

## TRUSTS & ESTATES

### GOVERNING LAW

- **Hodel v. Irving** – Complete restriction on intestate sale and devising may be a “taking”
  - **Constitutionally Allowed:** Federal transfer tax laws, *NY Trust Co. v. Eisner* (estate tax), *Bromley v. McCaughn* (gift tax). Elective shares, Rule(s) against Perpetuities, etc also allowed.

### THE PRINCIPLE OF DONATIVE FREEDOM

- **Restatement 3d of Property 3** – “The organizing principle of the American law of donative transfers is freedom of disposition.”
- **U.S. provides unparalleled donative freedom** – can disinherit children (but not spouse), laws generally to prevent unintentional disinheritance
- **Rest. 2d of Property 6.2** – “an otherwise effective restriction in a donative transfer designed to prevent the acquisition or retention of an interest in the event of some, but not all, first marriages of the transferee is valid if, and only if, under the circumstances, the restraint does not unreasonably limit the transferee’s opportunity to marry...”
  - **cmt. a** – “The restraint unreasonably limits the transferee’s opportunity to marry if a marriage permitted by the restraint is not likely to occur”
  - **cmt. c** – “If marriage within the permitted sphere would be so contrary to [the transferee’s] beliefs that it is unlikely that such marriage will ever occur, the restraint is general and invalid. By the same token, if the religious beliefs of the transferee do not stand in the way of such marriage, but the number of persons eligible for marriage to the transferee is negligible, the restraint is again general in effect and therefore invalid.”

### ASSETS, GENERALLY

- **SHIFT VIA PROBATE:** Anything with title. Tenancies-in-common, homes (unless held in joint tenancy), etc.
- **AUTOMATICALLY SHIFT:** Joint tenancies and tenancies in the entirety (i.e. property with a “right of survivorship”), POD stuff, etc.
- Treated the same for gift/estate tax purposes.
  - **Estate Tax** – Transfer due to death
    - **Federal** - \$5m Credit (2012), maybe \$1m in 2013 – Highest at 35% - May soon go to 50%+
    - **State** - \$1m credit.
  - **Gift Tax** – Requires *complete transfer inter vivos*.
    - **Federal** - \$5m credit (2012), maybe \$1m in 2013 – Highest at 35%
    - **If control/interest retained, no gift tax.** (I.R.C. 2036, 2038).

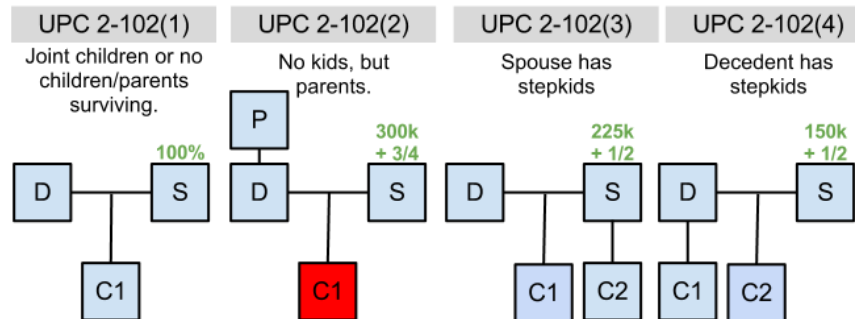
### PROBATE SYSTEM(S)

- **Probate** – System of (1) making property owned at death marketable again (“title-clearing”), (2) paying off decedent’s debts, and (3) implementing the decedent’s donative intent respecting property remaining after creditors discharged.
  - **Old:** “Common Form” probate *ex parte* with right to petition,
  - **ONLY HANDLES TRANSFERS IN TITLE.** Thus, “will substitutes” like third party contracts (i.e. insurance contracts) not handled.
  - **“Personal Representative”** – Party charged with managing estate of decedent – responsibility to collect, protect, inventory, and appraise all probate assets.

## INTESTATE SUCCESSION

- **UPC 2-101(a)** – “Any part of a decedent’s estate not effectively disposed of by will passes by intestate succession[.]”
- **GENERALLY**
  - **Historical Rules:** Two core canons: (1) male > female, and (2) eldest > youngest, and eldest should take entire state (primogeniture).
    - **English Statute of Distribution 1670** – Codified rules dividing property among children and leaving portion for surviving wife.
  - **“Heir”**
    - **HALF BLOOD = FULL BLOOD.** **UPC 2-107.**
    - **Country of residence/domicile/whatever (“Alienage”) irrelevant.** **UPC 2-111.**
    - **No double connections – single connection only.** **UPC 2-113.**
    - **Old:** Generally means those entitled – (Blood + State Sanctioned Relationships [Marriage, Adoption, etc]) – *Nemo Est Haeres Vives* (“No-one living has any heirs”). Defined by kinship – that is, blood. Land only given to direct blood.
    - **Considered:** Cohabitation, Domestic Partnerships, etc.
  - **“Survival”**
    - **Rest. 3d. Of Property 1.2** – Survival required to succeed decedent’s property in testate or intestate succession.
    - **UPC 2-104(a)(1)** – “An individual born before a decedent’s death **who fails to survive the decedent by 120 hours** is deemed to have predeceased the decedent. If it is not established by clear and convincing evidence that an individual born before the decedent’s death survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period. **[Else to parents, spouse, etc]”**
      - **EXCEPTION: If no taker under (a) (above), then maybe to descendants of deceased spouse.** **UPC 2-104(b).**
      - **Often provided (even longer) in wills.**
      - **Uniform Determination of Death Act 1** – “An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.”
    - **UPC 2-104(a)(2)** – “An individual **in gestation at a decedent’s death** is deemed to be living at the decedent’s death if the individual lives 120 hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent’s death lived 120 hours after birth, it is deemed that the individual failed to survive the required period.”
      - Rebuttable presumption that date of conception was 9 months prior to birth. *Equitable Trust Co. v. McComb.*
      - **UPC 2-120(k), 2-705** - Inheritance and other rights to children **conceived after the death of a parent** if the child is in utero not later than 36 months, or born not later than 45 months, after the parent’s death.

### ▪ (A) SPOUSE



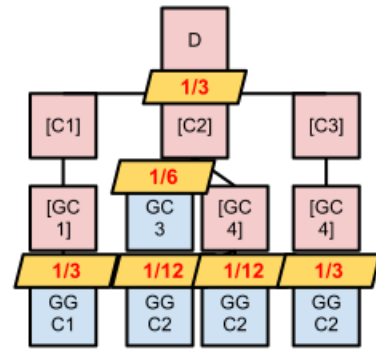
- **APPLY AFTER ELECTIVE SHARE.**
- **Old:** Common law provided only elective share, etc. Old UPC adopted scheme (with some changes) similar to above.
- **UPC 2-102** – The intestate **share of a decedent’s surviving spouse** is:
  - (1) the **entire state IF**
    - (A) [No kids/parents] no descendant or parent of the decedent survives the decedent, OR
    - (B) [Same kids] all of the decedent’s surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;
  - (2) [All kids dead but parents] the **first \$300,000, plus three-fourths** of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent,
  - (3) [Spouse has step kids] The **first \$225,000, plus one-half** of any balance of the intestate estate, if all of the decedent’s surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent,
  - (4) [Decedent has step kids] **the first \$150,000 plus one-half** of any balance of the intestate estate, if one or more of the decedent’s surviving descendants are not descendants of the surviving spouse.
- **UPC 2-103(b)** – [If no taker via parents (SEE BELOW), if (1) decedent has a deceased spouse with descendants, passes to them, (2) including equally if more than one deceased spouse]

- “Conduit theory” – Theory that mutual children will inherit by blood from surviving spouse. Considered worrisome if step kids (i.e. non-adopted children) exist.

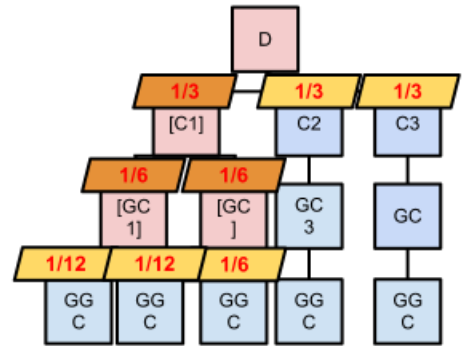
▪ (B) DESCENDANTS/”ISSUE” OTHER THAN SPOUSE

- AFTER SPOUSAL SHARE (Inc. Elective Share) – INHERIT 100% IF NO SURVIVING SPOUSE
- UPC 2-103(a) – [Descendants > Parents > Descendants of Parents > Grandparents/Descendants of Parents]
  - UPC 2-103(b) – [Stepchildren if worst case scenario.]
  - UPC 2-105 – [Escheat if no takers at all]
- (i) STRICT PER STIRPES – (1) divide estate into shares at the generation nearest to the decedent (i.e. his/her children), (2) allocate primary shares, one to each surviving member and one to the collective group of any of a deceased member’s children (i.e. grandchildren) (3) divide and subdivide each primary share allocated to the living descendants of a deceased child.
  - DECEASED CHILDREN must have descendants for primary shares to go forward – no transfer to spouse, etc.
- (ii) MODIFIED PER STIRPES– [Skip first] Same, except (1) - primary shares calculate at the generation that contains at least one living member. Death of all children -> calculation at level of grandchildren.
- (iii) PRE-1990 UPC SYSTEM – [Skip all where needed] Modified per stirpes *except* that division in step (3) done at level with first surviving member – thus, one share owned by three great-great-grandchildren is divided by 3.
- (iv) CURRENT UPC SYSTEM – UPC 2-106 (intestacy), UPC 2-709 (wills/trusts/etc) [PER CAPITA AT EACH GENERATION]
  - [COMBINE dead shares where created and transfer down]
  - (1) Divide estate into primary shares at nearest generation containing at least one living member. Shares also go to each deceased person with one or more surviving descendants.
  - (2) Allocate one primary share to each living member of the primary-share generation.
  - (3) Combine remaining shares (i.e. dead people shares) into a single share and divide equally among members of a single generation.
  - NY EPTL 1-216 – Codifies this rule.
- Definition – Default often “Strict Per Stirpes” of “Per Stirpes” used, but this rule is not absolute.
  - “By Representation” – Means as representing party (i.e. direct descendant) legally entitled to share.
  - UPC 2-708 – UPC rules of shares govern if not specified in will.

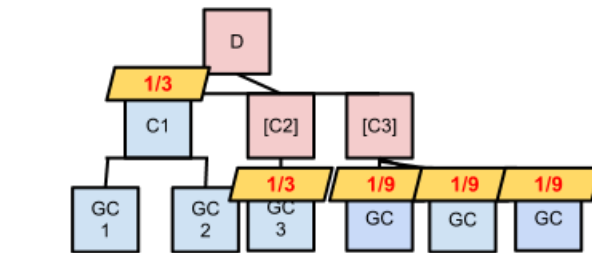
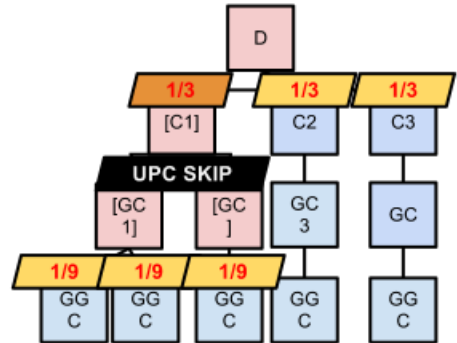
Strict Per Stirpes



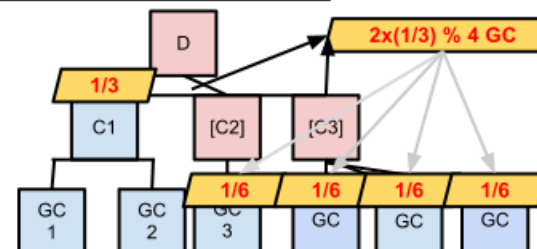
Modified Strict Per Stirpes



Old UPC



Current UPC



▪ (C) MINORS AND INCAPACITATED ADULTS

- Guardians/Etc
  - UPC 5-310(a)(4),(6) – Allows a parent or spouse to appoint a guardian by will “or other signed writing.”

- **Non-UPC States** – Laws generally contemplate two types of guardian: guardians of the person (care and custody of minor/adult), and guardian of property/estate (managing assets, etc).
  - **Uniform Guardianship and Protective Proceedings Act (UGPPA) (UPC Article V)** – Person appointed conservator is accorded powers, duties, and liabilities comparable to those of a trustee. Conservator also receives substantial management powers that are exercisable without a court order.
  - **Uniform Gifts to Minors Act** – Lifetime transfer to minors (gift)
  - **Uniform Transfers to Minors Act** – Gives substantial discretionary powers free of court supervision to custodian.
- **(D) PARENTS AND THEIR DESCENDANTS**
    - **UPC 2-103** – Parents of decedents with large estates inherit if the **decedent leaves a surviving spouse but no descendants OR no spouse or descendants**.
      - **IF NO KIDS BUT SPOUSE:** ¼ of probate estate, *if it exceeds \$300,000* (ignoring inflation adjustment of 1-109) (if spouse still exists – else, all to parents, etc).
      - **IF NO SPOUSE:** 100% equal.
    - **SPLIT UPWARDS 50/50.**
      - **[Up, down, up, down – no further than g-parents].**
      - **UPC 2-103(a)(2)** – [If no surviving spouse, and no descendants,] “to the decedent’s parents equally if both survive, or to the surviving parent if only one survives”
      - **UPC 2-103(a)(3)** – [If no surviving spouse, and no descendants, and no surviving parents,] “to the descendants of the decedent’s parents or either of them by representation”
        - **UPC 2-016** – Applies per-capita-at-each-generation system.
      - **UPC 2-103(a)(4)** – [If no surviving spouse, and no descendants, and no surviving parents, and no descendants of parents,] (A) “half to the decedent’s paternal grandparents equally if they both survive [or to only one or to descendants]”, (B) [same for maternal].
        - **No horizontal equity.** No point to it.
      - **UPC 2-105** – Escheat to state if no-one surviving.
      - **DESCENDANTS PAST GRANDPARENTS DO NOT COUNT** -> Escheat to state if no takers?
    - **[UNWORTHY PARENTS] - UPC 2-114** – No inheritance for so-called “unworthy” parents/etc if “there is clear and convincing evidence that immediately before the child’s death the parental rights of the parent could have been terminated ... on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent towards the child.”
      - **Ancestral Property-** No right of reversion of ancestral property.
    - **[SPECIAL RULES]**
      - **Half-Blood Relatives** – Generally treated the same as whole-blood relatives. [UPC 2-107](#).
      - **Marriage by Affinity** – Generally excluded.
  - **(E) REMOTE ANCESTORS**
    - **Parentelic System** – UPC/etc system, where (1) children, (2) parents, (3) parent’s descendants, etc.
    - **Nearest Kindred** – Kinship based on table of consanguinity. Nonrepresentative – relatives take in right, equal share given.
      - **Civil Law Method** – Counts the number of generations up (from intestate to intestate’s ancestor who is also ancestor of the collateral relative) and (2) down (from the common ancestor to the collateral relative). **Closest number alive takes all in equal shares.**
  - **(F) ULTIMATE FAILURE**
    - **Escheat.** “If there is no taker under the provisions of this [article], the intestate estate passes to the state.” [UPC 2-105](#).

**REARRANGING / ALTERING WITH/WITHOUT A WILL**

- **(A) DISCLAIMER**
  - **UPC 2-1106(b) –“(1)** [A] disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as soon as the time of the intestate’s death. **(2)** The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general. **(3)** [If no provision in will...] **(A)** If the disclaimant is not an individual, the disclaimed interest passes *as if the disclaimant did not exist*. **(B)** If the disclaimant is an individual [...] the disclaimed interest passes as if the disclaimant had *died immediately before the time of distribution*. [...]”
    - **May also do so with jointly held property.** See **UPC 2-1107**.
    - **MAY NOT DO SO ONCE ACCEPTED, ASSIGNED, ETC.** See **UPC 2-1113**.
    - **Allows avoidance of creditors (but not universal).** See, e.g., *Thompkins State Bank v. Niles*. May kick in fraudulent conveyance, etc.
    - May cause a loss of eligibility for public assistance.
  - **PRESUMES DISCLAIMING PARTY AS DEAD.**
    - **Statutory Approaches**
      - **(1) Bad** – Transfers via “Estate”. Allows party to effectively change shares due to UPC generation-skipping provisos.
      - **(2) Bad** – Transfers via “disclaimed interest”. Goes from decedent level, BUT groups together per UPC to give children other than the children of the decedent more of a share.
      - **(3) GOOD – UPC 2-1106(b)** – [Acts if predeceased, but ONLY divides as to descendants of disclaimant.]
        - **Prevents “cheating” and getting descendants more.** **UPC 2-106 cmt.**
    - **I.R.C. 2518(b)(4)** – Qualified disclaimer (to avoid taxes) **must be made “without any discretion on the part of the person making the disclaimer.”**
      - **I.R.C. 2518 Requires:** (1) Writing, (2) received by transferor no later than 9mos after (A) interest made, (B) age 21, (3) No acceptance of any of the benefits of the transfer, THEN (4) Interest passes to (A) Spouse or (B) Descendants of person making disclaimer.
- **(B) REARRANGEMENT BY HEIRS**
  - **UPC 3-912** – “[...] competent **successors may agree among themselves to alter the interests**, shares, or amounts to which they are entitled under the wil of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions [...]”
- **(C) NEGATIVE WILLS (DISINHERITING)**
  - **Old:** Common law held attempts at disinheriting ineffective. Usually had to disinherit by specifically not mentioning.
  - **UPC 2-101(b)** – [Testator may “**expressly** [i.e. EXPLICITLY] exclude or limit the right of an individual or class to succeed [by intestate succession – subsequently passes as if disclaimed]”
  - **UPC 2-101(b) cmt** – Allows negative wills, as doing otherwise “defeats a testator’s intent for no sufficient reason”
  - **Elective Share** – Allows wife to elect 1/3 of all property, in effect throwing out will. Usually done when disinherited. Evolved from dower, which gave 1/3 right in real property.
- **(D) ADVANCEMENTS**
  - **OLD:** English Statute of Distribution provided all gifts as advancements except for small sums, etc. Heavily relied on gift “purpose”
  - **UPC 2-109 – Advancements. (a)** [...] If an individual dies intestate as to all or a portion of his [or her] estate, property the decedent gave during the decedent’s lifetime to an individual who, at the decedent’s death, is an heir is treated as an advancement against the heir’s intestate estate *only if* **(i)** the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement or **(ii)** the decedent’s contemporaneous writing or the heir’s written acknowledgement otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent’s intestate estate. **(b)** For purposes of [a], property advanced is valued at the time the heir came into possession or enjoyment or the property or as to the time of the decedent’s death, whichever first occurs. **(c)** If the recipient [fails] to survive the decedent, [property not taken into computation] unless the decedent’s contemporaneous writing provides otherwise.
    - **Hotchpot Method** – Add advanced \$ to overall estate, divide, then subtract advanced from advancee’s share.
  - **Releases/Assignments** – Allowed. Heirs may release or assign their rights. Generally held to be prospective, depending on the language of the release/assignment, even as to new wills. *Ware v. Corwell*.
- **(E) DEBTS – UPC 2-110** – [Debt owed debtor is not charged against intestate share of anyone except debtor. NOT CALCULATED if debtor fails to survive decedent.]
  - **BUT cannot disclaim and avoid setoff.** **UPC 2-1106(b)(3)(A).**
- **(F) CONTRACTS TO/NOT TO MAKE WILL** – High evidentiary standard. **UPC 2-514.**
- **(G) AUTHORITY BY MINORS**
  - **UTC 303** – Established criteria permitting representation of trust beneficiaries by fiduciaries (p.r.s, guardians, and conservators) and parents.
    - **UPC 1-403** – Conservators may represent minors, parents may do so, guardians ad litem, etc – for “formal proceedings” and “judicially supervised settlements” only.
  - **UTC 304** – Allows “another having a substantially identical interest with respect to the particular question or dispute” to represent.
- **Chain of Title - When Statutory:** Generally shifts ownership directly and immediately to heirs or devisees, -Old/Nonstatutory: PR first gets personal proeprty for administration.



## QUALIFYING TO TAKE (DEFINING SPOUSES AND DESCENDANTS)

- **(1) “SURVIVING SPOUSE”**
  - **(A) DIVORCE**
    - **Old: Formal view.** Cannot just declare self unmarried, etc, EVEN IF ACTING UNMARRIED *See Holmes v. Fentress.*
    - **UPC 2-802(a)**–“An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he [or she] is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife is not a divorce for the purposes of this section. [...]”
      - **UPC 2-802(b)** –[Exceptions – lessens formalism of C.L.] “For purposes of parts 1, 2, 3 and 4 of this chapter and of section 15-3-203 of this code, a surviving spouse does not include: **(1)** a person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife; **(2)** a person who, following a decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third person; or **(3)** a person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.
    - **Limited Jur Exception:** Adulterers/abandoners excepted as well.
  - **(B) PURATIVE SPOUSES**(Good faith belief of marriage)
    - **Not recognized by former/current UPC.**
    - **Model Marriage and Divorce Act 209 (MMDA)** – Putative spouse “acquires the rights conferred upon a legal spouse.” Putative spouse defined as “[a]ny person who has cohabited with another to whom he is not legally married in **good faith belief that he was married to that person.**”
      - **Restatement 3d 2.2 cmt e** – “Unless precluded by applicable statute, a putative spouse is treated as a legal spouse for purposes of intestacy.”
    - **Property right classification, not legal spouse.** Generally for second woman in bigamous relationship who does not know of relationship. **Equitable division** created, usually based on years of relationship.
  - **(C) COMMON LAW MARRIAGE** (Acting as married)
    - **Most states have abolished.** Generally prone to lying, etc.
    - **Few states allow.** Generally require open and actual cohabitation as husband and wife. Some require parties holding themselves out to world as husband and wife, with reputation as married couple. Any statement of “we’re not married” will destroy.
    - **Restatement 3d of Property 2.2 cmt f** – [Common law spouse is a spouse for purposes of intestate succession.]
  - **(D) UNMARRIED PARTNERS (“Palimony”) - THEORIES**
    - **(A) Contract** - Quantum meruit sort of situation, where promise can be implied. *Estate of Quarg.*
      - **Interpreted** from the couple’s “conduct and actions interpreted in light of all the surrounding circumstances.” *Estate of Quarg.*
      - **Oral agreement/IMPLIED CONTRACTS SUFFICIENT.** *Marvin v. Marvin.*
      - Cannot be sexual aspects of relationship alone. Must be divided, generally done so per *Marvin v. Marvin.*
    - **(B) Constructive Trust** – Idea that party held title in constructive trust, IF other partner paid some amount of it.
      - Can be in OLD wife for NEW wife. I.e. intestate title transfers, but old holds in constructive trust for new.
      - Also used for “murdering heirs”.
    - **(C) Quantum Meruit** – Amount put into relationship by other partner (i.e. dishwashing, etc) not paid for.
    - **(D) Resulting Trust** – Concept of “holding” purchase money for jobs, etc done via quantum meruit.
    - **(E) Special Provisos (“Status” Marriage?)**
      - **(i) Same-Sex Partners Only/Primarily** – Cali, NJ, Oregon, Washington
      - **(ii) Opposite sex Partners Only** –Ex: *Goode v. Goode* (common law marriage gives right to property). Division of property based in equity, generally. *Peffley-Warner v. Bowen.*
      - **(iii) Same and Opposite Sex Equally** – ALI attempt
        - **Restatement 3d of Property 2.2 cmt. g** – To the extent that a domestic partner is treated [by the PLFD] as having the status of a spouse, conferring rights on such a partner on the dissolution of the relationship, the domestic partner who remains in that relationship with the decedent until the decedent’s death should be treated as a legal spouse for the purposes of intestacy.

- **(2) “DESCENDANT”**
  - **(A) INTESTATE SUCCESSION (INTESTACY)**
    - **(i) ADOPTED CHILDREN/STEPCHILDREN/FOSTER CHILDREN (INTESTACY)**
      - **Generally:** Adoption kills old lines unless stepparent adoption or relative adoption, stepchildren/foster children do not inherit.
  - **ADOPTED CHILDREN**
    - **Common Law “Clean Slate Doctrine”** generally emphasizes disconnection with old family, reconnection with new. *See Estate of Donnelly*. Generally accepted by UPC with exceptions added.
      - **Trend moving away.** “Open” adoptions becoming popular.
    - **UPC 2-118(a) – [Adopted children are children of adoptive parents.]**
      - **UPC 2-119(a) – [NOT children of genetic parents after adoption]**
      - **Marriage of adoptees/whoever irrelevant.** UPC 2-117.
      - **EXCEPTIONS – ALLOW INHERITANCE FROM GENETIC PARENTS**
        - **UPC 2-119(b) – [stepparent adoption] contra Donnelly.**
          - Runs only to benefit of child?
        - **UPC 2-119(c) – [adoption by a relative of the genetic parent.]**
          - **UPC 2-113 – NO DOUBLE LINE INHERITANCE.**
        - **UPC 2-119(d) – [Death of both genetic parents -> adoption]**
        - **Uniform Adoption Act (UAA) 4-102 – [For good cause, person with consent of custodial parent of a minor may adopt as a stepparent. (No marriage required)]**
          - **UAA 4-103 – [Adoption by stepparent does not affect (1) relationship between adoptee and adoptee’s spouse or deceased spouse, and (3) right of adoptee or descendant of adoptee to inheritance/etc from adoptee’s further parent]**
    - **Non-UPC “Equitable Adoption” – Rights of adoption given per situation, usually if in procedure of adoption or if adoption process stopped by law. UPC basically ignores. UPC 2-122 (does not effect).**
  - **STEPCHILDREN/FOSTER CHILDREN**
    - **UPC 1-201(5) – “Child” ... excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.**
      - **UPC 2-113 – NO DOUBLE LINE INHERITANCE.**
      - **UPC 2-103(b) – [Stepchildren may be able to take in emergency before escheat]**
    - **Foster Children** - Generally do not inherit, but may do so under special situations. **UPC 2-103(b), 1-201(5).**
  - **(ii) CHILDREN OF PARENTS NOT MARRIED TO EACH OTHER (INTESTACY)**
    - **Old: “Filius Nullius” – child of no-one. No inheritance. Slow but constant march away from this doctrine.**
    - **UPC 2-117 – [No distinction based on marital status for parent determination]**
      - **Some states require proof of paternity (due to old perception of difficulty in determination).** NY req’s court determination OR written admission, etc. **NYEPTL 4-1.2(a).** (pp. 83).
        - **Written admissions count for admission of paternity.**
        - **Uniform Parentage Act** adopted in 19 states, helping outline various methods (blood tests, genetic tests, etc) to determine parentage.
      - **Concord non-UPC jurs.**
    - **UPC 2-114 – [Barring parents from inheriting from kids]** (a) A parent is barred from inheriting from or through a child of the parent if (1) the parent’s paternal rights were terminated and the parent-child relationship was judicially reestablished; or (2) [the child died before 18 and parental control could have been judicially severed]. (b) [Parent treated as predeceased].

- **(iii) CHILDREN OF ASSISTED REPRODUCTION (INTESTACY)**

- **LOOK UP 2-120.**
- **Old:** Relatively silent, UPC amended in 2008 to address issue.
- **2-120(e)** – Presumption that birth certificate sets forth parents.
- **(A) Assisted Reproduction (Non-sex) (INTESTACY)**
  - **(1)** Parent-child relationship exists between child and birth mother. **UPC 2-120(c).**
  - **(2)** P-C relationship does not exist between child and mere third party donor. **UPC 2-120(b).**
  - **(3)** P-C relationship exists between the child and
    - **(i)** a husband of the birth mother whose sperm is used for assisted reproduction by the birth mother, **2-120(d)**, or
      - (Who can withdraw consent before insemination.) **UPC 2-120(j).**
    - **(ii)** an individual who is identified on the child’s birth certificate as the child’s other parent, **1-120(e)**, or
    - **(iii) [CONSENT]** an individual who consented (via **(1)** signed record or **(2)** other evidence, including functioning as parent or intent but prevention by death) to assisted reproduction by the birth mother with intent to be treated as the child’s other parent. **UPC 2-120(f).**
      - **Cannot sign parentage unless acted as parent BEFORE child turned 18.** Prevents signing-into-inheritance. **UPC 2-120(g).**
      - Presumption spouse of birth mother acted as father. **UPC 2-120(h).**
      - No “child” if assisted repro AFTER divorce. **UPC 2-120(i).**
      - Withdrawal of consent = not parent. **UPC 2-120(j)**
- **(B) Surrogacy (“Gestational Carriers”) (INTESTACY)**
  - **(1)** No P-C relationship exists between surrogate and child unless **(i)** surrogate designated as a parent in a court order, **UPC 2-121(b)**, or **(ii)** surrogate is genetic mother and court order mandates P-C relationship OR no other relationship established under UPC. **UPC 2-121(c).**
  - **(2)** A P-C relationship exists between child and intended parents (contracting with surrogate) who either **(1)** functioned as a parent within the child’s first two years or who **(2)** died during the pregnancy AND **(A)** the other parent functioned as a parent no later than 2 years from child’s birth, **(B)** a relative functioned as the parent no later than 2 years from child’s birth, or **(C)** no other intended parent but a relative of the deceased functioned as a parent no later than 2 years from child’s birth. **UPC 2-121(d).**
  - **(3)** P-C relationship does not depend on the validity or enforceability of surrogacy contract. **UPC 2-121(a)(1), (i).**
- **(C) Posthumous Reproduction (INTESTACY)** (Few states)
  - **TWO REQUIREMENTS: 2-120(f) [Consent to be a parent – usually by writing, act, etc] and 2-120/2-121(k) [Timing] (ALSO APPLIES TO SURROGACY (2-121(h)).**
  - **2-120(f) – [P-C relationship by consent with]** an individual who consented (via **(1)** signed record or **(2)** other evidence, including functioning as parent or intent but prevention by death) to assisted reproduction by the birth mother with intent to be treated as the child’s other parent.
  - **UPC 2-120(k) – [Timing]** “If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual’s death, the child is treated as in gestation at the individual’s death for purposes of [2-104(a)(2)] if the child is: **(1)** in utero not later than 36 months after the individual’s death, or **(2)** born not later than 45 months after the individual’s death.”



- **(B) RULES FOR CLASS GIFTS (WILLS)**
  - **Rest 3d Prop 11.3** – [RULE “rebuttable upon a finding of a different intention.”]
  - **(0) CHILDREN BY MARRIAGE** – Presumptively not included absent intent. **UPC 2-705(c)**.
  - **(i) ADOPTED CHILDREN/STEPCHILDREN/FOSTER CHILDREN (CLASS GIFTS)**
    - **If Donor = Adoptee - UPC 2-705(b)** – [Adopted child generally member of class]
      - **Adoption of Adults** – Explicitly permitted. Generally doesn’t inject person into class UNLESS adopting party is decedent.
      - **Adoption of Spouse or Domestic Partner** – Generally disallowed. UAA 5-101(a)(1).
      - **UPC 2-705(g)(3)** – [Person in the process of being adopted treated as adopted]
    - **If Donor != Adoptee** – General “stranger to the adoption” rule -> **NOT included**.
      - **UPC 2-705(f)**– [UPC/Rest.-unique **EXCEPTION** to “stranger to the adoption” rule **IF:**] (1) adoption took place before child reached age of majority [18], or (2) adoptive parent was child’s stepparent or foster part, or (3) adoptive parent functioned as a parent of the child before the child reached the age of majority]
        - Prevents adoptee from inheriting unless sufficient indicia of being part of new family.
      - **Stepchildren and Foster children NOT included** – Class gifts generally do not include stepchildren. **Rest. 3d of Prop. 14.1 Com. K**. California applies rule for certain stepchildren and foster children.
      - **Half-blood children** treated as whole blood children. **UPC 2-705(d)**.
  - **(ii) CHILDREN OF PARENTS NOT MARRIED TO EACH OTHER (CLASS GIFTS)**
    - **Old:** Presumptively excluded, but cases like *Will of Hoffman* noted changing “societal attitudes,” etc.
    - **“Issue” in will includes nonmarital biological children.** *Will of Hoffman, NY Est. Powers & Trusts L. 2-1.3*.
      - **Adopted out = NOT ISSUE. 2-118/2-119**
    - **UPC 2-705(b)** –[Nonmarital Children] “A class gift that uses a term of relationship to identify the class members includes [...] a child born to parents who are not married to each other, and their representative descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. **[SEE ABOVE]**” [...] [Provision in will relating to adopted kids, etc does not apply to surrogate children ,etc]
      - **REQUIRES PROOF OF PARENTAGE.** Use system above.
      - **UPC 2-117** – [No distinction based on marital status for parent determination]
    - **UPC 2-705(e)** – [Abandoned Children - **IF TRANSFEROR != GENETIC PARENT**], “a child of a genetic parent is not considered the child of that genetic parent unless the genetic parent [etc] functioned as a parent of that child before the child reached [18] years of age” *Concord Rest 3d of Prop 14.7* (also allowing if death prevented genetic parent from acting as parent]
      - Prevents children never acknowledged BUT blood relatives from inheriting.
  - **(iii) CHILDREN OF ASSISTED REPRODUCTION (CLASS GIFTS)** (Few states)
    - **UPC 2-705(b)** – [Treated in accordance with rules of intestacy] [BUT see class closing rules]
      - **SUBJECT TO INTESTACY RULES – 2-120/121(ABOVE)**
      - **Must satisfy (c) for mother, (d)(e)(f) for father**
    - **UPC 2-705(g)(2)** – [**CLASS CLOSING** rules for Assisted Reprod.] “If a child of assisted reproduction or a gestational child is conceived posthumously **and distribution date is the deceased parent’s death**, the child is treated as living on the distribution date if the child lives 120 hours after birth and was in utero not later than 36 months after the deceased parent’s death or born not later than 45 months after the deceased parent’s death.”
      - **DOES NOT APPLY UNLESS CLOSING DATE = DEATH.** Otherwise, no worry about endless class.

## EXECUTION OF WILLS

- Generally
  - A deceased dies *testate* (and becomes a *testator* or *testatrix*), but may be *partially intestate*. The will is *ambulatory* until death.
    - **UPC 1-201** – “Devise” is “a testamentary disposition of real or personal property”
    - **Older Terminology:** Disposition of land → *devise* to a *devisee*, whereas personal property a *legacy* or *bequest* to a *legatee*.
  - **UPC 3-108** – Probate of will must occur within 3 years of death.
- Probate – Process by which instrument is *offered* by *proponent*, then *admitted to probate*. Estate handled by *administrator*.
  - “**Executor**” – Old term for will-designated party. “**Administrator**” – Ct-appointed. UPC = “**P.R.**” - All have **fiduciary duties**
  - “**Formal/Informal Probate**” vs. “**Formal/Informal Administration**”
  - **Ancillary Administration** – Special probate opened in each state where land is owned for territorial jurisdiction.
  - “**Strike Suit**” – Langbein finds that, if successful, take 10% of estate.

## • FORMALITIES

- **OLD**
  - **Statute of Frauds, 1677** – [Loose] “All devises and bequests of any lands ... shall be in writing and signed by the party so devising the same by some other person in his presence and by his express directions and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses or else they shall be utterly void and of none effect.”
  - **Wills Act 1837 Sec. IX** – [Stricter] “And be it further enacted, That no Will shall be valid unless it shall be in Writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the Foot or End thereof by the Testator, or by some other Person in his Presence and by his Direction; and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary.”
- **UPC 2-506** – [Will valid if executed outside state even if not within state of executed]
- **(1) MENTAL**
  - **(a) TESTAMENTARY INTENT**
    - Testator must intend the document to be a will or to become at the decedent’s death. Rest. 3d of Prop. 3.1 Cmt. g
    - **UPC 2-502(c) [Extrinsic Evidence]** “Intent that the document constitute the testator’s will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator’s handwriting.”
      - **Generally indicates evidence always admissible**. “Can” almost requirement.
        - **Writing creates presumption of testamentary intent**. Thus, extrinsic evidence generally more used to rebut.
      - **Old:** Admissible only if will *ambiguous on its face*, not as to whether or not intent existed. Thus, if the will was clear but no intent was proven, still no extrinsic evidence. *Estate of Kuralt*.
      - **Sham will arguments allow extrinsic evidence**, even in common law jurisdictions. *Lister v. Smith*.
    - **Conditional Wills** – Presumption in favor of validity. *Eaton v. Brown*.
  - **(b) TESTAMENTARY CAPACITY**
    - **(1) AGE** – Must be 18. **UPC 2-501** [physical requirement, not mental capacity standard]
    - **(2) MENTAL CAPACITY**
      - **UPC 2-501** – [Must be “of sound mind”]
        - **Rest. 3d of Prop. 8.1(b) – [WILL STANDARD]** “... must be [1] capable of knowing and understanding in a general way the nature and extent of his or her property, [2] the natural objects of his or her bounty, and [3] the disposition that he or she is making of that property, and must also be [4] capable of relating those elements to one another and forming an orderly desire regarding the disposition of property.”
        - **Totality of the Circumstances Test**. *Fletcher v. DeLoach*.
          - “**Unnatural Bequest**” **HIGHLY RELEVANT**. Examining the will to see if its provisions are “just and reasonable, and consonant with the state of the [testator’s] family relations.” *Id.*
          - **UPC 5-409(d)** – [Appointment of conservator is not evidence of incapacity]
          - **UPC 5-407(b)(3)** – [Conservator may make changes to will for otherwise mentally infirm person.]
        - **Mental ability, not knowledge** (of who is alive, etc). *Williams v. Vollman*.
          - **Actual knowledge** probably not required (ex: knowledge of death of daughters and wife). *Williams v. Vollman*.
          - **Appointment of a conservator proves nothing**. **UPC 5-409(d)**.
          - **Old age, mere forgetfulness, filthy personal habits etc don’t count**. *Fletcher v. DeLoach; Selb’s Estate*



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- (A) “LINE OF VISION” – *Stephens v. Casdorpb*
- (B) “CONSCIOUS PRESENCE” – Includes Restatement of Property 3d.
  - “If [witnesses] are so near at hand that they are within the range of any of [testator’s] senses, so that he knows what is going on, the presence requirement has been met.” *Demaris’ Estate*
- Requirements re: Witnesses
  - Competency/”Credibility” – Not required, but some non-UPC locations require. [UPC 2-505](#).
    - BUT Witnesses must generally be able to remember/attest to signing. *Young v. Young*.
  - Interested Parties not prohibited by UPC, UPC 2-505(b), but other states sometimes prohibit and use “purging” statutes to simply cut that person out of will and force them to be a witness.
    - Often extended to spouse.
- Nature of Signature
  - Attestation clauses sometimes used, but not required – create rebuttable presumption that events recited therein actually occurred. [Rest. 3d 3.1 com. Q.](#)
  - Some states require signatures/names/addresses. [Rest. 3d of Prop, Statutory Note to 3.1.](#)
- (B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgements.”
  - Not effective until after ’08.
  - Notarization counts. *Estate of Hall* (using harmless error rule)
- [UPC 2-504 - SELF-PROVED WILLS](#) – [Notary public can self-prove re: procedures, etc]
  - [UPC 3-406\(1\)](#) – [If self-proved, the will satisfies the requirement **without testimony of any attesting witnesses**, unless fraud or perjury.]
  - [UPC 2-504](#) – [If **accidentally signed self-proving doc only**, then signature can apply to whole will]
- (b) [**Holographic Wills – no attestation requirement**] “A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions [old: material provisions] of the document are in the testator’s handwriting”
  - **Generally incorporates pre-printed text.** *Estate of Black* (hinging on all relevant parts being in handwriting)
    - History of incorporation: First generation allowed NO incorporation (had to independently be holographic will), Second generation (former 2-502) only required “material provisions” be in handwriting but looks only to handwriting to prove testamentary intent, Third Generation (CURRENT 2-502) only requires “material portions” be in handwriting and portions of the document not in handwriting can prove testamentary intent.
      - [UPC 2-502 - “Material Portions”](#) – Implies only dispositive provisions of will. Ostensibly allows forms, insofar as important parts are written out.
  - **Extra Content** (Printed content, etc)
    - Intent Theory – Words or marks not intended by testator to be part of will tossed out.
    - Surplusage Theory – Portions in handwriting alone stand as wil if they make sense standing alone regardless of other info.
- (c) [**Extrinsic Evidence**] [Extrinsic evidence allowed, including non-written portions for holo. wills]
  - Avoids unnecessarily strict readings such as in *Estate of Johnson*
- [e] STATUTORY WILLS
  - Uniform Statutory Will Act – Require following of formalities with specific procedures. Uses incorporation-by-reference.
  - Nonculpative Wills – Oral wills for chattels, etc.
  - 10 USC 1044d – [Allows for lesser formalities for military wills, generally under supervision of JAG]
- [f] [**FAILED FORMALITIES – FORGIVING/REMEDIES**]
  - GOALS: (1) CAUTIONARY (2) EVIDENTIARY (3) PROTECTIVE
  - **Usual Remedies:** (1) Dropping requirement, (2) Forgiveness methods (below), (3) Not admitting to probate
  - (A) **STRICT COMPLIANCE** – Requires absolute compliance or will tossed out.
  - (B) **SUBSTANTIAL COMPLIANCE** – Substantial compliance, hinging on attempts at fulfilling formalities that failed (usually for some technical reason).

- **(C)UPC 2-503– [Dispensation/Harmless Error]** Although a document or writing added upon a document was not executed in compliance with [2-502], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing established by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent’s will, (2) a partial or complete revocation of the will, (3) an addition to or alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.”
  - **For formation errors**, NEVER FOR INTENT.
  - **Rest. 3d Prop 3.3** - “A harmless error in executing a will may be excused if the proponent established by clear and convincing evidence that the decedent adopted the document as his or her will.
    - **Cmt. b** – “In applying [the harmless-error rule] to particular cases, **a hierarchy [exists]**. Writing is absolutely required, with signature also incredibly important. Unsigned documents may be excusable. Crossed wills may justify consideration of harmless error]
- **[g] Mistake of Law/Fact** – May reform to correct mistakes proven by clear and convincing evidence. **UPC 2-805.**
  - **Also may do so for tax objectives.** **UPC 2-806.**
- **PROCESS**
  - **Questions:** (1) Your will? (2) Read and understood? (3) Disposition of your property in accordance with your wishes? (4) Do you request \_\_\_ witnesses to witness the signing of your will?
  - **Signing:** Margin of each page + foot, have all witness and watch, one witness read attestation clause, all agree, all sign in presence, notary public executes self-proving affidavit.

## WILL COMPONENTS AND CONSTRUCTS

- **(1) Integration**
  - Generally **only requires some evidence of intention everything goes together**, but some courts require a “relation of sense” or physical attachment is required. *Seiter’s Estate*.
  - **Rest. 3d of Prop. 3.5** – [To be part of a will, a page or other writing must be present at signing and intended as part of will]
  - **Generally, anything counts/works – all evidence admitted.**
- **(2) Incorporation by Reference**
  - **Unattested papers (papers not present during attestation) can be regarded as part of the will by incorporation.**
  - **UPC 2-510 – [Incorporation by Reference]** A writing [1]in existence when a will is executed may be incorporated by reference if [2] the language of the will manifests this intent and [3] describes the writing sufficiently to permit its identification. Concord *Simon v. Grayson*.
    - **Changes to document** may make it no longer “in existence” when executed -> no incorporation.
    - **Exact precision not required.** *Simon v. Grayson*.
    - **Can potentially effectuate by codicil if attached, etc.** *Simon v. Grayson* (badly dated letter)
    - **Holographic wills** may not allow incorporation, but DIVIDED. **Rest. D Prop 3.6 cmt f (allows)**.
    - Not allowed in NY, CT, LA.
- **(3) UPC-Unique “Separate Writing” Doctrine**
  - **UPC allows ex post writings for personal property other than money.**
  - **UPC 2-513 – [Separate Writing Identifying Devise of Certain Types of Tangible Personal Property]** Whether or not the provisions applying to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money.
    - **[Cont’d]** To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with **reasonable certainty**. The writing may be referred to as one to be in the existence at the time of the testator’s death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.”
- **(4) Codicil**
  - **Republication allowed, assumes new date.** **Rest 3d. Of Prop 3.4.**
  - **Requires intent to bring will forward (but presumed, rebuttable).** Can simply revoke, etc.
- **(5) Acts having Independent Significance** – Allowed to influence will.
  - **UPC 2-512 – [Events of Independent Significance]** A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator’s death. The execution or revocation of another individual’s will is such an event.
  - **Issues:** “Contents of Desk” dispositions, etc. Risk of both fraud and intent.

## CONTESTING WILLS

- **[0] CONTESTING GENERALLY**



- **UPC 3-905, 2-517, Rest. 3d of Prop 8.5** – [“In terrorem” (No-contest) clauses are unenforceable if probable cause exists for instituting suit.]
- **UPC 3-720** – Good faith p.r. who defends suit gets reimbursement, etc.
- **Afforded Execution Ceremony** – Overdoing it to preempt contest, etc. **Explanations in will** sometimes useful.
- **Will substitutes avoid the issue.**
- **Probating a Will**
  - **UPC 2-516** – Duty to person with custody of will to deliver on the request of an “interested person” (per 1-201(23)).
  - **UPC 3-912** – [Allows informal agreements as to probate, may allow non-probation of will.]
- **[0.5] FAILURE IN CREATION – see above.**
- **(1) UNDUE INFLUENCE/DURESS**
  - **Rest. 3d Prop. 8.3 (a)** “A donative transfer is invalid to the extent that it was procured by **undue influence, duress, or fraud.**”
    - **Rest. 3d Prop. 8.3(b)** A donative transfer is procured by **undue influence** if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made. [...] **(c)** A donative transfer is procured by **duress** if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.
    - **UNDUE INFLUENCE: PRESUMPTION (Shifts burden of evidence, but not of persuasion) – (1) CONFIDENTIAL RELATIONSHIP + (2) SUSPICIOUS CIRCUMSTANCES.** *Lipper v. Weslow*
      - **(1) “CONFIDENTIAL RELATIONSHIP”**
        - **(1) Fiduciary relationships** – By law
          - **MRPC 1.8** – No gifts, etc. Should not write will one profits from.
        - **(2) Reliance relationships** – Family relationship or otherwise, there was a relationship based on special trust and confidence.
          - **Spouses generally do not count.** Even if sole beneficiary, given the logic of the determination. *Estate of Mowdy.*
          - **Partners may have issues, but presumptively ok.** *Rest 3d of Property 8.3 cmt f.*
        - **(3) dominant-subservient relationships** [donor subservient to wrongdoer's dominant influence
      - **(2) SUSPICIOUS CIRCUMSTANCES**
        - **Factors:** (1) Extent to which donor was in weakened condition, (2) extent wrongdoer participated in making will, (3) whether donor received independent advice from attorney etc, (4) whether will was prepared in secrecy or haste, (5) whether donor's attitude towards others changed based on influence, (6) discrepancy between new and previous wills, (7) continuity of purpose between old and new wills, (8) whether disposition of property is such that a reasonable person would consider it unnatural, unjust, or unfair. *Rest 3d of Property 8.3 cmt h.*
        - **Unnatural distributions, when justified, still okay.** Especially if explained out in will. *Lipper v. Weslow.*
- **(2) FRAUD/FORGERY**
  - **Rest. 3d Prop. 8.3 (a)** “A donative transfer is invalid to the extent that it was procured by **undue influence, duress, or fraud.**” [...] **(d)** A donative transfer is procured by **fraud** if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.
    - **(A) FRAUD IN THE EXECUTION (WHAT)** – Testator is defrauded about the nature or contents about the document.
      - **(A) FORCING CREATION** – No probate (no TI)
      - **(B) PREVENTING CREATION** – No probate, CT *IF 2-502 (Formalities) OR 2-503 (Harmless Error) MET*
    - **(B) FRAUD IN THE INDUCEMENT (WHY)** – Testator generally misled into forming testamentary intention she would not have otherwise formed. *Latham v. Father Divine.*
      - **(A) FORCING CREATION** – No probate.
      - **(B) PREVENTING CREATION** - No probate, CT *IF 2-502 (Formalities) OR 2-503 (Harmless Error) MET.* Ex: *Latham v. Father Divine* (cult).
    - **[C] CONSTRUCTIVE TRUSTS**
      - **INTERFACE WITH 2-502/2-503** – Constructive trust *only if those statutory formalities are met* – otherwise, allegedly “true” writing cannot be trusted for C.T. purposes.
      - **Available against innocent parties.** Unjust enrichment no matter what. *Pope v. Garrett.*
- **(3) SLAYER RULE** – See below.
- **(4) REMEDIES**
  - **Constructive Trust** – Retains disposition, but equitable. *Latham v. Father Divine.* Even against innocent beneficiaries. *Pope v. Garrett.*
  - **Tortious Interference with an Inheritance** – A person who, by undue influence, duress, fraud, or other tortious conduct, causes a decedent to divert property from one who would otherwise received it can be liable. *Marshall v. Marshall.* – **NEW, VERY RARE**



## REVOCAION OF WILLS

- **UPC 1-201(57)** – “Will” [includes a testamentary instrument that merely revokes another will].
- **(A) UPC 2-507 – [Revocation by Writing or Act]**(Concord *Gilbert v. Gilbert*)
  - **UPC 2-507(a)(1) [WRITING]** [A will or any part thereof is revoked ] By executing a **subsequent will** that revokes the previous will or part **expressly or by inconsistency**; or
    - **UPC 2-507(b) [Revocation by Inconsistency]** If a **subsequent** will does not expressly revoke a previous will, the execution of the subsequent will **wholly revokes** the previous will by **inconsistency** if the testator intended the subsequent will to replace rather than supplement the previous will.
      - **UPC 2-507(c)** -The testator is presumed to have intended a subsequent will to **replace rather than supplement** a previous will if the subsequent will makes a complete disposition of the testator’s estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator’s death.
      - **UPC 2-507(d)** - The testator is presumed to have intended a subsequent will to **supplement rather than replace** a previous will if the subsequent will does not make a complete disposition of the testator’s estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will **only to the extent** the subsequent will is **inconsistent** with the previous will; each will is fully operative on the testator’s death to the extent that they are not inconsistent.
        - **Alt:** whether the later will “was intended to wholly supplant [the earlier] will.” *Danford’s Estate* (California ONLY)
        - Testator may have multiple effective wills. *Gilbert v. Gilbert*.
  - **UPC 2-507(a)(2)– [ACT]** [A will or any part thereof is revoked] by performing a **revocatory act** on the will, if the testator performed the act **with the intent and for the purpose of revoking the will** or part or if another individual performed the act in the testator’s **conscious presence** and by the testator’s direction.
    - **[Cont’d.] ... “revocatory act on the will” includes burning, tearing, canceling, obliterating, or destroying the will** or any part of it. A burning, tearing, or canceling is a “revocatory act on the will”, **whether or not** the burn, tear, or cancellation **touched any of the words on the will**.
    - **Codicils** not revoked if will revoked by act, but may be construed to have no meaning. *Rest 4.1 cmt n*.
    - **(1) ACT**
      - Includes burning, tearing, canceling, etc. – **Generally questionable**.
      - **(i) Revocation by 3d Party** – Allowed in **conscious presence** under 2-507. Subject to same “Line of Sight”/”Conscious Presence” distinction
      - **(ii) Ineffective Attempts (+ Fraudulent or Accidental Destruction)** – Do **not** destroy, but **constructive trust** may be given. *Estate of Tolin*.
      - **(iii) Partial Revocations** generally worrisome.
        - **MAJORITY - Allowed**
          - **UPC 2-507** – [Allows partial revocation – “will or any part thereof”]
        - **MINORITY – Disallowed if “significant change”**
          - **Rest 3d of Prop 4.1 cmt i** – Notes that in some places partial revocations ineffective if effect and purpose would be to rearrange shares within a single devise or to rewrite terms of will.
          - **“Significant change”** – Shifting from one to another, with possible exception of disinheriting and dropping into remainder. Very broad definition.
    - **(2) INTENT**
      - **(i) Physical mutilations give rise to a presumption of intent if sole possession of the will proven**. *Bakhaus’ Estate*.
        - **“Sole Possession”** – Means the testator only had access to it. Lockbox, etc.
        - **But minor damages may not lead to presumption**, especially with proffered evidence. *Estate of May*.
      - **(ii) Lost wills presumed destroyed with intent, rebuttable by clear and convincing evidence**. *Crozier*.
        - **Contra Restatement 3d of Prop. 4.1 Cmt. J.** – Not as strong as C&C ev.
        - **Duplicate wills** may assist, also may refute presumption. See *Stiles v. Brown*, but sometimes losing one copy can lead court to believe revocation. See *Phinizee v. Alexander*.
        - **Proof of contents of lost will must be proven by clear and convincing evidence**.
          - **“Conformed Copy”** – Exact copy (stamped as such) of will.
          - Numerous states use “lost will statutes” to limit proof.
      - **(iii) Fraud** (i.e. malicious destruction by 3d party) doesn’t count, but difficult to prove. *Est. Of Legeas*.

- **(B) Remedy**
  - **CONSTRUCTIVE TRUST** – Where sufficient evidence of intent/etc.
  - **Rest 3d of Prop. 4.1 cmt n** – Does not revoke codicil unless codicil depends on will for meaning. (agreed with in *Francis Will*)
- **(C) Revocation by Changes in Circumstance** – Marriage, Divorce, Remarriage.
  - **Common Law:** Premarital will revoked on marriage for women, on both marriage and birth of issue for man. Eventually began allowing for revocation upon “subsequent changes in the conditions or circumstances of the testator” (i.e. divorce) *Lansing v. Haynes*
  - **UPC 2-508** – [Except for divorce and slayer rule, no revocation on change of circumstances]
  - **UPC 2-301(a)** – [If will executed before testator married, surviving spouse entitled to intestate share of that not devised to share, UNLESS (1) will was made in contemplation of marriage to surviving spouse, (2) will expresses intention to not be defeated by marriage, or (3) testator provided by spouse by transfer outside will.]
    - **Omitted Spouse Statute(s)** – Protect against inadvertent disinheritance, but do not prohibit deliberate disinheritance.
    - **Does not change upon marriage.** Contrast common law.
  - **UPC 2-804** – [Change of circumstances provision]
    - **UPC 2-804(b)** – [rebuttable presumption of revocation upon divorce – severs both spouse’s interest and spouse’s relatives’ interest in virtually all prop, inc. j.t.s – see statute]; concord **Rest 3d of Prop 4.1(b)**.
      - **UPC 2-804(d)** – [Severance acts as if parties predeceased – may kick into intestacy]
      - **Old version** only applied to spouse, maintained spouse’s relatives’ right to disposition.
- **(D) Revival**
  - **Old Standards**
    - Varied between ecclesiastical, anti-revival, and common law rule.
    - **“Ecclesiastical Rule”** (Some US States) – Intent-dependent.
      - **“Anti-revival Rule”** (Some US states) – Require *re-execution* to take effect (heavy emphasis on intent).
    - **Common Law Rule** – “Automatic revival”/”Ambulatory Revocation” once second will revoked – theory that original will never revoked in the first place.
  - **UPC version of Ecclesiastical Rule** – Intent dependent. UPC system.
    - **UPC 2-509(a)** [**Will #2 wholly revokes Will #1, Will #2 then revoked by act - presumption against revival**] “If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act [under 2-507], the previous will remains revoked until it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator’s contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.”
      - **Cannot piece together will. NO REVIVAL OF WILL COMPLETELY REVOKED BY ACT.** Contra **Restatement 4.2(b)**, allowing revival (“clearly and convincingly”).
      - **Boysen Modification** – Requires a set number of factors to be analyzed under statutory language, including knowledge of previous will, nature of extent of disposition of property in previous will, and whether or not testator disclosed an intent to make a disposition which the earlier will directs. Explicitly rejected by UPC.
    - **UPC 2-509(b)** [**Codicil or Will #2 that partly revoked Will #1, Will/Codicil then revoked by act, revives previous**][If subsequent will that partly revoked a previous will is revoked by act, previous will’s formerly revoked part is revived unless evident from t.i]
      - Testator likely knew will #1 had continuing effect. *Acord Estate of Hering* (limited to facts – statutory mess).
      - **Includes codicils.** UPC 1-201 defines “will” to include “codicil.”
    - **UPC 2-509(c)** [**#1 revoked by #2 revoked by #3 – no revival of #1**][If subsequent will wholly or in part revokes previous will and subsequent will revoked by another (third) later will, previous will NOT revived unless terms of #3 indicate otherwise.]
      - **Stricter evidentiary standard.** Intent must be set out in instrument.
- **(E) Dependent Relative Revocation**
  - **Rest. 3d of Prop. 4.3** – (a) A partial or complete revocation of a will is presumptively ineffective if the testator made the revocation (1) in connection with an attempt to achieve a dispositive objective that fails under applicable law, **or** (2) because of a false assumption of law, or because of a false belief about an objective fact, that is either recited in the revoking instrument or established by clear and convincing evidence. (b) the presumption [in (a)] is rebutted if allowing the revocation to remain in effect would be more consistent with the testator’s probable intention.
    - **Based on inferred intention.** Infers that destruction (and revocation) of a document is intended only where something is to replace it. *Estate of Callaban*.
    - **Acts may be difficult.** Tearing up will may not show entire intent to be “dependent.”
    - **Acts like 2-503 Harmless Error** in some respects.
- **(F) Agreements to/ not to Revoke** - Generally allowed, but dangerous/etc. **UPC 2-701** – [Joint will does NOT create presumption of promise not to revoke]

## POST-EXECUTION EVENTS

- **Professional Responsibility**
  - **Formal Op. 210** – Sending out changes probably bad as ad.
  - **Probably necessary, if not required, if changes in law**, client’s situation, etc.
- **(1) Changes in the Client’s Estate**
  - **(0) Complete Failure -> Residuary Clause.** **UPC 2-604** (AFTER application of antilapse, etc).
  - **(A) TYPES OF DEVISES**
    - **Specific Devise** – Specific asset, etc.
    - **General Devise** – Payable from general assets of estate, like money.
    - **Demonstrative Devise** – Predominantly payable from specified source, but otherwise from general estate if primary source insufficient.
    - **Residuary Devise** – Residuary clause.
  - **(B) ADEMPMENT BY EXTINCTION**
    - Results “because of ‘the doing of some act with regard to the subject-matter which interferes with the operation of the will’” *Estate of Hume*
      - **Cause of extinction irrelevant.** *Balfour*.
      - **(i) “Identity” theory** - Ademption depends solely upon existence of subject matter. Ex: *Estate of Hume*; **Rest 3d of Prop 5.2.**
        - **Exceptions to Strictness of Identity Theory**
          - **(i) Classification-Out.** Classify as general devise, thus allowing \$.
          - **(ii) Change-in-form Principle – as embodied in 2-606(a)(5).** Going from one car to another, etc.
          - **(iii) Date-of-Death Construction.** “My car” becoming car at time of death.
      - **(ii) “Intent” Theory** – Testator’s intent determines extent/nature of ademption. – PREFERRED BY C.L.
      - **(iii) UPC APPROACH: UPC 2-606(a) – [“Nonademption” – payback for specific devises]** A specific devisee has the right to specifically devised property in the testator’s estate at the testator’s death and to (1)-(4) [balance of purchase price unpaid, condemnation award, proceeds unpaid for fire or casualty insurance, foreclosure award, etc], **(5) [Change-in-form]** any real property or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real property [...], and
        - **UPC 2-606(a)(6) [Fallback Intent theory]** [If (1)-(5) fail,] a pecuniary devise equal to the value of its date of disposition [...] but only to the extent it is established that ademption would be inconsistent with the testator’s manifested plan of distribution or at the time the will was made, the date of disposition or otherwise, the testator did not intend ademption of the devise.
      - **UPC 2-606(b) – [Guardian or conservator may sell, but devisee right to general pecuniary devise of equal amount]**
        - **UPC 5-418** – [Conservator must take estate plan into account when making investment/expenditure decisions.]
        - **Minority/UPC Approach:** Value can be drawn from residuary estate
        - **Majority Approach:** Can recover only of traceable funds. Ex: *Morse v. Converse*.
    - **(C) ACCESSIONS AND ACCRETIONS**
      - **Old:** General/specific devise, where split only received if devise specific.
      - **Securities** – Presumption that percentage of equity is given (not number of stocks).
      - **UPC 2-605 – (a)** [Where securities given, if those securities beget additional securities those securities go to beneficiary as well, PENDING securities involve securities of the same org, another org, or same org for reinvestment.] **(b) [Cash distributions** [of any kind?] from securities not included.]
        - Stock splits, etc do not fundamentally change nature of equity, go to beneficiaries. *Watson v. Santalucia*; **Rest 3d 5.3.**
        - Ignores common law general/specific division exception, as gotten rid of in *Watson v. Santalucia* and in the **Rest. 3d of Prop 5.3**

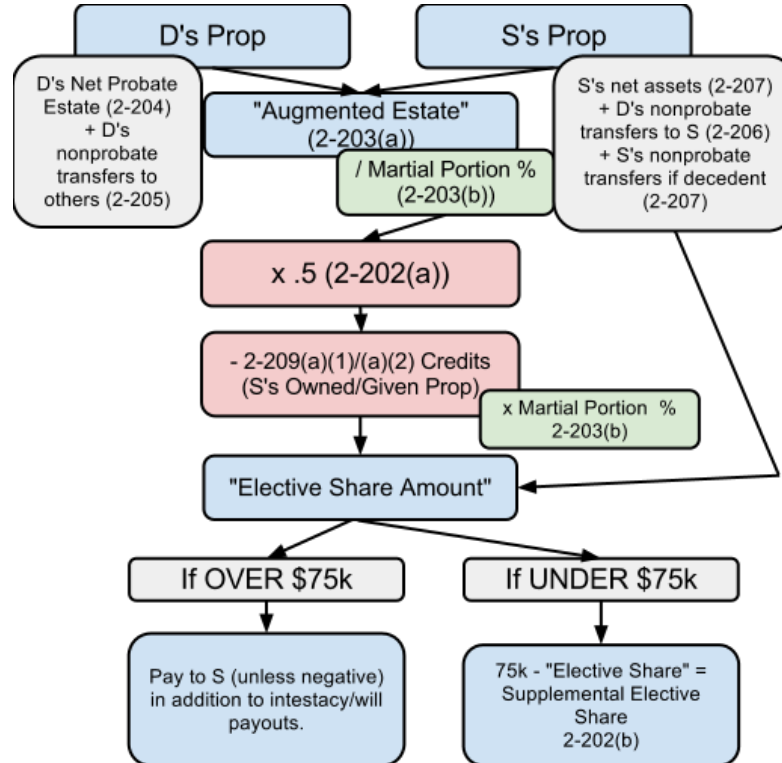
- **(D) ABATEMENT**
    - Where estate insufficient to fulfill all devises (usually via money).
      - **SUBJECT TO ABATEMENT CLAUSE (t.i)**, like all other provisions.
    - Common Law: Title to land shifted automatically, generally last to abate. Gotten rid of by UPC.
    - **UPC 3-902 – [Order of Appropriations/Abatement] – (a)** [ORDER: Property not disposed of by the will; residuary devises; general devises; specific devises.] A [demonstrative devise] is a specific devise for these purposes. **Abatement is in proportion** to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will. **(b)** If the **will expresses an order of abatement** [or if devise frustrated by order of abatement in (a)], shares divided [to give effect to t.i.]
      - **STATES VARY WILDLY.**
      - **All property considered the same for abatement.** Contrast common law division of land/personalty.
      - **May not reflect testator's intent.** Residue generally used for spouse, etc.
      - **Estate Taxes** – Some states put “equitable apportionment” on nonprobate assets as well, etc.
  - **(E) SATISFACTION (Ademption By)**
    - **UPC 2-609 – [Satisfaction – Advancement-like rule req. writing]** **(a)** Property a testator gave in his [or her] lifetime is treated as a satisfaction of a devise in whole or in part, **only if (i) will provides** for deduction of gift, **(ii) testator declared in contemporaneous writing** that gift is in satisfaction of the devise or value is to be deducted from devise, **OR (iii) devisee acknowledged gift in satisfaction** or to be deducted from value of devise.] **(b)** [Property is valued at time of acquisition/enjoyment or at testator's death, whichever comes first.] **(c)** [If devisee fails to survive testator, gift is treated as full or partial satisfaction as appropriate, per 2-603/2-604, unless contemporaneous writing provides otherwise.]
      - **RARE.** Writing requirement makes incredibly rare.
  - **(F) [DISCLAIMER]** – See intestacy section
  - **(G) [THIRD PARTY CONTRACT]** – See intestacy section.
- **(2) LAPSE AND ANTI-LAPSE**
    - **General:** If a party fails to survive, property generally falls into residue or otherwise is devised by will. Antilapse prevents such falling for blood descendants, generally.
    - **UPC 2-601** – [OPERATE ONLY IN ABSENCE OF INTENT]
    - **UPC 2-702** – [120 hour survival rule]
    - **UPC 2-604 – [LAPSE - Failure of Testamentary Provision.]** **(a)** Except as provided in section 2-603, a devise, other than a residuary devise, that fails for any reason becomes a part of the residue. **(b)** Except as provided in section 2-603, if the residue is devised to 2 or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.
      - **If Residuary** – Pass to residuary estate.
      - **If Residue Lapses with other residuary interest** – Goes to other devisee.
      - **If Residue Lapses Entirely** – Intestacy. (“No residue of a residue”)
    - **UPC 2-603 – [ANTI-LAPSE]**
    - **(a) [Definitions]:** (1) [Alt Devisee] (2) [Class Member] (3) [Descendant of a Grandparent] (4) [Descendants] (5) [Devisee] (6) **"Devisee"** includes: **(i)** a class member if the devise is in the form of a class gift; **(ii)** an individual or class member who was deceased at the time the testator executed his will as well as an individual or class member who was then living but who failed to survive the testator; and **(iii)** an appointee under a power of appointment exercised by the testator's will. (7) [Stepchild] (8) [Surviving devisee] (9) [Testator]
      - **Dead devisees at time of execution = “void” lapse = STILL COVERED.** UTC 2-603(a)(6).
      - **Applies to appointees under power of appointment.** UTC 2-603(a)(5)-(9).
    - **(b) [Substitute Gift if protected class [NOT SPOUSE]]** If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:
      - **[MUST BE PROTECTED CLASS: NOT SPOUSES, ONLY BLOOD DESCENDANTS]**
      - **(1)** Except as provided in paragraph (4), if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants [who take by representation].
      - **(2)** Except as provided in paragraph (4), if the devise is in the form of a class gift, other than a devise to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,” “relatives,” or “family,” or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased devisee. [All take as if all have survived, descendants of deceased devisees take by rep.] For the purposes of this paragraph, “deceased devisee” means a class member who failed to survive the testator and left one or more surviving descendants.
      - **(3) [WORDS OF SURVIVORSHIP IRRELEVANT in the absence of add'l evidence]** [Concord *Ruotolo v. Tietjen*]
        - **But contrary intent may defeat.** Contrary intent probably = alt disposition.
      - **(4) [ANTI-LAPSE BARRED IF (A) ALT DEVISEE = CLASS GIFT AND ONE MEMBER CAN TAKE OR (B) ALT DEVISEE DESIGNEE CAN TAKE]**
    - **(c) [TIEBREAKER - More Than One Substitute Gift; Which One Takes.]** If, under subsection (b), substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

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- (1) Except as provided in paragraph (2), the devised property **passes under the primary substitute gift [UNLESS]**
  - (2) If there is a **younger-generation devise**, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.
  - (3) In this subsection: (A) “Primary devise” means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator. (B) “Primary substitute gift” means the substitute gift created with respect to the primary devise. (C) “Younger-generation devise” means a devise that (i) is to a descendant of a devisee of the primary devise, (ii) is an alternative devise with respect to the primary devise, (iii) is a devise for which a substitute gift is created, and (iv) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise. (D) “Younger-generation substitute gift” means the substitute gift created with respect to the younger-generation devise.
- **Generally gives lapsed gift to devisee’s descendants, though most only apply to relatives.**

## ELECTIVE SHARES (AND AVOIDANCE), PRENUPS, AND UNINTENTIONAL DISINHERITING

- (0) Property Systems
  - **Separate Property** – No right of survivorship, needs elective share
  - **Community Property** – 50/50 seizure, automatic survivorship, no elective share.
- (1) UPC Elective Share
  - **UPC 2-112** – [Dower and curtesy abolished]
  - **DOES NOT RENOUNCE WILL. In addition to will.**



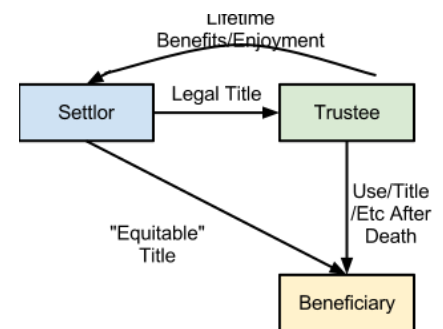
- **Personal right.** Expires on death, so cannot devise right to elective share. **UPC 2-202 [General Rule]**
  - **UPC 2-211(a)** – [Must petition within 9mos of death or 6mos of probate, whichever later expires]
- **UPC 2-208** – [TRANSFERRED PROPERTY EXCLUDED IF ADEQUATE AND FULL CONSIDERATION REC'D]
- **UPC 2-209** – [After reduction, if marital property portion cannot be paid, (c) net probate estate applied first to pay funds, and if then unsatisfied, (d) liability apportioned among recipients of nonprobate transfers.]
  - **UPC 2-209(e)** – [Treated as general pecuniary devise – no ademption by extinction, etc]
  - **UPC 2-210(a)** – [Only original recipients of nonprobate transfers liable for such reduction – PERSONAL ONLY]
  - **UPC 2-214** – [Good faith “payors” protected if pay to beneficiary before knowing of intention to file for elective share]
- **OTHER SYSTEMS**
  - (1) **Dower** – Common law life estate in land, usually 1/3 or 1/2, curtesy equivalent for men
  - (2) **Common Property** – 50% in fee, complete
  - (3) **Old UPC** – 1/3 of decedent’s estate
- (2) **Protection against Will Substitutes**
  - (a) **UPC (Augmented Estate)** – See above
  - (b) **Common Law**
    - **“Illusory Transfer Test”/“Illusory Trust”** – Trust created to avoid provision of elective share. *Seiert v. Southern Nat'l Bank of S.C.*
      - **Seifert** – **Dominant View** - Illusory = invalid, entire trust goes to residuary estate.
      - **Newman** – Illusory = invalid *only for elective share*, spouse is like IRS.
      - **Alt**: Sometimes willingness to **simply lump in trusts with estate**, not using test. *Sullivan v. Burkin*



- **(3) Premarital/Marital Agreements**
  - **Old:** Contract-like analysis, failure to disclose things like financial status irrelevant.
  - **General:** More support BEFORE marriage, high skepticism AFTER marriage.
    - **Substance of K irrelevant**, as parties generally expect strict enforcement. *Simeone v. Simeone*.
  - **UPC 2-213**
    - **(a)** [Elective share, etc] **may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.**
    - **(b)** A surviving spouse's waiver is **not enforceable if** the surviving spouse proves that:
      - **(1)** he [or she] did not execute the waiver **voluntarily**; or
      - **(2)** the waiver was **unconscionable** when it was executed **and**, before execution of the waiver, **he [or she]:**
        - **(A)** was **not provided a fair and reasonable disclosure** of the property or financial obligations of the decedent;
        - **(B)** **did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations** of the decedent beyond the disclosure provided; and
        - **(C)** **did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations** of the decedent.
      - **Presence of counsel** relevant, MAJORITY VIEW. *Simeone v. Simeone; Marriage of Bonds*
    - **(c)** [Question of Law]
    - **(d)** ["All rights" = elective share, homestead rights, etc]
  - *Rosenberg v. Lipnick*: DISCLOSURE + DISCRETION - "[Factors include whether:] (1) it contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement; (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth; and (3) a waiver by the contesting party is set forth. [Also should consider knowledge, respective intelligence, respective ages, etc]"
  - **New Uniform Marital and Premarital Agreement Act**
    - **Three new features:** **(1)** Cannot enforce against party without legal counsel or without the party having an opportunity to determine if it wants legal counsel, **(2)** No enforcing if no receipt of adequate financial disclosure UNLESS express waiver, **(3)** Unless represented by independent legal counsel, plain language explanation of waived rights/obligations required.
- **(4) OMITTED CHILDREN (Pretermitted Heir)**
  - **UNINTENTIONAL OMISSION ONLY.** Children may be intentionally disinherited in every state except LA. Ex: *Azgunce v. Estate of Azgunce* (subsequent codicil evidence of intention to omit).
  - **UPC 2-302**
    - **(a)**[If] a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, **the omitted after-born or after-adopted child receives a share in the estate as follows:**
      - **(1)** If the testator had **no child living when he [or she] executed the will**, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, **unless the will devised all or substantially all of the estate to the other parent of the omitted child** and that other parent survives the testator and is entitled to take under the will.
      - **(2)**[UPC-Unique]If the testator had **one or more children living when he [or she] executed the will**, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows: **(A)** [Portion limited to already devised amount to other kids] **(B)**[Omitted gets share as if included with all other kids]**(C)**[To the extent feasible, devise of the "Same character" as others]**(D)** In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.
        - **AS LITTLE OR LIMITED AS GIVEN TO OTHER KIDS.**
    - **(b)****Neither subsection (a)(1) nor subsection (a)(2) applies if: (1) [Intent] it appears from the will that the omission was intentional; or (2) [Transfer outside will – unique to UPC] the testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred** from the amount of the transfer or other evidence.
      - **Execution of codicil after birth = intentional omission.** *Azgunce v. Estate of Azgunce*.
    - **(c)** If at the time of execution of the will the testator **fails to provide in his [or her] will for a living child solely because he [or she] believes the child to be dead**, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child. [...]

## NON-PROBATE (“PURE”) SYSTEMS

- **QUESTION OF FORM FOR PROPERTY, SUBSTANCE FOR TAXATION/CREDITOR’S RIGHTS**
  - **Creditors’ Rights** newly recognized by UPC, modern law.
- **(0) Valid, Generally**
  - Rest. 3d Property 7.1 – **Will Substitute** “is an arrangement respecting property or contract rights that is established during the donor’s life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor’s death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor.”
  - **UPC 6-101 – Nonprobate Transfers on Death** – A provision for nonprobate transfer on death in an [various nonprobate systems] is nontestamentary. This subsection includes a written provision that (1) money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent’s death to a person who the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later; (2) money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or (3) any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.
  - **UPC 6-102 – Liability of Nonprobate Transferees for Credit Claims and Statutory Allowances – (b)** [Transferee is subject to liability for allowed claims against decedent’s probate estate and statutory allowances to spouses, etc to the extent estate unable to handle.]
  - **Features**
    - **ASSET SPECIFIC** - Limited to specific enumerated assets or sets of assets.
    - **Secret** – Can hide disposition of property better than will.
- **(1) REVOCABLE INTER VIVOS TRUSTS**
  - **Transfer of legal title to trustee for third party**, but held in trust for settlor until death. Settlor retains power to revoke, modify, etc.
    - **Settlor still owns property -> Less worry re: duties, etc.**
  - Revocability allowed as valid *inter vivos* trusts. *Farkas v. Williams*, contra *Mathias v. Fantine*.
    - Even if self-declared. Maybe issues with present transfer test?
    - **Present Transfer Test** – Upon creation of trust, settlor transfers *equitable remainder interest* to remainder beneficiary, subjected to settlor’s power to revoke.
  - **CREATION/CAPACITY**
    - **SEE BELOW SECTION ON TRUSTS FOR REQUIREMENTS.**
      - **TRUST REQS + UPC6\*\* SERIES**
    - **UTC 601– [Capacity]** - The capacity required to create, amend, revoke or add property to a revocable trust or to direct the actions of the trustee of a revocable trust is the **same as that required to make a will**.
      - **IN ADDITION TO NORMAL UTC PROVISOS.** Irrevocable = gift = lower standard; this = testamentary.
      - **UTC 808(a)** – [While trust revocable, trustee may follow direction of settlor contrary to terms of trust.]
      - **UTC 406** - A trust is void to the extent the creation of the trust was induced by fraud, duress or undue influence
    - If beneficial interest retained, **PRESUMED REVOCABLE**. **UTC 602 cmt; Rest. 63 cmt c.**
    - If created for purpose and that purpose impossible to achieve, will **sub fails**. *Chlymer v. Mayo*.
  - **FRAUD**
    - **Must transfer legal title.** Otherwise, no trust.
    - **“SELF DECLARED TRUSTS”** – Where settlor acts as trustee. Generally allowed, though troublesome.
      - **“Fraudulent Transfer”** – Worry about transfer in fraud if creditors. States generally allow creditors to reach such assets. **UPC 6-102** (only applies if not fraudulent transfer and if creditors of the estate).
    - **Trustee can be beneficiary, but not ONLY beneficiary.** Creates CoI.
    - Taxed per substance, not form.
  - **TYPES**
    - **“Pour-over Devise”** – Provision in will that (i) adds property to inter vivos trust or (ii) funds trust not funded during lifetime but with instrument made during lifetime. [i.e. not testamentary trust]. **Rest 3d of Prop. 3.8.**
      - Allowed by **UPC 2-511**. Allows “pour over” in (a).
      - Can be empty before filling, and can even be irrevocable (for gift tax) or revocable (for estate tax).
      - Once allowed as a form of incorporation by reference.
- **(2) CONTRACTUAL ARRANGEMENTS:**
  - **(A) LIFE INSURANCE**
    - **UPC 2-706** – [Antilapse for life insurance –exact same]
    - **Insurance contracts nontestamentary, BUT** outside contracts related to POD may be. *Wilboit v. Peoples Life Ins. Co.* (technically, contract separate from insurance policy).
    - **ILITs – Irrevocable Life Insurance Trusts** – Irrevocable, and thus not subject to estate tax(?)
    - **Requires insurable interest in life of Insured.** Generally, trustee may purchase on settlor.
      - May designate anyone as beneficiary, including trustee (sort of pour-over devise).



- Trustee has an insurable interest in settlor – SPECIFIC REQUIREMENTS. *See* UTC 113.

- **(B) PENSIONS**

- **(C) MULTI-PARTY ACCOUNTS**

- **Generally:** UPC allows all, but older courts disfavored POD accounts as testamentary.
- **UPC 6-203** – [Account may be for single or multiple parties, with or without right of survivorship/POD/agency designation.]
  - **UPC 6-211(b)** – [Ownership in proportion to net contribution]
- **UPC 6-212** – [(a) Multi-party accounts paid to surviving party, (b) When account has POD, (c) Sums on deposit without right of survivorship etc go to defendant's estate. (d) Liability stuff]
  - **UPC 6-214** – [Transfer by 6-212 is effective by reason of terms of account, not testamentary etc]
- **UPC 2-613** – [(a) rights at death determined at death of a party. (b) right of survivorship or POD designation cannot be altered by will]
- **Totten Trusts** – “X in trust for Y” – functionally equivalent of will in bank account, considered legal in NY, etc but creditors can reach.
- **Joint Accounts/POD accounts** – Survivorship feature allows immediate shift.
  - **Generally not held in joint tenancy.** Only right to amount of contribution.
  - **Joint tenancy** allows unilateral severance, etc.
  - **POD accounts** generally held by courts to be testamentary, so *disallowed*.

- **(3) REVOKING/AMENDING**

- **(A) REVOCABLE TRUSTS**

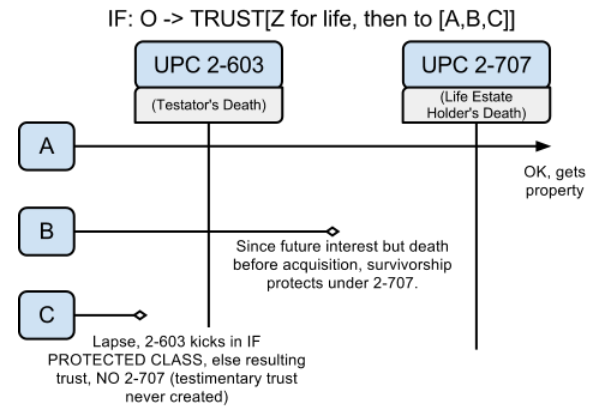
- **UTC 602** – [Revocation or Amendment of Rev. Trust]
  - **(a)** [Unless stated in trust otherwise or before date of Code, may revoke trust]
    - **Incapacity irrelevant.** UTC 602 cmt.
    - **Contrast Common Law Rule.** C.L. held presumption of irrevocable unless explicitly retained power to revoke. UTC and *Estate and Trust of Pilajas* reverse.
  - **(b)** If a revocable trust is created or funded by more than one settlor: **(1)** to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; **(2)** to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and **(3)** upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.
  - **(c)** The settlor may revoke or amend a revocable trust:
    - **(1)** by substantial compliance with a method provided in the terms of the trust; or
    - **(2)** if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:
      - **(A)** a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
        - **UPC 6-213(b)** – [May not alter survivorship of multiple-party or POD acct]
      - **(B)** any other method manifesting clear and convincing evidence of the settlor's intent.
  - **(d)** Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs. [...]
- **UTC 603** – [Settlor's Powers presumptively exist] **(a)** While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. **(b)** During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.
- **UTC 604** – [Limits on Action Contesting Validity of Rev. Trust] – **(a)** [Earlier of three years or 120 days after person sent copy of trust instrument / proceeding], **(b)** [Trustee not liable for distribution etc of trust property after death of settlor UNLESS (1) trustee knows of contest proceeding or (2) potential contestant has notified and commences action within 60 days.] **(c)** [If trust invalid, beneficiary liable to return money, etc]
- **(i) Impossibility - If created for purpose and that purpose impossible to achieve, will sub fails.** *Clymer v. Mayo.*

- **(B) OTHER WILL SUBS**

- **Revocation by Will**
  - **(A) Totten Trusts** – Generally Y. *Scanlon's Estate*
  - **(B) POD Accounts** – Generally N. UPC 6-213(b), *maybe* Y in some jurisdictions.
  - **(C) Life Insurance (+ Pension plans, Ret. Accts)** – Mostly N. *Stone v. Stephens.*
  - **(D) Joint Tenants** – No (right of survivorship implied)

## LAW OF WILLS AS APPLIED TO WILL SUBSTITUTES

- **UTC 112** - The rules of construction that apply in this State to the interpretation of and disposition of property by will **also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.**
    - **UPC 2-701** – [Rules apply, in absence of contrary intention, to all “governing instruments”]
    - **Rest. 3d 7.2** – [Though no need to follow formalities, rules governing substantive disposition governed by law governing wills]
  - **(1) REVOCATION UPON DIVORCE (ONLY)**
    - **UPC 2-508** – [Except for divorce and slayer rule, no revocation on change of circumstances]
    - **UPC 2-804(b)** - [Revocation Upon Divorce.] Except as provided by the express terms of [an instrument, court order, divorce agreement, etc] the divorce or annulment of a marriage:
      - **(1) revokes any revocable [disposition or appointment of property in a deed, will trust, beneficiary designation, power of attorney, transfer-on-death account, or donative instrument of any other type executed before the divorce or annulment]**
        - Applies to those dying *after* enactment, regardless of will execution.
        - **Concord *Clymer v. Mayo*** (destroying trusts for spouse, possibly preserving for nieces and nephews based on evidence of t.i.)
      - **(2)** [severs joint property/community property into equal tenancies in common]
    - **UPC 2-804(d)** – [Act as if former spouse and all relatives of former spouse disclaimed or, if fiduciary/rep capacity, if died before divorce]
    - **UPC 2-804(e)** – [Revival if divorce nullified]
  - **(2) ANTI-LAPSE (“Survivorship”)**
    - **UPC 2-702** – [120 hour survival rule]
    - **MUST SURVIVE TESTATOR’S DEATH TO GET FUTURE INTEREST.** Otherwise, lapse, and 2-707 does not apply. **UPC 2-707(b).**
    - **UPC 2-707[TRUSTS] (+UPC 2-706 for other will subs, but WITH descendant of grandparents limit) –**
      - **(b)[Survivorship Required; Substitute Gift. – **NO PROTECTED CLASS REQ IF TRUST, ELSE REQ**] A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:**
        - **(1)** Except as provided in paragraph (4), if the future interest is **not in the form of a class gift** and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants [by representation].
        - **(2)** Except as provided in paragraph (4), if the future interest **is in the form of a class gift**, other than a future interest to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,” “relatives,” or “family,” or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary [as if all survived]. For the purposes of this paragraph, “deceased beneficiary” means a class member who failed to survive the distribution date and left one or more surviving descendants.
        - **(3)** [Without additional evidence, **words of survivorship irrelevant**].
        - **(4) [Survivorship barred IF:] (A)** [one member of alt devisee class gift is entitled to take OR] **(B)** [alt beneficiary exists/entitled to take]
    - **(c)[More Than One Substitute Gift; Which One Takes. - primary or younger generation gift]**
    - **(d)[If No Other Takers, Property Passes Under Residuary Clause or to Transferor's Heirs.] [...]**
    - **[Else] [Protection of payors, etc]**
  - Approaches
    - **C.L.:** No survival requirement (vests at creation) – *First Nat'l Bank of Bar Harbor v. Anthony* – Trust needs no survival
      - Throws result into intestacy. Added taxes, probably also removes control over who gets property.
    - **UPC:** Antilapse Rule (survival rule implied but circumvented) – Also C.L. *Estate of Button* – Application of Antilapse by analogy
      - **Protects only relatives/protected class.** Thus may better fulfill t.i. + avoid estate tax. UPC HAS NO PROTECTED CLASS REQ.
- **(3) ADEMPMENT BY EXTINCTION**
  - Generally, “ademption” occurs **where connected to will**. No ademption if not testamentary trust, etc? *Wasserman v. Cohen*
  - **ID THEORY:** Lack of presence = ademption by extinction. *Wasserman v. Cohen*
  - **INTENT THEORY:** Rest. 3d of prop 5.2 cmt 1



- **(4) SLAYER RULE**

- **UPC 2-508** – [Except for divorce and slayer rule, no revocation on change of circumstances]
- **APPLIES TO ALL FORMS OF WEALTH SUCCESSION.** Wills, will subs, etc.
- **General principle: UPC 2-803(f)** - A wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from his [or her] wrong.
- **UPC 2-803(c) [Revocation of Benefits Under Governing Instruments.]** The felonious and intentional killing of the decedent: **(1)** revokes any revocable **(i)** disposition or appointment of property made by the decedent to the killer in a governing instrument, **(ii)** provision in a governing instrument conferring a general or non-general power of appointment on the killer, and **(iii)** nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent; and **(2)** severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants [or tenancy by the entirety] with the right of survivorship [or as community property with the right of survivorship], transforming the interests of the decedent and killer into equal tenancies in common.
  - **UPC 2-803(e)** – [Acts as if killer disclaimed all interest]
    - **UPC 2-1106** – [i.e. treated as if predeceased.]
  - **UPC 2-803(g)** – [“Felonious and Intentional Killing”] – [...] “a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section”
    - **Includes accomplices/co-conspirators.** *UPC 2-803 cmt.*
  - **UPC 2-803(d)**- [Does not affect third party's good faith reliance on apparent title by survivorship]
  - **UPC 2-803(h)** – [Payor/third party protection], **UPC 2-803(i)** – [Protection of good faith purchasers]
- **Slayer does not forfeit property already owned.** *Luecke v. Mercantile Bank of Jonesboro*, etc.
  - **TWO FACTORS TO DETERMINE IF VESTED:** (1) COMPLETE CONTROL OVER PROPERTY?, and (2) REQUIREMENT OF SURVIVAL?
- **Joint Tenancies**
  - **UPC 2-803(c)(2)** – Slayer owns in fee simple (proper result – principle of vested interests)
  - *Neiman v. Huff* – Slayer owns life estate
- **REMEDY: Constructive Trust.**



## TRUSTS

### • TYPES

- INTENTIONAL TRUSTS (Express Trusts)
  - Private Trusts – Enforceable by beneficiary
  - Charitable Trusts – Enforceable by Att’y General, etc.
- UNINTENTIONAL TRUSTS
  - Constructive Trusts – Remedial, as discussed above. -> RESULT OF EQUITY, IMMEDIATE TRANSFER WITHOUT MIDDLEMAN
  - Resulting Trust – Where express trust fails, the result thereof. -> REVERSION, ESSENTIALLY
- CREATING
  - Transfer Trust - Transfer from S to T
  - Self-Declared Trust – S to S for B.
- Other
  - Revocable Inter Vivos Trust – Testamentary-esque instrument, estate tax, subject to some laws of wills
  - Irrevocable Inter Vivos Trust – Gift, gift tax, not(?) subject to law of wills
  - Postponement of Enjoyment Trust – Delayed for some period of time or event – restricts beneficiary use.
  - Testamentary Trusts – Created by will, part of estate, etc. Law of wills, mostly.
    - Pour-over trust – Created *before* will, but will pours into trust. Law of wills, mostly.
  - Blind Trust – Trust where trustee is an independent third party, settlor cannot control assets (to avoid CoIs).
  - HONORARY TRUST – UTC 409 treats as real trust, common law treated as power of appointment.
- Marital Deduction Trusts
  - (1) Life Estate + Gen’l Power of Appointment – Usually requires some “specific reference” to attempt to prevent use of power of appointment.
    - Blanket Exercise Residuary Clause – Exercises ONLY IF NO SPECIFIC REFERENCE REQUIREMENT.
  - (2) Qualified Term Interest Property – Right to all income for life, no general power of appointment

## ELEMENTS OF A TRUST

- Requirements, Generally
  - UTC 402 – [Requirements] –
    - (a) A trust is created only if: (1) the settlor has capacity to create a trust; **[[1.5] A res exists or will exist...]** (2) the settlor indicates an intention to create the trust; (3) the trust has a definite beneficiary or is: (A) a charitable trust; (B) a trust for the care of an animal, as provided in Section 408; or (C) a trust for a noncharitable purpose, as provided in Section 409; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary.
  - UTC 407 – [Can be oral if proven by clear and convincing evidence]
- (0) Capacity
  - UTC 601– [Capacity] – The capacity required to create, amend, revoke or add property to a revocable trust or to direct the actions of the trustee of a revocable trust is the same as that required to make a will.
    - UTC 406 – A trust is void to the extent the creation of the trust was induced by fraud, duress or undue influence
- (1) Res (“Certainty of Subject”)
  - UTC 401 – [Creation via transfer or declaration] – A trust may be created by: (1) transfer of property to another person as trustee during the settlor’s lifetime or by will or other disposition taking effect upon the settlor’s death; (2) declaration by the owner of property that the owner holds identifiable property as trustee; or (3) exercise of a power of appointment in favor of a trustee.
    - Rest 3d of Trusts 401 – [Any legally recognized property interest that is transferable can be the subject of a trust]
    - UTC 403 – [Jurisdiction] – [Valid if compliant with jurisdiction in which executed or law of jurisdiction where domiciled, had business, or trust property located.
      - Situs – If testamentary, at estate location, otherwise, if inter vivos, then where title of assets are (multiple OK.)
  - “Property Interest”
    - Future profits and “mere expectancies” - **SPLIT**
      - No. *Brainard v. Comissioner*. (stock profits, tax fraud, no other transfer)
      - Yes. *Spielman* (license, no tax fraud, actual transfer of something else)
      - Contract may be subject matter of trust.
    - Pour-over devises work. [UPC 2-511](#).



- (2) **Intent to Create a Trust (“Certainty of Intent”)**
  - **Rest 3d. Of Trusts 13** – “A trust is created only if the settlor properly manifests an intention to create a trust relationship.”
- (3) **Beneficiaries (“Certainty of Object”)**
  - **UTC 402(a)(3)** – [A trust is created only if ... the trust has a **definite beneficiary** or is ... (A) a charitable trust, (B) [for an animal], or (C) [for a noncharitable purpose]
    - (A) **Charitable Trust** – SEE BELOW
    - (B) **Pet Trusts** generally valid, BUT must have some enforcer, etc. *Estate of Seairight* UTC 408; 402(a)(3)(B).
      - **Court may limit amount, like with honorary trust.** UTC 408(c).
    - (C) **[Honorary Trust]** – SEE BELOW
    - **UTC 404 – [Purposes]** – A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.
  - (i) **Definite Classes**
    - **UTC 402(b)** – A **beneficiary is definite if the beneficiary can be ascertained now or in the future**, subject to any applicable rule against perpetuities.
    - **UTC 402(a)(5)** – [Settlor cannot be object (merges interests), BUT can if multiple parties]
  - (ii) **Indefinite Classes (Powers of Appointment)**
    - **Rest. 46(1)** – [No trust if indefinite]
    - (A) **“Definiteness” via Power of Appointment**
      - **UTC 402(c)** – [UPC Allows] A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.
        - **UPC 2-608** – [Residuary clause must expressly exercise testamentary power of appointment to utilize at all]
        - Donor gives Donee power to pick from Objects certain Appointees or to give to Takers in Default.
        - **PERSONAL TO HOLDER.** Cannot be transferred AT ALL, BUT may be disposed of in will.
        - **REGARDLESS IF MANDATORY OR NOT.** UTC 402 cmt.
      - **Scope**
        - **General** – Can devise to self, own estate, creditors of estate, or creditors generally. TAXABLE.
        - **Specific** – Any limits on general appointment, NOT TAXABLE.
      - **Timing**
        - **Testamentary Power** – Can devise in own will
          - **Specific Reference Requirement** – Requirement to dispose in will specifically.
        - **Present Power** – Can exercise now
      - **Relation Back Theory** – Appointment makes disposition “relate back,” donee does not as conduit.
      - **Common Law Restriction - Discretion**
        - **Discretionary Power** – Power in someone other than trustee.
          - Upheld if at least one person fits definition. **ENFORCEABLE.**
        - **Mandatory Power** – Power in the trustee to pick the class.
          - Upheld if all can be identified, meaning **GENERALLY UNENFORCEABLE**
      - **Contra** common law “definite class” rule. Cannot create trust to “friends” at discretion of trustee under common law. *Clark v. Campbell.*
    - (iii) **Honorary Trusts**
      - **Allowed, limited to lawful noncharitable purposes and for 21 years** (i.e. RAP). UTC 409; UPC 2-907.
        - **Includes pet trusts.** UTC 409.
        - **May be limited to reduce extravagance.** UTC 409(c); UPC 2-907(a), (c).
        - **Common Law:** Not enforceable, but construed as power of appointment.
      - **Special dispensation rules** set out in **UPC 2-907(c).**
- (4)+(5) **Trustee Has Duties/Not Sole Beneficiary**
  - (i) **PICKING A TRUSTEE**
    - **UTC 402(a)(4)** – “A trust is created only if: .... (4) the trustee has duties to perform”
    - **Must be reasonable** – cannot pick a rock, frog, etc.
      - If dead/unavailable, court will pick replacement (if trust instrument does not provide)
      - If none selected, self-declaration.
      - If not reasonable, no trust created
    - **Rest 3d of Trusts 31** – [Trust does not fail for lack of acceptance of trustee, etc – court can appoint] Accord *Adams v. Adams.*
      - **Rest. 3d of Trusts 14** – “A trust can be created without notice to or acceptance by any beneficiary or trustee”.
      - **UTC 701** – [After becoming trustee, must get permission of court to leave]

- At common law, trustee's sole title to the property passes to heirs, *Rest 2d of Trusts 104, 105*, but some states like NY appoint power to court.
  - **CANNOT BE BENEFICIARY.** Otherwise, merger of interest(s).
    - **BUT** life estate in trustee maybe ok. Means split interest.
- **(ii) DELIVERY TO TRUSTEE**
- Transfer of legal title required for non-self-declared trust, *Farmer's Loan & Trust v. Winthrop*, but constructive trust may apply if evidence of intent exists. *Rest 3d. Of Trusts 16*.
    - **General requirement: must comply with laws regarding transfer of property interest in question.** (Ex: statute of frauds for land, etc).
    - **Consideration not required.** *Rest 3d of Trusts 15*.
- **(iii) DUTIES VS PRECATORY LANGUAGE**
- **SUBJECT ALSO TO MANDATORY DUTIES.** *See below*.
  - *Rest 3d of Trusts 13 cmt d* – “Unless a testator or other transferor manifests an intention to impose enforceable duties on the transferee, an intention to create a trust is lacking and no trust is created.”
    - **Presumption precatory language = trust duty.** *Colton v. Colton*
  - *Rest 3d of Trusts 13 cmt d Factors:* (1) the specific terms and overall tenor of the words used; (2) the definiteness or indefiniteness of the property involved; (3) the ease or difficulty of ascertaining possible trust purposes and terms, and the specificity or vagueness of the possible beneficiaries and their interests; (4) the interests or motives and the nature and degree of concerns that may reasonably be supposed to have influenced the transferor; (5) the financial situation, dependencies, and expectations of the parties; (6) the transferor's prior conduct, statements, and relationships with respect to possible trust beneficiaries; (7) the personal and any fiduciary relationships between the transferor and the transferee; (8) other dispositions the transferor is making or has made of his or her wealth; and (9) whether the result of construing the disposition as involving a trust or not would be such as a person in the situation of the transferor would be likely to desire.
- **(iv) TRUSTEE DISCRETION**
- *Rest 3d of Trusts 50(2)* – [Abuse of discretion by trustee “depend[s] on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purposes in granting the discretionary power and in creating the trust]
    - **Good faith required, nonwivable.** *Cmt. b.*
      - **“Unfettered Discretion”** – Can be unreasonable, but GOOD FAITH STILL APPLIES
    - **Cmt c** – Court may intervene if unreasonable, etc.
    - **Cmt c** – Extended discretion can be granted by terms of instrument, etc
    - **Cmt e** – General presumption that trustee has some discretion to account for beneficiary's other resources.

## Spendthrift, Discretionary, and Support Trusts

- (0) Generally
  - Support Trust – Directing trustee to pay as much as necessary for support or education. Rest 15 cmt d
  - Protective Trust – Destroyed at attempt at alienation.
  - Discretionary Trust – Provision giving trustee discretion to pay for beneficiary only as much as trustee sees fit. Rest 15 cmt c
    - Good faith requirement as part of law, so no wild discretion. CANNOT WAIVE.
  - Mixed Proviso – Discretion + Support proviso. Generally very present.
  - Spendthrift Trust – Disabling restraint on alienation.
  - HONORARY TRUST (ABOVE) – 21 year indefinite trust for noncharitable purpose.
- (a) Spendthrift Trusts
  - Generally: Spendthrift provisions prevent attachment of distributions, not eventual acquiring. Without spendthrift language, may attach, but may never compel distribution, with or without.
  - Valid in American law. Not so in other systems.
    - UNIQUE TO TRUSTS. Legal interests generally cannot be burdened by disabling or forfeiture restraints.
    - *Broadway Nat'l Bank* – Established precedent allowing spendthrift trusts.
  - (i) May never compel, sometimes attach distributions
    - UTC 501 – [May attach mandatory(?) distributions unless spendthrift provision] To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.
      - Sometimes limited in amount. “Station-in-life” test.
      - EXCEPTION: Blatant defrauding of creditors (including courts)
    - UTC 504 – [May not compel distribution]
      - (b) [No compelling of trustee to distribute] Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if: (1) the discretion is expressed in the form of a standard of distribution; or (2) the trustee has abused the discretion.
        - Contra common law: If support trust, reachable unless limited to education, etc.
        - Contra Restatement, allowing creditors to compel
      - (c) [Exception Creditors – see below]
      - (d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.
      - (e) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or cotrustee.
  - (ii) Spendthrift Provisions – No Attachment
    - UTC 501 – [Provisions “not subject to” spendthrift can be reached by creditors]
    - UTC 502 [Spendthrift Requirements/Result]
      - (a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.
        - Can apply to both *payments AND principal* of trust. *Estate of Vought*
        - Non-UPC: Sometimes limited by amount or “station-in-life”. Ex: *NYEPIL 7-3.4*.
      - (b) A term of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust,” or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.
      - (c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.
- (b) Exemption Creditors: May Compel, Attach
  - UTC 503(b)–[Exceptions to Spendthrift Un-Attachability] (b) A spendthrift provision is unenforceable against: (1) a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance; (2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and (3) [US gov't]
    - UTC 503(c) – [May get court order attaching funds if exception creditor]
    - UTC 504(c) – [Special exception: may force trustee to compel ONLY IF protected class] To the extent a trustee has not complied with a standard of distribution or has abused a discretion: (1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and (2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee

would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

- **UTC 504(a)** – [“Child” means any person for whom an order of child support ordered]
- **UTC has no “necessary services”, tort creditors, etc.**
- **Generally:** Tax, Spousal Support, and child Support.
- **Controversial:** Alimony, “Necessary services or supplies”, tort creditors.
- Sometimes wife/child not considered “creditors”, exempting them from spendthrift provisions. Ex: *Hurley v. Hurley*

○ **(c) Asset Protection Trusts**

▪ **SPENDTHRIFT TRUSTS ON SELF**

- *FCC v. Affordable Media; In re Lawrence* – Settlor jailed for not repatriating trusts, even though trusts contained provisions preventing repatriation/etc on duress.
- **Trust Protectors** – Those managing trustees (GENERALLY FOREIGN NATIONALS OVERSEAS)
  - **UTC 808 cmt** – [Recognizes trust protectors.]
  - **Cannot be settlor.** Otherwise, subject to US courts, etc.
  - **Fiduciary duties questionable. LIMIT TO VETO POWER** (otherwise, court may force to force to pay money)

▪ **UTC 505 – [Exceptions subjecting settlor to creditors regardless of spendthrift – kills APTs]**

- **(a)** Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:
  - **(1)** During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.
  - **(2)** With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.
  - **(3) After the death of a settlor**, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is **subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].**
- **(b)** For purposes of this section:
  - **(1)** during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and
  - **(2)** upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code]] [, or as later amended].

▪ **N.Y. EPTL 7-1.5 – [All] trusts spendthrift without waiver, etc]**

## Termination and Modification of Trusts

- **SPECIAL RULES FOR REVOCABLE TRUSTS.** See above.
- **(1) *Clafflin*:** Beneficiaries may not compel payment UNLESS **(1)** all beneficiaries consent (and are competent to do so) AND **(2)** premature termination (or modification) will not defeat a “material purpose” of the trust.
  - **UTC 411 – [Noncharitable Irrevocable Trust]**
    - **(b) [*Clafflin*]** A noncharitable irrevocable trust may be **terminated [i]** upon consent of all of the beneficiaries **[ii]** if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be **modified** upon **[i]** consent of all of the beneficiaries if the court concludes that **[ii]** modification is not inconsistent with a material purpose of the trust. [...]
    - **(c)[Court relaxation of requirements power]** If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:
      - **(1)[Material purpose]** if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
      - **(2)[Money left for undiscovered/nonconsenting parties]** the interests of a beneficiary who does not consent will be adequately protected.
  - **(i)“UNANIMOUS CONSENT” OF ALL BENEFICIARIES**
    - **General/Common Law**
      - **If dies** – Successor in interest
      - **If contingent** – Remainderman gets vote too
      - **If children** – Multiple approaches – Common law presumes any living human can have children
    - **UTC/UPC Exceptions/Approaches**
      - **UTC 411(e)[Court relaxation of requirements power]** [If not all beneficiaries consent,] the modification or termination may be approved by the court if the court is satisfied that:
        - **(1) [Material purpose]** if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
        - **(2) [Money left for undiscovered/unconsenting parties]** the interests of a beneficiary who does not consent will be adequately protected.
      - **UTC 301** – [May give notice/get consent from **representative** of person.]
      - **UTC 302** – [**Holder of general testamentary power of appointment**, pending no conflict, may represent and bind persons whose interests, as appointees or takers in default, are subject to power.]
      - **UTC 303** – [Generally allows binding actions from **conservators, guardians, trustees, p.r.s, etc]**
      - **UTC 304** –[**Substantially Related Interest**] [If minor, incapacitated, unborn, or unidentified and not reasonably ascertainable identity, may be represented by another having “a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest ...”]
      - **UTC 305**–[**Guardian ad Litem**] [Court may appoint representative to act on behalf of minor, incapacitated, unborn, or unidentified and not reasonably ascertainable identity]
      - **UPC 2-707** – [Antilapse statute can expand who has to consent]
  - **(ii) PREMATURE TERM./MOD. DOES NOT DEFEAT MATERIAL PURPOSE**
    - General prohibition on early payouts/termination/etc where “**nothing has happen which the testator did not anticipate, and for which he has not made provision.**” AND that does not render trust “altogether useless”. *Clafflin*
      - **Common Law *Prima Facie* Material Purpose (“Undefeatable” Trusts)**
        - **(1) Postponement of Enjoyment**
        - **(2) Spendthrift** (Contra UTC 411(c), considering such immaterial)
        - **(3) Discretionary**
        - **(4) Support**
        - [So only successive enjoyment trusts eligible, generally]
    - **Statutory Exceptions**
      - **UTC 411(c)** – [Spendthrift provision not presumed to be material], contra [Rest 2d 337 cmt l.](#)
      - **Restatement 3d Sec. 65** – [Court may still modify if reasons for term/modification outweigh material purpose]
      - **Restatement 3d Sec 65 Cmt** – [Material purposes NOT to be readily inferred]
- **(2) SPECIAL UTC RULES – *CYPRES* EQUIVALENT + DE MINIMIS TRUST**
  - **UTC 410 – [*Cy Pres* for noncharitable trusts]**
    - **(a) In addition to the methods of termination prescribed by Sections 411 through 414,** a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or **the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.** [...]
  - **UTC 414 – [Low value trust too small to run]** **(a)** After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total **value less than [\$50,000]** may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.
  - **Rest 3d Trusts 65** – [Allows court to terminate if it determines reasons for termination > material purpose.]

- **(3) “EQUITABLE DEVIATION” (UNANTICIPATED CIRCUMSTANCES)**
  - **FOR ADMINISTRATIVE PROVISIONS ONLY – NO PURPOSE CHANGES.**
  - Used generally when *Clafin* cannot apply.
    - Cannot anticipatorily give *Clafin* power. *Clark v. Campbell*.
    - Generally unnecessary if trust well-drafted.
  - **UTC 412(a) – [Intent effectuating for furtherance of trust purposes]** The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
    - No emergency or express language required. Inferred intent OK.
    - No beneficiary consent required.
  - **(i) DISTRIBUTIVE DEVIATIONS**
    - Generally limited to single-beneficiary, postponement-of-enjoyment trusts. But see *Petition of Wolcott* (residuary beneficiaries, but ostensible goal of trust was to benefit life interest (wife))
    - **Generally permitted for unanticipated circumstances (ex: medical need, inflation, etc).** *Petition of Wolcott* (hinging on intent); **UTC 412** (above); **Rest. 66** [approving of *Wolcott*]
    - **Uniform Principal and Income Act** – [Trustee must administer trust in a fair and impartial way unless trust indicates otherwise.]
  - **(ii) ADMINISTRATIVE DEVIATIONS** (Impracticability/Waste/Selling)
    - **UTC 412(b) – [Intent overriding for impracticability and waste]** The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration. [Concord *Matter of Pulitzer*]
    - **Applies regardless of settlor's intent.** *Matter of Pulitzer*.
- **(4) Settlor Destruction** – If revocable OR per UTC if consent of settlor + beneficiaries. *Phillips v. Lowe*, **UTC 411(a)**.

## Charitable Trusts

- **(0) Generally**
  - Charitable trusts and corporations (acting as trustees for trust) **do not require definite beneficiaries, can exist forever.**
  - **Rest. 2d of Trusts 391** – [Enforceable by attorney general, co-trustee, or person with special interest in matter]
    - **“Special Interest”**– A person with interests beyond those of the regular community. Does not include students for university. *Russel v. Yale*
    - **Settlor** may also contribute. **UTC 405(c)** [major departure from common law]
  - **Special Features**
    - **Generally excepted from R.A.P.** Must be purely charitable (does not extend to non-charitable devises)
      - **Rule of Reasonableness** for accumulations of income. 400 years too much. *James' Estate*; **Rest. 2d of Trusts 401 cmt k.**
    - Tax-exempt, generally. **IRC 501.**
- **(a) Charitable Purposes**
  - Must either be for a **“general purpose”** for entire community or fall into **P.H.E.R.G.** setup. **If purpose fails, 21 year time limit.**
    - **UTC 405(b)** – [If no definite charitable purpose of beneficiary, court may pick one pursuant to t.i.]
    - Tax deductions limited to trusts for “religious, charitable, scientific, literary, or educational purposes, including the encouragement of art, or to foster national or international amateur sports competitions [limited to no stadiums] BUT [may not attempt to influence legislation or political campaign]. **IRC 2055(a)(2).**
    - Foreign beneficiaries OK. **Rest 2d of Trusts 374 cmt i.**
  - **(i) General Benefit for Community**
    - **Whole community.** Cannot subdivide – otherwise, must fit into specified list below.
    - **Extrinsic evidence always admissible** if language vague. *Wilson v. Flowers*
      - Including **how the trust is to be or has been administered.**
    - **Not mere kindness – implies some dimension of need.** Devise for “benevolent purposes” not charitable enough – “benevolence” is mere kindness. *Estate of Kradwell*; *Morice v. Bishop of Durham*.
    - **SPLIT if also involves non-charitable purpose.** Private portion subject of normal rules.
  - **(ii) Specified Purposes (PHERG)**
    - **LIMITED TO P.H.E.R.G.:** Poverty, Health, Education, Religion, and Government. **UTC 405(a); Rest 3d of Trusts 28**
    - **More than a “Candy Trust”.** *Shenandoah Vallue Nat'l Bank v. Taylor*.
      - Result: Honorary Trust – *Non-charitable* specific purpose trust – if no charitable purpose found, no protections, BUT may exist for 21 years.
      - Generally OK: Scholarship awards, *Estate of Carlson*, even if prefer own children, *Estate of Sells v. Commissioner*.
    - **Not allowed:** Political parties, etc; *however*, unpopular causes irrelevant. *Estate of Breeden* (socialism). Also *possibly* irrationality. Scott on Trusts 370.4.



- **Stupidity does not defeat.** *Estate of Kidd* (photographing soul.)
  - (iii) **Effect of Failure – Noncharitable Purposes with Indefinite Beneficiaries -> HONORARY TRUST**
    - **UTC 409(1) – [Becomes Honorary Trust]** A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than [21] years.
- (b) **The Cy Pres Doctrine** (si-pray, from “*Cy Pres comme Possible*”)
  - **FOR CHANGES OF PURPOSE.**
  - **IF UNLAWFUL, IMPRAC, ETC – CY PRES OR TERMINATION.**
  - **Common Law:** Had to prove (1) general charitable intent and (2) unlawful, impractical, or impossible to achieve (no waste).
    - Gift-overs automatically meant no general charitable intent.
  - **UTC 413(a)** – “Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, [UTC/Rest add:] or wasteful: (1) the trust does not fail, in whole or in part; (2) the trust property does not revert to the settlor or the settlor’s successors in interest; and (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor’s charitable purposes.” *concord Rest. 3d 67.*
    - **PRESUMPTION OF GENERAL CHARITABLE INTENT.** Contra common law (requiring proof)
    - **Adds “wastefulness”, presumes general charitable intent.** Common law had no wastefulness proviso, *see Estate of Buck*, and also required proof of general charitable intent.
  - **UTC 413(b) – [Barred by gift-overs – reverter > cy pres IF still applicable]** A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect: (1) [if settlor alive, reverter] the trust property is to revert to the settlor and the settlor is still living; **or** (2) [if to devisee or descendants within 21yrs] fewer than 21 years have elapsed since the date of the trust’s creation.
    - **Means t.i. (probably) does not have general charitable intent IF requirements met.** BUT, if two charitable devisees, then probably first takes under Antilapse-like principles.
      - Contra common law – prima facie lack of general charitable intent.
  - **Discriminatory Trusts**
    - **UTC 404** – [Purpose cannot be illegal, interpreted to include invidious discrimination]
    - **“Invidious” discrimination may be required.** *Rest 3d of Trusts 28 cmt f.*
    - **State as Trustee**
      - **State action generally found where state must act as trustee.** *Evans v. Newton*
      - No transfer-away if discriminatory – must equitably deviate. *Estate of Wilson.*
    - **Private Trusts**
      - **SPLIT:** Destroying based on public policy as “illegal” where racially based (*Home for Incurables of Baltimore city v. University of Md. Medical Sys Corp.*) vs allowing and distancing state based on testatory intent where gender-based (and worry about reverse effect on women). *Estate of Wilson.*

## FIDUCIARY DUTIES

### • (a) GENERALLY

- **Rest. 3d Sec 5** – Not like officer/director or bailee. PR takes legal title (unlike bailee, just taking physical possession).
- **UTC 201 – [Role of the Court] (a)** The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law. **(b)** A trust is not subject to continuing judicial supervision unless ordered by the court. **(c)** A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.
  - Legislation usually requires qualification if testamentary trustee OR where minor beneficiaries.
- **UTC 103(13) – “Qualified beneficiary” means** a beneficiary who, on the date the beneficiary's qualification is determined: **(A)** is a distributee or permissible distributee of trust income or principal; **(B)** would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph **(A)** terminated on that date without causing the trust to terminate; or **(C)** would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
  - **i.e. immediate beneficiaries and first-tier remaindermen**, NOT second-tier on forward.
- **Decisions by Trustees**
  - **Common Law:** Unanimous if private, if charitable, unanimous unless majority (if three or more trustees)
  - **UTC 703:** Unanimous if 1-2, majority if 3+
  - **UTC 808** – [May follow directions of settlor contrary to trust]

### • (b) ENUMERATED DUTIES

- **(0) UTC 105(b) – [MANDATORY DUTIES + GOOD FAITH]**
  - **(2)** the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;
  - **(3)** the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
  - **[(8)** the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;]
  - **[(9)** the duty under Section 813(a) to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;]
  - **(10)** the effect of an exculpatory term under Section 1008;
    - **UTC 1008(a) – [Exculpatory Clause generally invalid]** - A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it: (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or (2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.
      - **UTC 1008(b) [Protection from exculpatory clause]** An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.
      - **WAIVES LIABILITY EXCEPT FOR BAD FAITH.** *Matter of Green*
      - **UTC 1009** – [Beneficiaries may consent/release to breach]
      - **UTC 808(a)** – [Settlor may ratify breach IF power to revoke]
  - **“Bad Faith” (esp. in Loyalty context)**
    - **Standard:** “Arbitrary, reckless, indifferent, or intentional disregard of the interests of the [beneficiaries].” *Commercial Union Ins. Co v. Liberty Mutual* (cited in *Estate of Green*).
- **(i) Duty to Inform and Account**
  - **Priority of Accounting:** Testamentary Trust (required to account to court) > Irrevocable Trust (due to vested nature > Revocable Trust (no notice requirement)
  - **UTC 813(a)** – “A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a[ny] beneficiary's request for information related to the administration of the trust.”
    - **(b) [Notification re: creation of trust, inc. Full trust instrument on demand]**
    - **(c) [Regular Reports]** A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.
    - **(d) [Waiver may be given and taken back]** A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.
  - **UTC 810** – [Recordkeeping Requirements]
  - **UTC 814** – [ Numerous notice/info requirements]

- **UTC 814(b)(2)-(3)** – [Duty to respond to requests for info reasonably related to beneficiary’s interest]
  - **UTC 814(b)(8)** - [Must notify beneficiaries of irrevocable trust of “existence of trust, of the identity of the trustee, and of their right to request the trustee’s reports.”]
- **(ii) Duty of Loyalty**
- **(0) UTC 802**
    - **(a) A trustee shall administer the trust solely in the interests of the beneficiaries.**
    - **(b)** ... a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee’s own personal account or which is otherwise affected by a conflict between the trustee’s fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless: **(1)** the transaction was authorized by the terms of the trust; **(2)** the transaction was approved by the court; **(3)** the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005; **(4)** the beneficiary consented to the trustee’s conduct, ratified the transaction, or released the trustee in compliance with Section 1009; or **(5)** the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.
    - **(c) [Also prohibited if:]** **(1)** the trustee’s spouse; **(2)** the trustee’s descendants, siblings, parents, or their spouses; **(3)** an agent or attorney of the trustee; or **(4)** a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee’s best judgment.
    - **(d)** A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.
    - **(e) [Theft of opportunity]** A transaction not concerning trust property in which the trustee engages in the trustee’s individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.
    - **(f) [Investment OK** even if getting compensated from company if meets prudent investor rule]
    - **(g) [Must use stock voting rights, etc in best interest of trust]**
    - **(h)** This section does not preclude the following transactions, if fair to the beneficiaries: **(1)** an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee; **(2)** payment of reasonable compensation to the trustee; **(3)** a transaction between a trust and another trust, decedent’s estate, or [conservatorship] of which the trustee is a fiduciary or in which a beneficiary has an interest; **(4)** a deposit of trust money in a regulated financial-service institution operated by the trustee; or **(5)** an advance by the trustee of money for the protection of the trust.
    - **(i)** The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.
  - **(a) Duty to Obtain Highest Possible Price (subset of bad faith in *Green*)**
    - **(1) Must inform beneficiaries and trustees re: sale.** *Allard.*
    - **(2) Must Acquire highest possible \$**
      - **(A) Fair Market Value** – Per appraisals OR testing the market.
      - **(B) Market the Property** – Evaluation of work put into marketing, use of public services, etc.
      - **(C) Adequacy of Price** – Procedure focused, not normative or hindsight – focuses on bidding, who paid, etc.
  - **(b) “SELF-DEALING”**
    - **ONLY REMAINING “NO FURTHER LOOK” BASIS UNDER UTC.**
    - **Includes indirect self-dealing** with spouse, law firm, etc. Reflected in UTC 802.
- **(iii) Duty to Segregate/Earmark**
- **UTC 810(b) – [NO COMINGLING]**
    - **Comingling = instant breach of fiduciary duty.**
    - **UTC 810(c)** – [Duty to **earmark instead of segregate if not readily segregated** – generally includes re-titling bonds, etc]
      - **Common Law:** Prima facie vio (No further inquiry)
      - **UTC: Inquiry**
  - **No-further-inquiry Rule** – Where self-dealing, no further inquiry, may immediately set aside.
- **(iv) Duty of Prudence (Prudent Investor Rule)**
- **PRESUMED DUTY TO INVEST.**
  - **Old:** “Prudent Man rule” explicitly rejecting “speculation,” creating a *de facto* prohibition re: investment in equity securities and the like, allowing only government and (later) AAA bonds. All investment evaluated individually, meaning independent of needs of beneficiaries or rest of portfolio. Slow shift to allow “Nifty 50” equity securities pushes towards lenience.
  - **Generally**

- **UTC 804** – “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”
    - **UTC 809** – “A trustee shall take reasonable steps to take control of and protect the trust property.”
    - **Modern Portfolio Theory** – Dominant theory under Uniform Prudent Investor Act. Hypothesizes (1) Market risk and (2) Firm-specific (or non-market) risk, emphasizing diversification, etc.
      - **MPT Changes:** (1) Standard of prudence via entire portfolio, (2) Fiduciary’s central consideration is investing between risk and return, (3) all categorical restrictions abrogated, (4) diversification required, (5) delegation prohibition reversed – may delegate.
      - **Thus:** (1) Avoid risk through diversification and (2) Pick investments within categories carefully.
    - **General penumbral duty to diversify.** *Estate of Janes.*
    - “Morals investing” generally discouraged. Langbein & Posner article.
  - **Delegation**
    - **UTC 807**
      - **(a)** A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in: (1) selecting an agent; (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) periodically reviewing the agent’s actions in order to monitor the agent’s performance and compliance with the terms of the delegation.
      - **(b)** In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. [...]
  - **Remedy:** Market Loss (if assets sold and tied to market index) (Restatement), vs Lost Capital (sale then vs sale now)
- **(v) Duty of Impartiality**
  - **UTC 803** – “If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests.”
  - **Extends to sale of unproductive assets, *Dennis v. RI Hospital Trust Nat’l Bank*, and distinguishing between “Income” and “Principal.” *Estate of Bixby.***
  - Some allowance for discrimination between income beneficiaries and remaindermen where major profit savings? *Estate of Bixby*; accord Uniform Principal and Income Act 104(a).
  - **Uniform Principal and Income Act** – [Sets out various rules for categorizing either]
- **(vi) Waiver**
  - **May be implied.** *Estate of Jane*
  - **Ratification must be explicit.**
    - **UTC 808(a)** – [Settlor may ratify breach IF power to revoke]
- **(vii) Remedy**
  - **UTC 1002(a)** – [Trustee liable for greater of (1) restoration or (2) profit realized]