Trusts & Wills Outline

1. Introduction
   1. Definitions
      1. Right of alienation
         1. The right to pass on property when you die
      2. Right of testation
         1. The right to decide who gets your property when you die
         2. Contrary to primogeniture
            1. First born son got everything
         3. Not absolute: spouse and children are protected
      3. Descent
         1. Property passing by law
      4. Devise
         1. Property passing by will
      5. Escheat
         1. Property passes to the state
      6. Taking
         1. Government takes private property in fee simple for just compensation
      7. Regulation
         1. Government requires a private party to do something with his property
      8. Abrogation
         1. Complete elimination
   2. Power to transmit property at death
      1. Constitutional issue: taking vs. regulation
         1. Takings require compensation, but regulations do not
         2. Three part test
            1. Economic impact of the law
            2. Interference with investment-backed expectations
            3. Character of the governmental action
         3. *Hodel v. Irving*
            1. Government cannot abrogate one’s rights of alienation and testation with just compensation
      2. Restrictions on passing property
         1. The testator’s intent is given effect to the maximum extent allowed by law
         2. Prohibited restrictions
            1. Spousal rights
            2. Creditors’ rights
            3. \*Unreasonable restraints on alienation or marriage
            4. \*Promoting separation/divorce
            5. Racial or categorical restrictions
            6. Encouraging illegal activities
            7. Rules against perpetuities and accumulations
         3. Partial restraints of marriage imposing reasonable restrictions are valid and do not violate public policy
            1. A restraint is unreasonable if a permissible marriage is not likely to occur
            2. This is a question of fact under the circumstances of the particular case
   3. Transfer of decedent’s estate
      1. Probate transfer
         1. Functions
            1. Evidence of transfer of title
            2. Protects creditors
            3. Distributes decedent’s property
         2. Terminology
            1. Personal representative to carry out the decedent’s affairs

Executor

Will names the person

Must give bond unless the will waives the requirement

Administrator

Will does not name the person or named person cannot, so the court names one

Must give bond

* + - * 1. Testate

Devise

Give real property

Bequeath

Give personal property

* + - * 1. Intestate

Descends to heirs

Real property

Distributed to next-of-kin

Personal property

* + - 1. Procedure
         1. A person with a pecuniary interest in the estate starts it
         2. Petition court to probate the will or initiate intestate succession
         3. Court sets a date and notifies all potential heirs and named gift receivers
         4. Will is probated in jurisdiction where the decedent was domiciled at death

Real property located in another jurisdiction is ancillary jurisdiction

Court in that jurisdiction uses that jurisdiction’s law

In CA: before a regular superior court

* + - * 1. Court names personal representative
        2. Personal representative gives notice to creditors
        3. Formal vs. informal

Formal

Litigated judicial determination after notice to interested parties

Informal

Personal representative administers the estate w/o going back to court

Requires notice to heirs, who may object…results in formal probate

* + - * 1. Barring creditors

Short term

Creditors must file claims within a period of time after probate begins

Usually 2-4 months

Must give creditors actual notice; publication is not enough

Long term

Starts immediately at death for 1-2 years

Creditors are barred if claims are not filed w/in this time no matter what

* + - * 1. Closing the estate

Judicial approval is required to relieve the representative from liability

* + 1. Universal succession
       1. Europe
          1. Heirs step into decedent’s shoes at time of death
          2. Take all titles, assume all liabilities
       2. CA
          1. Property passing to surviving spouse by will/intestacy is not subject to administration unless the surviving spouse wants it to be
          2. If not, the surviving spouse takes title and assumes personal liability
    2. Contests/challenges to a will
       1. Will is admitted to probate, and a party challenges all or part of it
       2. Within the statute of limitation after court gives notice (usually 120 days)
       3. By a party with a pecuniary interest
          1. Better off monetarily if the will is struck down or
          2. Worse off monetarily if the will is probated
  1. Professional responsibility (decided by court of general jurisdiction)
     1. negligence
        1. Duty/breach
           1. Attorney must draft a valid will that carries out the testators wishes as expressed to the lawyer

Not necessarily the actual wishes

If attorney sees an ambiguity, he MUST ask for clarification

* + - * 1. Duty extends to any foreseeable plaintiff

Intended and actual beneficiaries

* + - 1. Causation
      2. Damage
    1. Breach of contract
       1. Problem: there is no privity of contract b/w attorney and beneficiaries
       2. Third party beneficiary theory
          1. If a foreseeable third party beneficiary can prove he is an intended beneficiary, he may sue the attorney

1. Intestate Succession
   1. If you die without a will, the laws of intestacy dictate who gets your property
      1. Issue
         1. Those to whom you have contributed biological material
      2. Ancestors
         1. Those who have contributed biological material to you
   2. Marital property in general
      1. Community property
         1. Property acquired by a married person during the marriage
         2. California Probate Code 100
            1. Upon the death of a married person, ½ of the community property belongs to the surviving spouse and the other half belongs to the decedent
            2. Decedent may will away his ½ interest in the community property during his life
      2. Separate property
         1. Everything you earn before marriage or you acquire through gift/inheritance
            1. As long as it is kept separate from community property
      3. California Probate Code 101
         1. Upon the death of a married person domiciled in CA, ½ of the decedent’s quasi community property belongs to the surviving spouse and ½ belongs to the decedent
            1. Quasi community property

Personal property obtained outside of CA that would have been community property if obtained in CA

* + - * 1. Real property outside CA

Probated according to the law of the state in which it sits

* 1. CA Intestate succession
     1. California Probate Code 6400
        1. Any part of a decedent’s estate not disposed of by will passes to his heirs according to the California Probate Code
           1. No will, invalid will, assets not disposed of in any way
     2. California Probate Code 6401 (intestate share passing to surviving spouse)
        1. (a)
           1. Surviving spouse’s intestate share of community property is ½ of the community property that belongs to the decedent under California Probate Code 100
        2. (b)
           1. Surviving spouse’s intestate share of quasi-community property is ½ of the quasi-community property that belongs to the decedent under California Probate Code 101
        3. (c)
           1. Surviving spouse’s intestate share of separate property is

The entire intestate estate if

decedent had no surviving issue, parent, sibling, or issue of deceased sibling

½ of the intestate estate if

Decedent leaves one child or the issue of one deceased child

Decedent leaves no issue but leaves a parent/s or the issue of a surviving parent

1/3 of the intestate estate if

Decedent leaves more than one child

Decedent leaves one child and the issue of one or more deceased children

Decedent leaves issue of two or more deceased children

* + 1. California Probate Code 6402 (intestate share not passing to surviving spouse OR the entire intestate estate if there is no spouse)
       1. (a)
          1. Decedent’s issue takes equally if they are all of the same degree of kinship to the decedent
          2. If of unequal degree, the more remote issue take according to California Probate Code 240… as such: the property is divided into as many equal shares as there are

living members of the nearest generation of issue AND

each get one share

deceased members of that generation who leave issue

each deceased member’s share is divided equally among his living issue

* + - 1. (b)
         1. If no issue, it goes to decedent’s parent or parents equally
      2. (c)
         1. If no issue or parent, it goes to the issue of the parents

If all of the same degree of kinship to the decedent, the issue take equally

If of unequal degree, those of more remote degree take the same as California Probate Code 240

* + - 1. (d)
         1. If no issue, parent, or issue of parent, it goes to grandparent or grandparents equally
         2. If no grandparents, it goes to the issue of the grandparents

Each taking equally if all of the same degree of kinship to the decedent

If of unequal degree, those of more remote degree take the same as California Probate Code 240

* + - 1. (e)
         1. If no issue, parent, issue of parent, grandparent, or issue of grandparent, it goes to a pre-deceased spouse’s issue

Each taking equally if all of the same degree of kinship to the pre-deceased spouse

If of unequal degree, those of more remote degree take the same as California Probate Code 240

* + - 1. (f)
         1. If no issue, parent, issue of parent, grandparent, issue of grandparent, or issue of a pre-deceased spouse, it goes to the “next of kin” equally

Closest blood relatives

* + - * 1. Where two or more collateral kindred in equal degree each claim through different ancestors, those who claim through the nearest ancestor are preferred
      1. (g)
         1. If no next of kin and no issue of a pre-deceased spouse, it goes to the pre-deceased spouse’s parents equally
         2. If no pre-deceased spouse’s parents, it goes to the issue of those parents

Each take equally if all of the same degree of kinship to the pre-deceased spouse

If of unequal degree, those of more remote degree take the same as California Probate Code 240

* 1. Meaning of “survive” and simultaneous death
     1. At common law
        1. Irreversible cessation of circulatory and respiratory functions
     2. Standard for “death” on life support
        1. Requires total brain death
           1. Not responsive to painful stimuli
           2. No spontaneous movement/breathing for an hour
           3. No blinking, swallowing and fixed/dilated pupils
           4. Flat EEG twice in 24 hours
           5. Absence of intoxication/hypothermia
     3. Rules of intestacy
        1. A person succeeds to decedent’s property only if he survives the decedent for an instant of time
        2. 120 hours by clear and convincing evidence
        3. Burden on party whose claim depends on survivorship
     4. California Probate Code 220
        1. If order of death is relevant, and it cannot be established that one survived the other by clear and convincing evidence, each person’s property is distributed as though that person had survived the other
  2. Shares of descendants
     1. In general
        1. A pre-deceased child’s descendents divide the pre-deceased child’s share among themselves
     2. Per capita
        1. “to my children, per capita”
           1. Equal share to each living person fitting the description
           2. Nothing to grandchildren
        2. “to my issue, per capita”
           1. Equal share to each living person fitting the description
           2. Children’s share = great grandchildren’s share
     3. Classical/English per stirpes
        1. Divide the estate into one share for each branch w/ living descendants
        2. If the person is alive, he keeps his share
        3. If the person is dead, his share drops down to the next generation with living people. These living people divide the share among themselves
     4. Modern per stirpes
        1. DEFAULT (California Probate Code 240)
        2. Drop to the first level where somebody is alive
        3. Give one share to each living person and each dead person with issue on that level
        4. Drop the share of each dead person with issue to the next generation where somebody is alive and divide the share among that level
     5. Per capita at each generation
        1. (Uniform Probate Code)
        2. Drop to the first level where somebody is alive
        3. Give one share to each living person
        4. Combine the share of each dead person with issue on that level into a pot
        5. Drop the pot down to the next level where somebody is alive
        6. Give one share of the pot to each living person and each dead person with issue on that level
  3. Adoption
     1. Adopted Children as heirs
        1. Adoption
           1. creates a legal link b/w adoptive parents and child

both may inherit from each other

* + - * 1. severs the legal link b/w biological parents and child
        2. EXCEPTION

If a child’s biological parent remarries and the new spouse adopts the child, there is still a legal link b/w the child and the biological parent

Thus…

an adopted child may inherit from natural parent and adoptive parent

BUT an adopted child may not inherit from the other biological parent

* + - * 1. UPC

A child adopted by a biological parent’s spouse may inherit from

his biological parent whose spouse adopted him AND

his other biological parent, but only for him to inherit from this other biological parent

The other biological parent can NOT inherit from him

* + - * 1. Misc

A child’s biological parents die, and he is adopted by relatives

The child inherits from the biological parents b/c the will applies at death, which is BEFORE the adoption

After the adoption, the child will not be able to inherit from the biological family THROUGH his deceased biological parents

BUT IN CA:

The child may inherit from his biological family through his deceased biological parents

His biological family may not inherit from him, though

* + - 1. Adopted Children of Divorced Parents as heirs
         1. Same situation as if one of the parents dies
    1. Adopted Adults
       1. This is generally allowed
          1. A husband may adopt his wife to make her his issue for the purposes of intestate succession
       2. BUT
          1. testator’s intent is key when he uses words like “issue” or “descendants”
          2. Did the testator intend for adopted children to inherit? Adopted adults? Adopted spouses?
          3. If not, the adopted adult/spouse may not inherit this way
    2. Undoing a parent/child relationship
       1. a parent child relationship cannot be undone…you cannot “un-adopt” somebody
       2. purpose of adoption is to make adopted children like biological children, and you can’t “un-have” biological children
       3. If it is possible, it is incredibly difficult
    3. Equitable Adoption
       1. Occurs when a child is not legally adopted, but is treated as a child
       2. Requirements, under a contractual theory
          1. Must have an agreement b/w biological and adoptive parents

Can be implied

* + - * 1. Biological parents must give up custody of child
        2. Child must live in the adoptive parents’ home
        3. Adoptive parents must take the child into their home and treat him as their own
        4. Adoptive parents must die intestate
      1. Equitably adopted child may inherit from/through equitably adopted parents, BUT equitably adopted parents CANNOT inherit from/through equitably adopted child
  1. Illegitimate Children
     1. Common Law
        1. Filius Nullius (child of no one)
        2. Illegitimate children could not inherit from either biological parent, and biological parents could not inherit from illegitimate children
     2. Modern Law
        1. Inheriting from biological mother
           1. All jurisdictions allow an illegitimate child to inherit from his biological mother
           2. Cannot require paternity test
        2. Inheriting from biological father
           1. Depends on jurisdiction
           2. State statutes discriminating against illegitimate children must meet intermediate scrutiny

Substantial justification that serves an important state interest

Can require reliable proof of paternity

subsequent marriage of biological parents

biological father’s acknowledgment

adjudication during biological father’s life

clear and convincing evidence after biological father’s death

* 1. Post-Humous children
     1. Kids conceived while father is alive, but are born after he dies
        1. Common Law
           1. If conceived while father is alive, the child is treated as a biological child of the deceased father
        2. Common Law Presumption (CA rule)
           1. Such a child born w/in 300 days of conception is presumed to be the deceased father’s child
     2. Kids conceived after father’s death with reproductive technology
        1. In general, courts consider
           1. Best interest of child
           2. State interest

reliable proof of paternity

* + - * 1. Reproductive rights of genetic parents

did deceased father consent to use of his semen

* + - 1. In CA
         1. Such a child is deemed to have been born in the deceased father’s lifetime if

deceased father consented in writing

notice is given to executor/trustee of estate w/in 4 months of the possibility of post-humous conception

child was in utero w/in two years of decedent’s death

Child is not a clone

* 1. Transfers to Minors
     1. Minors can own property, but they cannot manage it
     2. If both parents die, court names or appoints a guardian
        1. usually one person
        2. possible to have a guardian of the minor’s person, and another guardian of the minor’s property
        3. Guardians must make reports to the court
     3. If a guardian is not desirable b/c of the court supervision
        1. Make a Custodian under Uniform Transfer to Minors Act
        2. may use the property for the minor’s benefit w/o court supervision
     4. Can also use a trust
        1. place minor’s property in a trust with great flexibility given to trustee
        2. more expensive
  2. Bars to succession
     1. Homicide
        1. an heir should not profit from his own wrongdoing by killing the testator
           1. If the killing was intentional

Intestate succession with a constructive trust

Property passes to killer and held in a constructive trust for the other heirs

* + - * 1. If the killing was unintentional

The killer receives the inheritance

* + - 1. Disqualification
         1. Court determines that the killer predeceased the deceased
         2. Property never goes to killer…passes to killer’s next of kin
    1. Disclaimer
       1. An heir can elect to not inherit property
          1. Tax purposes, not worth the trouble, etc
       2. requirements
          1. disclaimer must be in writing
          2. file it in probate court
       3. Result is…the property goes to disclaimer’s next of kin

1. Challenging A Will
   1. In CA, only judges hear will contests
      1. NOT juries
   2. Standing
      1. Must have a pecuniary interest in the outcome of the case
      2. Must be harmed by the will if valid…or must benefit if the will is invalidated
   3. Capacity
      1. In general
         1. A person over the age of 18 who is of sound mind and not suffering from a mental disorder can make a will
      2. Sound Mind
         1. A person is NOT competent to make a will if
            1. the person lacks the mental capacity to

Understand the nature of his testamentary act

Understand and remember the nature and situation of his property OR

Understand and remember his relations to relatives whose interests are affected by the will

* + - 1. If the testator is incompetent, the **entire** will is invalid
      2. There is a presumption of capacity
         1. Burden is on the challenger to show incapacity through one of the three factors
      3. Being weird or eccentric does not render you incompetent
      4. Attorney’s professional responsibilities
         1. duty not to draft a will if he suspects his client lacks testamentary capacity
         2. Lawyer should ask relevant questions as to testamentary capacity on videotape and/or get a professional diagnosis to prevent a will contest
    1. Mental Disorder
       1. A person is NOT competent to make a will if
          1. the person suffers from a mental disorder with hallucinations/delusions that CAUSE him to devise his property in a way that he otherwise would not
       2. MUST have some sort of delusion/hallucination
          1. not the same as in criminal law
          2. Factors

Would a reasonable person in testator’s position believe it to be true?

Would a reasonable person change his mind if confronted with contrary evidence?

* + - 1. Only the **portion** of the will that is CAUSED by the insane delusion is invalid
         1. Actual causation must be shown by a preponderance of the evidence
         2. able to strike a single clause caused by a delusion/hallucination in an otherwise valid will executed by a testator of sound mind
         3. must show that there is not a rational reason for the testator to dispose of his property in the way that he did
      2. Delusion
         1. a fixed false belief

You sincerely believe a falsity to be true, and it is impossible to convince you otherwise

* + - * 1. It’s possible to be delusional about a single thing

i.e. being otherwise normal, but believing Obama is the anti-Christ

* 1. Undue Influence
     1. Factors for circumstantial evidence of undue influence
        1. Susceptibility of the testator
        2. Opportunity of the wrongdoer
        3. Disposition of the wrongdoer to exert undue influence
        4. Causation of the testator to dispose of his estate in a way that he otherwise would not
     2. Influence: what is undue?
        1. it is fine to persuade a testator to include you in his will
        2. But when another person’s plan takes the place of the testator’s plan, it becomes undue
     3. Burden of proof
        1. On the challenging party to show undue influence
        2. BUT
           1. If there is a confidential relationship and the influencer participated in the drafting of the will, the burden of proof switches to the non-challenging influencer
        3. Rebuttal
           1. Any reasonable way to show there was no undue influence

Includes presence of an independent attorney

* + 1. Written explanations for how the testator devises her estate
       1. intended to show that undue influence is absent
       2. not effective…may even provide additional evidence of undue influence
    2. No-contest clauses (in terrorem)
       1. Provisions that eliminate a gift to a beneficiary who challenges the will
       2. These are ONLY enforceable if the challenger lacked probable cause to contest the will
       3. These are only effective when the beneficiary has something to lose
    3. Gifts to attorneys
       1. Model Rules of Professional Conduct
          1. An attorney cannot draft a will that gives him a substantial gift UNLESS he is related to the testator
       2. CPC
          1. A donative transfer to an attorney who drafts the will is invalid UNLESS he is related by blood or marriage to the testator
    4. On the exam
       1. Go through factors
       2. Conclude whether it is enough
       3. Determine if there is a confidential relationship
       4. Shift burden of proof
       5. Go through factors
       6. Conclude
    5. Possible remedy
       1. constructive trust
  1. Fraud
     1. Introduction
        1. Wills executed as a result of fraud are invalid
        2. Possible to invalidate individual provisions if you can isolate those that were caused by fraud
        3. Constructive trust is a possible remedy
     2. Elements
        1. misrepresentation to the testator
           1. includes concealment
        2. intent to deceive
        3. purpose of influencing the disposition
        4. must have CAUSED the testator to dispose of his property in a way he otherwise would not
  2. Duress
     1. Ridiculous coercive behavior usually involving violence or threats of violence
     2. Possible remedy
        1. Constructive Trust
  3. Tortious Interference with Expectancy
     1. Civil cause of action to consider if none of the other contests work
     2. Against the person—not the person—with punitive damages available

1. Execution of Wills
   1. Formalities
      1. Justifications for Formalities
         1. Ritual function
            1. tells everyone it is legally binding/important
         2. Evidentiary function
            1. produces good evidence of the testator’s intent
         3. Protective function
            1. protects against fraud, undue influence, etc
         4. Channeling function
            1. allows testator to channel his desires in a way that is extremely likely to carry out those intentions
      2. Requirements
         1. Wills must be in writing
            1. Ink on paper
         2. Wills must be signed by one of the following
            1. The testator
            2. Another person in the testator’s name in his presence and at his direction
            3. A conservator for a minor
         3. Wills must be witnessed by two people who
            1. Are present when the testator signs/acknowledges the will/signature
            2. Understand it is the testator’s will
            3. Also sign the will and see the other sign it
            4. Also sign the attestation clause

Certifies that the formalities were followed

* + - 1. Witnesses must not be interested
         1. Any person competent to be a witness may be a witness to the will
         2. A will is NOT invalid if an interested witness signs it
         3. Unless there are at least two other disinterested, signing witnesses

There is a presumption that it was procured by undue influence, fraud, or duress

Interested witness must prove by preponderance of the evidence that there was not any

If they do, they get the gift

If they do not, they get what they were promised in the will, but NO more than their intestate share

* + 1. Validity of Execution
       1. CA will recognize a will as valid if the execution complies with
          1. CA law
          2. The law at the time of the execution in the place it was executed
       2. Most jurisdictions have statutes of this nature
    2. Method of execution
       1. Ensure pages are permanently fastened and numbered
       2. Ensure testator has read and understands the will and its contents
       3. Ensure witnesses see testator sign/acknowledge
       4. Ensure witnesses sign the will and the attestation clause
       5. Optional self-proving affidavit
          1. Notarized, under oath
          2. Witness will no longer have to appear in court
          3. Creates a very strong presumption it is valid
  1. Mistakes and Curative Doctrines
     1. Reciprocal wills
        1. H and W often have mutual, identical wills
        2. If either signs the wrong one, the court will probably reform the will to make it the signor’s
           1. i.e. change the names each time they appear in the will
           2. This is the trend, but courts use to very strictly enforce the requirement that the testator sign his own will
     2. Curative Doctrines
        1. Traditionally
           1. Formality requirements were very strictly enforced
        2. Substantial Compliance
           1. A will with a formal defect will nonetheless be probated if

it expresses the decedent’s testamentary intent and

substantially complies with the formalities

* + - 1. Harmless Error/Dispensing power
         1. UPC Rule
         2. The court may dispense with a formality completely if there is clear and convincing evidence that the testator intended it to be his will
      2. CPC 6110
         1. CA RULE!
         2. If a will does not adhere to the witness requirements, it will be treated as if it does if there is clear and convincing evidence that the testator signed it with the intent that it be his will
    1. On the exam
       1. Start with strict formality compliance
       2. If there is a problem, look to substantial compliance
       3. If there is still a problem with witnesses’ signatures, look to 6110
  1. Holographic Wills
     1. Wills that do not comply with strict formalities are valid whether or not witnessed if
        1. The testator handwrites the material provisions
           1. A provision that “does something”

i.e. naming an executor, bequeathing property, etc

* + - 1. The testator signs it by hand
         1. Can be signed any way other documents are signed

i.e. “father”

* + - 1. There must be testamentary intent (intend for it to be his will)
         1. Mentioning death
         2. Giving things away
         3. Anything making it important
    1. In CA
       1. it does not have to be dated unless
          1. it is inconsistent with a previous will
          2. there is evidence that the testator lacked capacity at some point when it may have been executed
       2. Testamentary intent can be determined by handwriting or as part of a commercially printed will form
          1. Otherwise, you basically ignore typewritten provisions
       3. Extrinsic evidence is admissible to determine whether a document constitutes a will or the meaning of an unclear provision
  1. Conditional Wills
     1. Conditional language in a will does not mean it may only be probated if the stated event happens
        1. i.e. “If I don’t come back from my journey…”
     2. It may be probated upon death for any cause
     3. If a testator truly wants it to be conditional, he must be very unequivocal about it

1. Revocation of Wills
   1. Acts constituting revocation
      1. Subsequent wills revoking a prior will expressly or by inconsistency
         1. Expressly
            1. Add a clause revoking all previous wills
         2. Inconsistency
            1. If a subsequent will is completely different from the first, it revokes the first will completely
            2. If a subsequent will is partly inconsistent from the first, the first will remains in effect and the subsequent will is treated as a codicil amending the inconsistent provision
      2. Physical Act
         1. Either the testator or another person in his presence and at his direction must
         2. Burn, tear, cancel, obliterate, destroy, or throw it away
         3. With the intent and purpose to revoke the will
      3. Presumption
         1. A will is presumed to have been destroyed if there is evidence that the testator had it in her possession before death, but it cannot be found after she dies
         2. Rebuttal
            1. May/may not require clear and convincing evidence
            2. Very suspicious situation

When an heir who would benefit from intestate succession claims that he cannot find the will

This probably would rebut the presumption

* + - 1. If properly rebutted, the will is treated as lost
         1. Extrinsic evidence is admissible to prove its contents
    1. Partial Revocation
       1. Express partial revocation
          1. Every jurisdiction allows this
       2. Partial revocation by physical act (crossing out parts of a will)
          1. Allowed in CA (EXAM)
          2. Many jurisdictions do not allow it b/c of the high risk of fraud
  1. Duplicates
     1. An original will executed with a duplicate is revoked if either the testator or another person in his presence and at his direction
     2. Burns, tears, cancels, obliterates, destroys, or throws away the duplicate
     3. With the intent and purpose to revoke the duplicate
     4. Photocopies are NOT duplicates!
        1. revoking a photocopy does not revoke the original
  2. Codicils
     1. In general
        1. a codicil is an amendment to a will
        2. You cannot have a codicil without an underlying will
        3. If it is by itself, it is basically a will
     2. Revoking a codicil does NOT revoke the underlying will
     3. BUT revoking the underlying will revokes the codicil
  3. Cancelling
     1. Must actually cross out or putting lines through a provision to cancel it
     2. Writing “Null and Void” on the back is NOT enough
  4. Dependent Relative Revocation
     1. Requirements
        1. Testator revokes his will
        2. under a mistaken belief of law/fact that a subsequent will is valid
        3. And he would not have revoked the first will if he had known the truth
     2. This renders the revocation ineffective
     3. It isn’t what the testator wants (the second will), but it is better than having no will at all
        1. ASSUMING the testator would not rather die intestate
  5. Revival
     1. Situation
        1. Testator executes a subsequent will expressly/by inconsistency revoking the previous will
        2. Testator later revokes the subsequent will intending to revive the previous will
     2. CA Approach
        1. the previous will is revoked unless there is evidence that the Testator intended it to take effect as executed
  6. Revocation by operation of law/change in circumstances
     1. Divorce
        1. At divorce, provisions in a testator’s will for the ex-spouse are revoked
           1. Includes gifts, power of appointment, and naming of executor/trustee/etc
           2. Treated as if the ex-spouse failed to survive the testator
        2. Revival occurs when the testator remarries the ex-spouse
     2. Marriage: Pretermitted spouses
        1. If a person marries AFTER he makes his will, but fails to change his will in favor of the new spouse
        2. The omitted spouse gets the testator’s intestate share
           1. Testator’s ½ interest in CP
           2. A portion of testator’s SP, but not more than ½ of it
        3. UNLESS
           1. The will evidences that the omission was intentional OR
           2. There is evidence that the omitted spouse was provided for in a transfer outside of the will with the intent that it be in lieu of a testamentary gift OR
           3. The omitted spouse waived her right to share in the estate
     3. Children: Pretermitted children
        1. If a child is born/adopted AFTER the parent makes his will, but fails to change his will in favor of the new child
        2. The omitted child gets what he would have if the parent had died intestate
        3. UNLESS
           1. The will evidences that the omission was intentional OR
           2. The testator had one or more children and gave the entire estate to his wife OR
           3. There is evidence that the omitted child was provided for in a transfer outside of the will with the intent that it be in lieu of a testamentary gift

1. Components of a Will
   1. Integration
      1. All papers present at the time of execution intended to be part of the will are integrated into the will
      2. Fastening them together is not necessary, but it is prudent
   2. Republication by codicil
      1. a will is treated as if it were executed when its most recent codicil was executed
         1. unless doing so is contrary to testator’s intent
      2. A validly executed codicil is able to cure defects in the original will!!
         1. Must be clear that the two documents are closely related…that the second document is meant to be a codicil to the will
      3. Codicils require same execution formalities as a will
   3. Incorporation by Reference
      1. Writings in existence when a will is executed may be incorporated by reference if
         1. the will manifests intent to do so and
         2. describes the writing sufficiently to permit its identification
      2. Courts have been lenient on the description requirement
   4. Acts of Independent Legal Significance
      1. If a testator changes his will by engaging in some activity that was not intended to be testamentary, the change is effective
      2. Essentially, a non-testamentary act can act as a codicil
      3. i.e.
         1. a will leaves the residue to his “children.” At the time, he was two children. If he has another child, the residue will be left to all three—even though he only had two at the time it was executed
         2. a will leaving his “car” to his son. At the time, he had a Honda. If he trades in the Honda for a Ferrari, the son gets the Ferrari—even though he had a much less-valuable Honda at the time
2. Contracts Relating to Wills
   1. In general
      1. Contracts relating to wills on/after 1/1/1985 can only be established by
         1. provisions of a will stating the contract’s material provisions
         2. express reference in a will to the contract and extrinsic evidence proving its terms
         3. a writing signed by the testator evidencing the contract
      2. a joint/mutual will does not have a presumption of a contract not to revoke
   2. To Make a Will
      1. A promise to include a person in your will in consideration for services is a valid contract
         1. requires offer/acceptance & consideration
         2. do NOT require will formalities b/c it is under contracts law
      2. Remedy for breach
         1. if testator is still alive, the promisee can sue him and get specific performance
         2. if testator is dead, the promisee is entitled to a constructive trust
   3. Not to Revoke a Will
      1. Issues often arise in mutual wills
         1. H and W each execute their own will, but they are identical
      2. If H and W have mutual wills with a valid contract not to revoke, W dies, and H remarries
         1. does the re-marriage and pretermitted spouse rule trump the contract?
            1. Majority rule

Third-party beneficiaries prevail over new spouse

* + - * 1. Minority rule

Pretermitted spouse prevails over third-party beneficiaries

Although it undermines the contract, there is a strong public policy to encourage marriage

1. Will Substitutes (NOT COMPLETELY CLEAR)
   1. Introduction
      1. Major trend over last 20 years
      2. Advantages
         1. easier and more convenient
         2. avoids probate
         3. limits estate tax
   2. Revocable Living Trusts
      1. May be done in writing or orally
         1. as long as there are no statute of frauds issues
      2. Unlike wills
         1. trusts only pass property specifically placed in trust
      3. Pros
         1. property management by a fiduciary who is liable if he screws up
         2. keeps property separate and avoids comingling
         3. Reduces estate tax liability
         4. avoids probate
         5. avoids ancillary probate for out of state property
         6. unlike wills, trusts are not public documents
         7. can generally select the law you want to govern
         8. dealing with incompetency
            1. co-trustee can manage the trust
      4. Cons
         1. fees add up quickly
            1. still probably saves money in the long run
         2. creditors can reach a trust as much as they can a will
         3. trusts do not have a short term statute of limitations
      5. Pour Over Wills (Testamentary trusts)
         1. an inter vivos trust that governs all of your assets
         2. an inter vivos trust is set up, and a will devises the residue into this trust upon testator’s death
      6. UTATA
         1. Allows a testator to pour-over assets into a trust with a will—even if the trust is empty at the time the will is executed
         2. allows for informal amending of the trust
         3. At Divorce
            1. Like wills, a divorce revokes any provision in a revocable trust for the ex-spouse if the trust and the pour over will were part of a single-testamentary scheme
            2. The ex-spouse is deemed to have predeceased the settlor
      7. Revoking a trust
         1. can be done in any way that shows an intent to revoke
         2. if the trust specifies the method of revocation, it can only be revoked in that way
         3. common law presumption of revocation for a will in testator’s possession at death that cannot be found has been revoked does NOT apply to trusts
      8. Creditors’ Rights
         1. in general
            1. creditors stand in the settlor’s shoes
            2. if the settlor can reach the trust’s assets, so can the creditors

i.e. revocable living trusts

* + - * 1. if the settlor cannot reach the trust’s assets, neither can the creditors

i.e. irrevocable living trusts

* + - 1. If the settlor dies
         1. Creditors can reach the assets to the extent the settlor would have been able to during his lifetime
         2. Basically, this rule enables creditors to reach assets in a trust that became irrevocable after settlor died
  1. Life Insurance
     1. Whole life insurance
        1. the insured pays a certain sum of money for coverage throughout his entire life
        2. insurance company pays proceeds to the beneficiary upon insured’s death
        3. has a “savings feature”
     2. Term life insurance
        1. the insured pays the insurance company for coverage for a fixed time
        2. insurance company pays proceeds to beneficiary only if the insured dies w/in the term
        3. no “savings feature”
     3. Changing beneficiaries
        1. the insured cannot normally change his policy’s beneficiary by will
        2. must follow the procedure laid out by the policy itself
        3. also applies to POD’s, bank accounts, and most other will substitutes
  2. Pensions
     1. Defined benefit plans
        1. a plan giving the employee a specific amount of money throughout his retirement
        2. common in government/union jobs
        3. usually very little is left at death, so not really any beneficiaries
     2. Defined contribution plans
        1. employee puts a certain amount into his plan each month
        2. employee may withdraw what he puts in plus interest
        3. if you die after retirement w/o receiving all of the proceeds, they can be passed on to beneficiaries
  3. Payable on Death Provisions
     1. Language attached to contract/deed/bank account calling for survivorship
        1. depositor retains lifetime dominion while designating beneficiaries to take on his death
     2. CANNOT be changed with a will
  4. Gifts
     1. May give up to $13,000 to one person per year to avoid tax
  5. Joint Accounts/Tenancies
     1. Joint Tenancies
        1. The donor gives the donee an interest equal to his
        2. the donor loses the power to revoke the transfer
        3. they must act together to transfer the property
     2. Joint Bank Accounts
        1. either cotenant may consume the account
        2. depositor may revoke/alter cotenancy designations as he would beneficiaries for any other will substitute
     3. All avoid probate on death and transfers title to survivor
  6. Planning for Incapacity
     1. Living wills
        1. not really a will, but requires similar formalities
        2. made during lifetime
        3. Lays out under what circumstances you want to be kept alive under life support, and under what circumstances you want them to pull the plug
     2. Durable Power of Attorney
        1. Power of attorney gives somebody else the power to engage in legal actions for you
        2. normally, this stops when you become incompetent, but NOT if it is made durable
        3. This allows another person to make the decision to remain alive or die for you

1. Will Construction
   1. Mistaken/Ambiguous language
      1. Plain meaning rule
         1. Extrinsic evidence may not be used to prove the testator intended a different meaning unless the word/phrase is ambiguous
      2. Patent/Latent ambiguity
         1. Patent
            1. Ambiguity is on the face of the will
            2. Common Law did not allow extrinsic evidence to construe patent ambiguity
         2. Latent
            1. Ambiguity is not on the will’s face, but appears during probate
            2. Common Law did allow extrinsic evidence to construe latent ambiguity
         3. Modern trend
            1. Extrinsic Evidence is allowed to construe any ambiguity
      3. Personal Usage Exception
         1. If the testator had an idiosyncratic way of referring to people, extrinsic evidence may be used to show the testator meant somebody other than whose actual name is in the will
      4. False Demonstratio Doctrine
         1. Courts cannot change the language in the will, but they can cross language out!
         2. When a description of a person/thing has many aspects and not all of them fit any one person/thing, less essential aspects may be rejected if the rest of the description clearly fits
            1. i.e. “19 Southfield Dr,” but testator owns 17 Southfield Dr…cross out “19” to have just “Southfield Dr”…this is enough to identify the property as 17 Southfield Dr
      5. Scrivener’s Error Doctrine
         1. If there is clear and convincing evidence that the scrivener made a mistake
         2. If there is clear and convincing evidence of what the testator’s intent was
         3. Then the court may use extrinsic evidence to correct the mistake
         4. EXAM: use ONLY on ESSAY…NOT on MC
      6. Validity of the will
         1. Extrinsic evidence is admissible to determine whether a will was valid or not
            1. Fraud, undue influence, lack of capacity, improper execution, lack of testamentary intent
   2. Death of Beneficiary before Testator
      1. Lapsing
         1. If a devisee does not survive the testator, it lapses (fails)
      2. Default Rules/Common Law
         1. If s specific/general devise lapses, it falls into the residue
         2. If a residuary devise lapses, the testator’s heirs take by intestacy. If there is more than one residuary devisee, the deceased’s share passes to testator’s heirs, NOT to the other residuary devisees
            1. “no residue of a residue” rule
            2. Almost every jurisdiction has abolished this rule

Thus, deceased residuary legatee’s share is taken by remaining residuary legatees

* + - 1. If the gift is to a class, and one member predeceases the testator, the surviving class members divide the gift
      2. If the devisee is dead at the time the will is executed, it is void
         1. Same default rules apply
    1. Extrinsic Evidence for no-residue-of-a-residue???????????
       1. look at extrinsic evidence to see if text is ambiguous
          1. reasonably susceptible to two or more meanings
       2. If so, admit the extrinsic evidence
       3. Decide the meaning of the language
    2. Anti-Lapse statutes
       1. under certain circumstances, another beneficiary may be substituted for the predeceased beneficiary for specific gifts/residues
       2. CA Rule (CPC 21110)
          1. If a transferee dies before the testator, the deceased transferee’s issue take in his place under section 240
          2. The deceased transferee’s issue do not take if the will expresses a contrary intention or substitute disposition

i.e. “I don’t want anti-lapse to apply” or “to A, but if A predeceases me, to B”

* + - * 1. Transferee means the testator’s kin or his spouse’s kin

But NOT the spouse

* + - 1. Questions to ask
         1. Did the transferee predecease the testator, so the gift is subject to lapse?
         2. What is the transferee’s relationship to the testator?
         3. Does the transferee have issue?
      2. Language of survival
         1. Defeats the anti-lapse statutes
         2. i.e. “To A, if she survives me” = lapse
         3. Expresses a contrary intention
    1. Class Gifts
       1. If a member of a class predeceases the testator, the remaining class members take the deceased member’s share
       2. What is a “class”? Depends if testator was group-minded
          1. Factors

Named as a group or as individuals

Whole or separate shares

Common characteristics

Overall testamentary scheme

* + - * 1. Express class

“brothers,” “siblings,” “uncles,” etc

* + - * 1. Natural class

Reference to a group by their individual names constitutes a natural class

“to Stan, Justin, Rebecca, Matt, and Steven” instead of “my cousins”

* + - * 1. Intended class

Intended class has burden of proof to show the members have a common characteristic that separates them from others

* + 1. EXAM
       1. Will lapse occur?
       2. What happens if not prevented?
          1. Falls into residue
       3. do anti-lapse first
       4. if that doesn’t work, try it as a class
       5. if neither work, the gift lapses
  1. Changes in Property After Will is Executed
     1. Types of gifts
        1. specific
           1. disposition of a specific item of the testator’s property

i.e. a ’55 Chevy

* + - 1. general
         1. testator intends to give a general benefit and not a particular asset

i.e. $10K

* + - 1. demonstrative
         1. testator gives a general gift from a specific source

i.e. $10K from my savings account

* + - 1. residuary
         1. conveys portion of testator’s estate not otherwise given by other parts of the will

i.e. “all of the rest, residue, and remainder of my estate”

* + 1. Ademption by extinction
       1. When a testator gives a specific devise in his will, but the testator sells or gives the property away before he dies
       2. identity theory
          1. if a specifically devised item is not in the testator’s estate, it is extinguished
          2. Ways to get around this rule

Change in substance vs. change in form

changes in from do not result in ademption

i.e. giving “100 shares of tiger stock,” but Lion buys Tiger…beneficiary takes 100 shares of Lion stock

* + - 1. Intent theory
         1. CA RULE

If a specifically devised item is not in the testator’s estate, the beneficiary may be entitled to replacement or FMV of the original item if this is what the testator would have wanted

If the testator intended to extinguish the gift and deprive the beneficiary, it is extinguished

* + - 1. UPC
         1. Gives the devisee

a balance of the unpaid purchase price for a specifically devised gift if the testator sells it

Any unpaid condemnation award for the taking of the property

Unpaid insurance proceeds if the gift is destroyed

Property acquired by the testator intended to replace the specifically devised gift

A pecuniary devise equal to the value of the specifically devised property on the date of disposition if the testator did not mean for it to be extinguished

* + - 1. stock split
         1. situation: a company splits the stock, so 100 shares is now worth 200 shares. The will devises 100 shares. Does the devisee get 100 or 200?
         2. After a stock split, the testator has the same percentage of ownership

Thus, devisee gets 200

* + - 1. stock dividend??????????
         1. Follows the same rule as stock splits
    1. Ademption by satisfaction
       1. when a testator gives the devisee a general/demonstrative gift after executing his will
          1. does this “satisfy” the gift in the will?
       2. CA Rule
          1. The gift is adeemed by satisfaction if

Given during devisee’s lifetime

Testator intended it to satisfy the gift in the will

Some sort of written evidence of his intent to satisfy the gift in the will

* + - 1. Does not apply to specific gifts!
         1. This would be ademption by extinction
    1. Exonerations of liens
       1. when a testator gives a piece of property encumbered by a lien
       2. CL
          1. Devisee takes property free and clear b/c executor pays lien out of residuary estate
       3. CA Rule
          1. The executor does not pay off the lien with the estate
          2. The devisee takes the property subject to the lien
    2. Abatement
       1. When the testator’s estate does not have the property/funds to fulfill the terms of the will
          1. Which gifts are reduced first?
       2. Order of abatement
          1. Residue
          2. General
          3. Specific/demonstrative

Reduced pro rata

1. Trusts
   1. Introduction
      1. Basics of trusts
         1. trust
            1. an arrangement in which a trustee manages property in a fiduciary capacity for one or more beneficiaries
            2. at least some interest must pass to a beneficiary for it to be a trust
            3. Do not last forever b/c of the rule against perpetuities

Interest must vest w/in 21 years

that is, paid to the remainder beneficiaries

* + - 1. settlor
         1. the creator of the trust and person who puts property into it
         2. for revocable living trusts, settlor retains the power to revoke/amend the trust and control right to trust income during his lifetime
      2. Res
         1. Property placed in trust
      3. trustee
         1. settlor gives property to trustee, who is the manager of the res
         2. holds legal title
         3. owes a fiduciary duty to the beneficiary
      4. beneficiaries
         1. entitled to trust’s benefits
         2. holds equitable title
         3. owed a fiduciary duty

can sue for breach

* + - 1. testamentary trust
         1. a trust created by a will b/c the settlor is dead
         2. always irrevocable
         3. NOT a pour-over will
      2. inter vivos trust
         1. a trust created during the settlor’s lifetime
         2. may be revocable/irrevocable
         3. created when property is placed in trust

deed of trust

one way to create a revocable trust

settlor transfers property to the trustee to be held in trust

deed must be **delivered**

upon settlor’s death, the property is distributed to beneficiaries or held in further trust

declaration of trust

another way to create a revocable trust

settlor declares himself to be trustee of certain property for the benefit of himself during his lifetime

can be done orally

unless statute of frauds requires it

reminder passes to others at his death

as settlor, he retains power to revoke the trust and right to trust income

as trustee, he controls the management of the trust property

* + - 1. Revocable vs. Irrevocable trusts
         1. In CA, every trust is revocable unless specified as irrevocable
      2. Bypass trust
         1. Example

Husband puts his ½ CP in trust when he dies

Income goes to his wife

When wife dies, property passes to children

* + - 1. power of appointment
         1. designating a person to decide who gets your property
         2. there is no fiduciary duty
         3. exercise of power is purely discretionary
         4. using the word “trust” or other intent to create a trust s inconsistent b/c trusts bestow a fiduciary duty on the trustee, but one with power of appointment has no such duty
      2. When trusts fail/Remedies
         1. Resulting trusts

Anytime a trust fails in whole or in part

The party holding the party returns it to the settlor or his heirs

Property falls to residue. If it was the residue, to intestacy

* + - * 1. Purchase Money Resulting Trust

When property is bought in another’s name, and that person is not a natural object of your bounty

This creates a trust with the person as trustee, unless it was intended to be a gift

If it fails, it goes back to you or your heirs

* + - * 1. Constructive Trust

Used to prevent unjust enrichment

* + - * 1. Equitable charge

If a testator gives property to a person, subject to the payment of a sum of money to a third party, he has created an equitable charge

NOT a trust

This creates a security interest in the property

There is no fiduciary relationship

* 1. Creating a Trust
     1. Requirements
        1. settlor’s intent to create a trust
        2. identifiable res—property placed in trust
        3. ascertainable beneficiaries
        4. writing…but not always
     2. Intent to create a trust
        1. exists when a party transfers property to another person with the intent to vest the beneficial ownership in a third person
           1. no exact words are required
        2. Precatory language does NOT create a trust
           1. Transferring money to another person “with the hope” that he uses it in a particular way
           2. There is a moral obligation, but NO legal obligation to use it for that benefit
     3. Necessity of res—trust property
        1. Must have at least an express declaration to place property in trust
           1. A gratuitous promise to make a gift does not satisfy this requirement
        2. What is not “property”?
           1. Future hopeful earnings

Income from stocks you hope to earn the following year does not qualify as trust property

* + - 1. Important distinction b/w trust and gift
         1. Gifts require

Intent

Delivery

manual

handing property to somebody

constructive

giving somebody access to property

symbolic

giving somebody property through a legal instrument

i.e. the mail

* + 1. Ascertainable Beneficiaries
       1. Trustee must know to whom he owes a fiduciary duty, and the court must know who is able to enforce the terms of the trust and the fiduciary duty
       2. Must be able to ID the beneficiary by name or a description enabling the court to find who they are through objective means
          1. “children,” “issue,” “nephews,” “relatives” are all sufficient
          2. “friends” is NOT
       3. Must be human beings
    2. Honorary Trusts
       1. If there is not an ascertainable beneficiary, the trust fails
          1. i.e. tombstones or pets
       2. But, its purpose may still be served through an honorary trust
          1. The transferee is not under a legal obligation to carry out the settlor’s purpose
          2. As long as the transferee does so, the honorary trust survives

Cannot use it for his own benefit

* + - * 1. If the transferee stops using the property for the settlor’s purpose, a resulting trust is imposed
    1. Constructive Trust
       1. Sends the property to where it was supposed to go in the first place
       2. Requirements
          1. Confidential/Fiduciary relationship
          2. Express/Implied promise from transferee to transferor
          3. A transfer in reliance on that promise
          4. Transferee is unjustly enriched by keeping the transferred property
       3. With an oral promise to re-convey land *for an illegitimate reason* (like avoiding creditors), a constructive trust is unavailable b/c of “unclean hands”
    2. Necessity of a Written Instrument
       1. Testamentary trusts must be in writing…d’uh
       2. Statute of Frauds requires inter vivos trusts of land to be in writing
    3. Oral Trusts for Disposition at Death
       1. In general
          1. Must prove the existence of an oral trust and its terms by clear and convincing evidence
          2. Oral trusts are only for personal property
       2. Secret Trusts
          1. A testamentary trust with terms that are undisclosed in the instruments

Looks like an outright gift, but there was a promise made in the past that was not referred to in the will

* + - * 1. Extrinsic evidence is allowed to prevent the transferee’s unjust enrichment
        2. Remedy is a constructive trust
      1. Semi-Secret Trusts
         1. A testamentary trust with language suggesting that the transferee is not supposed to receive it outright

i.e. “to use as I have instructed him”

* + - * 1. Extrinsic evidence is NOT allowed
        2. These are INVALID
        3. Remedy is a resulting trust
    1. Oral Inter Vivos Trusts of land
       1. NOT possible
          1. Must be in writing and signed
       2. You can get around this with a constructive trust
          1. In anticipation of death, mother gives property to son relying on his promise to re-convey it and son refuses to give it back when she gets better
          2. Court will impose a constructive trust for her benefit
          3. This skirts the writing requirement
  1. Rights of Beneficiaries to Distributions from the Trust Fund
     1. Introduction
        1. Trusts distribute assets to the beneficiaries through the trustee
        2. Classes of Beneficiaries
           1. Life/Income

Entitled to some/all of the income for life

* + - * 1. Remainder

When all beneficiaries perish, the trustee distributes the res to the remainder beneficiaries

They own it free and clear

* + - 1. Types of distribution
         1. Mandatory trusts

The trustee must distribute the income to the beneficiary according to the trust instrument

No discretion

Unitrust

The trustee must pay a single, fixed percentage to the beneficiary every year

2-4%

Could come from either the income or the principal

* + - * 1. Discretionary trusts

The trustee has complete discretion over whether/how much income/principlal is given to the beneficiary

Pure discretionary trust

beneficiary has no right to receive payments of income/principal

any such payments are up to the trustee

Support trust

trustee’s discretion is limited by an ascertainable support standard

Discretionary support trust

adds an express statement of discretion to the support trust language

* + 1. Scope of Duty
       1. duty to decide
          1. trustee must exercise discretion pursuant to the trust’s terms
          2. don’t forget the trustee owes a fiduciary duty
       2. duty to inquire
          1. trustee must inquire about the beneficiary’s status and needs before exercising discretion re: payment to beneficiary
    2. Scope of Discretion
       1. duty to act reasonably
          1. trustee must act as a reasonable trustee would
          2. objective standard
       2. duty to act in good faith
          1. trustee must act in what he believes is in the beneficiaries’ best interest
          2. subjective standard
    3. Exculpatory clauses
       1. excuse the trustee from liability except for willful neglect/default
       2. attorneys insert these to protect themselves
       3. may be unenforceable if the trustee who is exculpated drafted the will or had a say in it
  1. Rights of Beneficiary’s Creditors
     1. In general
        1. Creditors stand in the shoes of the beneficiary
        2. Mandatory trusts
           1. Creditors may sue the trustee and go after scheduled income payments
        3. Discretionary trusts
           1. Creditors may NOT sue the trustee and force him to pay them

the beneficiary has no right to payment, so neither should his creditors

* + - * 1. But, creditors may obtain a court order requiring the trustee to pay them before making further distributions to the beneficiary
        2. Also, creditors who supply NECESSITIES are able to reach the trust’s assets
    1. Spendthrift trusts
       1. a trust with a spendthrift clause designed to prevent the beneficiary from squandering the res
          1. restricts the beneficiary from transferring his interest

voluntary alienation

by sale or gift

involuntary alienation

creditors’ reaching

* + - 1. Valid for both contract creditors and tort judgment creditors
      2. CA Rule
         1. Tort judgment creditors are able to pierce a spendthrift clause if the tort qualifies as a felony
      3. Ways to reach funds in a spendthrift trust
         1. Tort judgment

See above

* + - * 1. Child support
        2. Alimony
        3. Necessities
        4. Tax liens
    1. Self-Settled trusts
       1. A person places his assets in a spendthrift trust and makes himself the beneficiary
       2. This gives himself the benefit of a spendthrift provision shielding his assets from creditors
       3. 11 states and the Caribbean allow this
    2. Supplemental Needs trusts
       1. for institutionalized beneficiaries
       2. directs the trustee to give beneficiary benefits the state is unable/unwilling to provide
       3. CA allows this, but most jurisdictions do not
  1. Trust Modification/Termination
     1. Consent
        1. If all three parties consent, trust may be modified/terminated
        2. If all beneficiaries and settlor consent, may be modified/terminated
           1. Even if trustee objects
           2. Problem of unborn remaindermen

Somebody who is not born, but would become a remainder beneficiary when he is

He cannot consent

* + - * 1. Doctrine of Virtual Representation

As long as there is a beneficiary w/ the same interest as an unborn remainder beneficiary, the person before the court can consent on behalf of the unborn beneficiary

* + - 1. If all beneficiaries consent
    1. Modification
       1. Deviation and Changed Circumstances
          1. If settlor is dead/does not consent, and if because of unforeseen changes in circumstances it is no longer possible to carry out the trust’s purpose, the trust may be modified if all beneficiaries consent

For both administrative and dispositive provisions

* + - * 1. Trusts may not be changed merely b/c it would be advantageous to a beneficiary
        2. Trust protectors

Not a trustee, but somebody you trust

can be court-appointed too

can be given power to

modify the trust’s terms

terminate the trust

remove the trustee

* + 1. Termination
       1. A trust may be terminated before it does so naturally if
          1. The settlor and all beneficiaries consent OR
          2. If the settlor is dead, all the beneficiaries consent and there is no material purpose left to be accomplished
       2. Mandatory trusts
          1. Easiest to terminate
          2. Perhaps the only type that may be terminated
       3. Discretionary/Support/Spendthrift trusts
          1. May NOT be terminated
          2. Always have material purposes remaining
  1. Trustee Removal
     1. Courts may remove a trustee who is dishonest or has engaged in a serious breach of trust
        1. minor breaches and simple disagreements are not enough
     2. Trust may include a provision for trustee removal
        1. retained by settlor
        2. appointed to trust protector

1. Fiduciary Obligations
   1. Introduction
      1. Duties do not arise until trustee accepts the position
      2. Duties are owed to beneficiaries
      3. Beneficiaries may sue to enforce them
      4. Whether trustee is paid or not is immaterial
   2. Duty of Loyalty
      1. NOT to engage in self-dealing
         1. buying/selling assets from/to the trust in a personal capacity (also applies to trustee’s spouse)
            1. Exception

Trustee is allowed to set a reasonable fee (about 1%)

* + - 1. No Further Inquiry Rule
         1. If a trustee engages in self-dealing, the court will not inquire whether the transaction was made in good-faith or was fair/reasonable

It is per se unreasonable

Even if it benefits the trust

* + - * 1. Exceptions

If the settlor authorizes self-dealing

The court can inquire further as to good-faith or fairness/reasonableness

If the trustee makes full disclosure to beneficiaries and they consent

the court can inquire further

* + - 1. Damages
         1. If the transaction can be undone, it will be
         2. If the transaction cannot be undone, the trustee must disgorge any profits
    1. NOT to have conflicts of interest
       1. Arises when the trust deals with a party whom the trustee has an interest…which may affect the trustee’s assessment of the proposed transaction
       2. No Further Inquire Rule does NOT apply
          1. Good-faith and fairness/reasonableness are relevant
       3. Damages
          1. If the trustee is authorized to sell, but sells for too little $$$ WITHOUT a conflict of interest

He is liable for the difference b/w the FMV at **time of sale** and the sale price

$100K (FMV) - $75K (sale price) = $25K damages

* + - * 1. If the trustee is NOT authorized to sell, but sells for too little $$$ WITHOUT a conflict of interest

He is forced to pay appreciation damages

He is liable for the difference b/w the FMV **at the time of judgment** and the sale price

$500K (FMV) - $75K (sale price) = $450K damages

* + - * 1. FOR THE EXAM: Use appreciation damages anytime trustee violates duty of loyalty

That is, if there is a conflict of interest

Regardless if authorized or not

* 1. Duty of Care
     1. To administer the trust
     2. NOT to delegate
     3. To keep and render accounts
     4. To furnish information to the beneficiary
        1. trustee must provide a copy of the trust instrument to the beneficiary
     5. To exercise reasonable skill/care in managing investments
        1. “prudent investor rule”
     6. To take/keep control of the trust property
     7. To preserve/protect the trust property
     8. To enforce claims against third parties
     9. To defend the trust
     10. To keep trust property separate from trustee’s own funds
         1. must not comingle
         2. must earmark trust property
     11. To inspect bank accounts
         1. must place trust property in a FDIC bank
         2. must not exceed the insurable amount in any account
     12. To make the trust property productive
         1. must not merely sit on it
         2. must make safe investments, but also generate income
     13. To pay income to the beneficiaries
     14. To use reasonable care to prevent breach by a co-trustee
  2. Trust Investment Law
     1. History
        1. categories of acceptable investments
           1. Government Bonds
           2. Corporate Bonds
           3. Other very conservative investments
        2. traditional prudent man rule
           1. abolished the categories
           2. trustee should invest with the same care that a prudent man would with his own property
           3. taking into consideration dual goals of generating income while preserving the principal
           4. applied in hindsight
           5. each investment was assessed in isolation, rather in the context of the portfolio as a whole
           6. resulted in very conservative investments with very little income
        3. modern prudent investor rule
           1. trustee must invest and manage the trust as a prudent investor would…considering

general economic conditions

inflation/deflation

tax consequences

role of each investment

expected total return

beneficiaries’ other resources

need for liquidity, regularity of income, and preservation/appreciation of capital

asset’s special relationship to the purpose of the trust or a beneficiary

i.e. a family-owned business

* + - * 1. investment decisions are assessed in the context of the portfolio as a whole as an overall strategy
        2. trustees must take reasonable steps to verify the facts relevant to management/investment
        3. trustees with special skills are held to a higher standard
    1. Modern Law
       1. Duty to Diversify
          1. In general, a trustee must diversify

This duty is fact sensitive

Depends on purpose of the trust and particular investment in question

Must be a very good reason not to diversify

it’s a family-owned business

it’s a very small portfolio

* + - * 1. Damages (capital lost + interest)

Take value of stock on the day a prudent investor would have sold it

Subtract the proceeds of the stock’s sale

if it has not been sold, subtract the stock’s value at the beginning of the accounting

Court has discretion to award interest

* + - * 1. If not authorized to diversify

Petition the court for instructions

Court will almost certainly allow you to sell and diversify

* + - * 1. If a corporate trustee is trustee of a trust with the same corporation’s stock

This is a conflict of interest

Must get rid of it right away

If there is language authorizing the trustee to keep the corporation’s stock

almost certainly takes care of the conflict of interest

Must STILL diversify

* + - * 1. Waiver

It is possible to waive the duty to diversify

Language must be extremely clear and unequivocal

* + - * 1. Social Investing

Trustee’s may refuse to invest in something he finds anathema

If this is done too often, it could be a problem with diversification

* + - * 1. Pension Funds

Investing all a beneficiary’s pension in his former employer is possible if all beneficiaries consent

* + - 1. Duty NOT to delegate
         1. Traditionally

Discretionary duties could not be delegated

Investing the property

Distributing the property

Trustee could seek advice, but would still be liable for decisions

Could delegate ministerial tasks

CPA for accounting

Lawyer for legal action

Secretary

* + - * 1. Modern Rule

Most trustees are not qualified in at least one aspect of investment/management

Trustee may delegate investment/management functions that a prudent trustee of comparable skill would delegate under the circumstances

Trustee must use reasonable skill/care/caution in

selecting an agent

establishing scope/terms of delegation

reviewing agent’s performance and compliance

at least once per year

Agent owes a duty to the trust to exercise reasonable care to comply with delegation’s terms

A trustee who uses the reasonable skill/care/caution is not liable to beneficiaries/trust for agent’s actions/decisions

Agent submits to the jurisdiction of the state courts

* + - 1. Duty of Impartiality
         1. Trustees must be impartial b/w income and remainder beneficiaries and cannot favor one over the other

Income beneficiaries

prefer investments that produce immediate income

Remainder beneficiaries

prefer investments that increase the principal

* + - * 1. Traditionally

Trustees could not favor one over the other

* + - * 1. Modern

Trustee must invest the property so it produces a reasonable income while preserving the principal/capital for the remaindermen

Problematic Situations

investment produces income, but does not appreciate

“over-productive asset”

solution

re-allocate some income toward the principal (i.e. use income to improve the premises)

sell the asset and buy a new one w/o this partiality problem

investment is quite valuable, but does not produce income

“under-productive asset”

solution

re-allocation probably won’t work

sell the asset and buy a new one w/o this partiality problem

Investing in gold and other valuable material

NOT allowed b/c it produces zero income

Investing in unimproved land

NOT allowed b/c it produces zero income

Characterizing receipts

income

rent/interest/dividends/

principal

stock awarded for a certain amount/capital gains/

What about royalties from a depreciating asset?

10% are income

90% are principal

What about royalties from a copyright

10% are income

90% are principal

* + - * 1. Overriding the duty of impartiality

Evidence of the settlor’s intent to prefer one type of beneficiary over the other can modify/override the duty of impartiality

If there are no indications of intent in the instrument, the trustee must be impartial

* + - * 1. Unitrusts

UPAIA prohibits trustees who are also remainder beneficiaries from re-allocating

conflict of interest

May use unitrust to get around this

Trustee has no discretion and must pay income beneficiaries a fixed percentage of the principal each year—regardless of how much the trust earns

usually 4%

This simplifies the partiality problem for the trustee

* + - * 1. UPAIA

Allows re-allocation

Allows characterizing receipts to remain impartial

i.e. half of rent goes to income and half goes to improving the property

allows conversion to a unitrust

* + - 1. Duty to Collect/Preserve Assets
         1. Collect

Find the assets

Take control of them from whomever is holding them

Inspect them to make sure it is what the trust should receive

* + - * 1. Preserve/Protect

Manage it as a prudent person would with his own property

i.e. getting fire insurance on a house, keeping it in good repair

* + - 1. Duty to Earmark
         1. Trustee must ID trust assets as such
         2. If it has title

Must take title in name of the trust

Deed/Pink slip must say the trust owns it

* + - * 1. Damages for failing to earmark

Traditionally

Trustee is strictly liable for any loss after failing to earmark

Modern

Trustee is only liable if the failure to earmark **caused** the loss

Not liable for loss caused by general economic conditions if it was a prudent investment

i.e. a creditor going after trustee’s assets…possible to take trust assets that are not earmarked

* + - 1. Duty NOT to comingle
         1. A trustee may not

mix his own assets with trust assets

mix one trust’s assets with another trust’s assets

* + - * 1. Exceptions

A trustee is allowed to put assets of different trusts in a single bank account

He must keep careful records of which trusts owns which amount of money

i.e. a lawyer’s client trust account

A trustee is allowed to put different trust assets into single investment

He must keep careful records of which trusts owns what

* + - * 1. Damages for comingling

IF the comingling causes a loss, the trustee is liable

* + - 1. Duty to Inform
         1. Trustee’s duties

Trustee shall promptly furnish a copy of the trust instrument to the beneficiary

Within 60 days of accepting a trusteeship, trustee must notify beneficiaries of his name, address, and phone number

Trustee must notify beneficiaries in advance of changes in method/rate of his compensation

* + - * 1. Beneficiary’s rights

Enough information to determine their rights and whether a breach has occurred

Complete and accurate information about the nature/amount of trust property

Even if settlor wanted to keep it confidential

Ability to inspect the subject matter of the trust and the accounts/vouchers/documents relating to the trust

* + - * 1. When a trust is created for more than one beneficiary, each is entitled to information as to the entire trust
      1. Duty to Account
         1. Trustee must regularly account for his actions (once a year) as trustee so his performance can be assessed according to the terms and fiduciary duties (how much property there is, amount of income, how it was dispensed)

Inter vivos trusts

trustee sends accounting to beneficiaries

beneficiary has a duty to review the accounting

Testamentary trusts

trustee sends accounting to the court

each beneficiary gets a copy

beneficiary has a duty to review the accounting

if nobody objects, the court “allows” the accounting and nobody may sue for actions undertaken during that accounting period

* + - * 1. An allowed accounting may be re-opened for fraud/concealment

Includes constructive fraud

If a trustee makes factual representations on an accounting that turn out to be false without taking reasonable efforts to confirm their accuracy, the factual representations are fraudulent

1. Charitable Trusts
   1. Requirements
      1. Must have a charitable purpose that is NOT illegal
         1. relief of poverty
         2. advancing education
         3. advancing religion
            1. promoting atheism does NOT qualify, but there may be an EP issue here
         4. promoting health
         5. governmental purposes
            1. promoting a single political party does NOT qualify
            2. promoting socialism DOES qualify though
         6. other purposes beneficial to the community
      2. Must be of indefinite duration
         1. rule against perpetuities does NOT apply
            1. controls how long a trust may last
      3. NO specific beneficiaries
         1. must benefit the public at large
   2. Charity vs. Benevolence
      1. Benevolent trusts
         1. something nice and thoughtful, but does NOT benefit the public at large
         2. These FAIL b/c of the rule against perpetuities
         3. distributed according to rules of intestacy
      2. Look to circumstances to see if it is charitable or benevolent
         1. characteristics of beneficiary
         2. timing of gift
         3. restrictions on how the funds may be used
   3. Modification: Cy Pres
      1. Allows a charitable trust to be modified if its original purpose becomes impossible/impracticable/illegal
         1. avoids a resulting trust
         2. applies ONLY to valid charitable trusts
      2. requirements
         1. trust must have a particular charitable purpose
         2. it becomes impossible/impracticable/illegal to carry it out
            1. impracticable = no reason to carry out the purpose
            2. Inefficiency/Ineffective philanthropy is NOT enough!
         3. Settlor must have had a more general charitable intent
      3. If requirements are met, court must decide what purpose conforms as **closely as possible** to the original purpose
      4. Discriminatory Trusts and Cy Pres
         1. Only a problem if there is state action
            1. If it is totally private, a discriminatory trust is allowed to proceed
         2. If there is state action making the discriminatory trust illegal, cy pres may be used
            1. Strike the language making it discriminatory
         3. Other alternatives
            1. Administrative deviation

Judges change the way the trust is administered—not its purpose

* + - * 1. Let the trust fail

Resulting trust

* + 1. Gift Overs
       1. when a charitable trust has an alternative disposition should it fail
          1. i.e. “if the trust fails, money goes to Catholic church”
       2. the presence of a gift-over is a strong indication NOT to use cy pres
  1. Supervision of Charitable Trusts
     1. Donors
        1. The donor does NOT have standing to enforce the terms of a charitable trust/gift
           1. Exception

Donor retains a reversionary interest

Donor expressly reserves the right to enforce the terms of the trust

* + - 1. RECENT CA CASE
         1. Donors of a charitable trust/gift DO have standing
         2. Unsure how far this will extend

Executor? Spouse? Heirs?

* + 1. Attorney General
       1. Has standing to enforce terms of a charitable trust and fiduciary duties
       2. Very limited resources
       3. Not effective for smaller trusts
    2. Individuals with special interests
       1. those receiving benefits from the trust have standing
       2. those who may or potentially receive benefits may have standing
       3. depends on the size of the group with special interests
          1. i.e.

living in a homeless shelter = standing

being one of 40K students at a large university = no standing