporated is an invalid deed?

- [1] This is irrelevant.
- [2] Reason: The document does NOT have to be valid for what it purports to stand for.
 - [a] Thus, you can incorporate by reference an invalid deed, an invalid contract, or even an invalid will of the testator or of a third person.

[III] FACTS OF INDEPENDENT SIGNIFICANCE

[A] Theory & definition of doctrine:

- [1] Who a beneficiary is, or what gift is given, may be given meaning by facts of significance independent from testator's will.
- [2] Example: T's will states "I leave all my property to the Church I am a member of at the time of my death."
- [3] Problem: From the 4 corners of the will we cannot determine the identity of the church. Can we admit parol evidence? Remember that we can't admit parol evidence whenever we want to b/c we are concerned about maintaining the integrity of the Statute of Wills (the CA Probate Code).
- [6] People join churches for religious reasons, social reasons, psychological reasons, etc. But people do not join a church just to validate a devise in a will; they join a church for reasons *independent* of the will.
- [8] B/c of these independent reasons for joining a church, there is truthfulness to such fact or act. Therefore, this fact or act is susceptible of independent verification. As such, there is no concern for fraud.
- [9] Thus, this fact of significance, the church that testator was a member of at the time of his death, will be ascertained (from records or testimony) & will be admitted into evidence in the probate of testator's will.
- [10] Summary: Fact of independent significance allows us to fill in the blanks to T's will w/ parol evidence that is trustworthy.

[B] When to use this doctrine:

- [1] Ask yourself this question: Even w/o the will, would this fact have existed?
- [2] In the above hypo the answer is yes.
- [3] The fact or act can be a future fact or act or a past fact or act.
 - [a] Example: Testator's will states, "I leave all my property to people I had Thanksgiving dinner w/ in 1999."
 - [b] This is a past fact, independent of testator's will.

[IV] POUR OVER WILLS

[A] The problem: Part or all of T's estate is devised to the trustee of an inter-vivos trust to be distributed to the terms of the trust.

- [1] Example: On January 1, testator executes a document creating the ABC Trust, an inter-vivos trust (an inter-vivos trust in this context is a trust created by T during T's lifetime). On January 2, T executes his will. In the will, T devises part or all of his estate, "To the trustee of the ABC Trust, to be administered pursuant to the terms of that trust." T dies.

What we have here is a “pour-over will.” That means that part or all of T’s estate is devised to the trustee of the inter-vivos trust, to be administered pursuant to the terms of that trust.

- [2] But appreciate the problem that we have in the above hypo:
- [a] Who is the trustee of this trust?
 - [b] Who are the beneficiaries?
 - [c] From the 4 corners of the will, we do not know. Remember, generally speaking, we cannot just admit parol evidence whenever we want to b/c we are concerned w/ maintaining the integrity of the Statute of Wills.
- [B] How, then, do we validate the pour-over provision? There are three ways:
- [1] Incorporation by reference:
 - [a] Trust instrument (a writing),
 - [b] In existence when the will was executed,
 - [c] It is clearly identified in the will,
 - [d] T intends to incorporate the trust instrument into the will.
 - [e] Thus, the trust instrument will be admitted into probate & the pour-over provision will be validated.
 - [2] Independent Significance:
 - [a] Even w/o the will, we would still have this inter-vivos trust.
 - [b] The trust instrument therefore, is a fact of significance *independent* from the will.
 - [c] Thus, the pour-over provision can be validated on this theory, too.
 - [3] Uniform Testamentary Additions to Trusts Act (UTATA):
 - [a] So long as you have a valid trust, which was in existence b/c the will was executed, or at the time of execution, the pour-over provision is valid by statute.
- [C] Example: On January 1, T creates the inter-vivos trust. On January 2, T executes the will, devising part or all of her estate to “the trustee of the ABC Trust, to be administered pursuant to the terms of the trust.” On January 3, T modifies the trust. Thereafter, T dies.
- [1] How do we validate the pour-over provision?
 - [a] Incorporation will *not* work: Trust as modified was not in existence at the time of the will.
 - [b] Facts of independent significance works: The trust as modified is still a fact of significance independent from the will. Even w/o the will, there would be this trust.
 - [c] UTATA works: Under the act, a pour-over provision is valid even if the trust is subsequently modified. Why? B/c the statute says so.
 - [2] **On the bar exam, discuss all three theories for a pour-over situation.**

4th CONCEPT: FORMALITIES OF EXECUTION FOR ATTESTED OR FORMAL WILLS (WITNESSED WILLS)

3 Issues:

1. Elements for an attested will
2. Interested witness problem
3. Conditional wills

[I] ELEMENTS FOR AN ATTESTED WILL (4 elements):

- [A] **The first element:** Will MUST be in writing. Oral wills are not recognized in CA.
- [B] **The second element:** The will must be signed by one of the following three people:
 - [1] Testator

- [2] A third person, in testator's presence & at testator's direction. This arises if testator is incapacitated.
- [3] By a conservator pursuant to a court order
- [C] **The third element:** The signing by testator, the third person, or the conservator must be done in the presence of two witnesses, both present at the same time.
- [1] What if testator had previously signed alone or in the presence of just one of the witnesses? Does testator have to sign again in the presence of the two witnesses? The answer is no.
- [2] In such case, testator simply *acknowledges* his signature ("This is my signature") or *acknowledges* the will ("This is my will"), in the presence of the two witnesses, both present at the same time.
- [D] **The fourth element:** The witnesses understand that the instrument they signed is T's will.
- [E] Note the following in California:
- [1] The witnesses do not have to sign in the presence of each other.
- [2] The witnesses do not have to sign in the presence of testator.
- [3] Testator does not have to declare to the witnesses, "this is my will" b/c CA does not have a so-called "publication" requirement; something about the situation must indicate to the Ws that it is T's will.
- [4] Testator does not have to sign b/f the witnesses sign: There is no order of signing in California.
- [5] Neither T nor the witnesses have to sign at end of the will: Signing *anywhere* on will is okay in CA.
- [6] The signing by testator & the witnesses do *not* have to be "one continuous transaction" (no significant break in time b/w the signing by testator & the witnesses):
- [a] In *estate of Eugene*, the court held that even when a witness signs *after* testator's death, the will is valid under California's doctrine of "substantial compliance" (the will is valid if there is substantial compliance w/ the requirements of the CA Probate Code, even if there is not literal compliance) & there is no issue of fraud.
- [7] Witnesses must sign b/f the T dies.
- [F] **Meaning of "presence"**
- [1] Testator must sign or acknowledge in the "presence" of two witnesses. What means presence? It means one of two things:
- [a] Signs presence: The witnesses see testator sign; or
- [b] Conscious presence: Testator signs or acknowledges w/in the witnesses' hearing & the witnesses know what is being done.

[A] INTERESTED WITNESS

- [1] A witness who is a beneficiary under the will.
- [B] **Consequences of finding an interested witness:**
- [1] The will is NOT invalid.
- [2] But unless there are 2 other disinterested witnesses, a presumption arises that the witness-beneficiary secured the gift by wrongdoing.
- [3] If witness-beneficiary rebuts the presumption of wrongdoing, no problem: witness/beneficiary takes the gift.
- [4] If witness-beneficiary cannot rebut the presumption of wrongdoing, he or she takes the amount as does not exceed what would be given by intestacy.
- [5] Example: Gift is \$1000 & intestacy would be \$600, if the presumption is not rebutted, witness/beneficiary takes \$600.

[C] **The presumption of wrongdoing is inapplicable if witness/beneficiary is taking only in a fiduciary capacity.**

[1] Example: The witness-beneficiary takes only as a trustee.

[III] **CONDITIONAL WILLS**

[1] A conditional will is one whose validity is made conditional by its own terms.

[2] Example: Testator's will states: "This is my will, if I die in Europe during my vacation."

[3] Will is to be probated only if the condition is satisfied: that testator die in Europe on his vacation.

[B] Conditional wills can be formal (attested) wills or holographic wills.

FIFTH CONCEPT: FORMALITIES OF EXECUTION FOR HOLOGRAPHIC (HANDWRITTEN) WILLS

3 Issues:

1. Elements for a valid holograph
2. Testamentary intent
3. Dates

[I] **ELEMENTS FOR A VALID HOLOGRAPH**

[A] **First element: The holograph must be signed by the testator.**

[1] The signature can be anywhere in the will.

[B] **Second element: The material provisions must be in T's own handwriting.**

[1] The "material provisions" are:

- [a] the gifts made and
- [b] the beneficiaries' names.

[II] **TESTAMENTARY INTENT**

[A] **RULE:** In a holographic will, a statement of testamentary intent ("This is my last will") need not be on the face of the will & in T's handwriting.

[B] There are, however, 3 problems related to a statement of testamentary intent:

[1] What if T signs & executes a writing that lists just the names of people & next to each name, an asset that T owns?

- [a] Is this a holographic will, or is it just a list?
- [b] Extrinsic evidence is admissible to determine testator's testamentary intent.

[2] What if T writes a series of letters?

- [a] Is this just a series of letters, or is it a will?
- [b] The series of letters can constitute one will under *integration*.
- [c] Extrinsic evidence is admissible to show T's intent.

[3] What if the testamentary intent ("this is my last will & testament") is part of a commercially printed form will?

- [a] The Uniform Probate Code expressly states this is not a problem.
- [b] Any statement of testamentary intent contained in a holographic will may be set forth either in the testator's own handwriting or as part of a commercially printed form will."

[III] **DATES**

[A] A date is NOT required in a holographic will.

[B] But lack of a date can create a problem with:

[1] Inconsistent wills; &

- [2] Capacity.
- [C] Problem of lack of dates & inconsistent wills:
 - [1] If an undated holograph is inconsistent w/ the provisions of another will, the undated holograph is invalid *to the extent of the inconsistency*—unless the undated holograph’s time of execution is established to be after the date of execution of the other will.
 - [a] What if there are two undated holographs?
 - [b] If you can’t establish which one came last, neither holograph is probated *to the extent of the inconsistency*.
- [D] Problem of lack of dates & capacity
 - [1] If a holograph is undated, & if it is established that the testator lacked testamentary capacity at any time during which the will *might have been executed*, the holograph is invalid—unless it is established that it was executed at a time when the testator had testamentary capacity.

SIXTH CONCEPT: CHOICE OF LAW

- [I] Illustration of the Problem
 - [A] Example:
 - [1] Testator is a domiciliary of New York. Testator goes to North Carolina to have his will executed. Thereafter testator becomes a domiciliary of CA & dies here in CA.
- [II] CAN WILL BE ADMITTED INTO PROBATE IN CALIFORNIA?
 - [D] Summary: The will is admitted into probate in CA if the will complies w/ the formalities of execution of:
 - [1] CA law,
 - [2] The law of the place where the will was executed, or
 - [3] The law of the place of T’s domicile at the time of execution.

SEVENTH CONCEPT: CODICILS

3 issues:

1. Defined
2. Republication
3. Revocation of codicils

[D] A testamentary instrument executed in compliance w/ the CA Probate Code which modifies, amends, or revokes a will.

[I] REPUBLICATION

- [A] Defined:
 - [1] A codicil republishes a will. This means that a codicil causes the will to speak from the date that the codicil is executed on (also called “down-dating”).
 - [2] In CA, a codicil does *not* automatically republish a will. Rather, the testator must expressly state the codicil is republishing the will. Example: Testator’s codicil reads: “Except for the changes made herein in this codicil, I otherwise confirm & republish my will of January 1, 2000.”
 - [3] On the bar exam, republication comes into play in two scenarios: [i] pour-over wills & incorporation by reference & [ii] pretermission problems.

[B] **Pour-over wills & incorporation by reference:**

- [1] Example: On January 1, testator executes an inter-vivos trust. On January 2, testator executes a will w/ a pour-over provision. On January 3, the trust is amended.
- [2] On these facts, incorporation by reference will *not* work b/c the trust as modified was not in existence when the will was executed.
- [3] New fact added: On January 4, T executes a codicil which republishes the will.
- [4] B/c the codicil republishes the will, the codicil causes the will to speak from January 4.
- [5] Thus, incorporation by reference now works b/c the trust as modified was in existence on the date that the will is deemed executed, which now is January 4.

[C] **Pretermission problems:**

- [1] Example: Year 1 the will is executed (everything to charity). Year 2 child is born or testator marries or enters into a domestic partnership (child, spouse, or domestic partner is pretermitted). Year 3 a codicil is executed which republishes the will.
- [2] B/c the codicil republishes the will, the will now speaks from Year 3.
- [3] As such, there is no pretermission b/c the birth, marriage, or domestic partnership is deemed to have taken place b/f the will was executed.
- [4] NOTE: There is an alternative theory to take care of this situation – this alone w/o any discussion of republication precludes discussion of pretermission.

[III] REVOCATION OF CODICILS

[A] **Rules regarding revocation of codicils:**

- [1] If testator executes a will, then executes a codicil. If subsequently revokes his codicil, there is a rebuttable presumption that testator intended to revoke only his codicil.
- [2] On the other hand, if testator executes a will then executes a codicil & testator subsequently revokes the will, there is a rebuttable presumption that testator intended to revoke the will & codicil.

EIGHTH CONCEPT: REVOCATION BY PHYSICAL ACT

4 issues:

- 1. Elements
- 2. Cancellation & Interlineations
- 3. Duplicate wills
- 4. Mutilated wills

[I] **ELEMENTS FOR REVOCATION BY PHYSICAL ACT:**

- [A] ***First Element: Will must be burned, torn, cancelled, destroyed or obliterated.***
 - [1] Cancellation: lining out or crossing out w/ a pen or pencil.
 - [2] Obliteration: erasing.
- [B] ***Second Element: Testator must have the simultaneous intent to revoke.***
 - [1] If testator accidentally destroys his will, thereafter finds out about it & says, “That’s okay b/c I wanted to revoke it anyway,” the will is *not* revoked.
 - [2] Reason: The act and intent must coincide.
- [C] ***3rd Element: The act must be done either by testator, or by someone in testator’s presence & at his direction.***

[II] CANCELLATIONS AND INTERLINEATIONS

[A] Definitions

- [1] Cancellation: crossing out or lining through.
- [2] Interlineation: writing b/w the lines.

[B] Example: Testator executes a typed formal (attested) will that states, "I leave \$1,000 to Mary." Testator then takes his pen, crosses out the \$1,000 & interlineates "\$1,500" just above the \$1,000. T signs his name. Question: Do we have a holographic codicil on top of a formal will? Answer: No.

[1] \$1,500 gift is invalid as a holograph b/c the material provisions (gifts & names of the beneficiaries) are not in T's own handwriting.

[c] Moreover, the \$1,000 gift has been revoked by physical act (cancellation).

[d] Mary, therefore, takes nothing.

[2] But in a little twist to our traditional view of dependent relative revocation (DRR) (we previously stated that the 2 documents must be very similar), we can save Mary's gift so that Mary takes the original \$1,000:

[a] Revocation of the \$1,000 was conditional, dependent & relative to \$1,500 being effective.

[b] B/c the \$1,500 was not effective, by operation of law, the \$1,000 was never revoked.

[3] But compare: If the original gift to Mary was \$1,500 & testator cancelled this out & the interlineation was \$1,000, can DRR be used to give Mary the original \$1,500?

[a] **When the interlineation is less than the cancelled provision, DRR will not be used.**

[b] Mary will take nothing.

[D] Cancellation to increase a gift is prohibited.

[1] **Rule: You cannot increase a co-beneficiary's gift by cancellation.**

[2] Example: "I leave my farm to X & Y." X is cancelled out. What does X take?

[a] X takes 1/2 of the farm.

[b] The other 1/2 goes to the residuary devisees or, if none, by intestacy.

[E] **An interlineation or other handwritten addition to a typed (attested) will that does not qualify as a holographic codicil may nonetheless be a valid cancellation.**

[1] Example: Testator executes a valid typed formal will. Subsequently testator writes "Null & Void" across the face of the will.

[a] W/o a signature accompanying this "Null & void" addition, the addition cannot be deemed a holographic codicil to the typed formal will.

[b] Nonetheless, writing "Null & Void," even w/o a signature, is a valid cancellation of the typed formal will.

[III] DUPLICATE WILLS

[1] **If T or someone in T's presence & at his direction, revokes by physical act one of the duplicate originals, then the other duplicate original also is revoked, as a matter of law.**

[IV] MUTILATED WILLS

[1] **If a will is found in a mutilated condition at testator's death, & when last seen it was in testator's possession, there is a presumption: T mutilated the will w/ the intent to revoke the will.**

NINTH CONCEPT: REVOCATION BY SUBSEQUENT WRITTEN INSTRUMENT

2 Issues:

1. Manner of revoking
2. Revival

[I] MANNER OF REVOKING

- [1] **Express revocation:**
- [a] Will #1 can be revoked by Will #2 if Will #2 expressly revokes Will #1.
 - [b] Example: If Will #2 states, "I hereby revoke all previously executed wills," then Will #1 is revoked.
- [2] **Implied revocation:**
- [a] Will #2 revokes Will #1 by implication if will #2 totally disposes of T's estates.
 - [b] If Will #2 totally disposes of all of testator's estate, there is nothing for Will #1 to act upon.
 - [c] Thus, by implication, Will #2 has revoked Will #1.

[II] REVIVAL

- [1] **Situation #1: Revocation by physical act.**
- [a] Example: Testator executes Will #1. Testator thereafter executes Will #2, which revokes #1 (expressly or impliedly). Testator thereafter revokes #2 by physical act (example, by cancellation or tearing).
 - [b] Is Will #1 automatically revived—back in operation?
 - [c] In California, Will #1 is *not* automatically revived; rather, Will #1 is revived only if testator manifests an intent to revive Will #1. Oral statements by testator at the time Will #2 was revoked are admissible. Thus, when testator revokes Will #2 & states, "Now Will #1 is back in operation," then Will #1 is revived. But if T states, "Now everything is back the way I want it," this is not clear.
- [2] **Situation #2: Revocation by subsequent instrument.**
- [a] Example: Testator executes Will #1. Testator subsequently executes Will #2, which revokes Will #1 (expressly or impliedly). Testator subsequently revokes Will #2 by codicil.
 - [b] Is Will #1 automatically revived, that is, back in operation?
 - [c] In California, Will #1 is not revived unless it appears from the terms of the codicil that T wanted Will #1 revived.

FIFTH CONCEPT: REVOCATION BY OPERATION OF LAW

4 issues:

1. Omitted child
2. Omitted spouse
3. Omitted domestic partner
4. Final dissolution of marriage or domestic partnership

[1] **OMITTED OR PRETERMITTED CHILD (heavily tested)**

- [1] A pretermitted child is a child born or adopted after all testamentary instruments are executed and not provided for in any testamentary instrument. Such a child receives an intestate share of the T's estate, equal in value to that which the child would have received if the T had died intestate. Thus, the child receives an intestate share of assets decedent owned at death plus the assets held in any intervivos trust.
- [a] For the child to take this intestate share, other gifts will have to be abated (reduced).
 - [b] Hence, revocation by operation of law.

- [3] **3 Exceptions: if any of the following exceptions exist, the child will not take the intestate share:**
- [a] 1st exception: decedent's failure to provide for the child in any testamentary instrument was intentional, & that intention appears from the testamentary instrument.
 - [b] 2nd exception: At the time of execution of the will, the testator had one or more children & devised (will or inter-vivos trust) all or substantially all of his estate to the parent of the omitted child.
 - [c] 3rd exception: T provided for the child by transfer outside the will w/ the intention that the transfer is to be in lieu of a testamentary provision.

[II] OMITTED SPOUSE

- [1] A surviving spouse who married the decedent after the execution of all testamentary instruments & is not provided for in any testamentary instrument.
- [2] Consequences of an omitted spouse: omitted spouse takes a statutory share of the T's estate equal to that which the spouse would have received had the T never had any testamentary instrument. Thus, the omitted spouse receives a statutory share of assets decedent owned at death plus the assets held in any revocable inter vivos trust:
 - [a] ½ of the CP (thus, the omitted spouse ends up w/ 100% of the CP).
 - [b] ½ of the Q-CP (thus, the omitted spouse ends up w/ 100% of the Q-CP).
 - [c] A share of the SP of T equal in value to that which the spouse would have received if the T had died intestate, but in no event is the share to be more than ½ the value of the SP in the estate.
- [3] For the omitted spouse to take this statutory share, other gifts will have to be abated (reduced).
- [4] Hence, revocation by operation of law.
- [5] **3 Exceptions. If any apply, the omitted spouse will not take the aforementioned statutory share:**
 - [a] First exception: decedent's failure to provide for the spouse in any testamentary instrument was intentional & that intention appears from the testamentary instrument.
 - [b] Second exception: T provided for the spouse by transfer outside of the will w/ the intention that the transfer be in lieu of a testamentary gift.
 - [c] Third exception: Omitted spouse signed a waiver.
- [6] **Waiver**
 - [a] Waiver defined: a voluntary relinquishment of a known right whether signed before or during marriage.
 - [b] What can be waived? Any & all probate rights can be waived: the right to take a probate home, a family allowance, an intestate share, & any other probate transfer rights, including the right to take as an omitted spouse.
- [7] **3 elements for a waiver:**
 - [a] *Waiver must be in writing, signed by the waiving spouse b/f or during marriage;*
 - [b] *Full disclosure by T of T's finances; and*
 - [c] *Independent counsel by the waiving spouse.*

[III] OMITTED DOMESTIC PARTNER

- [A] Domestic partners defined:
 - [1] *Partners must be [i] of the same sex, or [ii] of the opposite sex & at least one person is at least 62 years of age.*

[2] *Partners must have filed a declaration of domestic partnership w/ the Secretary of State.*

- [B] Recent legislation gives domestic partners the same rights & obligations as married persons.
- [C] Thus, domestic partners may hold property as CP or quasi-CP.

[IV] FINAL DISSOLUTION OF MARRIAGE OR DOMESTIC PARTNERSHIP

[A] Four rules regarding testamentary gifts:

- [1] By operation of law, there is a revocation of the devise if there is an annulment or final dissolution of marriage, or termination of domestic partnership.
- [2] Legal separation does not count.
- [3] Devise is reinstated if the will is unchanged & the testator remarries the former spouse, or reestablishes another domestic partnership w/ the former domestic partner.
- [4] These rules do not apply if the will expressly states otherwise:
 - [a] Example: "Even if my domestic partnership terminates, my partner is to take all my property."

ELEVENTH CONCEPT: REVOCATION BY CHANGE IN PROPERTY HOLDINGS (ADEMPTION)

4 issues:

1. Classification
2. Ademption by extinction
3. Ademption by satisfaction
4. Advancements

[I] CLASSIFICATION

[A] **Specific devise:**

- [1] A specific devise is a gift of a particular item.
- [2] There is something unique about it.
- [3] T must have the *intent* the beneficiary take this particular thing, & nothing else. B/c T is dead, we must look to objective manifestations of T's intent.
- [4] Examples:
 - [a] Real Property – this is always specific.
 - [b] An antique automobile is specific.
 - [c] "100 shares of my Xerox to Bob" is specific b/c of the word, "my," indicating something unique. Although publicly traded stock typically is a general gift (discussed below), by stating "100 shares of my Xerox to Bob," T has attached some uniqueness to it. So, too, if T listed the serial numbers of the shares.
 - [d] "100 shares of Amalgamated Fuzz to Bob" is a specific gift if Amalgamated Fuzz is a closely held corporation: if not publicly traded, there is a uniqueness to the gift.

[B] **General devise:**

- [1] A general devise is payable out of the general assets of the estate.
- [2] There is nothing unique or special about this gift.
- [3] Example: "100 shares of Microsoft to Bob."

[C] **Demonstrative devise:**

- [1] A hybrid b/w a general & a specific gift.
- [2] It is a gift from a particular fund, but if that is not enough, executor can resort to general property.

- [3] Example: "To John I leave \$1000 from my account at Bank of America." If there is only \$900 in the account at the Bank of America, this is how the executor pays John:
 - [a] First from the account at the Bank of America (\$900)
 - [b] Then the balance (\$100) comes from general assets if necessary.

[D] **Residuary devise:**

[1] All other property not expressly disposed of in the will. It is easy to recognize.

[E] **3 reasons for classifying gifts:**

- [1] **For ademption by extinction problems:** Only specific gifts adeem by extinction. Thus, if a gift is classified as general, there is no issue of ademption by extinction.
- [2] **For ademption by satisfaction problems:** Typically, only general gifts adeem by satisfaction.
- [3] **For abatement problems:** There is a priority whereby gifts to beneficiaries have to be cut back or abated to come up w/ the statutory share for the omitted child or spouse or domestic partner.

[II] ADEMPMENT BY EXTINCTION

[A] ***CL test: Ademption by extinction is when a specific gift fails b/c T did not own property at T's death.***

[1] Intent was important only for determining whether gift was general or specific.

[B] ***California: Intent is important not just for determining whether a gift is general or specific, but a second time in determining whether testator intended the gift to fail.***

[C] **There is no ademption by extinction in CA in the following situations. The common thread is that T did not intend the gift to fail:**

- [1] **Securities changing form:** This arises b/c of mergers, stock splits, stock dividends, or reorganizations of corporations & stock is re-issued.
 - [a] Example: T devises a specific gift of 100 shares of ABC stock to beneficiary. Thereafter, during T's lifetime, there is a reorganization or merger so that the 100 shares of ABC stock are exchanged by the corporation for 1000 shares of XYZ stock. When T dies, T owns 1000 shares of XYZ stock.
 - [b] In CA, there is no ademption by extinction. Beneficiary takes the 1000 shares of XYZ stock b/c T did not change the stock, the corp did.
- [2] **Conservator sells off the assets.**
 - [a] Example: T devises Blackacre to beneficiary. Thereafter, a conservator is appointed &, w/ court approval, the conservator sells off Blackacre.
 - [b] Beneficiary takes net sales price of Blackacre.
- [3] **Eminent domain award, casualty award, or an installment sale of property in which testator holds the deed or trust as security for the sale.**
 - [a] In CA, there is no ademption by extinction w/ respect to the eminent domain proceeds, insurance proceeds, or installment payments paid after T's death.
 - [b] What about those proceeds paid during testator's lifetime? See if you can trace.
 - [c] Tracing. If you can trace the proceeds into one bank account (especially if there were no other transactions in that bank account outside of that initial deposit from the eminent domain award, casualty award, or installment sale) then the beneficiary may argue that by making the proceeds easily traceable, T intended no ademption by extinction. T intended beneficiary to take all the proceeds, even those payable during T's lifetime.
 - [d] If tracing not possible, then you probably have an ademption by extinction w/ respect to those proceeds paid during testator's lifetime.
- [4] In all other situations:

- [a] Classify the gifts as general, or
- [b] Try to trace.

[III] ADEMPMENT BY SATISFACTION

- [A] Definition: T gives the beneficiary an inter vivos down payment on a devise.
- [B] **How to establish a satisfaction → 4 alternative ways:**
 - [1] The will itself provides for a deduction of the inter vivos gift.
 - [2] T declares in a contemporaneous writing that the gift is a satisfaction.
 - [3] Beneficiary acknowledges in a writing (at any time) the satisfaction.
 - [4] The property given in the satisfaction is the same property that is the subject of a specific gift to the beneficiary. This is an ademption by satisfaction & also by extinction, b/c the property no longer exists in T's estate.
- [C] What if beneficiary receives a satisfaction but predeceases the T?
 - [1] RULE: Where the issue of the predeceased beneficiary takes the devise under the anti-lapse statute, the issue of the predeceased beneficiary is treated as if he had received the satisfaction, unless T's will or contemporaneous writing states otherwise.
 - [2] Example: T devises \$1000 to his brother, Abel. T subsequently makes a satisfaction of \$700 to Abel. Abel predeceases testator. Abel is survived by a son, Baker. Unless testator's will or contemporaneous writing states otherwise, Baker takes only \$300 (\$1,000-\$700).
- [D] How to value the satisfaction if not made in cash?
 - [1] If the value of the satisfaction is expressed in the contemporaneous writing of the T or in a contemporaneous writing of the beneficiary, that value is conclusive.
 - [2] In all other cases, the property is valued at its FMV, measured at time the transferee came into possession of the property.

[IV] ADVANCEMENTS

- [1] A satisfaction deals with a testacy situation (decedent dies w/ a will), whereas advancement deals with an intestacy situation (decedent dies w/o a will).
- [2] Concept is identical & rules for advancements are nearly the same as for the rules for satisfactions.
- [B] Establishing an advancement: 2 alternative ways:
 - [1] Intestate declares in a contemporaneous writing that the gift is an advancement.
 - [2] Heir acknowledges in a writing (at any time) that the gift is an advancement.
- [C] What if heir-apparent receives an advancement but predeceases the intestate?
 - [1] **RULE: The issue of the heir-apparent is not treated as having received an advancement, unless the advancement provides otherwise.**
 - [2] This is the opposite of a satisfaction.
- [D] How to value the advancement if not made in cash?
 - [1] If the value of the advancement is expressed in the contemporaneous writing of the intestate or in a contemporaneous writing of the heir-apparent, that value is conclusive.
 - [2] In all other cases, the property is valued at the FMV at time the time the transferee (heir) came into possession of the property.

12th CONCEPT: CONTRACTS (TO MAKE A WILL OR DEVISE, OR TO NOT MAKE A WILL OR DEVISE)

5 issues:

1. Scenario

2. Requirements
3. When the cause of action accrues
4. Joint & mutual wills
5. Remedies available to promisee

[I] Scenario

- [A] Example: T executes a will that states, "I leave Blackacre to Abel." Can testator revoke the gift & execute another will leaving Blackacre to Baker?
- [1] Yes, b/c wills can be changed – that is the nature of wills.
 - [2] But what if there is a K b/w testator & Abel, providing that T will not revoke his will? In such case, if T revokes, T is in breach of K and, upon T's death, Abel may sue T's estate for breach of K.

[II] REQUIREMENTS

[A] **Five alternative ways in CA:**

- [1] ***The will or other instrument (e.g. a trust) states the material provisions of the K.***
 - [a] Example: T's will states: "In consideration of the \$5,000 Abel has given me, I have promised to devise Blackacre to Abel, & I hereby do devise Blackacre to Abel."
- [2] ***There is express reference in the will or other instrument (e.g. a trust) to a K.***
 - [a] The terms of the K may be established by extrinsic evidence, including oral testimony.
 - [b] Example: T's will states, "Pursuant to my contract, this is my will."
 - [c] The point is that b/c there is express reference in the will to a K, the terms of the K can be established by extrinsic evidence, & that evidence is not limited to written evidence. It can include oral testimony. Thus, in this regard, the statute of frauds is *not* a problem, & this is so even if the subject matter of the K is real property.
- [3] ***There is a writing signed by the decedent evidencing a K.***
- [4] ***Clear & convincing evidence of an agreement b/w decedent & promisee enforceable in equity.***
- [5] ***There is clear & convincing evidence of an agreement b/w decedent & a TP for the benefit of the claimant that is enforceable in equity.***

[III] WHEN THE CAUSE OF ACTION ACCRUES

[A] **General Rule**

- [1] The cause of action accrues when decedent dies.

[B] **Exception to the general rule:**

- [1] The cause of action accrues during decedent's lifetime if the decedent is engaging in conduct which would be a fraud on the promisee.
- [2] Example: T enters into a K w/ Abel to devise Blackacre to Abel. Thereafter, T prepares to sell Blackacre w/ the intent to dissipate the funds.
 - [a] On these facts, Abel may be irreparably harmed if the sale goes through.
 - [b] Consequently, Abel may be able to secure an injunction to either prevent the sale of the property or, failing that, to enjoin T from dissipating the funds from the sale.

[IV] JOINT AND MUTUAL WILLS

- [1] ***Joint Will: The will of 2 or more people on 1 document.***
 - [a] The provisions do not have to be reciprocal.

- [b] When the 1st person dies, the will is probated. When the 2nd person dies, the will is probated again.
- [2] **Mutual Wills (also known as Reciprocal Wills): The separate wills of 2 or more people which are reciprocal.**
- [3] **Joint & Mutual Wills: Reciprocal provisions on one instrument.**
- [1] The execution of a joint will, or mutual will, or a joint & mutual will does not create a presumption of a K to not revoke or make a will.
- [2] But it may be evidence of a K, in conjunction w/ other factors

[V] **Remedies Available to Promisee**

- [A] Damages.
- [B] SP: P can seek to force the executor to comply w/ the terms of the K.
- [C] Constructive trust remedy: court can probate the will as if it was, giving the property to the devisee, & make the devisee a constructive trustee, who will have only one obligation: to transfer the property to the promisee of the K.

THIRTEENTH CONCEPT: RESTRICTIONS ON TESTAMENTARY DISPOSITIONS

3 Issues:

1. Definitions
2. Spousal/domestic partner protection
3. Unworthy heirs or beneficiaries

- [A] CP → *All personal property wherever situated & all real property situated in CA, acquired during marriage or domestic partnership while domiciled in CA that is not SP.*
- [B] SP → *Property that is acquired b/f marriage or domestic partnership & during marriage or domestic partnership by gift, bequest, devise, or descent together w/ the rents, issues, & profits thereof.*
- [C] Q-CP → *All personal property wherever situated, & all real property situated in CA, acquired by a decedent while domiciled elsewhere that would have been CP if the decedent had been domiciled in this state at the time of its acquisition. In the absence of death or divorce or termination of domestic partnership, it is treated as CP of the acquiring spouse or the acquiring domestic partner.*
 - [2] For probate Q-CP is limited to CP located in CA. (APPLIES FOR CASES OF DEATH)

[II] **SPOUSAL/DOMESTIC PARTNER PROTECTION**

- [A] Protection is given to the surviving spouse or domestic partner based upon our CP system.
- [B] **Four rules to protect the surviving spouse or domestic partner**
 - [1] **Protection regarding CP:**
 - [a] T can dispose of only 1/2 of the CP (surviving spouse or surviving domestic partner owns the other 1/2).
 - [2] **Protection regarding Q-CP:**
 - [a] Assuming T is the spouse who acquired the Q-CP, can dispose of only 1/2 of the Q-CP (surviving spouse or surviving domestic partner owns the other half at death of T).
 - [b] Note that the non-acquiring spouse or domestic partner has no testamentary power to dispose of the acquiring spouse's or domestic partner's Q-CP during the lifetime of the acquiring spouse or domestic partner.
 - [3] **Widow's election (which includes a widower & a surviving domestic partner):**

- [a] Arises when testator attempts to dispose of more than ½ the CP or ½ the quasi-CP.
 - [b] In such case, the widow may invoke the widow's election. This means that:
 - [c] The survivor may accept the gift given in testator's will in lieu of his or her statutory right (½ CP & ½ Q-CP); this is called **taking "under the will."**
 - [d] Or, the survivor can renounce all benefits given in the will & confirm his or her rights to ½ the CP & ½ Q-CP; this called **taking "against the will."**
 - [e] Example: Husband's will states "I give my spouse all of my SP if she allows me to dispose of all of our CP to the Red Cross."
 - [f] In the above example, W can take under the will & accept the will's provisions (give up her ½ of the CP & take all of Husband's SP), or take against the will (renounce the SP gift & retain her ½ interest in community & Q-CP).
- [4] **Illusory transfers of Q-CP & the widow's election**
- [a] **An inter-vivos transfer by the decedent to the acquiring spouse or domestic partner) of the Q-CP to a TP w/ consideration is allowed.**
 - [b] Reason: The survivor, i.e. the non-acquiring spouse or domestic partner, had a "mere expectancy" in the Q-CP and not a property interest.
 - [c] **Exception to rule: The transfer will not be allowed, however, when the transfer of the Q-CP is deemed illusory & the surviving spouse or domestic partner invokes the widow's election.**
 - [d] The transfer is deemed illusory when the decedent (the acquiring spouse or domestic partner) retained some interest or control over the property. The interest can be an ownership interest, a use, or a co-tenancy.
 - [e] In such cases, upon the death of the decedent, the surviving spouse or domestic partner may require the transferee to restore ½ of Q-CP to the decedent's estate.

[III] KILLERS

- [B] **Those who feloniously & intentionally kill the decedent cannot take any benefits under the will or by intestacy.**
- [C] Proof needed:
 - [1] A conviction (which includes a plea of guilty) is conclusive.
 - [2] In all other cases, the probate court determines guilt by a preponderance of the evidence.
- [D] Consequence of finding that the killing was felonious & intentional:
 - [1] Killer is deemed to have predeceased the decedent, & the anti-lapse statute does not apply.
 - [2] Problem of one JT feloniously & intentionally killing the other JT:
 - [1] There is a severance of the JT so that the killer does not have a right of survivorship.
 - [2] But note, the killer does not lose his or her ½ interest in the property.
- [F] Problem of a beneficiary feloniously & intentionally killing the insured:
 - [1] Killer-beneficiary does not take any benefit under the insurance K.

FOURTEENTH CONCEPT: INTESTATE SUCCESSION

6 issues:

1. Surviving spouse/domestic partner
2. All others
3. Per capita/representation
4. Adopted children
5. Non-marital children

6. Half-bloods

[I] **SURVIVING SPOUSE/DOMESTIC PARTNER**

- [A] *CP: Surviving spouse or domestic partner inherits decedent's 1/2 of the CP.*
- [B] *Q-CP: Surviving spouse or domestic partner inherits decedent's 1/2 of the Q-CP.*
- [C] *SP: Surviving spouse or domestic partner inherits decedent's SP as follows:*
 - [1] *If decedent leaves no issue, parents, brother or sister, or issue of a deceased brother or sister, all to surviving spouse or domestic partner.*
 - [2] *If decedent is survived by one child, or issue of a predeceased child, 1/2 to surviving spouse or domestic partner & 1/2 to child or child's issue.*
 - [3] *If decedent is survived by 2 or more children, or issue of predeceased children, 1/3 to surviving spouse or domestic partner & 2/3 to the children or their issue.*
 - [4] *If decedent is survived by no issue, but leaves parent or parents or their issue, then 1/2 to parent or parents or their issue, 1/2 to surviving spouse or domestic partner.*

[II] **ALL OTHERS, INTESTATE LEAVES NO SURVIVING SPOUSE OR DOMESTIC PARTNER**

- [A] **Intestate Scheme**
 - [1] Down to the decedent's issue
 - [2] Up to parents
 - [3] Down to issue of parents
 - [4] Up to grandparents
 - [5] Down to issue of grandparents
 - [6] Issue of a predeceased spouse or domestic partner:
 - [a] Definition of a predeceased spouse or domestic partner: a spouse or domestic partner who died while married to or in partnership w/ the decedent; it is *that* spouse or domestic partner's issue, i.e., decedent's former step-children.
 - [7] Next of Kin
 - [8] Parents of a predeceased spouse or domestic partner: This is the decedent's former in-laws.
 - [9] Issue of parents of a predeceased spouse or domestic partner.
 - [10] Escheat

[III] **PER CAPITA REPRESENTATION PROBLEM**

- [A] Whenever issue takes by intestacy, or if a will or trust provides for issue to take w/o specifying the manner, they take in the manner provided in § 240 of the Probate Code. This means:
 - [1] *Issue of the same degree take "per capita," or equally & in their own right.*
 - [2] *Issue of more remote degree take "per capita w/ representation."*
 - [b] Under § 240, we make our distribution [i] at the first level someone is living & give shares to all living people at that generation, & [ii] to deceased members of that generation who leave issue.
- [B] If a will or trust calls for a distribution "per stirpes" or "by right of representation," or by "representation," we make a different distribution **(tested only once in the last 20 years)**.
 - [1] Such terminology requires a *"strict per stirpes" distribution.*
 - [2] That means you make the distribution at the first generation or first level, even if everyone is dead, so long as they left issue. The issue then step into the shoes of their predeceased ancestor.

[IV] **ADOPTED CHILDREN**

- [A] *An adopted child is always treated as a natural child of the adopting parents.*
- [B] *Regarding the adopted child's natural parents, the adoption severs the relationship.*

- [1] **Exception:** The relationship to the natural parent is not severed if the adoption is by the spouse or domestic partner of the natural parent, or after the death of either of the natural parents.
- [a] Example: H1 marries W. They have a child C. H1 dies. W marries H2. H2 adopts C. C inherits not just from W & H2, but also from H1's line.

[C] **As to stepchildren or foster children**

- [1] The child is treated as having been adopted if 3 elements are satisfied
- [a] **The relationship began during the child's minority;**
- [b] **It continued throughout the parties' lifetimes; &**
- [c] **It is established by clear & convincing evidence that the stepparent or foster parent would have adopted but for a legal barrier.**

[D] **Equitable adoption**

- [1] Also known as adoption by estoppel.
- [2] Arises when the parties hold themselves out as parent & child.

[V] **NON-MARITAL CHILDREN**

- [A] In CA, marital status of the parents is irrelevant.
- [B] The key is whether a parent-child relationship existed, irrespective of marital status.
- [C] In a domestic partnership, a parent-child relationship is established as to the non-birthing partner by means of one of several presumptions:
- [1] A child born during the domestic partnership is presumed to be the child of the non-birthing domestic partner.
- [2] A child born after the formation of a domestic partnership is presumed to be the child of the non-birthing domestic partner if the latter is named on the birth certificate or pays child support.

[VI] **HALF BLOODS**

- [A] Defined: Relatives who have only 1 common parent.
- [B] Example: Half-siblings
- [C] **RULE:** Relatives of the half blood inherit the same as the whole blood.

FIFTEENTH CONCEPT: DISTRIBUTION OF THE ESTATE: WHO CAN TAKE?

- 3 Issues:
1. Posthumous Children
 2. Lapse & anti-lapse
 3. Simultaneous death

[I] **POSTHUMOUS CHILDREN**

- [A] A posthumous child is a child conceived during the lifetime of the intestate or T, but born after the death of the intestate or T.
- [B] Posthumous children are deemed heirs of the intestate & beneficiaries of T's will.

[II] **LAPSE AND ANTI-LAPSE**

- [1] If it is required that the beneficiary survive the T, what happens if the beneficiary predeceases the T?
- [2] Example: T devises \$1K to A, & A predeceases T.
- [a] What happens to A's gift?
- [b] It is distributed under the rule of lapse.

- [3] **RULE OF LAPSE:** *If the beneficiary does not survive the T, beneficiary's gift lapses, or fails. Thus, if a gift lapses, unless a contrary intent is expressed in the will, the gift falls into the residue, if there is one; if it is already part of the residue, it goes to other co-residuary devisees. Otherwise, the gift goes by intestacy.*

[C] **Anti-Lapse Statute:**

- [2] CA'S ANTI-LAPSE STATUTE: *Applies only if the devisee who predeceased the T was "kindred" of the T, or kindred of a surviving, deceased or former spouse or domestic partner of the T, & this predeceased devisee leaves issue. In such case, the issue of that predeceased devisee will step into the shoes of that predeceased devisee.*
- [5] NOTE: For the anti-lapse statute to apply, devisee must be "kindred" (blood relative) of the T or T's spouse or domestic partner—but the devisee cannot be the spouse or the domestic partner.
- [6] Note also: the issue of the predeceased devisee will take under the anti-lapse statute take in the manner provided in § 240: those of the same degree take "per capita" while those of more remote degree take by "per capita w/ representation" (see above for discussion).
- [7] In CA, both the rule of lapse & the anti-lapse statute applies to wills & *also* to revocable trusts.
- [8] In CA, the anti-lapse statute also applies to class gifts. E.g. T executes a will devising Blackacre "to my children." At the time the will was executed, T had 3 kids, A, B & C. After T's will is executed, C predeceases T. C leaves children C1 & C2. Under CA's anti-lapse statute, C's gift does not lapse. Rather C1 & C2 take C's devise. C1 & C2 take C's 1/3 by representation, each taking 1/6.

[III] **SIMULTANEOUS DEATH**

[B] CA adopted the Uniform Simultaneous Death Act.

[C] Its application can be best understood in the following 5 situations:

- [1] ***T & devisee die under circumstances of simultaneous death, a plane crash, for example.*** You cannot tell by clear & convincing evidence that devisee survived the testator—not even for one second. If you can establish by clear & convincing evidence that devisee survived testator for even a second, devisee takes. But if you cannot so establish by clear & convincing evidence that devisee did survive testator, the Uniform Simultaneous Death Act provides that devisee is deemed to have predeceased the T. Thus, the devisee will not take. What will happen to the gift? The gift will either lapse or be distributed under CA's anti-lapse statute.
- [2] ***A & B, as JT w/ right of survivorship, & die under circumstances of simultaneous death:*** you cannot tell by clear & convincing evidence who survived whom. In such case, you sever the joint tenancy: ½ the JT property goes to A's estate & ½ the JT property goes to B's estate.
- [3] ***H & W or domestic partners have wills & own CP or Q-CP & die under circumstances of simultaneous death:*** you cannot tell by clear & convincing evidence who survived whom. In such case the CP & quasi-CP will be severed:
- [a] ½ CP & ½ Q-CP will be distributed through H's or one domestic partner's estate;
- [b] ½ CP & ½ Q-CP will be distributed through W's will or the other domestic partner's estate.
- [4] ***A life insurance policy & the insured & beneficiary die under circumstances of simultaneous death:*** you cannot tell by clear & convincing evidence that the beneficiary survived the insured. If it cannot be so established that the beneficiary survived the insured, then the beneficiary is deemed not to have survived the insured.
- [a] See if there is an alternative beneficiary named.

- [b] If there is no alternative beneficiary, the policy proceeds are paid to the insured's estate: to the residuary devisees in the will if there are any, but if none, the proceeds will go to the insured's heirs.
- [c] But note: if the policy premiums are paid for w/ CP or Q-CP & the insured & beneficiary are spouses or domestic partners, then ½ the proceeds go to the H's or one domestic partner's estate, & ½ the proceeds go to the W's or the other domestic partner's estate.
- [5] ***The intestate & heir die & the 120-hour rule:*** Here the rule is a little different. For any heir to take, the heir must survive the intestate by 120 hours. If it cannot be determined by clear & convincing evidence that the heir has survived the intestate by 120 hours, it is deemed that the heir did not survive the intestate, & the heirs are determined accordingly.
 - [a] This 120-hour rule does not apply if the property would escheat.

SIXTEENTH CONCEPT: DISTRIBUTION OF THE ESTATE: WHAT DOES A BENEFICIARY TAKE?

5 issues:

1. After acquired property
2. Increase during Testator's lifetime
3. Increase after Testator's death & during probate
4. Abatement
5. Exoneration

[I] AFTER ACQUIRED PROPERTY

- [A] A will passes all property the T owned at death, including after-acquired property.
- [B] After acquired property defined: Property acquired after the will was executed.
- [C] Example: In 1990, T executes a will leaving all of her estate to Mary. At the time the will was executed, T's net worth is \$1,000. When T dies in 2000, T has a net worth of \$1 million. B/c a will can dispose of after acquired property, Mary will take the full \$1 million, not just the \$1,000 or the property owned by T at the time the will was executed.

[II] INCREASES DURING T'S LIFETIME

- [A] *Stock dividends or splits paid during testator's lifetime go to the beneficiary if the stock is owned by T at T's death.*
- [B] Example: T devises 100 shares of Chevron stock to beneficiary. Before T dies, Chevron declares a stock dividend.
 - [1] Beneficiary gets the 100 shares & the stock dividends.

[III] INCREASE AFTER T'S DEATH AND DURING PROBATE

- [A] Regarding specific devisees, all increase goes to the beneficiary:
 - [1] Stock dividends,
 - [2] Stock splits,
 - [3] Rents,
 - [4] Cash dividends,
 - [5] Interest on indebtedness.
- [B] General devisees do not receive any increase.
 - [1] Exceptions: General pecuniary gifts earn interest on such gifts not distributed 1-year after T's death. The interest received is a formula based on the legal rate of interest.

[IV] ABATEMENT

- [A] Defined: The process by which certain gifts are decreased.
- [B] When abatement arises: (note – if you see omitted child/spouse/DP, look for abatement)
- [1] When it is necessary to pay for the share of the omitted child, or omitted spouse or domestic partner.
 - [2] When there is an omitted child, or omitted spouse or domestic partner, gifts of devisees must be decreased to come up w/ the statutory share of the omitted child/spouse/domestic partner.
 - [3] Thus, whenever you have an omitted child, or omitted spouse or domestic partner, there will almost certainly be the related issue of abatement.
- [C] Order of abatement for omitted children & omitted spouses
- [1] First abate property not passing by the decedent's will or revocable inter-vivo trust.
 - [2] Then abate from all beneficiaries of T's will or revocable inter-vivo trust pro rata, in proportion to the value of the gift received.
 - [3] No distinction is made b/w specific, general, & residuary gifts.
 - [4] **Exception for specific gifts: the court can exempt the specific gift if abating the specific gift would defeat the obvious intention of the T. This obvious intention must appear from the language in which the specific devise is created, or from the general terms of the will or trust.**
 - [5] Note that there is no favoring of relatives over non-relatives.
 - [6] Note that the order of abatement for omitted children & omitted spouses & omitted DPs is not the order of abatement to pay off general debts of the decedent. The order to pay off general debts of the decedent is: (1) intestate property, (2) residuary gifts, (3) general gifts to non-relatives, (4) general gifts to relatives, (5) specific gifts to non-relatives, (6) specific gifts to relatives. To the extent that they can be satisfied from the designated fund, demonstrative gifts are treated as specific gifts.

[V] EXONERATION

- [A] Defined: The debt is extinguished
- [B] **CL view: If T devised a specific gift subject to an encumbrance for which T was personally liable, the executor was required automatically to pay off the debt b/f passing the property to the beneficiary.**
- [C] **CA view: No automatic exoneration**
- [1] In CA, the devisee takes the specific gift subject to the encumbrance, unless the testator's will states that the specific gift is to be exonerated. Moreover, a general direction "to pay all my just debts" is not sufficient to exonerate. If the gift is exonerated, in the absence of a contrary intention in the will, other specific gifts do not abate.

SEVENTEENTH CONCEPT: WILL SUBSTITUTES

From this point on, apply general legal principles (not CA law).

2 issues:

1. Gifts causa mortis
2. Totten trusts

[I] GIFT CAUSA MORTIS

- [A] **Defined: a gift made in contemplation of imminent death.**

- [B] Property that can be the subject of a gift causa mortis: personal property only; no gifts of real property.
- [C] **Donor must make a delivery of the property to donee.**
- [1] Delivery can be one of three forms: actual, symbolic, or constructive delivery.
- [a] **Actual delivery or manual delivery:** The corpus itself is transferred to donee.
- [b] **Symbolic delivery:** Something representative of the corpus is given to the donee. Typically it is a writing evidencing ownership. Example: Cash is not available for a manual delivery, but giving the donee a bank document evidencing ownership of the account, such as the quarterly statement of interest earned in the account.
- [c] **Constructive delivery:**
- [1)] Common law view: what is given to the donee is a key, that unlocks a box or room, in which is located the corpus, which is too big or bulky for a manual delivery. The key can be literal, or figurative, such as a treasure map that would lead one to the buried treasure. Thus, the heart to a common law constructive delivery is the opening of access to a room wherein is the corpus, that is that is too big, or bulky, or otherwise unavailable.
- [2)] Modern view: A constructive delivery will be found whenever the donor has done everything possible to effectuate a delivery, & there is no issue of fraud & mistake.
- [D] If donor survives the peril, the gift is revoked by operation of law.

TRUSTS

- a. **RULE: Any ascertainable person or group of people can be the legal beneficiary of a private express trust. Person includes a legal person.**
- i. Corporations can be beneficiaries.
 - ii. Unincorporated associations.
 1. C: Could not.
 2. Modern rule: can be the beneficiary.
 - iii. Class gifts are valid, but watch out for a class that is too big (e.g. all of the people of the state of CA). Even if it is ascertainable, it simply cannot be administered.
 1. But might be a charitable trust.
 - iv. A child conceived when the interest was created & later born is deemed an ascertainable person.
 - v. RAP issues:
 1. E.g. O to bank in trust "to A but if liquor is ever sold, to B."
 2. B's interest can vest 10000 years from now, which is certainly more than any life in being plus 21 years. Hence B's interest is stricken.

2. Trustee

- a. **RULE: A trust must have a trustee, but the court will not allow the trust to fail solely b/c there is no trustee or a trustee refuses to serve.**
- b. The court, in such a case, will appoint a trustee.
- c. Until a trustee is appointed, the settlor or the settlor's estate will hold legal title.

3. Manifestation of Trust Intent

- a. **There must be present manifestation of trust intent made by the settlor.** You cannot manifest an intent for a trust to arise in the future.

- b. No magic words, however, are needed to create a trust. Settlor does not have to use the words “trust” etc.
- c. Although no magic words are needed, precatory words by themselves are not sufficient to create a trust.
 - i. Precatory words – words of wish, hope or desire. Precatory words are not mandatory words, which is required for a trust. E.g. S gives \$100K to brother with the hope & desire that he will use it for my sister.” No trust is created, & brother is owner of the \$100K.
 - ii. **Precatory words + parol evidence may create a trust; e.g., in prior example, if the money had been used by the settlor originally to support the sister, & the settlor then stopped supporting the sister after the grant.**
 - iii. If you conclude that the words are precatory & the parol evidence is not sufficient to cause a trust to be created, then the transferee owns the property in fee simple.
- d. Statute of frauds: Trusts of personal property do not have to be in writing. The statute of frauds applies only to real property.

4. Creation: How to Create a Private Express Trust

- a. 2 time frames – a trust created to take effect at settlor’s death or during settlor’s lifetime.
 - i. At Settlor’s Death: If settlor wants to create a trust to take effect at settlor’s death, the only way settlor can do that is by complying w/ the Statute of Wills, i.e. the local probate code. Thus the settlor is really a testator. Thus, a part of testator’s will has a provision for a testamentary trust, a trust which will take effect at testator’s death.
 - 1. E.g. T’s will states: “I devise Blackacre to bank to hold in trust for the benefit of my son for his life.”
 - ii. During Settlor’s Lifetime: If settlor wants to create a trust to take effect during his lifetime, there are 2 ways to accomplish this: transfer in trust or declaration in trust.
 - 1. **Transfer in Trust: In a transfer in trust, third person is the trustee.**
 - a. For a trust of *real property*, the settlor must execute & deliver a deed transferring title to the trustee. The writing requirement is due to the statute of frauds.
 - b. For a trust of *personal property*, there must be delivery to the trustee of the trust property at the time settlor manifests the intent to create the trust. The delivery can be actual, symbolic or constructive.
 - c. NOTE: If there is no delivery to a trustee, there is no trust. Moreover, a promise to deliver the corpus in the future is not a delivery.
 - 2. **Declaration in Trust: Settlor herself is trustee.**
 - a. For a trust of *real property*, there must be some writing satisfying the statute of frauds indicating that settlor is also the trustee.
 - b. For a trust of *personal property*, b/c the settlor is also the trustee, there is no issue of delivery: one cannot deliver property to oneself. So if settlor is going to be the trustee in trust of personal property, the only thing we have to look at is the present manifestation of trust intent.

5. Legal Purpose

- a. **RULE: A trust may be established for any legal purpose.**
- b. What if the trust is for an illegal purpose or, if not illegal, violative of public policy? In such a case, distinguish b/w illegality at creation from illegality after creation.
 - i. Illegality At Creation
 - 1. **Try to excise the bad from the good. If you can, the trust will stand.**

- a. E.g. S creates a trust for A on the condition that A divorce his spouse. Such a trust violates public policy.
 - b. Result: The court will excise the illicit condition. Thus A would take free of the condition.
2. ***If it is not possible to excise the illicit condition & sever the good from the bad, the court has 2 options, & will do whatever achieves the best result.***
- a. *First Option:* Invalidate the trust at its inception – trust is not recognized, & settlor remains the owner of the property.
 - i. E.g. S creates a trust to defraud S's own creditors. The court will invalidate the trust so that S's creditors can reach the assets.
 - b. *Second Option:* Allow the trustee to keep the property for himself.
 - i. Reason: Punishment to the settlor /c he does not have clean hands.
- ii. Illegality After Creation
1. ***If a trust becomes illegal after creation, a resulting trust is decreed.***
- a. Resulting trust – an implied-in-fact trust based on the presumed intent of the parties.
 - b. Resulting trustee has the sole obligation to transfer the property back to the settlor if he is alive, or to the estate if he is not.
 - c. Thus if a trust is created that was perfectly legal at the time of creation but subsequently becomes illegal due to a change in law, we have a resulting trust in favor of the settlor if settlor is alive, & if not, to his estate.

SECOND CONCEPT: CHARITABLE TRUSTS

1. Definition of a Charitable Trust

- a. Statute of Elizabeth: Trusts for education, alleviation of poverty, alleviation of sickness, or to help orphans.
- b. Restatement: Any trust which confers a substantial benefit upon society.
- c. Examples of charitable trusts:
 - i. Help the poor,
 - ii. Advance education,
 - iii. Help the sick,
 - iv. Promote religion.

Creation of a Charitable Trust

- a. Method: It is created the same way a private express trust is created.

Requirements:

1. *Manifestation of trust intent (either at T's death by will or during his lifetime by declaration of trust or transfer in interest),*
2. *Of a presently existing interest in property that can be transferred,*
3. *For a legal purpose.*

3. Beneficiary of a Charitable Trust

a. Identification of the Beneficiary

- i. In a charitable trust, there is no ascertainable person or group of persons who are the beneficiaries, as in a private express trust because society is the beneficiary of a charitable trust.
- ii. While an individual may receive an incidental benefit, the focus is on society.

1. E.g. A trust is established to endow a chair at a university. While an individual professor may receive a benefit from a trust to endow a chair at a university, the trust is not a private express trust, but a charitable trust b/c society benefits when education is advanced.
 - b. **Where the beneficiary is of a small group of people, is this a charitable trust, or a private express trust?**
 - i. E.g. Settlor creates a trust to alleviate poverty among his poor relatives. Is this a charitable trust or a private express trust? Split of authority.
 1. One view: it is a private express trust because only a few people are getting a benefit.
 2. Other view: it is a charitable trust b/c whenever poverty is eliminated, society benefits.
 - ii. Why care if the trust is a private express trust or a charitable trust? B/c of the RAP & Cy Pres.
4. **RAP**
- a. *CL RAP applies in many jurisdictions, but it does not apply to charitable trusts.*
 - i. Thus a trust to alleviate poverty among settlor's poor relatives, assuming this is a private express trust, will violate CL RAP b/c it can vest more than 21 years after a life in being.
 - ii. A charitable trust, on the other hand, is not affected by the rule. Thus a charitable trust, such as a university chair, can endure forever.
5. **Cy Pres – "As nearly as possible."**
- a. In cy pres, if the court finds that settlor had a general charitable intent (e.g. to help the poor who are sick) & only the mechanism for effectuating that is not possible or practicable (e.g. a free hospital), the court can modify the mechanism, cy pres, as nearly as possible, to effectuate the settlor's general intent.
 - b. Specific vs. general intent –
 - i. *Specific intent – if settlor has a specific charitable intent, cy pres cannot be used.*
 - ii. Determined by introducing intrinsic evidence (the trust instrument) & extrinsic evidence to ascertain settlor's intent.
 - c. Only the court invokes cy pres, not the trustee on his own. The trustee may petition the court, but only the court has cy pres power.

THIRD CONCEPT: POUR-OVER WILLS

1. Scenario

- a. *Settlor creates an inter-vivos trust, w/ a provision in her will devising part or all of the estate to the trust.*
- b. The pour-over provisions are validated in 3 ways:
 - i. Incorporation by reference,
 - ii. Facts of independent significance, &
 - iii. Uniform Testamentary Additions to Trusts Act (UTATTA).

FOURTH CONCEPT: MISCELLANEOUS TRUSTS

1. Honorary Trusts

- a. **Definition of Honorary Trust: No ascertainable beneficiary & confers no substantial benefit on society; is thus a "goal" of the settlor.**
- b. B/c there is no ascertainable beneficiary, it cannot be a private express trust.

- c. B/c there is no substantial benefit to society, it cannot be a charitable trust.
- d. The trustee is not *required* to carry out settlor's goal, but has the power to carry it out. The trustee is on his honor only to carry out settlor's intent.
- e. E.g. A trust to advance an unusual political ideology.
 - i. A trust to further fox hunting.
 - ii. To take care of S's pet, but a trust to take care of MANY animals may be a charitable trust.
- f. **Problems w/ Honorary Trusts:**
 - i. Trustee may, in an honorary trust, refuse to carry out settlor's wishes & the trust then fails. Then there is a resulting trust in favor of the settlor or the settlor's estate.
 - 1. This "failure" of the trust never happens w/ a private express trust or a charitable trust.
 - ii. RAP Problems – There is no measuring life for these trusts, & consequently, they virtually always violate the RAP.
 - 1. B/c these trusts violate the RAP, some courts strike the trust at its inception, & as a consequence we have a resulting trust.
 - 2. In other states, courts allow the honorary trust to endure for 21 years & then a resulting trust follows to the end of the trust. This is the approach of the Restatement of Trusts & the Uniform Probate Code.

2. Totten Trust

- a. Is always a bank account.
- b. **Defined:** a totten trust is also referred to as a tentative bank account trust whereby *the named beneficiary takes whatever is left in the account at the death of the owner of the account.*
 - i. *It is not a true trust.*
 - ii. The depositor/trustee owns the account during his lifetime & owes the named beneficiary no fiduciary duties whatsoever.
 - iii. Is just a will substitute.
 - iv. E.g. "Mary Smith's trustee for John Jones" on the name of the bank acct.
 - 1. Mary Smith is the settlor/depositor.
 - 2. Mary Smith has full control during her lifetime.
 - 3. Mary Smith does not owe John Jones any fiduciary duty whatsoever.
 - 4. She can do with the money anything she wants to during her lifetime.
 - 5. John Jones takes whatever is left, if anything, on Mary Smith's death.
- c. In some cases settlor may do something during his lifetime to elevate the totten trust to being a private express trust.
 - i. Look to the actions of the depositor/trustee for a manifestation of trust intent.
 - 1. Remember that no magic words are necessary to create a private express trust.
 - 2. Thus if Mary Smith tells John Jones, "I have created this trust for you," or words to that effect, Mary has manifested an intent to create a trust & elevated the totten trust to a private express trust with the full range of fiduciary duties.

FIFTH CONCEPT: RESTRAINTS ON ALIENATION

1. Spendthrift Trust (Spendthrift Provision of a Private Express Trust)

- a. **Definition:** *Beneficiary cannot transfer his right to future payments of income or principal & creditors cannot attach the right to future payments.*
- b. How to recognize on the bar exam:

- i. Terms of the trust must include basically: “No beneficiary of this trust shall be allowed to voluntarily transfer his right to future payments, & no creditor shall be allowed to attach any beneficiary’s right to future payments.”

c. 3 testable Issues:

- i. Voluntary Alienation – can beneficiary ever voluntarily alienate or transfer his right to future payments, notwithstanding the spendthrift provisions?
 - 1. **RULE: Generally, voluntary alienation is not allowed when there is a spendthrift provision as this would defeat the terms of the trust.**
 - a. But sometimes a court will recognize the beneficiary’s assignment on the ground that the beneficiary merely has given the trustee a direction or order to pay the beneficiary’s agent or representative (*i.e.* the assignee). In such a case, prior to the time of payment, the beneficiary would have the right to revoke the order or direction.
- ii. Involuntary Alienation – can creditors ever attach the beneficiary’s right to future payments, notwithstanding the spendthrift provisions?
 - 1. **RULE: Generally, involuntary alienation is not allowed when there is a spendthrift provision as this would defeat the terms of the trust.**
 - 2. **Common Law Exceptions:** Preferred creditors can attach the beneficiary’s right to future payments, notwithstanding the spendthrift provisions.
 - 3. **CL Preferred Creditors:**
 - a. Government creditors – IRS,
 - b. Those who provide the necessities of life to the beneficiary,
 - c. A child for child support,
 - d. A spouse for spousal support,
 - e. An ex-spouse for alimony.
 - 4. Tort judgment creditor – cannot spendthrift away tort liability.
 - 5. In addition to these CL exceptions for preferred creditors, there is also a rule in many jurisdictions that any creditor (even if not a preferred creditor) has the right to attach a “surplus” as measured by the beneficiary’s station in life.
- iii. Can the settlor ever create a spendthrift trust for himself or herself (*i.e.* a self-settled spendthrift trust)?

- 1. Involuntary Alienation – in every jurisdiction, the trust itself is valid, but the spendthrift provisions are not recognized. Will not allow you to insulate yourself from your own creditors.
- 2. Voluntary Alienation – split of authority:
 - a. Most – ignore the spendthrift provision & allow settlor to voluntarily alienate interest.
 - b. Some – will not allow settlor to transfer right to future payments; protect the beneficiary from himself.

2. Support Trusts (Support Provisions of a Private Express Trust)

- a. **Definition: Trustee is required to use only so much of the income or principal as is necessary for the beneficiary’s health, support, maintenance, or education.**
- b. **3 testable Issues**
 - i. Voluntary Alienation: Can the beneficiary ever voluntarily alienate or transfer his right to future payments, notwithstanding the support provisions?
 - 1. No. Would defeat the purpose of the trust & violate settlor’s intent.
 - ii. Involuntary Alienation: Can creditors ever attach the beneficiary’s right to future payments, notwithstanding the support provisions?

1. See rules for spendthrift trusts – the rules are the same. Generally no attachment but for preferred creditors.
- iii. *Self-Settled Support Trust* – see rules for spendthrift trusts

3. Discretionary Trust (Discretionary Provisions of a Private Express Trust)

- a. **Definition:** *Trustee is given sole & absolute discretion in determining how much to pay the beneficiary, if anything, & when to pay the beneficiary, if ever.*
- b. **3 testable issues:**
 - i. *Voluntary Alienation:* Can the beneficiary ever voluntarily alienate or transfer his right to future payments, notwithstanding the discretionary trust provisions?
 1. No, beneficiary cannot voluntarily transfer his right to future payments, because the beneficiary may not get anything.
 2. But, if there is in fact an assignment, the assignee steps into the shoes of the beneficiary. B/c the beneficiary could not force payment by the trustee, neither can the assignee. However, if the trustee has notice of the assignment & does decide to pay, then the trustee must pay the assignee or be held personally liable.
 - ii. *Involuntary Alienation:* Can the beneficiary ever involuntarily alienate or transfer his right to future payments, notwithstanding the discretionary trust provisions?
 1. On the one hand, creditors cannot attach the beneficiary's right to future payments b/c there is nothing to attach. The trustee may never allocate anything to the beneficiary. The beneficiary could not force payment, & neither can the creditors. Thus there is nothing to attach by the creditors.
 2. On the other hand, if the trustee has notice of the debt & the creditor's judgment against the beneficiary, & the trustee does decide to pay, he must pay the creditors or be held personally liable.
 - iii. Can settlor ever create a discretionary trust for herself? See rules for spendthrift trusts.

SIXTH CONCEPT: RESULTING TRUSTS

1. Definition of a Resulting Trust

- a. *A resulting trust is an implied-in-fact trust & is based on the presumed intent of the parties.* If a resulting trust is declared by the court, the resulting trustee will transfer the property to the settlor if he is alive, or to his estate (*i.e.* to the residuary devisees if any, & if none, to the intestate takers).

Situations Where a Resulting Trust Arises

- a. 1st: When a private express trust ends by its own terms, & there is no provision for what happens to the corpus thereafter.
 - i. E.g. S creates a trust to enable her daughter to obtain a law school education. Trust intent is silent as to what to do with the property after the education is done & paid for.
 - ii. Presumption that settlor wants the property back.
- b. 2nd: When a private express trust fails, b/c there is no beneficiary.
 - i. In such case we presume settlor wants the property back: to settlor if he is alive, & if not, to his estate.
- c. 3rd: When a charitable trust ends b/c of impossibility or impracticability, & cy pres cannot be used.
 - i. E.g. S creates a trust to build & maintain a free hospital but there is not enough \$ to do so.
- d. 4th: When a private express trust fails b/c it becomes illegal after creation.
- e. 5th: When there is excess corpus in a private express trust.

- i. E.g. Settlor creates a valid private express trust, but due to excellent investing, there is more than enough corpus to achieve the trust purpose. With respect to the excess corpus, there is a resulting trust.
- f. 6th: When we have a purchase money resulting trust.
 - i. E.g. A pays consideration to B to have title to property transferred to C.
 - ii. If A & C are not closely related, there is a rebuttable presumption that C is holding as a PMRT for the benefit of A. This can be rebutted.
 - iii. If A & C are closely related, there is a rebuttable presumption that A made a gift to C.
- g. 7th: Semi-secret trust – a semi-secret trust arises when the will makes a gift to a person to hold as a trustee, but does not name the beneficiary.
 - i. E.g. “\$100K to A as trustee.”
 - ii. The will on its face shows trust intention, but the beneficiary cannot be ascertained. To admit in the evidence to establish the terms of the trust would violate the Statute of Wills.
 - iii. Courts typically decree a resulting trust to testator’s estate.

SEVENTH CONCEPT: CONSTRUCTIVE TRUST

1. Definition of Constructive Trust

- a. A constructive trust is a remedy to prevent fraud or unjust enrichment. The wrongdoer’s obligation is to transfer the property to the intended beneficiary as determined by the court. Is a means to disgorge a wrongdoer of his ill-gotten gains.

2. Establishment of a Constructive Trust:

- a. 1st: Where the trustee of a private express trust or a charitable trust makes a profit b/c of self-dealing.
 - i. W/ respect to those ill-gotten profits, the trustee will be a constructive trustee. As such, the trustee will have to turn those profits over to the intended beneficiaries of the trust, as decreed by the court.
- b. 2nd: W/ respect to the law of wills, when there is fraud or the inducement or undue influence.
 - i. Courts can deny the will probate & make the heir a constructive trustee who will have the obligation to turn the property over to the intended beneficiary, as determined by the courts.
- c. 3rd: “Secret Trusts w/in the Law of Wills”
 - i. Secret Trust – The will on its face makes a gift outright to A, but the gift is given on the basis of an oral promise by A to use the property for the benefit of B.
 - ii. T goes to A and says, “A, I shall devise 100,000 to you, if you promise to use this money for the benefit of B.” A states to testator that he (A) will comply. Thereafter T executes his will that states “I devise 100,000 to A.”
 - 1. When T dies, from the 4 corners of the will, it seems that A owns the 100,000 for himself, free of any trust.
 - 2. Parol evidence is admissible to show that the beneficiary was B.
 - 3. Thus, A will not be allowed to keep the property. A will become a constructive trustee who will have only 1 obligation: to transfer the property to B.
 - 4. BUT NOTE: for semi-secret trusts, cts will NOT impose a constructive trust. Rather they impose a resulting trust (back to testator’s estate).
 - 5. *On the bar exam, whether you have a semi-secret trust (I devise 100k to Abel as trustee) or secret trust (I devise 100k to Abel), discuss the rules for each, then apply the appropriate doctrine to the facts at hand.*
- d. 4th: Oral Real Estate Trust

- i. Would ordinarily have the statute of frauds as a defense, but in 3 situations, the grantee will be deemed a constructive trustee who will have the sole obligation to transfer the property to the intended beneficiary.
- ii. 3 cases:
 1. Fiduciary relationship between settlor & original grantee.
 2. Fraud in the inducement
 3. Detrimental reliance

EIGHTH CONCEPT: TRUSTEE POWERS & DUTIES

1. Trustee Powers

- a. Trustee has all enumerated powers.
- b. Trustee has all implied powers too.
 - i. Implied powers – helpful & appropriate to carry out the trust purpose.
 1. Examples: (1) power to sell trust property, (2) power to incur expenses, (3) power to lease, (4) power to borrow.

2. Trustee Duties Owed to Beneficiaries

a. Duty of Loyalty

- i. **Definition:** Requires that the trustee administer the trust for the benefit of the beneficiaries (implicitly, the trustee must be impartial), having no other consideration in mind.
 1. Corollary: no self-dealing
- ii. **Examples of self-dealing:**
 1. Trustee prefers one beneficiary, his child, over the others.
 2. Trustee sells trust property to trustee's spouse.
 3. Trustee lawyer hires himself.
- iii. **Consequences of Finding Self-Dealing:**
 1. If there is a loss, the trustee is "surcharged," meaning that the trustee has to make good the loss.
 2. If the trustee makes a personal profit, then w/ respect to those ill-gotten gains, the trustee is a constructive trustee.

Duty to Invest – Split of Authority: There are 3 alternative rules of the duty to invest.

Discuss all 3.

- i. **State Lists** – Some states have lists which trustee must follow in the absence of directions in the trust. Good investments include:
 1. Federal government bonds,
 2. Federally insured CDs,
 3. 1st Deeds of Trust in Real Estate,
 4. Stocks of Publicly Traded Corporations (maybe)
 5. NEVER – new business
 6. NEVER – 2nd deeds of trust
- ii. **CL Prudent Person Test** – Duty to invest requires the trustee to act as a RPP investing his own property, trying to maximize income while preserving corpus. If the trustee holds himself out as having greater skill, he is held to that higher standard.
 1. Key: each individual investment is scrutinized.
 2. Good investments include:
 - a. Federal government bonds,
 - b. Federally insured CDs,

- c. 1st Deeds of Trust in Real Estate,
 - d. Blue chip stocks,
 - e. Mutual funds (may be okay),
 - f. NEVER – new business.
 - g. NEVER – 2nd deeds
- iii. **Uniform Prudent Investor Act** – Adopted by most states. Act simply states that the trustee must invest as a prudent investor.
- 1. Key: Unlike the rules above, each individual investment is not scrutinized; performance is measured in the context of the entire trust portfolio. Thus any investment is not per se invalid. Consequently, even derivatives & futures Ks may be appropriate in the context of an entire portfolio.
- iv. **Miscellaneous Rules:**
- 1. Under any standard, the trustee has a duty to diversify so a loss does not destroy the entire portfolio.
 - 2. Under the 1st 2 rules, no speculating is allowed.
 - 3. If there is a breach of the duty to invest, the trustee must make good the loss. If there is a profit, the beneficiaries affirm the transaction. If the trustee makes 2 investments that breach the duty & 1 makes money, the trustee is still charged for the loss while the beneficiaries affirm the transaction that made money. There is no netting allowed to the trustee.

c. Duty to Earmark

- i. **Defined: Requires the trustee to label trust property as trust property.**
- ii. E.g. Proper – “John Smith is trustee of the ABC trust.”
- iii. **Consequence of Breach of Duty:**
 - 1. CL – If trustee breaches the duty to earmark and there is a loss, the trustee is held personally liable. No causal relationship is required b/w the failure to earmark & a loss. Thus if the stock market crashes & there is a loss, the trustee is personally liable, even though the failure to earmark did not cause the loss.
 - 2. Modern – If there is a failure to earmark & there is a loss, the trustee is held liable only if the loss was caused by the failure to earmark.

d. Duty to Segregate

- i. **Defined: Trustee cannot commingle his own personal funds w/ trust funds.**
- ii. Moreover, the duty to segregate also requires that the trustee not commingle the funds of different trusts.
- iii. If the trustee breaches the duty to segregate, the trustee can be removed & can be held liable for any loss.

e. Duty Not to Delegate

- i. **Defined: The trustee can rely on professional advisors in reaching a decision, but the trustee cannot delegate decision-making authority to these advisors.**
 - 1. CL – A trustee could not delegate the duty to invest to a professional money manager.
 - 2. Modern – A trustee can delegate the duty to invest, e.g. to a manager of a mutual fund.
- ii. Moreover, while a trustee cannot delegate to a third person, the trustee also cannot delegate to another trustee.
- iii. Under CL, in the absence of a contrary provision in the trust instrument, the trustees must act unanimously.

1. Modern – trustees can act by majority decision.

f. Duty to Account

i. Defined: Trustee on a regular basis must give the beneficiaries a statement of income & expenses of the trust.

1. If the trustee fails to render an accounting to the beneficiaries, the beneficiaries would file an action for an accounting.

g. Duty of Care

i. Defined: Trustee must act as a reasonably prudent person dealing with his own affairs.

ii. You will ALWAYS be able to discuss due care, so don't leave it out!

h. Remedies of Beneficiary for Breach of Duty:

- i. Damages,
- ii. Constructive trust remedy,
- iii. Tracing & equitable lien,
- iv. Ratify the transaction if good for beneficiary,
- v. Remove trustee.

3. Liability of Trustee to TPs (in K or in Tort)

a. Liability in K

i. CL Rule

- 1. Trustee is sued in his personal capacity. Consequently, the trustee's personal assets are at stake. But the trustee can get indemnification from trust assets if the trustee acted w/in his powers & was not personally at fault.
- 2. The only time the trustee would be sued in his representative capacity is if the K itself provided that in the event of a breach by the trustee, the trustee is to be sued in his representative capacity.

ii. Modern Rule

- 1. If the other person to the K, the promisee, knows that the trustee is entering into the K in his representative capacity, then the trustee must be sued in his representative capacity. Thus the trustee's assets are not personally at stake.

b. Liability in Tort

i. CL Rule

- 1. Trustee is sued in his personal capacity.
- 2. If the trustee was w/o personal fault, however, the trustee can get indemnification from trust assets. Thus if an agent committed the negligent act, or if this is a case of SL, the trustee can get indemnification.

ii. Modern Rule

- 1. Trustee is sued in his individual capacity & is personally liable only if the trustee is personally at fault.

NINTH CONCEPT: MODIFICATION & TERMINATION OF TRUSTS

1. Modification by Settlor

- a. Settlor can modify the trust if he expressly reserved the right to modify.
- b. Settlor also has the power to modify if he retained the power to revoke.
 - i. Power to revoke is greatest power the settlor can have.

2. Modification by Court

- a. Can be a modification by the court re: charitable trusts & the cy pres power: changing the mechanism to further settlor's general charitable intent.
- b. There also can be modification of charitable trusts or private express trusts regarding the court's deviation power.
 - i. *Deviation Power (Doctrine of Changed Circumstances)*:
 1. When the court exercises its deviation power, the court changes the administrative or management provisions of the trust.
 2. W/ deviation, the court is not changing beneficiaries.
 3. Requirements for Use of Deviation Power:
 - a. Unforeseen circumstances on the part of settlor, &
 - b. Necessity (deviation needed to preserve the trust).

3. Termination of Revocable Trusts

- a. When does the Settlor have the power to revoke?
 - i. Maj. Rule: To retain the power to revoke, the settlor must expressly reserve the power in the trust instrument.
 - ii. Min. Rule: Settlor has the power to revoke, unless the trust is expressly made irrevocable.

4. Termination of Irrevocable Trusts

- a. **3 Ways an Irrevocable Trust Can Terminate Prematurely**:
 - i. *Settlor & All Beneficiaries Agree to Terminate (need to appoint guardian ad litem for unborn beneficiaries)*
 - ii. *All Beneficiaries Agree & All Material Purposes Accomplished*
 1. Reason: Equity will not see a trust continue to carry out a minor or insignificant purpose.
 2. Can set aside sufficient funds to accomplish the insignificant purposes.
 - iii. *By Operation of Law: Passive Trusts & Statute of Uses*
 1. Statute of Uses comes into play when you have a private express trust w/ the corpus of real property, & the trust is passive – the trustee has no active duties & is just holding bare legal title.
 2. In such cases, under the Statute of Uses, the beneficiaries get legal title by operation of law, & thus the trust terminates.
 3. Not recognized in all jurisdictions.

TENTH CONCEPT: INCOME & PRINCIPAL (UNIFORM PRINCIPAL & INCOME ACT)

1. Income & Expenses Allocated to Life Tenant

- a. **Life tenant gets the following income**:
 - i. Cash dividends,
 - ii. Interest income,
 - iii. Net business income.
- b. **Life tenant's interest pays for the following expenses**.
 - i. Interest on loan indebtedness,
 - ii. Taxes,
 - iii. Minor repairs (e.g. painting).

2. Income & Expenses Allocated to Remainderman

- a. **Remainderman gets the following income**:
 - i. Stock dividends,
 - ii. Stock splits,

- iii. Net proceeds on sale of trust assets.
- b. **Remainderman's interest pays for:**
 - i. Principal part of loan indebtedness,
 - ii. Major repairs or improvements.

3. **Adjustment Power of Trustee**

- a. Trustee can disregard the above-stated rules regarding allocation of income to LIF & remainderman if a different allocation is necessary to administer the trust fairly.

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