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ABOUT THE AUTHOR

As a student at Harvard Law School, Steve Emanuel wrote concise outlines for his courses and sold them in the law school dining hall to his fellow students. His outlines were such an immediate hit that soon after graduation, Steve quit the practice of law and started his own company to publish the *Emanuel® Law Outlines* series and other study-aid series he helped write.

For more than 30 years, Steve's full-time job has been to update the *Emanuel® Law Outlines*—and other study aids he's written or published, like the *Law in a Flash* series—to reflect changes in the law, in casebooks, and on topics tested in bar exams. **Over 2 million copies** of study aids written by Steve have been sold. Steve is a member of the New York, Connecticut, Maryland, and Virginia bars, and has passed the California bar.

ABOUT THE BOOK—TOOLS TO SUCCEED

- The ***Capsule Summary*** provides a quick reference summary of the key concepts covered in the full Outline
- The **detailed course Outline with black letter principles** supplements your casebook reading throughout the semester and gives structure to your own outline
- The ***Quiz Yourself*** **feature** includes a series of short-answer questions and sample answers to help you test your knowledge of the chapter's content
- ***Exam Tips*** alert you to issues and commonly used fact patterns found on exams
- ***Essay Exam Questions and Answers,*** located at the end of the Outline, that help you review and prepare for exams.
- The ***Casebook Correlation Chart*** correlates each section in the Outline with the pages covering that topic in the major casebooks

INCLUDED IN THIS NEW EDITION OF *WILLS, TRUSTS, AND ESTATES KEYED TO SITKOFF/DUKEMINIER EMANUEL® LAW OUTLINE*

- **Substantial re-write and re-organization of the material to reflect the substantial changes in the new 10th edition of the Sitkoff/Dukeminier casebook**
- Expanded treatment of **the on-going debate of who qualifies as a "spouse" and "child" for inheritance purposes**
- **Improved treatment of the complicated undue influence doctrine**
- **Increased coverage of the debate over the traditional approach (formalities > intent) versus the modern approach (intent > formalities),** as evidenced in
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  - ☐ the most recent amendments to the Uniform Probate Code
  - ☐ the Restatement (Third) of Property, Donative Transfers
- **Increased coverage of the debate over how the law of wills should react to digital technology, in particular, whether an electronic will should be a valid will**
- Updates in **the "reformation movement"** (the courts' power to reform a written instrument) and **estate and gift taxes**
- **Increased coverage of the growing "directed trust" and "trust decanting" movements**
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- **Increased coverage of income taxation and grantor trusts**
- **More problems**—more review questions at the end of each chapter, and more sample exam essay questions

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Wendel

Wills, Trusts, and Estates

Keyed to Sitkoff/Dukeminier, Tenth Edition

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law outlines

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Keyed to Sitkoff/Dukeminier, Tenth Edition

Peter Wendel

Wolters Kluwer

WILLS, TRUSTS, AND ESTATES

KEYED TO SITKOFF/DUKEMINIER
TENTH EDITION

Peter T. Wendel
Professor of Law
Pepperdine University School of Law

The *Emanuel Law Outlines* Series

Wolters Kluwer

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To my students,
from whom I've learned so much,

and

to Jesse Dukeminier, a teacher's teacher—and one of the kindest individuals
I've had the privilege of knowing

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Preface

Wills, Trusts, and Estates is an intrinsically interesting class because it is all about who gets your property when you die. As law students, many of you will have a hard time associating with that issue because (1) mentally you still think that you are going to live forever, and (2) at this stage in your life, your debts probably exceed your assets so the issue in the course is moot as applied to you. To help bring the course and subject matter to life, envision your larger family situation and apply the issues in the course to different family members as appropriate. Sooner or later someone close to you will lose a loved one and you will want to be able to help that person through a very difficult time in his or her life. Even if you do not practice in this area, being able to explain the basics of a will, trust, or the probate process to the person will help the person, at least from a property perspective, through this critical period.

If you have lost a loved one recently, or if a family member is seriously ill, some of the issues in this course may be painful for you. If you are in that situation, I would advise you to let your professor know in advance so that both of you can avoid a potentially difficult classroom situation.

As you progress through the material, you will see that most of the rules, viewed and analyzed individually, are fairly straightforward and easy to understand. The degree of difficulty in the course is the overwhelming volume of rules. To keep all the rules clear, I strongly recommend that you keep the macro approach to the course in mind. Even if your professor does not cover the first chapter of the book, you should read at least the Capsule Summary for Chapter 1. The flowchart in the Capsule Summary for Chapter 1 sets out the roadmap for the whole course.

Individual students will use the outline in different ways. The best way to use this book depends on the student and the professor. Ideally, you should read the casebook, analyze the material, go to class and take good notes, and then create your own outline. As you create your own outline, if you encounter problems with wording certain rules or understanding certain doctrines, refer to the appropriate sections of this outline (see the **Casebook Correlation Chart**) for well-written rule statements and rule explanations and elaborations. If, however, you find yourself struggling with the material (either because of the nature of the material or because of the way that your professor is presenting the material), I would recommend that you read the appropriate sections of the outline before you read the casebook and go to class. That should give you a better understanding of what it is you are supposed to be extracting from the casebook and class discussions. In addition, some students need to see the "big picture" before they can fully understand the significance of the particular case or statute they are reading and analyzing. If you are that type of student, I recommend that you read the **Capsule Summary** of that topic before you begin reading the material in the book for that chapter. The Capsule Summary for that chapter will help to give you the big picture for the chapter so that you can absorb and understand the detailed information in the chapter as you read it the first time.

Learning psychologists emphasize that repeatedly covering material is the best way to move it from short-term memory to long-term memory. The **Quiz Yourself** section of each chapter is designed both to test your knowledge and understanding of the material, and to help transfer that knowledge from your short-term memory to your long-term memory. Because there are so many rules in this course, I strongly recommend that you answer the questions at the end of each chapter as you complete that chapter. Waiting until the end of the semester will not leave enough time for your long-term memory to properly absorb all the rules. Moreover, writing out your answers to the Quiz Yourself questions will give you some practice in exam-writing techniques. When you compose your essays, remember to write the rule before you apply it.

As the end of the semester approaches, you can review the Capsule Summary to refresh your recollection of the material and to spot those areas of the course where you are still weak. Use the outline to supplement your own outline and to fill in any gaps in your understanding. Moreover, you should read the **Exam Tips** to become sensitized to fact patterns, issues, and overlapping scenarios that commonly appear on Wills, Trusts, and Estates exams.

Many people have contributed to this project. I would like to thank the multitude of students I have taught at Pepperdine, UCLA, Loyola–Los Angeles and Santa Clara for keeping the material fresh and challenging, and who have given me so many different insights into, and perspectives on, the material. I want to thank Nick Walther and Noah Gordon for their editorial and production assistance with this latest edition of the outline. I want to thank my research assistant, Monica Paladini, for her extraordinary help.

I wish you the best with your Wills, Trust, and Estates course. I think you will find it interesting, challenging, and enjoyable.

Peter Wendel
November 2017

Casebook Correlation Chart

Wills, Trusts, and Estates **Emanuel Outline** (by chapter heading)	**Dukeminier/Sitkoff:** ***Wills, Trusts, and Estates*** (10th edition 2017)
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Capsule Summary

This Capsule Summary can be used to provide an overview of the material in the course and/or for review at the end of the course. Reading the Capsule Summary, however, is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed.

CHAPTER 1

INTRODUCTION TO WILLS, TRUSTS, AND ESTATES

I. INTRODUCTION: FREEDOM OF DISPOSITION

A. Testamentary freedom and "dead hand" control: The general presumption is that decedent's intent and testamentary freedom are – or should be – the guiding principles of the law of wills, trusts, and estates. Consistent with that view, a decedent may condition a beneficiary's gift on the beneficiary behaving in a certain manner as long as the condition does not violate public policy (i.e., exercise "dead hand" control). [1-2]

B. Validity: "Dead hand" control is generally upheld unless the condition constitutes a complete restraint on marriage, requires a beneficiary to practice a certain religion, encourages divorce or family strife, or directs the destruction of property. The modern trend is to give courts greater power to invalidate conditions that are "*unnecessarily* punitive or *unreasonably* intrusive" into *significant* personal matters. [2-4]

II. THE DEBATE OVER THE POWER TO TRANSFER PROPERTY AT DEATH

A. Introduction: The *freedom* to transfer property at death presumes the *power* to transfer property at death. While most accept that one should have the power to transfer one's property at death, not all agree. The scope of one's power to dispose of one's property at death has varied over time, it varies across cultures, and who qualifies as an heir can vary by state. [4]

B. Public policy debate: Some argue the power to transfer wealth at death is natural and good in that it encourages one to save and promotes family values, while others argue the power to transfer wealth at death perpetuates economic disparity and unfairly rewards those lucky enough to have been born to rich parents. Recent studies show that increasingly earned wealth accounts more for wealth disparity than inherited wealth. The historical compromise has been to permit wealth to be transferred at death, but to tax it (to permit some redistribution). [4-5]

C. Right vs. privilege: A decedent has the right to dispose of his or her property at death. Although the states have broad authority to regulate the process, the states cannot completely abrogate the right. [5-6]

III. WHO TAKES THE DECEDENT'S PROPERTY: THE MECHANICS OF SUCCESSION

A. Overview: The course can be boiled down to a single issue: Who gets the decedent's property when he or she dies? Who takes a decedent's property depends first on whether the property is nonprobate or probate property. Nonprobate property is generally limited to (1) property held in joint tenancy, (2) life insurance contracts (modern trend expands this exception to include all contracts with a payable-on-death clause), (3) legal life estates and remainders, and (4) inter vivos trusts. Nonprobate property passes pursuant to the terms of the nonprobate instrument. Probate property passes pursuant to the terms of the decedent's will, otherwise through intestacy. [6-8]

IV. THE PROBATE PROCESS: AN OVERVIEW

A. Default: Probate is the default. The decedent must take affirmative steps (create a valid nonprobate instrument) to avoid having the property pass through probate. If the decedent dies, testate (with a will), the probate property is distributed pursuant to the terms of the will. If the decedent dies intestate (without a will), the property is distributed pursuant to the intestate scheme. [8]

B. Probate administration: The probate court appoints a personal representative. He or she has the job of collecting the decedent's probate assets, paying off creditors' claims, and distributing the property to those who are entitled to receive the property. [8-11]

V. ESTATE PLANNING

A. Key objectives: In advising a party about his or her estate plan, the key objectives that an estate planning attorney should keep in mind typically are (1) honoring the party's intent, (2) avoiding estate taxes, and (3) avoiding probate. [11-12]

VI. PROFESSIONAL RESPONSIBILITY

A. Common law: Under the common law approach, the attorney owes no duty of care to, and is not in privity of contract with, intended beneficiaries. Accordingly, intended beneficiaries have no standing to sue for malpractice. [12-13]

B. Modern trend: Under the modern trend, (1) an attorney owes a duty of care to intended beneficiaries, and (2) intended beneficiaries are third-party beneficiaries with respect to the contract between the attorney and testator. Intended beneficiaries have standing to sue for malpractice. The expansion of liability on the attorney has been accompanied by the courts adopting more and more curative doctrine to correct mistakes by the drafting attorney. [13-14]

C. Conflict of interest and duty to disclose: The testator's attorney may owe a duty of care to another party if the attorney has an ongoing attorney-client relationship with the other party. The lawyer may have a duty to disclose what otherwise would be considered the testator's confidential information to the attorney's other client. [14]

CHAPTER 2

INTESTACY: THE DEFAULT DISTRIBUTION SCHEME

I. THE INTESTATE DISTRIBUTION SCHEME

A. Introduction: The default distribution scheme is intestacy. If a decedent fails to dispose of all of his or her property through nonprobate instruments or a valid will, the decedent's property passes pursuant to the state's descent and distribution statute to the decedent's heirs. [20-21]

B. A typical intestate distribution scheme: Although the details vary from state to state, the basic order of who takes is fairly similar: (1) surviving spouse, (2) issue, (3) parents, (4) issue of parents, (5) grandparents/issue of grandparents, (6) next of kin, (7) escheats to the state. How much each takes is where the differences typically arise state to state. [21-22]

C. The Uniform Probate Code (UPC) approach: The UPC intestate distribution scheme has fewer tiers of takers (thus property escheats to the state sooner) and a different method of calculating their respective shares (gives a greater share to a surviving spouse). [22-23]

II. SURVIVING SPOUSE: CALCULATING SHARE

A. Typical state statute: Under a typical state descent and distribution statute, the surviving spouse takes 100 percent of the decedent's intestate property if the decedent has no surviving issue, parents, or issue of parents; 50 percent if the decedent has one child (alive or dead but survived by issue) or no surviving issue but surviving parent(s) or issue of parents; and 33 percent if more than one child (alive or dead but survived by issue). [23-24]

B. Uniform Probate Code (UPC): Under the UPC, the surviving spouse takes 100 percent of the decedent's intestate property if no issue or parents, or 100 percent if all of the decedent's issue are also issue of the surviving spouse and the latter has no other issue; if the decedent has no surviving issue but surviving parent(s), the surviving spouse receives the first $300,000 plus 75 percent of the rest of the deceased spouse's property; if all the decedent's surviving issue are also issue of the surviving spouse but the latter has other issue, the surviving spouse takes the first $225,000 plus 50 percent of the rest; and if one or more of the decedent's surviving issue are not issue of the surviving spouse, the surviving spouse takes the first $150,000 plus 50 percent of the rest. [24-25]

III. SURVIVING SPOUSE: WHO QUALIFIES

A. Marriage requirement: The term ***spouse*** assumes that the couple has gone through a valid marriage ceremony (most states include ***putative spouses***, where the couple goes through what at least one spouse believes is a valid marriage ceremony, but the marriage is either void or voidable). In 2015, the U.S. Supreme Court ruled that all couples, regardless of the sex of the partners, are entitled to marry, so same-sex married couples now have all the same rights and duties as heterosexual married couples**.** Cohabitants do not qualify unless the jurisdiction recognizes common law marriage and the couple meets the requirements for common law marriage. [25-26]

B. Legal separation/divorce: Once married, even if a couple legally separates, for inheritance purposes they continue to qualify as spouses until a court enters its final order of dissolution. [26]

C. Survival requirement: At common law, to qualify as an heir one has to prove by a ***preponderance*** of the evidence that he or she survived the decedent by a millisecond. Under the modern trend, some jurisdictions require the heir to prove by ***clear and convincing*** evidence that he or she survived the decedent by a millisecond, while other jurisdictions, the UPC, and the Uniform Simultaneous Death Act require the taker to prove by clear and convincing evidence that he or she survived the decedent by 120 hours (five days). [26-28]

Scope: As a general rule, the survival requirement applies to all parties who claim a right to take some of the decedent's probate testate or intestate property. Traditionally a survival requirement did not apply to all the nonprobate transfers, but the modern trend is to apply a survival requirement to all nonprobate transfers. In some jurisdictions the survival requirement is the same for all types of property (probate and nonprobate), while in other jurisdictions the survival requirement varies depending on the type of property. [26]

CAPSULE SUMMARY

IV. DESCENDANTS/ISSUE: CALCULATING SHARES

A. Calculating shares: The term ***issue*** includes not only one's children, but also all of one's blood descendants. The jurisdictions are split over what it means to divide the decedent's property equally among the decedent's issue when the issue are not equally related to the decedent. Depending on the jurisdiction, the property is divided per stirpes, per capita, or per capita at each generation (if the decedent dies testate or with nonprobate property, the written instrument can expressly provide for which approach applies). [29-31]

B. Per stirpes: Under the per stirpes approach, the first division of a decedent's property always occurs at the first generation of issue (whether anyone is alive at that generation or not). The property is divided into one share for each party who is alive at that generation and one share for each party who is dead at that generation but who is survived by issue. The shares for those who are dead but survived by issue drop by bloodline to their respective issue. [31]

C. Per capita with representation: Under the per capita approach, the first division of a decedent's property always occurs at the first generation of issue where there is a live taker. The property is divided into one share for each party who is alive at that generation and one share for each party who is dead at that generation but who is survived by issue. The shares for those who are dead but survived by issue drop by bloodline to their respective issue. [32]

D. Per capita at each generation: Under the per capita at each generation approach, the first division of a decedent's property always occurs at the first generation of issue where there is a live taker. The property is divided into one share for each party who is alive at that generation and one share for each party who is dead at that generation but who is survived by issue. The shares for those who are dead but survived by issue drop by the pooling approach (the shares are added together and then distributed equally among the issue of the deceased parties at the prior generation). [32-33]

V. SHARES OF ANCESTORS AND REMOTE COLLATERALS

A. Collateral relatives: The decedent, the decedent's spouse, and the decedent's issue are the decedent's immediate family. All of the decedent's other relatives are called his or her "collateral

relatives." If the decedent has no spouse or issue, how the decedent's property is distributed to his or her collateral heirs varies by jurisdiction. There are three possible approaches: the parentelic approach, the degree of relationship approach, and the degree of relationship with a parentelic tiebreaker approach. [34-37]

VI. DESCENDANTS/ISSUE: WHO QUALIFIES

A. Qualifying as an issue: Establishing a parent-child relationship means each can inherit from and through the other. Such a relationship can be established naturally, whether the parents are married or not; by adoption, which severs the relationship with the natural parents as a general rule; or through equitable adoption. [37-45]

1. **Parents married:** Where the natural parents are married, the general rule is both parties (the natural parents and the child) can inherit from and through each other. (The UPC permits the genetic parent to inherit from and through the child unless (1) the parental rights were terminated, or (2) the child died before age 18 and there is clear and convincing evidence the parental rights could have been terminated.)

2. **Adoption:** Adoption establishes a parent-child relationship between the adopted child and the adoptive parents. As a general rule, adoption severs the relationship between the adopted child and his or her natural parent of the same gender as the adopting parent. In many jurisdictions, however, (1) if the adoption is by a stepparent, following the adoption the child can still inherit from and through the natural parent of the same gender as the adopting stepparent, but the natural parent cannot inherit from or through the child; (2) if the adoption was by a relative of a natural parent, the child retains the right to inherit from and through both natural parents; or (3) if the adoption was after the death of both natural parents, the child can still inherit from and through both natural parents.

3. **Equitable adoption:** Equitable adoption arises where (1) the natural parents and adoptive parents agree on the adoption, (2) the natural parents perform by giving up custody of the child, (3) the child performs by moving in with the adoptive parents, (4) the adoptive parents partially perform by taking the child in but failing to complete the adoption, and (5) the adoptive parent dies intestate. The child is entitled to a claim against the adoptive parent's estate equal to his or her intestate share.

4. **Child born out of wedlock:** Where the parents are unmarried, the general rule is the child can inherit from and through the natural parents (assuming paternity can be established), but for the natural parents or relatives of the natural parents to inherit from or through the child, the natural parents or relatives must acknowledge and support the child. (The UPC permits the genetic parent to inherit from and through the child unless (1) the parental rights were terminated, or (2) the child died before age 18 and there is clear and convincing evidence the parental rights could have been terminated.)

5. **Posthumously conceived child:** The emerging general rule is that posthumously conceived children qualify as a child of the deceased genetic parent (and thus can inherit from and through the parent) as long as (1) the parent authorized the use of his or her genetic material while alive, and (2) the child is conceived within a reasonable period (two to three years) of the parent's death. Whether the authorization must be in writing and the requisite time period vary from jurisdiction to jurisdiction.

VII. GIFTS TO CHILDREN

A. Advancements: At common law, inter vivos gifts to a child are irrebuttably presumed to count against the child's share of the decedent's intestate estate. Under the modern trend, inter vivos gifts do not count against an heir's share of the decedent's intestate estate unless there is a writing by the donor contemporaneous with the inter vivos gift expressing such an intent or a writing by the donee acknowledging such an intent. [46-47]

Hotchpot: Where there is an advancement, the amount of the advancement is added back into the decedent's intestate estate, and then each heir's share of the hotchpot is determined. In distributing the decedent's intestate property, an heir who receives an advancement has the value of the advancement credited against his or her share (of the hotchpot amount). [46]

VIII. BARS TO SUCCESSION

A. Introduction: Even where an individual is otherwise entitled to take from a decedent (be it nonprobate or probate property, testate or intestate property), the taker is barred from taking under the homicide doctrine or if he or she disclaims. [48]

B. Homicide doctrine: If the taker killed the decedent, and the killing was felonious and intentional, as a general rule the killer is treated as if he or she predeceased the decedent for purposes of distributing the decedent's property. The doctrine applies to all types of property—nonprobate, probate testate, and intestate property (where the property is joint tenancy, by operation of law it is converted into tenancy in common). The issue is a civil issue subject to the preponderance of the evidence burden of proof. The jurisdictions are split as to whether the issue of the killer should be barred from taking the share that would otherwise go to the killer. [48-50]

C. Disclaimer: If a party properly executes a disclaimer, declining to accept a testamentary gift the taker otherwise would have received, the party who disclaimed is treated as if he or she predeceased the decedent for purposes of distributing the disclaimed property. [50-51]

CAPSULE SUMMARY

CHAPTER 3
WILLS EXECUTION, REVOCATION, AND SCOPE

I. EXECUTING A VALID WILL

A. Overview: Assuming an individual has testamentary capacity, the next requirement for a valid will is that it has to be properly executed. Whether a will has been properly executed is a function of two variables: the jurisdiction's Wills Act formalities and how strictly the courts require the testator to comply with those formalities. [62]

II. COMMON LAW APPROACH TO ATTESTED WILLS

A. Attested wills: The three basic requirements for an attested will are (1) a writing that is (2) signed and (3) witnessed. Each jurisdiction, however, adds a variety of other, ancillary requirements.

Great care must be paid to each jurisdiction's Wills Act statute to ascertain all the necessary execution formalities in each jurisdiction. [63]

B. Judicial approach: Historically the courts have required strict compliance by the testator with each statutory requirement. Strict compliance requires 100 percent absolute compliance. Even the slightest deficiency or error in the execution ceremony invalidates the will regardless of how clear the testator's intent is. [63-64]

C. Typical statutory requirements: Although the statutory requirements vary from jurisdiction to jurisdiction, a number are common to most states. These requirements have given rise to a number of ancillary rules. [64-67]

1. **Signature:** Anything the testator intends to be his or her signature constitutes his or her signature. (If the testator is interrupted while in the act of signing and thus does not complete his or her signature, the assumption is that the testator intended to write his or her whole signature and that the partial signature was not intended to constitute a valid signature.) Most states permit another to sign for the testator as long as the signature is made in the testator's presence and at the testator's direction.

2. **Witnesses:** Most jurisdictions require the testator to sign or acknowledge his or her signature in the presence of two witnesses present at the same time. The witnesses must sign the will (and, in most jurisdictions, must know they are signing a will).

3. **Presence:** A requirement in virtually every Wills Act statute is that one party must perform in the presence of another party (that is, the testator has to sign in the presence of the witnesses, and/or the witnesses have to sign in the presence of the testator). Under the traditional line-of-sight approach, the party in whose presence the act has to be performed must be capable of seeing the act being performed if he or she looks at the moment it is being performed. Under the modern trend conscious presence approach, the party in whose presence the act has to be performed has to understand, from the totality of the circumstances, that the act is being performed.

4. **Order of signing:** Many courts hold that there is an implicit order of signing requirement that the testator must perform (sign or acknowledge) before either of the witnesses sign the will. The modern trend holds that it does not matter who signs first as long as the testator and witnesses all sign as part of one transaction (as long as no one leaves the room before all parties have signed the will).

5. **Writing below signatures:** Where there is writing (typed or handwritten) below the testator's and/or witnesses' signatures, the validity of the writing depends on (1) whether the state requires the testator and/or witnesses to subscribe the will (sign the will at the end, in which case the gift is invalid) and (2) if the will need not be signed at the end, when the gift was added to the will (if before it was signed, valid; if after it was signed, invalid).

6. **Delayed attestation:** At common law, the witnesses must sign the will immediately after the testator signs or acknowledges the will. Under the modern trend, delayed attestation is permitted as long as the witnesses sign within a reasonable time of the testator signing or acknowledging.

D. Interested witness: If one of the two witnesses to a will takes under the will, the witness has a conflict of interest. At early common law, the whole will was void. Today, the jurisdictions vary in their approach to the interested witness doctrine. Some void the entire gift to the witness, others purge the interested witness of the "excess" interest that he or she would take if this will were

valid, and others say that the interested witness scenario creates only a rebuttable presumption of wrongdoing on the part of the interested witnesses (and apply the purging approach if the witness cannot rebut the presumption). [67-68]

E. Switched wills: Where two testators with the same testamentary scheme (typically husband and wife) accidentally sign each other's will, the traditional common law approach is that the wills are invalid. Some courts try to save the wills under the misdescription doctrine, where all incorrect references in the will are struck and then the will is read to see if the court can construe and give effect to what is left. Under the modern trend, the will may be probated under scrivener's error. [68-70]

III. MODERN TREND APPROACH TO ATTESTED WILLS

A. Overview: The modern trend tries to facilitate the execution of attested wills by reducing the number of statutory requirements and/or by reducing the degree of compliance the courts require with respect to the execution requirements. [70]

B. UPC execution requirements: The UPC has simplified the execution process by (1) reducing the number of execution requirements and (2) loosening up on several of the requirements that remain. [70]

1. **Witnesses present at the same time:** At common law, the testator has to sign or acknowledge in the presence of two witnesses present at the same time. Under the UPC, the witnesses need not be present at the same time; the testator can sign or acknowledge in front of the witnesses separately.
2. **Acknowledgment:** At common law, if the testator uses the acknowledgment method of executing the will, the testator has to acknowledge his or her signature. Under the UPC, if the testator uses the acknowledgement method of execution, the testator can acknowledge either the signature or the will in front of the witnesses.
3. **Conscious presence:** The UPC expressly provides that where another signs for the testator, the conscious presence approach applies to the requirement that the party sign in the testator's presence and at his or her direction.
4. **Writing below signature:** The UPC does not require the testator or the witnesses to subscribe the will (sign at the bottom or end).
5. **Delayed attestation:** The UPC provides that the witnesses may sign the will within a reasonable time after witnessing the testator sign or acknowledge. (This also implicitly rejects the requirement that the witnesses have to sign in the testator's presence.)

C. Judicial approach—"curative doctrines": The UPC repudiates strict compliance. At first it advocated substantial compliance, but the most recent version of the UPC advocates the harmless error/dispensing power approach. [71-73]

1. **Substantial compliance:** Substantial compliance holds that a will was properly executed as long as (1) there is clear and convincing evidence that the testator intended the document to be his or her will, and (2) there is clear and convincing evidence that the testator substantially complied with the Wills Act formalities.

2. **Harmless error/dispensing power:** Harmless error/dispensing power holds that the will was properly executed as long as there is clear and convincing evidence that the testator intended the document to be his or her will.

   Electronic wills: A good faith argument can be made that an electronic or digital will should be valid if it meets the requirements of the harmless error doctrine.

D. Interested witnesses: The UPC has abolished the interested witness doctrine completely. [68]

IV. NOTARIZED WILLS

A. Notary option: Pursuant to the 2008 revisions to the UPC, a will is valid if signed by two witnesses *or a notary.* [73]

V. HOLOGRAPHIC WILLS

A. Rule statement: Holographic wills need not be witnessed, but (1) there must be a writing, (2) the writing has to be in the testator's handwriting (either completely or at least the material provisions—the jurisdictions are split), (3) the writing must be signed by the testator, and (4) the writing must express testamentary intent (the intent that the document be the decedent's will); some jurisdictions also require (5) that the writing be dated. The jurisdictions are split over whether the testamentary intent must be expressed in the testator's handwriting or whether it can be expressed in printed material on the document. If the will fails as a holographic will because the material provisions are not in the testator's handwriting, the document may still qualify as the testator's will if the jurisdiction recognizes the harmless error doctrine. [73-76]

VI. REVOCATION

A. Introduction: A validly executed will (attested or holographic) can be revoked by act, by writing (if the writing qualifies as a will), by presumption, or by operation of law. [76]

B. Revocation by act: A testator can revoke a will by act if (1) the act is destructive in nature (tearing, burning, obliterating, scratching, and so on), and (2) the testator has the intent to revoke when the act is performed. Someone other than the testator can perform the act as long as it is performed in the testator's presence and at his or her direction. At common law, the act has to affect at least some of the words of the will. Under the modern trend, the act need not affect the words of the will as long as the act affects some part of the will. (The act of writing can be a destructive act for revocation purposes.) Some jurisdictions do not permit partial revocation by act. [77]

C. Revocation by writing: A testator can revoke a will by writing if the writing qualifies as a will (either attested or holographic). A subsequent will can revoke a prior will either expressly or implicitly (through inconsistency), and either in whole or in part (in which case it is a codicil). [77-78]

Codicils: A will that merely amends and/or supplements an existing will and that does not completely replace an existing will is called a codicil. [77]

D. Revocation by presumption: Where a will was last in the testator's possession and cannot be found after the testator's death, a presumption arises that the testator revoked the will (by act). The presumption can be rebutted if the proponents prove by a preponderance of the evidence that a more plausible explanation exists for why the will cannot be found. If the presumption is rebutted, the will is not revoked, and under the lost will doctrine, the will can be probated if its terms can be established by clear and convincing evidence. [78-80]

E. Dependent relative revocation: Even where a will has been properly revoked, if (1) the testator revoked the will, in whole or in part, (2) based on a mistake, and (3) the testator would not have revoked but for the mistake, the revocation will not be given effect under dependent relative revocation. The courts appear to also require that either (4) the mistake must be set forth in the revoking instrument and be beyond the testator's knowledge, or (5) there must be a failed alternative scheme (typically an attempt at a new will that failed). [80-82]

F. Revival: If a testator executes will #1, and thereafter executes will #2 (a will or codicil), and thereafter revokes will #2, the jurisdictions are split over what is necessary to revive will #1. Under the English approach, will #2 never revoked will #1, so when will #2 is revoked, will #1 is "uncovered" and can be probated. The majority American approach, however, is that will #2 revokes will #1 the moment will #2 is executed. The jurisdictions that follow the American approach are split over what is necessary to revive will #1 when will #2 is revoked. Some jurisdictions require that will #1 be reexecuted. Other jurisdictions provide that all that is necessary to revive will #1 is that the testator intended to revive will #1. Under this latter approach, however, the key is ***how*** was will #2 revoked. Where will #2 is revoked by act, the general rule is that the courts will take virtually any evidence of the testator's intent to revive will #1. Where will #2 is revoked by writing (will #3), the intent to revive will #1 must be expressed in will #3. (Under the UPC, if will #2 is a codicil, revocation of the codicil automatically revives the provisions of the underlying will that the codicil had revoked.) [82-83]

G. Revocation by operation of law: Where the testator divorces, all of the provisions of the will in favor of the ex-spouse are automatically revoked by operation of law. (In some jurisdictions, the doctrine applies not only to the ex-spouse but also to the ex-spouse's family members, and in some jurisdictions the doctrine applies not only to wills but also to nonprobate instruments.) [83-84]

CAPSULE SUMMARY

VII. SCOPE OF A WILL

A. Introduction: There are a handful of doctrines that define the scope of a will and permit intent not expressed in a will to be given effect. [84]

B. Integration: Those pieces of paper physically present when the will is executed and that the testator intends to be part of the will constitute the pages of an attested will. [84]

C. Republication by codicil: A codicil has the effect of reexecuting, republishing, and thus redating the underlying will, but if redating the underlying will appears inconsistent with the testator's intent, the courts do not have to redate the will. [84-85]

D. Incorporation by reference: A document not executed with Wills Act formalities may be incorporated by reference and given effect along with the will if (1) the will expresses the intent to incorporate the document, (2) the will describes the document with reasonable certainty, and

(3) the document was in existence at the time the will was executed (the courts apply this last requirement strictly). [85-87]

E. Acts of independent significance: A will may refer to an act or event that is to occur outside of the will, and that act or event may control either who takes under the will or how much a beneficiary takes, as long as the referenced act has its own significance independent of its effect on the will. [87-89]

VIII. CONTRACTS CONCERNING WILLS

A. Contracts relating to wills: A person may contract to execute a particular will, to make a particular devise, or not to revoke a particular will or devise. If the contract is valid under contract law, the contract will be enforced against the testator's estate before the decedent's estate is distributed. At common law, the alleged contract could be oral. Under the modern trend/UPC approach, there must be a writing signed by the decedent evidencing the contract. [89-90]

B. Joint will/mutual wills: A joint will is a will executed by two different people that each intends to constitute his or her will. The intent to form a contract not to revoke must be express. Mutual wills are two separate wills with the same distribution scheme. The modern trend general rule is that the execution of a joint will or mutual wills does not give rise to even a presumption of a contract not to revoke. [90-91]

C. Contract rights vs. spousal protection rights: Where a surviving spouse remarries and then dies, and the surviving spouse's spouse claims his or her spousal protection rights, if such rights constitute a breach of a contract not to revoke, the jurisdictions are split over whether the contract beneficiaries under the contract not to revoke come first (typically the children of the first marriage) or whether the spousal protection rights of the surviving spouse come first. [91-92]

CHAPTER 4
TESTAMENTARY CAPACITY

I. GENERAL TESTAMENTARY CAPACITY

A. Overview: The traditional method of opting out of intestacy is to execute a will. The first requirement for creating a valid will is testamentary capacity. The testator must have testamentary capacity at the time he or she executes or revokes a will. [106]

B. Testamentary capacity: The testator must be 18 years old and of sound mind. Sound mind is ***the ability*** to know (1) the nature and extent of his or her property, (2) the natural objects of his or her bounty, (3) the nature of the testamentary act he or she is performing, and (4) how all of these relate to constitute an orderly plan of disposing of his or her property. Absent evidence to the contrary, there is a strong presumption of testamentary capacity. (Testamentary capacity is higher than marriage capacity but lower than contractual capacity, so the appointment of a conservator does not, in and of itself, mean the testator lacks testamentary capacity.) [106-108]

C. Defects in capacity: Even if the testator has testamentary capacity generally, if the will or any part thereof is caused by a defect in capacity (insane delusion, undue influence, or fraud), the court strikes as much of the will as was affected by the defect. [108]

II. INSANE DELUSION

A. Defined: An insane delusion is a false perception of reality that the testator adheres to against all reason and evidence to the contrary. The jurisdictions are split over the test for what constitutes an insane delusion. [108-110]

1. **Majority approach:** If there is any factual basis to support the belief, the belief is not an insane delusion. (Notice this approach is more protective of testator's intent.)

2. **Minority approach:** If a rational person could not reach the same conclusion under the circumstances, the belief is an insane delusion.

B. Causation: Even where the testator has an insane delusion, the delusion must cause the testator to dispose of his or her property in a way that he or she would not have otherwise. Some jurisdictions apply a "might have affected" approach to causation, while other jurisdictions apply a "but for" approach. (Notice the "but for" approach is more protective of testator's intent.) [110]

III. UNDUE INFLUENCE

A. Defined: Undue influence occurs where another substitutes his or her intent for the testator's intent; where there is coercion (typically mental or emotional, not physical). [111]

B. Traditional rule statement: The plaintiff bears the burden of proving (1) that the testator was susceptible, (2) that the defendant had the opportunity, (3) that the defendant had a motive, and (4) causation. Where the plaintiff can prove these elements, undue influence can be inferred. [111]

C. Judicial presumption of undue influence: Because undue influence is difficult to prove and the alleged undue influencer is in the best position to produce the relevant evidence, most jurisdictions have a court created burden-shifting approach to undue influence where the burden shifts to the alleged undue influencer to show ***no*** undue influence if the plaintiff meets the requirements of the presumption doctrine. The details of the presumption approach vary from jurisdiction to jurisdiction. Under the Restatement (Third) of Property, Donative Transfers, a presumption of undue influence arises if (1) there was a ***confidential relationship*** between the defendant and the testator, and (2) ***suspicious circumstances*** are present. Many states do not like the open-ended nature of the "suspicious circumstances" element and instead require for the presumption to arise: (1) the defendant and the testator were in a ***confidential relationship***, (2) the testator was of ***weakened intellect***, and (3) the ***defendant takes the bulk of the testator's estate***. [111-114]

D. Statutory presumption of undue influence: Gifts from a testator/transferor to certain takers smack of impropriety: (1) the attorney who drafted the will/instrument; (2) a care custodian who was caring for a dependent adult at – or near – the time when the gift/will was executed; and (3) a party who owes the testator/transferor a fiduciary duty. Increasingly states are creating a statutory presumption of undue influence or wrongful conduct in such circumstances. States typically require a heightened burden of proof to rebut the presumption (clear and convincing evidence); some jurisdictions make the presumption irrebuttable. (Some jurisdictions apply the presumption regardless of the size of the gift; some jurisdictions require an independent attorney to meet with the testator and determine the gift is the testator's true intent to overcome the presumption; and most jurisdictions do not apply the presumption if the donee is related to the testator/transferor by blood or marriage.) [114-116]

E. No-contest/in terrorem clause: If a testator suspects that someone may challenge his or her will (or other testamentary instrument), the testator may include a clause that provides that if the beneficiary challenges the will (or any provision in the will), the beneficiary is barred from taking under the will. No-contest clauses are generally valid but narrowly construed. Even if a beneficiary challenges a will (or clause) and loses, some jurisdictions will not enforce the clause if there is ***probable cause*** to support the challenge (whatever its basis), while other jurisdictions will not enforce the clause if the challenge is based on a claim of forgery, revocation, or misconduct by a witness or the drafter. [116-118]

IV. DURESS

A. Rule statement: Where a wrongdoer performs, or threatens to perform, a wrongful act that coerces the donor into making a donative transfer he or she would not have otherwise made. Transfers procured by duress are invalid. [118-119]

V. FRAUD

A. Rule statement: Fraud occurs where there is an intentional misrepresentation, made knowingly and purposely to influence the testator's testamentary scheme, that causes the testator to dispose of his or her property in a way in which he or she would not have otherwise. There are two types of fraud. [119-120]

1. **Fraud in the inducement:** A person intentionally misrepresents a fact to the testator to induce the testator to execute a will (or amend a provision in a will or revoke a will) in reliance on the misrepresentation.
2. **Fraud in the execution:** A person intentionally misrepresents the nature of the document (either completely or in part) that the testator is signing.

VI. TORTIOUS INTERFERENCE WITH AN EXPECTANCY

A. Rule statement: The plaintiff typically has to prove (1) the existence of an expectancy; (2) a reasonable certainty that the expectancy would have been realized but for the interference; (3) intentional interference with the expectancy; (4) tortious conduct involved with the interference, such as fraud, duress, or undue influence; and (5) damages. [120]

B. Advantages: Tortious interference with an expectancy is a tort action. The plaintiff still has to prove that the defendant committed an independent tort against the testator (not the plaintiff—typically either fraud or undue influence). Bringing the claim as one of tortious interference with an expectancy has several advantages: (1) it is not a will contest for purposes of a no contest clause; (2) punitive damages may be available; and (3) the action is subject to the standard statute of limitations, not the shortened probate statute of limitations. [120-122]

CHAPTER 5

CONSTRUING WILLS

I. ADMISSIBILITY OF EXTRINSIC EVIDENCE: OVERVIEW

A. Introduction: Assuming a properly executed will, upon the testator's death it has to be probated. Probating a will means construing and giving effect to its provisions. [130]

B. Admissibility of extrinsic evidence: The starting assumption is that the written will is the best evidence of the testator's intent and extrinsic evidence should not be admissible to vary its meaning (but extrinsic evidence is admissible if it goes to the *validity* of the will). [130-131]

II. ADMISSIBILITY OF EXTRINSIC EVIDENCE: DRAFTING MISTAKE

A. Drafting mistake: Many construction issues arise from a mistake in the drafting of the will. The law has evolved from being reluctant to admit extrinsic evidence to help construe a will to openly advocating admitting extrinsic evidence, not only to help construe a will but also to reform it. The problem is individual states are all along the spectrum, so one needs to pay careful attention to the applicable approach in that jurisdiction (or classroom). [131]

B. Common law approach: The common law (1) applied the plain meaning rule and (2) admitted extrinsic evidence to help resolve the ambiguity only if there was a latent ambiguity. Under the plain meaning rule, in determining whether there is an ambiguity in the will, the words of the will are given their usual plain meaning, and extrinsic evidence that the testator intended a different meaning is not admissible. If the will contains an ambiguity, under the common law approach extrinsic evidence is admissible to help construe the ambiguity only if it is a latent ambiguity (not apparent on the face of the will); extrinsic evidence is not admissible if the ambiguity is a patent ambiguity. Doctrines that evolved to permit the admissibility of extrinsic evidence to help resolve latent ambiguities were the misdescription doctrine, the equivocation doctrine, and the personal usage exception doctrine. [131-133]

C. Prevailing judicial approach: Acknowledging the inequities associated with the common law approach, many courts have forged a new approach that attempts to balance protecting testator's intent while being more open to extrinsic evidence to help construe a will. Under this approach, the courts have repudiated the plain meaning rule and take evidence of the circumstances surrounding the testator at the time he or she executed the will to help determine if there is an ambiguity in the will. In addition, this approach abolishes the distinction between latent and patent ambiguities and admits extrinsic evidence anytime there is an ambiguity in the will. This approach, however, is ineffective if the drafting mistake is a word or provision is omitted from the will. [133-134]

D. Open reformation: One can argue that historically some courts, primarily on an ad hoc basis, have admitted and used extrinsic evidence to reform a will if there was clear and convincing evidence that (1) the will contains a mistake, and (2) its effect on the testator's intent (New Jersey's probable intent doctrine is evidence of such an approach). The Restatement (Third) of Property, Donative Transfers, and the UPC openly adopt the power to reform approach. They expressly grant a court the power to reform (i.e., rewrite) a will, even in the absence of an ambiguity, anytime there

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is (1) clear and convincing evidence that a mistake of fact or law affected the specific terms of the will, and (2) clear and convincing evidence of testator's true intent. A minority (*but growing*) number of jurisdictions have adopted the Restatement/UPC approach. Lastly, a handful of courts have embraced the power to reform a will but under a narrower, judicially created scrivener's error doctrine: if there is clear and convincing evidence of a scrivener's error in drafting the will, and clear and convincing evidence of its effect on the testator's intent, extrinsic evidence is admissible to establish and to correct the error. (Scrivener's error is a new doctrine; its full scope has yet to be established.) The power to reform a will *may* cover a drafting mistake where a word or provision is omitted if there is sufficient evidence to meet the burden of proof inherent in the doctrine in question. [134-138]

III. CONSTRUCTION PROBLEMS—CHANGES IN THE BENEFICIARY

A. Lapse: Where a beneficiary predeceases the testator, the gift is said to lapse and will fail. [138]

B. Failed gifts: Failed specific gifts and failed general gifts fall to the residuary clause, if one, otherwise to intestacy; failed residuary gifts fall to intestacy. If part of the residuary fails, under the common law that part falls to intestacy, while under the modern trend that part goes to the other residuary takers. [138-139]

C. Anti-lapse: Anti-lapse may save a gift that otherwise would lapse and fail. Anti-lapse provides that where there is a lapsed gift, if (1) the predeceased beneficiary meets the requisite degree of relationship to the testator (varies by jurisdiction), and (2) the predeceased beneficiary has issue who survive the testator, then (3) the gift to the predeceased beneficiary will go to the issue of the predeceased beneficiary (4) as long as the will does not express an intent that anti-lapse should not be applied (low threshold—historically, an express survival requirement or an express gift-over to an alternative taker constituted an express contrary intent). [139-144]

Spouses excluded: As a general rule, the anti-lapse doctrine does not apply to gifts to spouses where the spouse predeceases the testator because a spouse does not meet the requisite degree of relationship requirement.

D. Class gifts: The class gift doctrine may also save a gift that would otherwise fail. A class gift has a built-in right of survivorship so that if one member of the class predeceases the testator, his or her share is redistributed among the surviving members of the class. Whether a gift to a group is a class gift is a question of testator's intent. Where it is not clear whether a gift to multiple individuals is a class gift, courts focus on four factors: (1) how the beneficiaries are described, (2) how the gift is described, (3) whether all the individuals share a common characteristic, and (4) the testator's overall testamentary scheme. The more factors favoring a class gift, the more likely a court is to find the gift to be a class gift. [142-144]

Anti-lapse and class gifts: Where a member of a class gift dies survived by issue, the jurisdictions are split over which doctrine should be applied first to try to save the otherwise failed gift— anti-lapse or the class gift doctrine. The modern trend is to apply anti-lapse first (which saves the gift by giving it to the issue of the predeceased beneficiary) before applying the class gift doctrine (which saves the gift by giving it to the other members of the class).

IV. CONSTRUCTION PROBLEMS—CHANGES IN THE TESTATOR'S PROPERTY

A. Types of gifts: There are four different types of gifts that one can make in a will. A specific gift is where the testator intends to give a specific item (typically that the testator owns at time of execution). A general gift is a gift of a general pecuniary value, where any item or items matching the gift will satisfy the gift. A demonstrative gift is a general gift from a specific source; demonstrative gifts are a subset of general gifts and are treated the same as other general gifts. A residuary gift is a gift of all the testator's property that he or she has not given away specifically or generally. [144-145]

B. Ademption by extinction: Under the common law approach, if the testator makes a specific gift and the item that is the subject of the specific gift is not in the testator's estate at time of death, under the identity approach an irrebuttable presumption arises that the gift was revoked and the beneficiary takes nothing. Under the UPC, a presumption against revocation arises, and the beneficiary is entitled to any replacement property the testator owns at time of death or, if none, the monetary equivalent of the gift. [145-149]

1. **Avoidance doctrines:** Because ademption is such a harsh doctrine, a number of avoidance doctrines have arisen: (1) classify the gift as general, not specific, so the ademption doctrine does not apply; (2) if the item is still in the testator's estate but it has changed, argue that the change is merely one in form, not substance, in which case the beneficiary is still entitled to the item; or (3) construe the will at time of death, not execution, and give the beneficiary the matching item in the testator's estate at death even if that is not the item to which the testator was referring when the will was executed.

2. **Softening doctrines:** A couple of "modified intent" doctrines that soften the impact of ademption have also arisen: (1) if, as a result of the transfer of the item that was the subject of the specific gift, at death the testator is owed an outstanding balance, the outstanding balance goes to the beneficiary; and (2) if the specific gift was transferred while a conservator or durable power of attorney agent was acting for the testator, the beneficiary is entitled to the monetary equivalent of the net sale price.

3. **UPC—intent-based approach:** The latest version of the UPC creates a presumption *against* ademption. If the testator has acquired property to replace the original specific gift, the beneficiary gets the replacement property. If the testator has not acquired replacement property, the beneficiary is entitled to the monetary equivalent of the specific gift if the beneficiary can prove ademption is inconsistent with the testator's intent. The UPC also adopts the outstanding balance and the conservatorship exceptions to ademption.

C. Stocks: At common law, the beneficiary receives the benefit of any change in the stock between time of execution and time of death if the gift of stock was a specific gift. The modern trend presumes the testator's intent was to give a percentage interest in the company and, in the event of a stock split or dividend, the only way to satisfy the testator's intent is to give the beneficiary the benefit of the change in stock, even if the gift is a general gift. The UPC gives the beneficiary the benefit of any change in the stock initiated by a corporate entity long as at the time of execution the testator owned stock that matched the description of the gift of stock given in the will. [149-150]

D. Satisfaction: At common law, if a beneficiary under a will receives an inter vivos gift from the testator of the same type of property as the gift in the will and the beneficiary is the testator's child, a rebuttable presumption arises that the inter vivos gift counts against the child's testamentary gift.

Under the modern trend/UPC approach, if the testator makes an inter vivos gift to any beneficiary under his or her will, the gift does not count against the beneficiary's testamentary gift unless there is a writing evidencing such an intent. If the donor creates the writing, it must be contemporaneous with the gift; if the donee creates the writing, it can be created anytime. [150]

E. Exoneration of liens: At common law, if a specific gift is burdened with debt (that is, a mortgage or lien), absent contrary intent expressed in the will, it is presumed that the beneficiary of the specific gift is entitled to have the debt completely paid off (out of the residuary typically) so that the beneficiary takes the gift free and clear of any debt. Under the modern trend, the beneficiary takes subject to the debt absent an express clause directing that the debt is to be satisfied before the gift is made. [150]

F. Abatement: If at time of death the testator has made more gifts than he or she has assets, the doctrine of abatement states that residuary gifts should be reduced first, general gifts second, and specific gifts last. Some states permit the court to vary from this order if abating the residuary first appears inconsistent with the testator's overall testamentary scheme (the testator intended the residuary taker to take the bulk of his or her probate property and abating the residuary clause would be inconsistent with this intent). [150-151]

CHAPTER 6
TRUSTS: OVERVIEW AND CREATION

I. CONCEPTUAL OVERVIEW

A. Trust introduction: The settlor creates a trust by transferring property to a trustee. The trustee holds legal title. The beneficiaries hold equitable title. Even if the trust is revocable and the settlor is the life beneficiary, there is no need to transfer legal title upon the death of the settlor. Property placed in a trust inter vivos passes pursuant to the terms of the trust and is nonprobate property. [158-160]

B. Bifurcated gift: The typical trust is a gratuitous trust (a way of making a gift). A gratuitous trust is a bifurcated gift. One party (the settlor) gives property to a second party (the trustee) to hold and manage for the benefit of a third party (the beneficiary). The trustee holds legal title to the trust property and manages the trust property. The beneficiaries hold equitable title. The trustee owes a fiduciary duty to the beneficiaries to manage the trust property in their best interests. The same party can be settlor, trustee, and beneficiary as long as there is another cotrustee or beneficiary. A trust is created the moment it is funded. As a general rule, a trust will not fail for want of a trustee; the court will appoint a trustee if necessary. The trust is an ongoing gift, often lasting for decades. This means that the trust property is bifurcated between the income and principal, and the equitable interest typically is bifurcated between a beneficiary who holds the possessory estate (typically a life estate) and the beneficiaries who hold the future interest(s) (typically a remainder). [160-163]

II. REQUIREMENTS TO CREATE A VALID EXPRESS TRUST

A. Trust requirements: To have a valid trust, (1) the settlor must have the intent to create a trust, (2) the trust must be funded, (3) the trust must have ascertainable beneficiaries, and (4) the terms of the trust *may* have to be in writing. [163-164]

III. INTENT

A. Rule statement: The intent to create a trust arises anytime one party transfers property to a second party for the benefit of a third party. Use of any pertinent term of art (***trustee***, ***trust***, or ***in trust***) generally is deemed to express the intent. If the trust in question is an ***inter vivos trust***, the words in question will either be in the ***declaration of trust*** (if the settlor is the trustee) or the ***deed of trust*** (if someone other than the settlor is the trustee). If the trust in question is a ***testamentary trust***, the best evidence of the testator's intent is the words in the will. [164-165]

B. Precatory language: Precatory language is where a donor makes a gift to a donee with the "wish" or "hope" that the donee will use the property for the benefit of another. The general rule is that precatory language does *not* create a trust. There is no legal obligation to use the property for the benefit of the other party, only a moral obligation. [165-167]

1. Gifts that fail for want of delivery: Where a party makes a gratuitous promise to make a gift in the future but then dies before properly transferring the property, the law is unclear as to whether the failed gift (for want of delivery) can be saved by converting the intent to make a gift in the future into a present declaration of an intent to create a trust with the declarant as trustee.

CAPSULE SUMMARY

IV. FUNDING—TRUST PROPERTY

A trust is funded when property is transferred to the trust/trustee. Historically because funding requires the transfer of a property interest, the courts focused on the necessary formalities associated with the type of property being transferred to the trust: personal property versus real property (Statute of Frauds). The modern trend focuses more on the intent to transfer the property interest and less on the formalities. [167-168]

A. Deed of trust: A deed of trust means a third party is trustee. *Where the deed of trust is oral*, the traditional and still general rule is that there must be some form of delivery (actual or symbolic) of the property in question (personal property) for funding to occur. Where, however, *the deed of trust is in writing* and it specifically identifies the property the trust is to hold: (a) if the property is personal property, the modern trend holds that the deed of trust also transfers the property to the trust (i.e., funds the trust); but (b) if the property is real property, the courts are split over whether the written deed of trust alone is sufficient to fund the trust. [168-169]

B. Declaration of trust:.A declaration of trust means the settlor is the trustee. If the *declaration of trust is in writing*, and it specifically identifies the property, the general rule now is the declaration will also transfer the property identified to the trust, thereby funding the trust without a separate writing or delivery. If *the declaration of trust is oral*, even if it specifically identifies the property being transferred to the trust, the modern trend general rule is that while this will be sufficient to transfer most personal property, it will not be sufficient to transfer any real property or titled personal property (i.e., stock). [168-169]

C. Adequate property interest: Virtually any property interests, except for future profits and expectancies, qualify as adequate property interests. [169-170]

V. ASCERTAINABLE BENEFICIARIES

Beneficiaries are ascertainable if they are identified by name or if there is an objective method of identifying the beneficiaries. The only exception to the requirement that the beneficiaries must be

ascertainable is where a trust is created for unborn children. In that case, the courts will monitor the trustee's actions. [170-171]

A. Honorary trusts: Where a private trust would otherwise fail for want of ascertainable beneficiaries, but the purpose of the trust is such that it is impossible to have ascertainable beneficiaries (for example, care of a pet or gravesite) and the purpose is specific and honorable, and not capricious or illegal, under the honorary trust doctrine the courts will permit the trust to continue as long as the trustee agrees to honor the terms of the trust. Technically, such trusts are subject to the Rule Against Perpetuities and that may cause the trust to fail, but under the modern trend to the Rule Against Perpetuities courts usually find a way around the Rule Against Perpetuities problem—at least for 21 years. [171-172]

B. UTC no ascertainable beneficiary trust: The UTC expressly recognizes the validity of a noncharitable trust even though the trust has ***no*** ascertainable beneficiary. Such a trust may last for up to 21 years. Although this trust is akin to the common law honorary trust, it need not have a specific and honorable purpose. [173]

VI. WRITING

The terms of the trust must be in writing if (1) the trust is an inter vivos trust that includes real property, or (2) the trust is a testamentary trust. [173-174]

A. Failed inter vivos trust—remedy: Where a settlor executes a deed transferring real property to a trustee, and the settlor and trustee orally agree on the terms of the inter vivos trust but the deed is silent as to the trust, the trust fails for want of writing. At common law, the trustee is permitted to keep the real property as his or her own because strict application of the Statute of Frauds bars evidence of the oral trust agreement to vary the terms of the deed. Under the modern trend, a constructive trust is imposed on the trustee to prevent unjust enrichment (particularly where the trustee procured the transfer as a result of fraud or undue influence or stood in a confidential relationship with the donor), and the trustee will be ordered to transfer the property to the intended beneficiaries. [174]

1. **Remedial trusts:** Constructive trusts and resulting trusts are remedial trusts that arise by operation of law as a matter of equity, and they are not subject to the traditional trust requirements. Constructive trusts typically arise and are imposed by courts to prevent unjust enrichment. The court will order the party currently holding title to the property to transfer the property to the party that the court concludes, as a matter of equity, is entitled to the property. Resulting trusts arise whenever a trust fails in whole or in part. The court will order the property transferred back to the settlor (or the settlor's estate if the settlor is dead).

B. Failed testamentary trust—remedy: Where a beneficiary under a will agrees to hold the property in question as a trustee for the benefit of others, but the terms of the testamentary trust are not in the will (or incorporated by reference), the testamentary trust fails for want of writing. Under the common law approach, the key is whether the failed testamentary trust is a secret or semisecret trust. A secret trust is where the face of the will makes no reference to the testator's intent that the beneficiary identified in the will was to take in a fiduciary capacity as a trustee and not as an ordinary beneficiary. Where the failed testamentary trust is a secret trust, a constructive trust is imposed and the property is ordered distributed to the intended beneficiaries. A semisecret trust is where the will hints at or expresses the testator's intent that the beneficiary is to take for the benefit

of others, but the identity of the trust beneficiaries and/or the terms of the trust are not set forth in a writing that can be given effect. Under the traditional common law approach, where a semisecret trust failed, a resulting trust is imposed on the trustee and the property is ordered returned to the testator's probate estate. Under the modern trend, a constructive trust is typically imposed on both a secret and a semisecret trust. [175]

CHAPTER 7

WILL SUBSTITUTES AND PLANNING FOR INCAPACITY

I. OVERVIEW OF THE WILL SUBSTITUTES

A. Introduction: One can opt out of intestacy by either (1) executing a valid will or (2) creating a valid nonprobate instrument. Historically, there were only four nonprobate options (collectively referred to as the "will substitutes," since they functioned for all practical purposes like a will): an inter vivos trust, a life insurance contract, joint tenancy, and a legal life estate and remainder. The modern trend is to expand the scope of the nonprobate arrangements. [182]

B. Governing law: The **traditional** common law approach held that inasmuch as these will substitutes are subsets of other areas of law, the rules and doctrines of those other areas of law would control. The modern trend is to apply the wills related rules to the will substitutes (since they de facto function as a will). [182-183]

CAPSULE SUMMARY

II. INTER VIVOS REVOCABLE TRUSTS

A. Revocable trusts: Historically courts struggled with whether a revocable trust was a valid will substitute where the settlor was also the trustee and life beneficiary (on the logic that such a legal arrangement is functionally indistinguishable from a will and that nothing really passed to the remainder beneficiary). Under the modern trend, all courts accept such a revocable trust as a valid will substitute. The Uniform Trust Code (UTC) goes further and declares that in such a trust the remainder beneficiary receives ***no*** interest until the settlor/life beneficiary dies. [183-185]

B. Revocability: Under the traditional common law approach, if a trust is silent as to its revocability, it is irrevocable. If the trust is revocable and expressly provides for a particular method of revocation, only that method suffices. If the trust is revocable and does not provide for a particular method of revocation, any method that adequately demonstrates the settlor's intent to revoke suffices (including the revocation methods that apply to wills). Under the modern trend UTC, (1) a trust is revocable unless it expressly provides that it is irrevocable; (2) if the trust is revocable and expressly provides for a particular method of revocation, that method is *not* exclusive unless the trust expressly so provides; (3) a subsequently executed will can expressly or implicitly revoke the trust, in whole or in part; and (4) where there is a particular method of revocation, substantial compliance with the method of revocation is all that is necessary to revoke the trust. [185-187]

C. Creditor's rights: When a life tenant's interest is extinguished, creditors of the life tenant have no right to reach the property. Under the modern trend, however, where the settlor is the life beneficiary of a revocable trust, creditors of the settlor can reach the property in the trust, even after the settlor's death. [187-188]

D. Trust construction issues: The modern trend is to apply the will construction rules (covered in Chapter 5) to the will substitutes, particularly revocable trusts (but not joint tenancy as a general rule). [188-190]

III. POUR-OVER WILLS AND INTER VIVOS TRUSTS

A. Introduction: A pour-over will and trust combination is the most common estate planning combination today, though the property being poured over to the trust under the terms of the will does not avoid probate. Where a will has a pour-over clause giving probate property to the trustee of the testator's separate trust, the pour-over clause must be validated under incorporation by reference, acts of independent significance, or the Uniform Testamentary Additions to Trusts Act (UTATA). [190]

B. Incorporation by reference: Under incorporation by reference, the trust ***instrument*** is being incorporated by reference into the will. The critical requirement is that the trust instrument must be in existence when the will is executed. The trust need not be funded inter vivos, but the trust that is created is a testamentary trust subject to probate court supervision for the duration of its life, and subsequent amendments to the trust are not valid absent a subsequent codicil to the will. [190-191]

C. Acts of independent significance: Under acts of independent significance, the trust must have its own significance independent of its effect on the decedent's probate property—that is, the trust must be funded inter vivos and have property in it when the testator dies. Subsequent amendments to the trust can be given effect regardless of when they are created, but many jurisdictions subjected the trust to probate court supervision (at least as to the probate property being poured into the trust). [191-192]

D. UTATA: Under the most widely adopted version of UTATA, the pour-over clause is valid as long as (1) the will refers to the trust, (2) the trust terms are set forth in a separate writing other than the will, and (3) the settlor signed the trust instrument prior to or concurrently with the execution of the will (under the most recent version of UTATA, the trust instrument need only be signed before the settlor/testator dies, not before or concurrently with the will). The trust need not be funded inter vivos, yet it will not be subject to probate court supervision after it is created, and amendments to the trust can be given effect regardless of when they are created. [192-194]

E. Contemporary role of revocable trusts: A number of pros and cons are associated with using revocable inter vivos trusts. Most scholars agree the pros outweigh the cons for the typical individual. [194-196]

IV. CONTRACTS WITH PAYABLE-ON-DEATH CLAUSES

A. Common law: At common law, the only type of contract with a payable-on-death (POD) clause that qualified as a valid nonprobate transfer was a life insurance contract (even though the effect of the contract is to pass the insurance proceeds upon the insured's death immediately to the beneficiary identified in the contract). [196]

B. Modern trend: The modern trend/UPC expands the life insurance nonprobate exception to include all third-party beneficiary contracts with a POD clause, including pension plans and, increasingly, IRA accounts. [197-–200]

C. Multiple-party accounts: Historically, banks and brokerage houses forced parties interested in creating multiple-party accounts to use the joint tenancy account even if that is not what the parties intended. There are three possible intents the parties may have had when they created the account: (1) a true joint tenancy, (2) an agency account, or (3) a POD account. Upon the death of one of the parties, the courts take extrinsic evidence of the parties' true intent and treat the property accordingly if there is clear and convincing evidence of an intent other than a true joint tenancy (although at common law, the POD intent is invalid so the property passes into the depositor's probate estate). Under the modern trend, the presumption is that inter vivos the parties own in proportion to their contributions, and at death there is a right of survivorship. The presumption, however, can be rebutted if there is clear and convincing evidence of a different intent, and that intent will control the disposition of the funds in the account. [200-203]

V. REAL PROPERTY NONPROBATE TRANSFERS

A. Joint tenancy/tenancy by the entirety: The right of survivorship means that upon the death of one joint tenant, his or her share is extinguished and the shares of the remaining tenants are recalculated. No property is passed at death, so nothing passes through probate. [203]

B. Transfer-on-death deed (TODD): The modern trend is to recognize TODDs. While the details currently vary from state to state, the key characteristics of a TODD typically are: (1) the deed must be executed and recorded inter vivos, but it does not become effective until the death of the grantor—i.e., absolutely no interest is transferred to the grantee until the grantor dies; (2) the deed is revocable during the grantor's life (but typically only by recording another deed that revokes the initial deed); and (3) the transfer is effective immediately upon the grantor's death and avoids probate. [203-204]

VI. PLANNING FOR THE POSSIBILITY OF INCAPACITY

A. Overview: Good estate planning includes planning for the possibility that the person may become incapacitated before he or she dies. With respect to property issues, historically the most common tool to deal with that possibility was the conservatorship or durable power of attorney; modern trend increasingly people are using an inter vivos revocable trust. With respect to personal decisions about one's health care, the principal tools are either a living will (medical directive) or a durable power of attorney for health care decisions. [204-206]

CAPSULE SUMMARY

CHAPTER 8

LIMITATIONS ON THE TESTAMENTARY POWER TO TRANSFER

I. SPOUSAL PROTECTION SCHEMES: AN OVERVIEW

A. Introduction: Every jurisdiction has several doctrines that protect surviving spouses (and, to some degree, children) that have the effect of limiting one's power to transfer one's property at death. A surviving spouse has a right (1) to support and (2) to a share of the couple's marital property. [216-217]

II. SURVIVING SPOUSE'S RIGHT TO A SHARE OF THE MARITAL PROPERTY

A. Separate property vs. community property: The scope of a surviving spouse's right to a share of the deceased spouse's property depends on whether the jurisdiction follows the separate property approach (in which case the right is called the *elective* or *forced* share) or the community property approach (in which case the right is part of the community property doctrine). [217]

B. Overview: The issue is (1) ***what*** credit, if any, the non-wage-earning spouse (historically the wife) should receive for contributing to the partnership and enabling the wage-earning spouse (historically the husband) to focus on earning money, and (2) ***when*** that credit should be recognized. The separate property approach gives the non-wage-earning spouse to immediate credit for any property acquisitions during the marriage and does not "force" the wage-earning spouse to share any property rights until the end of the marriage. Community property adopts the partnership model and gives the non-wage-earning spouse equal credit (50-50) for all property acquisition acquired during the marriage by the wage-earning spouse the moment the dollar/property is acquired. [217-218]

C. The elective (or forced) share: Under the separate property system, although each spouse owns his or her earnings acquired during marriage as his or her separate property, upon death the elective share doctrine provides that the surviving spouse is entitled to a share of the deceased spouse's property regardless of the terms of the deceased spouse's will. How much property the surviving spouse is entitled to (typically one-third of the estate subject to the elective share) and what property is subject to the elective share varies from jurisdiction to jurisdiction. [217-219]

D. Who qualifies: The modern trend is to extend spousal protection to same-sex couples, either by permitting them to marry or by granting elective share/community property rights to same-sex couples in a legally recognized civil union/domestic partnership. [219]

III. THE ELECTIVE SHARE: TRUE SHARING OR ENHANCED SUPPORT?

A. True sharing? Critics question whether the elective share is "true" sharing of marital property to the extent that (1) the right to claim an elective share is delayed until the other spouse dies, (2) the share is not necessarily an equal share of the marital property, (3) the share can be funded by the deceased spouse by a life estate, (4) the right is a personal right that cannot be claimed if the surviving spouse dies before claiming it, and (5) there are limits on an incompetent spouse's right to claim it. [219-220]

IV. THE ELECTIVE SHARE: DOCTRINAL CONSIDERATIONS

A. Property subject to the elective share: More than any other part of the elective share doctrine, the jurisdictions are split over what property is subject to the elective share. [221]

B. Common law: At common law and in a number of states, the elective share entitles the surviving spouse to a share of the deceased spouse's probate estate, regardless of the terms of the deceased spouse's will. A spouse can avoid the elective share, however, by putting his or her assets into nonprobate arrangements. [221]

C. Modern trend: The modern trend is to expand the reach of the elective share to limit the deceased spouse's ability to avoid the doctrine by using nonprobate arrangements. The jurisdictions are split, however, over how best to identify when the elective share doctrine should be expanded to cover nonprobate transfers. [221-227]

1. **Illusory transfer test:** Under the illusory transfer approach, the courts analyze whether the nonprobate arrangement really constituted an inter vivos transfer or whether the decedent retained such an interest (life estate, right to revoke, right to appoint) in the property that the transfer is more testamentary than inter vivos (and thus the property in question is subject to the elective share).
2. **Intent to defraud test:** Under the intent to defraud test, the issue is whether the decedent intended to defraud the surviving spouse of his or her elective share rights in the property. The jurisdictions that follow the intent to defraud approach are split over which approach should be taken to the intent to defraud: a subjective approach (did the decedent ***actually intend*** to defraud the surviving spouse of his or her elective share rights in the property in question) or an objective approach (focusing on a variety of factors).
3. **Present donative intent test:** Under the present donative intent test, the courts focus on whether the deceased spouse really had a present donative intent at the time he or she created the nonprobate transfer.
4. **The UPC marital property approach:** The 1990 UPC approach adopts the partnership model of marriage and is designed to ensure that the surviving spouse receives *half* of the *marital* property. First, the UPC calculates the couple's total marital property by combining both spouses' net worth and assuming that a fixed percentage of that combined estate is marital property (the percentage is based on how long they have been married). The surviving spouse is entitled to 50 percent of that combined marital property. Next, the UPC checks to see how much property the surviving spouse will actually have following the deceased spouse's death by adding together (1) the amount of *marital* property that the surviving spouse already owns, plus (2) the amount of property that the surviving spouse is receiving by virtue of the deceased spouse's death (via either probate or nonprobate means—without concern for whether it is marital). If this latter total does not equal half of the marital property (or even if it does, if the amount is less than $75,000), the surviving spouse is entitled to claim the difference from the other probate and nonprobate takers pro rata.

CAPSULE SUMMARY

V. COMMUNITY PROPERTY

A. Basics: Under the community property system, property acquired before marriage and property acquired by gift, descent, or devise during the marriage is each spouse's separate property. Property otherwise acquired by either spouse during the course of the marriage (typically earnings) is community property. Each spouse has an undivided one-half interest in each community property asset. Upon the death of a spouse, the surviving spouse owns his or her one-half of each community property asset outright, and the deceased spouse's half of each community property asset goes into his or her probate estate where he or she can devise it to anyone. [227-228]

B. Migrating couples: Migrating couples pose special problems because (1) property is characterized as separate property or community property at the time it is acquired according to the laws of the jurisdiction where the parties are domiciled at time of acquisition, (2) changing domicile does not