

## Wills Trusts and Estates

### Introduction:

#### I. Four ways to give money

##### A. Inter Vivos Gifts - during the lifetime you make a gift

1. What impedes people from giving away money
  - a. that it will not be there when they need it like people who lived through the depression
  - b. that their children will not come and visit them
  - c. they like to invest
2. Makes people give money
  - a. Taxes ramification; 10K a year without being taxed on it
  - b. Married people can give 20K per person a year (estate tax is 55%)
3. Irrevocable trust can be established for children and the grandchildren.

→ Crummy trust - how can you control the money and yet at the same time to give the 20K gift. You first give the money by placing it in an irrevocable trust and say that it was for health, education and welfare. To do this, the children and grandchildren are told that there is money for them. They have 30 days to withdraw. If they take money out then they will never see another 20K. If they do not take the money out then the money become part of a corpus of the trust and you can add more money and it will be governed by the health, education and welfare rule.

##### B. Will Substitutes - majority of the wealth is being transferred by this way.

If you are married and there is a joint checking account. If you die then the wife will get the right of survivorship. JT with right of survivorship

1. no probate
2. ease
3. no problem without id who the money can go to
4. you can designate a beneficiary as well

You still might want to get a last will and testament because you want it to pick up all the stuff that the will substitute does not cover. This is a “pour over” concept.

Living Trust - everything you own you describe - becoming Corpus. You have a life interest in the corpus and after death it goes to corpus. It will not pass through probate but instead it will be a will substitute. It avoids probate.

C. Testate (you have to pay for probate)

When we speak of a last will and testament. We need two things

1. formalities
  - a. witness will - there are witness; every state in the union recognize
  - b. holographic will - there are no witness - only about 12 states

recognize these;

- i. Love letters types; Father hates these because you don't know what it is; what if there was a will/letter that looks like a will, it is a will or a love letter?
- ii. You can not write on a will. It revokes a will and it is not a holographic will either.

Things that are required for holographic wills:

1. in the handwriting of the descendant
2. dated
3. signed

Formalities

1. witnesses

most states require 2

Louisiana and Vermont - 3

you can never have too many witnesses (at least 3) because one may be disqualified.

2. presence

- a. that the witnesses the testator sign\* most important
- b. the testator saw the witnesses sign
- b. the witnesses saw the other witnesses sign

3. the testator must sign at the end the full intended signature; you could have changed your mind before you sign; you must have the full signature

## Intentionalities

1. undue influence -When the husband died he gave money to wife. She thought that if she give the money to give to the boys they would be taxed on it. So wife changes will to all that she owns goes to the charity. The boys' wife contest the will.
2. lack of testamentary capacity - very de minimus test - you can have diminished capacity
  1. you know the object of your bounty - like your relative
  2. do you understand the extent of your wealth
  3. do you understand the nature of the transaction
  4. can you interrelate the above three
2. delusion - it is a facet of testamentary capacity - you can operate under Test. Capacity, but you are under delusion.
3. fraud - intentional misrepresentation of a material fact

D. Intestate - no will, nothing - it passes under a valid state statute - Heidi and FOB are married no children, FOB has two parents, as soon as FOB dies under the vast majority of state she would get first 200K and ½ of the augmented estate, the parents get the other half because they deserve return on their investment. If he has non marital children, issue is a class word it just keeps going - issue trumps parents.

if there is no spouse, child or heir - then you have collateral heirs and you begin with rank. You do individual that are closes to you, eg blood heirs. Ascending or Descending.

You have three kids all issue nobody else, to will - all testate. All throughout the years one was the favorite, some spend more money than others. everything is going to be divided equally, but yet one child will contest the division because one got more than other. Doctrine of advancement. the children will argue the DOA. (DOA only applies to intestacy. But you should do this because you never know.) One child has advanced funds that were substantial therefore they eat into his inheritance. The opposite of advancement will argue it was gift. You will bring in testimony to see what was the intention of the father.

There are three P consideration:

- protection of a valid spouse
- protection of identifiable children
- prevention of public policy infractions - example you may not say that you want your ashes dropped over santa monica because it is against public health; also you cannot say that you will get money if you kill another person.

Holder - an individual who owns property has a due process right to bequeath or devise property.

what are the rights of potential heirs. They have minimal rights. They only have right in reasonableness in reference to reasonable restriction by the owners of the property.

Three restrictions on an owners right to devise property.

1. restrictions concerning a spouse –
  - a. statutory
  - b. common law marriage

If you are married then you may not restrict the spouse's inheritance. You cannot disinherit the spouse without her permission.

HYPO: if you marry and leave your money to another woman you can: elect against the last will and testament = only spouses can do this

Election (old method)

1. dower
2. curtesy

Forced heirship - or the right of election -

1. old rule - a spouse has the right to elect 1/3 of the augmented estate
2. new rule (UPC) - if you are married less than a year you get 50K as a right of election. if you are married more than a year you get 50K and 3% a year for every year you are married up to 50% of the estate

East coast rule - old rule

West cost - new rule

→Marital children and non martial children

To get rid of a kid

1. kill
2. Release -through consideration a K is entered into and then they give the money

and they have no longer any rights

3 Give the child what he would have gotten under intestate - this way they would be equitable and have no standing to contest for undue influence or other contesting after the death.

If you do not mention the child, then the child becomes a pretermitted heir. This child will take an intestate portion.

3. more open - public policy restriction  
violence and adultery - all these are useful in PP restriction

spouse children and PP

**Shapira** - A family had three children, 1 girl and 2 sons. In his will the sons get a % of the assets only if he marries a woman of Jewish parents, within 7 years of death. If he did not comply then the money goes to Israel. The boys did not do this and contested the will. The court deals with the reasonableness of the restriction placed by the father upon the son.

adoption of name - yes ok but only if there was no disruption of the marriage

→ Transfer of Deced. Estate

Gift

\*Will substitute - most commonly used

intestate

testate

Statute of limitations

Probate - 3 years from date of death (VA 1 year) - to submit a last will and testament for probate, if you submit a will and then you find another will, the new will will not be valid. (UPC) Probate means submitting a will.

Contest - 1 year from probate to contest the will.

Universal succession - the heirs step into the shoes of the person. The heirs become the person you are representing. The heirs will be held accountable for everything like the bills.

## **Chap. 2 – intestacy: an estate plan by default**

### **SEC.A**

#### ***1. introduction:***

Intestate succession - it is a means by which property is distributed if there is not will and there is not will substitute.

1. begin with the x; x is dead
2. is there a surviving spouse; if there is no apparent parents or issue then spouse gets it all
3. if there are parents the spouse gets first 200k and  $\frac{3}{4}$  of the augmented estate; other  $\frac{1}{4}$  goes to the parents
4. issues - descendants are incorporating words, issue goes on and on to grandchildren, etc. children" stops at children. Issue trumps parents. You have to qualify as parent - no stepparent.
5. The new Uniform PC §2-102 Share of Spouse
6. if all the issue is of the decedent and spouse and there are no other issue of one of spouse then the surviving spouse get 100%. Issue gets nothing.
7. If the spouse who survives has kids from a prior union, then she gets first 150K and  $\frac{1}{2}$  of the augmented estate. If he had a kid with other person, than if this kid survives, then the surviving spouse gets first 100K and  $\frac{1}{2}$  of the augmented estate. The other half will share in the augmented estate that will be shared with other issue. If she and he both have child.
8. child in gestation was an issue.
9. disability has no relevance, they get money equally

§2-103 Shares of heirs other than surviving spouse  
if no parents then to GP, if not GP then where?

Per Stirpes - by representation

Per Capita - by your head

ABC take from x and not through x

If ABC die GHI take through B - they take by representation

By stirpes GHI takes through B

4 method of Intestate Succession - when there are no S ,I, the state will use one of 4 methods

1. Next Of Kin - go to first line where there is a survivor and make a per capital distribution to those at that line. This method was easy. This situation is only where there is no will.
2. UPC Old - most likely method - you go to first line where there is a survivor and

then you make a per capita and per stirpe distribution from then on. A get  $\frac{1}{4}$  because there are other siblings that all have issue. Spouse of a sib. they get nothing. GHI get  $\frac{1}{12}$  each, J gets  $\frac{1}{4}$  and KL get  $\frac{1}{8}$  each. If I and K die then OD get  $\frac{1}{24}$ . Because there was unfairness because equal relations are treated unequally therefore there was change.

3. UPC New - Cal. NM - you go to the first line where there is a survivor and make a per capita distribution and a per capita distribution throughout.  $\frac{3}{4} * \frac{1}{6} = \frac{1}{8}$  by all the line 2 people. Because I and K are dead, you add the  $\frac{1}{8}$  and  $\frac{1}{8}$  that they get and add them. The  $\frac{1}{4} * \frac{1}{5} = \frac{1}{20}$ . MN do not take because A is still alive.

4. Strict - to the top line regardless if there is a survivor and make a per capita per stirpes distribution throughout - same as UPC Old. If there was no siblings that are alive they go to children.

Half blood can take equally. Amount of blood does not matter. they are equal.

Adopted is issue. Stepchild is not issue. But if there is no one else, then the stepchild would take it instead of escheat.

If no spouse, P or GP or I, but there are siblings, but they are survived by their Issue - This is called Collateral Distribution.

Collateral- there is no issue, no parents, no spouse. Then one is spreading among the equals, the brothers sisters.

4 methods of collateral distribution can work down on to issue as well.

The 4 methods of distribution:

1. **Next of kin:** you go to that person or persons who are closest in consequence and you give all to them. There can never be per stirpe distribution in next of kin.

2. **Upc old:** most common in the east. You go to the first line where there is a survivor, make a per capita distribution, per stirpes (through out).

3. **UPC new:** 1991, states are adopting to this. Go to the first line where there is a survivor and make a per capita distribution through out. Look at the graph in 91.

4. **Strict method:** only in Ca. disregard survivors, always go to the first line regardless if there is survivor and do a per stirpes through out.

new UPC but exist only in Ca.

Elections and intestacy are two different things. Right of election: elect it against the will. If the husband dies, and didn't leave her anything, then the wife can elect to take  $\frac{1}{3}$  of augmented estate. Death of intestacy: the first 200 and then  $\frac{1}{2}$  of the

estate. So, intestacy is better off for the spouse, so don't be surprised if the will disappears.

## 2. *share of the surviving spouse:*

only one state allowing reciprocal beneficiaries (Vermont and Hawaii): being the person of the same sex or opposite, someone whom I can't marry, I can register as a reciprocal beneficiary so he or she can take the intestacy or the election as a spouse. This is a dead rule benefit, only benefit if death occurs happen.

→*Simultaneous death*: 2 approaches but only 1 exist today.

1. the uniform simultaneous death Act: abolished- there is no sufficient evidence of the order of deaths, the beneficiary is deemed to have predeceased the benefactor. We are talking about intestacy, testacy, and wills. Should survivorship be allowed when individuals die in such close proximity? Father: no, b/c we are paying tax two times. Thus, he says that in Will that one must survive 9 months. This approach says clear and convincing evidence of survivorship (the issue then becomes how the state defines death), even one hour, then there is survivorship. The code says 5 days in order to take survivorship. But they might keep the person on respirator and everything goes to the relatives.
2. uniform probate code: a claimant must establish survivorship by 120 hours by clear and convincing evidence and not sufficient evidence. However, you can state in your will you can state that the person must survive by a certain amount of time. You must look for simultaneous death provision. The issue becomes when is there a death? When a diagnosis is made or if a death certificate issued? W/in 5 days, they would have been treated as if they had died simultaneously. The Code has been adopted by the Act. So, everywhere uses 5 days (120 hours).

## Janus

the act was amended in 1991, and Janus is 85. So make sure on the exam, if the person dies b/f 1991, use the Act.

But you don't have to say 120 hours, you can make it as long as it is not against the rules of perpetuities. 5 days only if you say nothing. Only for intestacy.

Anti lapse: will exist: if they died together and left property for each other, then we will treat them as if they never knew each other or existed in their lives. Then the court will decide what really belong to the wife and the husband. Whatever is hers goes to her estate and vice versa.

### ***3. shares of descendants***

UPC 2-106- per capita at each generation. Those equally related to the decedent should take equal shares. Initial division of share made at the level where one or more descendants are alive (as under modern per stirpes), but the shares of deceased persons on that level are treated as one pot and are dropped down and divided equally among the representatives on the next generation level.

→ Negative disinheritance-

Can't write a negative will. A negative will is not enforceable until the new uniform probate code 2-101b.

Ca. allows inheritance among stepchildren or in-laws if there are no blood relatives.

Comment: if we allow in laws, why don't we allow far relatives.

### ***4. shares of ancestors and collaterals***

Half-bloods: blood is the basis of Va code, difference in treatment. Half-blood shares equally w/ full blood in the act or the code. In VA, if 3 siblings, two full blood, one half, and one sibling dies, the full blood would get 3/4 and half get 1/4.

→ Intestate Distribution:

Begin with 3 groups that are most important- valid spouse, issue, then parents (step parent is not a parent, adopted parents are; for antilapse, step parent is considered relationship). Spouse is more than likely to take first 200k and 1/2 of augmented estate (old upc). New upc- if the issues are theirs, then she gets everything. Parents never take if there is issue. Issue trumps parents. Right of election is the first 50 K dollars. Any people seeking must survive more than 5 days. If dealing with wills and testament, you can change that to 9 months. Lets say, there is no spouse, issue or parents, then deal with collaterals. Same laws for collateral applies to issue as well. Siblings take per capitas (share equally each). Stepchildren are not issue unless they are adopted. Parents trumps siblings.

1. next of kin

2. old upc (most common unless in CA)- go to the first line where there is a survivor, make a per capita distribution and make per stirpies. But if one doesn't have issue, then his share will not be counted on the per capita or first line.

3. new upc- per capita first level, so if 4 siblings, and one alive, he gets 1/4 and the rest 3/4 are shared equally by the 6 issues, each get one eighth.

Hypo: (E) F G H I (J)

Kl m so, GHI would get  $1/5^{\text{th}}$ . KLM would get  $2/5 \times 1/3 = 2/15$   
4. Strict- always make a per stirpes on the first line. No survivor requirements for strict (diff. from above 3), but you still don't count the one with no issue.  
Antilapse applies to the relatives of the predeceasing person

## **SEC. B transfers to children**

### ***1. meaning of children***

-Posthumous Children: children born after the death of decedents. It is the date of gestation that counts.

-adopted children

#### Hall v. Vallandingham

It is not the majority rule. Adopted child cuts off the natural parent's rights except when the natural parent's new spouse adopt the child and the one that is married to the adopter's right is not affected. The uniform code 2-113; 2-114 don't do that.

Adoption does not cut off natural parents' rights.

If the natural parents refuse the adoption, then can't go thru.

Ca allows adoption of adults in one year. NY, you can't adopt one you have sexual relationship (same sex partner),

#### O'Neal v. Wilkes

allow adult adoption even if sexual relation exists.

UPC says that if all the children are the children of the surviving spouse then all the money goes to the spouse because she will provide for the children.

Step children are not issue because they are not of blood.

CA and MD says that if there are no other heirs then they will allow the stepchild to take rather than let the money escheat to the state.

UPC §2-114 - Step mother adopts the child. Under UPC the child can inherit from three parents. The UPC allows this otherwise the natural mother loses all her rights to the child. The natural mother would not have allowed the adoption if this clause was not present. An adopted individual is the child of his adopting parents or parents and not of his natural parents has no effect on (i) the relationship between the child and that natural parent or the right of the child or a descendant of the child to inherit from or through the other natural parent."

#### Hecht

The holding: heirs may come about from the decedent after the death of the person.

## **2. Advancement (only applies to intestacy)**

1. Common Law - a parent intends equality among his or her children and any significant gift during lifetime raised a presumption of advancement which must be rebutted by a preponderance of the evidence. You must show that the money was a gift. It is an advancement if they said they want you to have it because they won't be able to see your happy smile."

2. UPC §2-109 - presumes no advancement but says that if a significant gift had been made to an heir and that gift is accompanied by a contemporaneous writing saying that it is an advancement an advancement takes place. There is no presumption of an advancement.

### **→Transfer of an expectancy**

Scott marries Grace, Daughter Virginia. Scott had a father Pops. When Grace and Scott divorced, they made a deal. Scott said I will give you all of Pops' money when he dies. However Scott only has a promise of giving money since Pops is still alive. If there is no consideration there is no contract. Pops then dies and then S says that I will not give you the money. the court stated that because G had to support V, therefore there was consideration. There was consideration because G had to take care of V. This is an assignment of an expectancy.

Grace can make sure that she gets something by going another route. She can demand a term insurance policy and name G as a beneficiary.

## **3. Managing a Minor's Property**

If parents die, then what happens to kid. Can you bequeath your children to someone else. NO but you can appoint a guardian for the children. Can nominate M and S to take care of my children. They have like religion and age to us and they will be good parents" However, if there was a blood relative like a sister who wants the kids, they may trump M and S.

The assets may be liquidated and put in a trust until a certain age. M and S may want to be compensated. You can do this by saying that everything may be liquidated except the house. All would live in the house until a certain age. The home may then

belong the M and S as payment.

Guardian - in reference to a person taking care of another person.

Custodianship - usually for a small amount of money or thing: jewelry or other thing.

Trust - is large things: estates, etc.

If there was a situation were Lewis was a trustee and this was stated in a letter, then can you use the letter be a holographic will?

## **SEC. C - Bars To Succession**

### ***1. Homicide, domestic violence***

If you do a PP wrong, then you and your issue are barred. If the states have enacted a statute, this does not prohibit common law from applying. The statute will most likely state intentional.

Example: if L and S are driving and L runs into a tree and S dies because of L drunk driving. L will be able to inherit. He did not intentionally kill her. The only prohibition would be through common law. In common law you would have to see if there was such gross negligence that he should be barred. The answer is NO?

Mahoney - woman kills husband. She is the heir under intestate. Public policy should bar inheritance from will substitute, intestate and testate. They used the unclean hands dicta. A persons should not benefit from his or her wrongdoing. Same rule applies to will substitutes.

### ***2. Disclaimer***

- this is a tax device. There are two types:

1. release - during the lifetime of the decedent, for consideration the H has released any claim against the decedent's estate.

1. kill the child
2. give what he would have gotten during the lifetime instead of after death
3. get a child to sign a release

prenupt - if L and M have children and each a big estate. When M dies she wants her children to get her estate. So they sign a prenuptial agreement. The prenuptial is a release to the right to elect.

2. renunciation - after the death of D, no consideration needed, and must be done after 9 months. If L and M are married and they have three kids. When L dies he leaves all property to W. There is no estate tax when all goes to W. When L does this he gives up the person exemption. However we do not want to give up the personal exemption. Therefore W will execute a partial renunciation of 650K (the limit) and this will pass to the will or through the intestacy and there is no estate tax.

Example - if M and L are married and L thinks that M is having an affair. L leaves his money to kids. The first 650K is ok but the remainder is taxable. Therefore the kids renounce and then leave the remainder to the mother (because they know she is not having an affair) and she gets the marital deduction.

### Troy v. Hart

Medicare - health care for 65+

SS - you get when you are 62

IRA - you begin taking at 59 1/2

Medicaid - for the poor; also pays for nursing homes until you die; 50% of all persons in nursing homes are on this.

37-I had a lots of money, but then you gave it all away except for 150K. You then apply to government. The government will not look at the 37<sup>th</sup> month to see past income.

Medigap - works with Medicare

Spend down - 36 months

The spend down program which involves medicaid. Medicaid will pay for nursing home but not medicare. How do you qualify to be poor so medicaid will pay for nursing home? They made themselves poor and the process is by spin down. If I have 1 million and put a little in bank, give the rest away to kids or others, after 36 months, it is spin down (allow you 2,700 for burials). They only look at what is within the last 36 months, and it is a pain for the nursing home to go thru the paper work.

Long term care insurance- if you go to a nursing home, they are going to pay for it. He is not too big on it b/c some people don't need it. So give money to your kids when you are alive.

### Troy v. Hart

Expectancy- sometimes nursing home would make some one sign that whatever one has for expectancy, it will give to nursing homes.

Issue: May you disclaim when you are under medicaid? No, you can't. you can't

accept from the public and give yours to someone else.

There is a big spousal loophole: Marital status is very important. Spouses occupy a special role in a medicaid spin down process. So you can transfer your asset to your spouse not subject to 36 months rules. And I can also transfer my house to spouse and pay the mortgage so he can take care of my kids and maintain the family. Long term care is the future.

### **Chap. 3. Wills: Capacity and Contests**

#### **Must have both for a will (it takes to tango)**

##### **Intentionalities (5 elements)**

##### **Pre-mortems**

Capacity

delusion

Mistake-primary intent

undue influence

fraud

2 kinds of wills. Witness wills (with witnesses) and holographic (with no witnesses) wills. He hates that b/c there is a lot of litigation. They both have Intentionalities and formalities.

If there is no capacity, the whole will goes down the drain, except for delusion mistake, undue influence and fraud allows the other part to be good.

Pre-mortem probate- in 5 state statute allowing one who goes to probate authorities to show your will. This automatically establish irrebuttable Intentionalities. Why don't more states do this? B/c lawyers don't like this, lawyers can make fortunes for wills under undue influence.

Self-proved will- can go to a notary public and if you do this, all your formalities are irrebuttable. So if you are in pre-mortem probate and you do the formalities, that means your wills are absolutely irrebuttable (he likes this).

On the test, he will always make us a judge or a lawyer with scenarios and we have to go back to these elements to see if they exist.

#### **Sec. A. Mental Capacity**

##### **Elements of intentinality:**

##### **Formalities**

##### **self proved will**

presence

Witness (usu. 3)

writing (computer doesn't work)

logical end

signature

In re Stittmater (a good case)

A woman never married and died at 48. She developed immense hatred for man and she left all her money left to national women association. Issue: was her mind so delusional, that is, not operating under any rational basis, that she did not have the capacity to bequeath her assets to the organizations.

Ex. Racial hatred can also be argued as delusional. Or an individual disinherited his children b/c he thinks they are not his. He was delusional in thinking that his children weren't his.

The key is whether there was rational basis.

Her cousins won b/c juries are in favor of families since they are better at emotional appealing. And in this case, some of the juries are men. So the better way is to go to will substitute.

Difference b/w capacity and delusion: delusion is an element of capacity. Capacity is total incapacity and delusion is only to one aspect.

Testamentary Capacity p. 163: do I understand the

- 1: the nature and extent of the testators' property
- 2: the persons who are the natural objects of the testatory bounty
- 3: the nature of the transaction
- 4: the relation b/w the above 3.

Only need de minimis capacity. Can be in the lucid intervals of mental incapacity.

In re Honigman

A man and a woman were married for 40 years. During the last two year of the man's life, he began a series of medical procedure and he also began telling others that his wife was unfaithful. At no time did he see her do the dirty deed and did not file for divorce. The woman herself is also old. This is not an uncommon scenario. New York at that time allowed 20,000 and 1/3 life estate and eliminated her choice. She contested the will that she did not the right to choose. She appealed that he was insane. Was he under an illusion that she was with another man and was that the reason that he did not leave her anything. If she got divorced, she would at least get half of the estate.

-In exam, if a spouse is involved (crime spouse) and the spouse will always have the choice. The silver bullet is the right of election. W/ the consideration of the attorneys fees, the 1/3 estate can actually be a better option, but see pre-termitted spouse.

The difference between mistake and insane dilution is that courts won't fix mistakes. Court will not allow you to fix the mistake unless the mistake of primary intent is proven.

### **SEC. B. Undue Influence**

undue, it is coercion of mind. The burden of proof of clear and convincing evidence is on the one who asserts undue influence. So it is hard to prove, but if you can establish a confidential relationship b/w the testator and the beneficiary, then the burden of proof shifts to the beneficiary to rebut the presumption of undue influence. 5 confidential relationships: priest- penitent, doctor-patient, attorney-client, guardian-ward, a relationship of an expressed trust. None of them mention parent child relationship, but you can argue that as an expressed relationship of trust. So if you took care of your mom and your mom dies and leaves everything to you, your siblings come to say that you unduly influenced her and b/c there is a trust relationship, the burden is on you to show by clear and convincing evidence that mom's mind was clear enough that she could resist undue influence. The key is susceptibility. The attorney cannot draft the will that the attorneys are the beneficiary, including making you the representation of the estate, you have to immediately make an affidavit that you have given her other options.

#### Lipper v. Weslow

A woman dies with two children and grandchildren from a child who predeceased her. She gave everything to only the two children and one of them is a lawyer who drafted her will (beneficiary who was in confidential relationship with her). Grandchildren claimed that she was unduly influenced. Ct found that she listed all reasons and rebutted the presumption b/c she was mentally strong to resist the undue influences.

Showing of strong mentality is very important. But susceptible is the key.

→No-contest clause- if any beneficiary under this will should contest any clause within, I direct such contesting beneficiary not inherit from me.

But public policy favors issue if there is probable cause. But every case has probable cause. Then why do you put that in? as a negotiating instrument to show how serious he or she is. If the contestant want something and if contest, she is not going to get anything and the will will go to intestacy and she would have to share the thing equally with others. How do we make it enforceable? You gotta give the contestant something to lose that she really wants so she will not contest so she can get the thing

and does not have to share with others. ex. Give A the sweater she really likes, if she contests, then she would have to share it with everyone..

Bequests to attorneys: you should not be drafting the will if you receive something significant under it. If it is a fee, it is fine, and make sure you make clear that it is a fee but not a bequest. Why would you give someone inheritance instead of fee? If it is fee, you get taxed on it, but not necessarily w/ inheritance, very low tax rate. Even though it is the fee, you still have to give clients affidavits that the client was given other options.

#### In re Will of Moses

He thinks what the focus should be is the susceptibility of mind. An older woman met a younger man who is really messed up, but for 15 years, they were in trust relationship and he was her attorney. But at the same time, the attorney did not spend enough time to her and offer her options and give the effects of leaving the assets to him. It doesn't matter that he didn't write the will, but it does matter b/c he is still her attorney. So, if representing her, make sure that she was individually making the decision and have it notarized should have to her that she should have gotten a lawyer who would grill her and put it in an individual file – it is not advising her on bequeathing money to him, it is not influencing her but just make sure that she is in a clear mind and making sure what she is doing what she really wants. the court was wallowing in her susceptibility but not her mind.

#### Kaufmann-

The court should have looked for convincing evidence of the freedom and clarity of the mind. But in this case again, they looked as susceptibility. Although susceptibility is the key to undue influence, but the court presumed susceptibility just b/c of the sexual relationship regardless whether their minds are clear.

The wills in both cases were set aside for undue influence. Be aware of the jury, most of the time, the contestants will win. Always think of the option of will substitute.

#### Seaward Johnson

SJ divorcing his wife and married Basia got Nina who was the attorney to protect the interest of his wife. Wife and Nina got to be good friend and Nina also befriended

#### **SEC. C. Fraud-**

an intentional misrepresentation of facts on which decedent relied. Hyperbole: is not

an intentional lie but an exaggeration. The crux is that you have to prove intention in the fraud.

-Fraud in the inducement- lie to get somebody to put or take something of the will

-Fraud in execution- prevent the will from being executed or say that it is something is not.

### Father Divine

A woman of great wealth wrote her last will to give everything to father divine and church. It was perfectly executed. Her family was outraged and b/c of constant whining, she wrote a second will to give 350,000 dollars to her family. It was never executed. Thus, the first will go into probate. The family claimed fraud that but for the fraud, there would have been an execution. They also allege that she was killed by father divine that is why she could not execute the 2<sup>nd</sup> will. The court thinks that the fraud is the bad act and set up a constructive trust (it is an equitable remedy to FIX a mistake). When you apply constructive trust, you are going to let father divine get it but then you are going to make it into the a constructive trustee and make equity by giving money to the people in the 2<sup>nd</sup> will b/c father divine had unclean hands.

→Tortious interference give not only compensation, but also punitive damages.

Summary:

Courts will not amend a mistake: ex. If dad left me nothing in a mistaken belief that I was dead, and I come back say that dad was mistaken, the court is not going to amend and give me something b/c they don't know how much I should get, unless dad stated his intention that if she hadn't died, she would have gotten

## **Chap. 4. Formalities and Forms-**

### **SEC. A.- Formalities and Forms**

presence, number of witnesses, signature. Formalities may be irrebuttable in a self proved process. see raney case.

\*The best thing to study is get his old exams, they will be just like the exam and don't give him a buffet of answers and let him chose what is the best, but it is what I am going to take charge of.

### ***Presence-***

strict rule-

1. the witness saw and testator sign

2. . And

3. The witness saw each other sign

UPC: a will should be

1. in writing (email or disk, anything that is easy to change is not a writing),
2. (proxy to sign) signed by testator by some in the testator's conscious presence and by the testator's direction (sight is the best way for conscious presence, even if they are not in the same room but can hear and see each other easily - phone communication is no good b/c they are not in conscious presence feel. Revocation by physical act (rip up the will) by proxy are fine too. You may not do it b/c you may be in haste and your friends may say that don't you trust me).
3. Signed by 2 individuals (he says to have more than 2) – watching the intestator sign is the best way. Acknowledgment .

UPC- Holographic will is valid if the signatures is of the testators and no requirement of the date. You should spell all these at out b/c it gives you at least a rebuttable presumption. If your state allows self-proved will, then it is irrebuttable. But even if you have an irrebuttable will, and you go back to VA and die domicile there, there is a strict sight requirement, the witnessing of signing (the formalities) will be the acknowledgment and you are w/ 2-506 on p. 242-243 situation (this means that if my will is executed in a state (CA) and has met the validity of that state, or my will is executed in a state and domiciled in another one (live in VA) and it meets the requirement of the execution or the place of domicile, even though I die in domicile in another state like Utah where the requirements are not met but if Utah has adopted 2-506, then my will be valid in Utah). So, do the 3 prong test.

#### In re Groffman

Testator says that my will is in the pocket and want them to witness (he is acknowledging the will), The problem is that they were not w/ presence w/ each other when signing, usu. there is a presumption of validity but in this case the will goes down the drain. The statute allows this but Mr. L and Mr. B come to rebut the presumption of validity. So the will go into testate and the wife can get the whole estate. Formalities were rebuttable.

When see the word presence, it always means sight.

Could the witnesses sign b/f the testator? Yes.

**Addition after signature- signing at the end – anything that “appears” after the will will be presumed to be added after the will and will not be allowed in**

**probate. The states have changed that.**

Videotape: a videotape will never be admissible as last testament, maybe used as evidence.

Delayed attestation- must sign in a reasonable amount of time (some states say 30 days)

A will does not need notary public except when you self-prove it.

Vintage of will: you should never use someone who is the beneficiary of the last will of intestament to be the witness. Don't say no, but then always have 3 other real witnesses.

If you will get more under the will from the will of intestacy or the previous will, then you are a party in interest. If you are a witness to the will as an interested party, then 3 results: 1. the will is valid but you don't take under the will, or 2. the will is valid and you take the under the will (UPC Code), or 3. the will is invalid and you don't take unless there are sufficient other witnesses.

Estate of Parsons

The state says that if you took anything, then you are party in interest. The one in hundred dollar said that fine, I will disclaim, this is renunciation as oppose to enunciation. Ct: no, you can't disclaim after the 9 months of the will, thus, the will goes down the drain (no probate for the will). Ca have since changed their rules on the interested party and adopted the UPC like New Jersey. Everybody is a winner, even a felon can be a witness..

Don't use interested witnesses.

Recommended method of executing a will P. 243

1. All the numbers should be fastened together. Staples may be used in a fraud, but non of them are fraud proof but should make good faith efforts.
2. The lawyer should be certain that the testator has read the will an understands its contents
3. The lawyer, the testator. Two disinterested witnesses and a notary public are brought together in a room
4. The lawyer ask :
  - a. is this your will?
  - b. Have you read it and understand it
  - c. Does it dispose of your property in accordance with your wishes.

Read those.

→Self-proving affidavit- typed at the end of the will, swearing b/f a notary public that the will has been duly executed, is then signed by the testator and the witnesses before the notary public, who in turn signs and attaches the required seal. UPC- 2 types:

- a. a combined attestation clause and self-proving affidavit so that the testator and the witnesses sign only once.
- b. A self-proving affidavit to be affixed to a will already signed and attested, which affidavit must be signed by the testator and witness in front of a notary after the testator has signed the will and the witnesses have signed the attestation clause.

→Safeguarding a will- attorney keeping the will could be a breach of client attorney duty. Don't tell them to put the will in a save deposit box unless someone has access to it. Get a fire proof metal box to have insurance policies, wills, tax returns.

#### In re Pavlinko's Estate

lawyers confused the two and the wife signed the husband's and the husband signed the wife's. The wills are invalid b/c the formalities are not met. The will needs to be signed by that person.

How to remedy this:

Should have argued that when we signed the will, I didn't sign my husband's will, just a specific testamentary scheme and allows the will to go into probate. So to eliminate the name. So on an exam, argue based on other things, saying that if we allow ... Why can't we allow this.

Why don't we allow probate of the residuary clause?

Mistakes were Intentionalities, can save it by asserting primary intent. Have to use clear and convincing prove standard to prove primary intent.

What is the diff. b/w primary intent and substantial compliance? Intent is on Intentionalities and substantial compliance is about formalities (harmless errors?)

Substantial compliance as means by which we fix formalities:

#### Ranney

Lawyer prepared the last will. At the end of the will and has the signature of the client but not the witnesses. And the self-prove affidavit is on page 5 and have the signatures of the client and all the witnesses. So, looking at only p.4, you do not have a valid will. The two step method in NJ- the will, not valid, then the SP Affidavit not valid as well. Can argue: look, you got two signatures (this clearly show that he intended it to be the last will , there is clear and convincing evidence of

the formalities, then even if the formalities be not met, the will may be probated. Did NJ substantial compliance come from statute or common law? Common law. So they are ignoring the language of the statute, but in Parsons, the court said that we can't be doing this, it is up to the legislature.

→ Fixing formalities involves substantial compliance and harmless errors and you also need clear and convincing evidence (ranney- only executed the self-proving affidavit but not the will- can't do so where the state requires two step. Ct allowed probate that it was harmless error and substantial compliance.

## ***2. Holographic Wills-***

Common law: entire will must be in the writing of the deceased and signed and dated. UPC: only material portion needs to be in the handwriting of the deceased and signed, need not be dated.

He doesn't like these wills b/c of the testamentary intent problem.

### In re Johnson

The will was a form he got in staple store and only underlined portions are his writings. There was no witness and there was no testamentary intent. The court said that you could only look at the handwriting portion, thus there was no evidence of any testamentary intent, all the testamentary intent was in the typed portion.

Why is that under UPC this will in probate since the language in the typed writing is substantial? B/c they defined that as ancillary, the material ones are the names of the people.

So, you gotta have witnesses or have everything in the writing just in case that you are in a common law jurisdiction and there are some jurisdiction that don't accept holographic will.

Hypo: a written will and signed by 2 witnesses. Is this a holographic will or a witness will? A witness will (so I want to argue b/c this is valid in every jurisdiction), but if one witness is a felon, and one has interest, then this back to holographic will).

→ What if you have the number on there and you cross it out to change to another number and sign next to it, then you have a physical act of revocation, the presumption is that the will is in whole revoked.(the will has two witnesses). You want to rebut the presumption that this is only revocation in part. So the number wouldn't have meant anything and the 5000 (suppose) will go into residuary. What can do is to go to holographic will, this will not work under Johnson b/c not all is in writing. So go under UPC and argue that the 50,000 amount is the material part

and the short initial is the full intended signatures. You do not look what you have always done, you look for if there is any event that interrupted the signature. Could the change be a small will in addendum to the whole will, that is called codicil? Yes

### Kimmel's Estate

If we can't find the will, can we allow this letter as a holographic will and goes into probate? Yes. "If anything happens to me" indicates testamentary intent. He would have argued that this should not be regarded as holographic will b/c he obviously referring to that he will bring a valid will in the future. But the court ordered that way b/c they would have been the logical inheritance anyway.

## **SEC. B- Revocation of Wills**

### ***1. revocation by writing or physical act***

#### Harrison

Complements Kimmel

Deceased say: I am going on a trip and I may not return, if I do not return, then ... is going to happen. So the question is whether this is a term or permanent will? Ct: these are words of inducement and thus, this is a permanent will. The court used the same rationale as Kimmel.

\*On exam: don't be so concerned w/ the right answer, but point out the right issue.

Could substantial compliance and primary intent apply to holographic wills? Yes  
could holographic will replace a last will intestament prepared by lawyers? Yes

\*Revocation- b/f you say that the will be revoked, you gotta tell him that the will is valid first

### **3 methods of revocations**

#### ***1. subsequent instrument***

a. expressed- I hereby revoke, then all the previous are down the drain

b. implied- will 1, this to Louis, will 2, this exact thing Linda then revoked. But if 100,000 to Louis and will 2, 100,000 to Linda, the will is not revoked b/c that is possible.

**2. Physical Act-** common law- the physical act must touch the writing. UPC- it could be revocation whether or not it touched any of the words on the will. It takes two to tango, it takes both intent and physical act present at the same time. They must be concomitant, be simultaneous.

→ lost will- when a will can be traced back to the deceased but can't be found and it is presumed to be lost and the presumption must be rebutted.

Hypo: A move into nursery house and give most of her stuff to others and the will is in them, then the other side will argue that giving away is act of revocation but can say that her oral intent is not revocation. Isn't lost will a presumption of revocation?

### **3. Operation of Law**

- a. wills Act: a will is revoked by a testator whenever s/he is married. But we don't need that anymore b/c pretermitted spouse according to the statute of testacy and we got election.
  - b. Common law: revoked whenever the testator marries and gives birth to a child. How can we benefit the child? A child born after the last will but b/f the death, then will be pretermitted heir.
  - c. Circumstances: significant change of circumstances (available in NY and DC), if one made a will at 18 and did not revoke that, died at 88, the intent will be regarded as revoked b/c it must have changed.
  - d. Divorce- amensa ethro- bed and board, meaning you are separated but can't get remarried. Ex. In ny, the only no fault divorce is to have separation for a year. During the separation, you are still legally married, thus the spouse will get all the benefit of law. But at the same time, the other spouse may not want that. If you have a client who separates from the spouse, the client must sign an effective release (disclaimer). That will be ok b/c it will allow the client to give up on the estate of the other spouse (vice versa), but has to have valid consideration (she should have something to lose too). A vinculo- real achieved divorce.  
→ UPC: once the final divorce is thru, the will is valid except to the provisions that benefit the former spouse and the spouse's family will be revoked. So the will is still effective and the provisions will be revoked. The spouse will be treated as if she pre-diseased him. This is unlike the wills act, common law, circumstances where all of them all go down the drain. But if you still want the spouse to get something, the best way is to republish by codicil ( a little will complements the valid last will and testament).
- prenupt? An agreement in the marriage what they should do if they get divorced.  
When have will substitute, the operation of law revocation applies to them too. What about other methods?

### **2. dependent relative revocation and revival**

Revival of the last will and testament

1. new will: the best method. Good b/c it is new and clean, bad b/c the will take on a new date.
2. re-execution: bad thing to do b/c you will have got marks on the will (writing over it)

3. republish by codicil: any three of the revocation can be republished.
4. DRR: dependent relative revocation- an individual does a slight visible act to revoke an otherwise valid the last will and testament and then draft a similar to the previous will and when the indi. Dies we find both instrument, the first one has been physical actly revoked, the second one has never been executed, so it would appear the ind. Would die intestate. But we can revoke the number one will. Revocation done to 1 was dependent on the probate of will number 2. If 2 may not be probated, then will number 1 is revived. This is looking at conditional revocation and conditional wills. Can do so b/c it is only minor change not major and it is similar thus indicating that the ind. Would have intended the first will to go into probate if the 2<sup>nd</sup> one is lost anyway.
5. Revoke revoking will: a revoke of the will but that was also revoked
  - a. common law: automatic revival if the second one that is revoked is gone
  - b. Ecclestial rule: you inquire what the intent of the testator would have been (this is the same as UPC code)

#### Harrison v. Bird

The revocation by a lost will. An old lady executed 2 last will and testament. Then she gave one to her attorney and one to best friend (beneficiary) and did not keep any. She told the lawyer to tear up the will and he did so and mailed it back to her. It was not a valid revocation b/c you gotta be in conscious presence (simultaneous presence, sight) for proxy of physical act. The proxy didn't count. Now she has possession of the will and there is a letter testifying that she has it. When she dies, we can't find it and so there is a revocation by lost will. The other will in the hands of the beneficiary doesn't matter anymore b/c if one is in the diseased possession and have been revoked, all others are revoked, regardless if they are all executed. May rebut this presumption by preponderance of evidence. If the torn up will was still in the hands of the lawyers, then there would not have been revocation.

#### Thompson v. Royall

The writing must be touched by the physical act. UPC doesn't have this rule, only have to touch the blue back of the paper (the back of the will). So, when deciding whether there is revocation or revival, just go down the tool bar. The judge wrote on the back of the will, this will is null and void and she signed the name. The revocation is not valid b/c she herself didn't do the writing and there is no witnesses. So, there is no holographic will and no witness will. There is no revocation and no subsequent instrument to revoke (cross out 5000 and write 50,000 and sign next to it and the number was material) and no physical act b/c there was no tearing up in her

presence, obliterating, burning that touches the writing. That is the old rule.

→ Dependent relative revocation- he would not have wanted the 5000 be revoked if the 50,000 can't be probated, that is conditional.

DRR (dependent relative[two involved] revocation)- a method of revival that a testator's revocation was conditioned upon a subsequent probate of another will and if there be no probate of the 2<sup>nd</sup>, then the 1<sup>st</sup> will is revived.

DRR has been equated with the doctrine of mistake. Clear and convincing. If it says that don't leave louis anything, then can't use it as mistake or DRR b/c there is no clear and convincing evidence of mistake of intent, so make it into probate.

May you revoke in part if the statute doesn't say so- the ability to revoke in whole incorporates ability to invoke in part.

### Carter

A little old lady had a valid (must be valid b/f we can revive) of testament, along the way, she wanted to make changes, her valid wills have pencil marks touching on the writing (physical act of revocation) and we find another instrument that looks like a will but was never executed. Whether or not this first will is revoked by physical act? Yes. Is the 2<sup>nd</sup> allowed to probate? No, the 2<sup>nd</sup> can't be b/c no formalities. Can the 1<sup>st</sup> one be revived? Yes, the diff. is minor, the similarity of the wills (evidence) show that she must not have hated the first one to not revoke it.

Many people would prefer mistake instead of using DRR. Our statement in this case is not being intentional, but she made a mistake b/c when she revoked the will she made a mistake that she could make the 2<sup>nd</sup> one to be probated. So mistake and DRR are two piece in a pie.

### Auburn

Little old lady writes a last will and testament and then she writes another will in 1959 (#2). The 2<sup>nd</sup> will revokes by subsequent instrument the 1<sup>st</sup> will. What if the 2<sup>nd</sup> will can't be found? Common rule- automatic revival of the 1<sup>st</sup>. Ecceslastical and UPC says that everyone get together and negotiate. In Wisconsin, no automatic revival (WEIRD). The lady went to live with her brother and told her brother that she destroyed, torn into pieces. She told the brother to take to the dump and let it fly in the wind. The will was traced to her. So #2 will was revoked by physical act. Under common rule or Ecceslastical rule, the 1<sup>st</sup> will can be revived. But not in Wisconsin. But she did that b/c she believed that by tearing up 2, she thought that there was automatic revival. The issue is can we revive #2, not #1 b/c it is gone b/c it

is revoked by subsequent instrument? Yes. B/c the will was similar in that she provided her assets to go to her friends. If not probated, her assets would go to her family. The argument is based on her mistaken belief that #1 would come back, in both she gave to friends. So, w/ #2, we comported w/ her intent. She made a mistake and that mistake should not be against her. Can't bring the 1<sup>st</sup> will b/c there was no statute or case law history allowing so in Wisconsin. Why not use DRR?

4 methods of revocation

1. every time w/ marriage or the birth of the child, the whole will goes down the drain.
2. Wills act.
3. significant change of circumstances.
4. revocation by operation of law – divorce or annulment. If separated, you need to do it from a prenupt or postnupt. In the event the couple remarry, then the will is revived automatically. Will substitutes are not immune in #4, but are immune from others.

UPC – only divorce or annulment provides revocation. The will remains effective.

1. write a new will
2. reexecute the old (bad choice, cts don't like this)
3. republication by codicil (formalities can't be republished by codicils, intent can.)
4. revoke the revocation

→ Operation of law revokes will or will substitute (new upc), but in most cases, only apply to will.

1. Common law- marriage and birth of a child, then the will is no longer valid, the whole will go down the drain.
2. Under wills act- marriage alone revoke the entire will.
3. Significant change of circumstances.- also revoke the will.

Revocation by operation of law – divorce. Board and bed separation and formal legal separation for one year. After one year can get final decree to get a divorce. Separation of will not bring about revocation, must be in the agreement, but in divorce, that is automatic. But only change the part about the spouse or family. This applies to will substitute. Alternate taker will take, if none, come back to residuary estate.

### **SEC. C. Components of a will**

Component of a will- What is actually included as parts of last will and testament.

#### ***1. Integration of wills-***

parts of wills are what we can identify as being the existence at the magic moment

(moment of signature and witness). If you number the pages, then there is the natural coherence and consequence, and that is all integration about.

Beale- P argued that it was not stapled, ct said it was integrated b/c it was numbered.

## ***2. Republication by Codicil***

(ask whether the codicil was valid to begin w/). Republication by codicil will validate a will which lacks intentions. In ny, codicil validates a will that lacks no formalities. So, if in the louis, cross out 5,000 ex., if you republish it a couple of years later w/ the 50,000, it will be valid.

→If you divorce and your will is revoked by operation of law but you still want the former spouse to get the property anyway, then republication by codicil, but better not let the spouse be the PR (personal representative). Now the codicil is part of the will.

→What is the downside of the codicil. A spouse or heir can only be pre-terminated w.in the time of codicil and death, marriage or birth has to happen w.in that time. Pull out his article (on the syllabus).

## ***3. Incorporation by reference***

Is in existence at the moment of the execution and is in probate when I die. Ex. I write a will w/ a trust w/ extensive powers in trustee, but if I list everything, then the will will be too long. So he can refer to the trust powers in the NY Code. Even if the law was changed, the law operative at death is the law, so the movement is operative b/y the magic moment (execution).

Ex. 2- I hereby bequeath my car, when I execute it, it was an old car, but when I die, I have an expensive car, the care given will be the expensive one (this is incorporation by reference).

### Greenhalge

the operative word is “in existence.” A lady had a will referred to a memo wrote by her and the memo will continue to change and in the will, she wrote that the memo will be changing. However, she later got a notebook and in it said that a painting will go to her friend. The painting was not going to her friend b/c the notebook was not in existence. However, in 1980, she republished the codicil and the woman get the painting b/c the codicil republished the will and the memo then was in existence. Rule- things incorporated must be in existence, and if it was in existence at the time of codicil, that will do.

Real property cannot pass by legal list but can under incorp.

→What is the diff. b/w list and incorp. By reference? W/ list, the list need not be in existence at the time of execution. They can change the list and it can incorporate anything besides money. People love this b/c it allows them to make changes w/o having to go thru testamentary formalities. Dilemma is if one didn't keep a list but went under the furniture on a tab and the name to whom she would give to. So, was it a list? It didn't look like a list but served as the function of a list.

#### Johnson

A bizarre decision. A will typed w/ no signature or witness but has a holographic instrument w/ signature and date. Issue: whether this holographic instrument incorp. by reference a typed will (which is not valid)? NY- no, there is no formality. In other states, may incorporate.

Was this meant to be a will incorp. by reference? And did the holograph incorporate it? Ct held yes. First determine whether this is a valid holographic instrument, then see whether it incorp. He doesn't think the phrase "this will" incorporated the typed portion. Just the written part is the whole will.

#### ***4. acts of independent significance***

which is no more than a latent ambiguity. Ex. A car or truck of my possession at the time of my death even though it is not something I own right now. This is ongoing change and still effective. What constitutes the last will and testament? Integration of wills It must have internal coherence and logical sense.

#### **SEC. D. -Contracts relating to wills**

if one makes a contract w/ another saying that he will leave everything to A in his will. The will didn't do so and go in probate and the contracting party can sue under contract law. But the contract will not revoke the will. So, if want to prove a contract, then have to do it in a will or in a written statement, that is the bottom line.

#### Via v. Putnam

If write a will b/f marriage, and get married, the will will be revoked not by UPC (upc operation of law only talks about divorce). The will will be changed b/c she is a pretermitted spouse under the 3 other revocation method. This only happens in the two time frame and get instate portion. Intestate portion is always better than right of election. P gets 1000 and 1/2 of estate b/c he has children who were not hers. How

can we fix? They should have signed prenupt agreement.

he had a prenupt agreement disclaiming interest of each other's estate and estate go into their children, they get married. They had 2 children. She dies and he marries another w/ no pre agreement. When he dies, he leaves a last will executed b/f marriage. She claims pretermitted spouse. Kids said yah, but dad signed the prenupt agreement that father gave it all to us. Wife's lawyer didn't mention the right of election b/c he realizes intestacy gets more.

Issue: may the children assert the contract, to which the step mother is not a signatory in barring the step mother from claiming pretermitted spouse? No, they may not use the contract to defeat the pretermitted spouse claim, only if the step mother had been a party in fact to a valid contract. this is b/c the public policy for the right.

Pre-termitted spouse status can be disclaimed by agreement of K with consideration and she herself has to be a party to the K. cf. pre-permitted kids.

### **Chap. 5. Will substitutes: Non-Probate transfers**

Such as insurance policies, trusts, contract. one consistent issue: **whether or not an obligation was created during life, if it was not, then the property will pass as part of the probate estate (testate or intestate).**

#### **SEC. A Contracts with payable-on-death provision**

##### Wilhoit

But in the K w/ insurance, she said that if she dies, the full amount and the interest shall be immediately payable to the brother. But the brother dies b/f the lady and when the lady dies, she leaves everything to a grand stepson. The estate of the brother says that it belongs to us. The issue here is does the will win or does the contract win? The will b/c the contract has an implied a condition of survivorship. So obligation established may be limited by settlor (who set up the contract)

##### Estate of Hillowitz

If UPC had been in existence, the result would have been different.

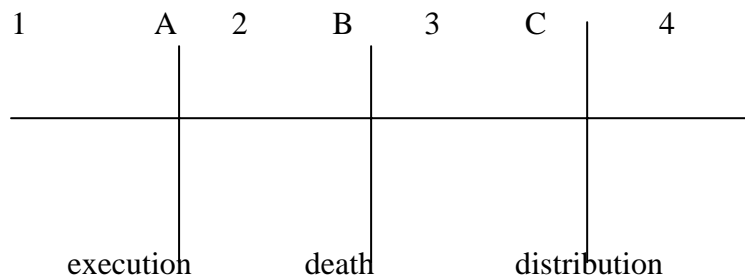
UPC anti-lapse statute- all states have that statute.

ex. My brother dies after execution of my will but b/f my death, every state has a statute says that if a bequest or devise is made to a relative and the relative predeceases but leaves issues, the issue take per-stirpe what the relative would have taken. Grandchild and all subsequent will be issues.

If someone dies simultaneously, (meaning with/in 9 months), then anti-lapse would apply.

Under the antilapse will apply to area one (before the execution of the will) as well. So if he has a sister who died in 1983 b/f the execution, her issue would also get per stirpies.

Anti-lapse applies to testamentary but not intestate case.



### Cook

Man married and had insurance policy naming wife as the beneficiary. He divorces her and remarries. The 1<sup>st</sup> wife is still the beneficiary when he dies. What would have changed the result? Revocation of operation of law. But at that time, there was no revocation by operation of law in Indiana.

### **SEC. B- Multiple party bank accounts-**

#### Franklin

Wife dies and when the man grows older he goes to his wife's sister and asked for her help. He opens up a joint account w/ a ROS (right of survivorship) which established a valid obligation. Issue: May you revoke a valid obligation with a subsequent instrument? Ct: yes, may do so.

### **SEC. D. revocable trusts**

Totten trust- A settlor goes to a bank and deposits money in trust for beneficiary, the settlor controls the money so he is the trustee and may revoke it anytime. If he gives the beneficiary pass book, the beneficiary has the money, but if he hasn't, the money is still settlors and creditors can go after him. You don't have right over the money until his death or giving. Yet at the same time, it is a still valid will substitute.

grown up trust - the settlor transfer Res (corpus of a trust, the actual thing) with a purpose (until a certain condition occurs- must be w/in the boundary of public policy) to trust (the settlor is a trustee). Legal title in the trustee and equitable title in the

beneficiary: 3 types

1. private
2. charitable
3. honorary (pets and cemeteries)

totten trust are always in a bank- no conditions (trust purpose) is there. this allows settlors to withdraw the money anytime and the tax is paid by the settlor and the beneficiary has no rights in that trust until the settlor dies. This is what is diff. from a joint account. They are revocable. Other grown up trust is irrevocable. This is also a will substitute that it doesn't go into probate.

Merger: once the legal and equitable interest merge, there is no longer a valid trust. Settlor can be an alternative beneficiary and there would be no merger, hypo: set up trust for A and name himself as alternative beneficiary, A dies, the money goes alternative beneficiary, if he died, go into his testate.

Merger occurs when the settlor set up a trust and names herself as the beneficiary (so to isolate creditors). So as long as the settlor and beneficiary are two diff. identity, then there is no merger.

→If the trust is irrevocable, how do you revoke it?

The trust is only revocable if the settlor retained right revoke. Unlike a will, can't revoke it by physical act. Can go to courts and explain that she didn't understand. UPC abolishes totten trust but the practice remains. Joint tenancy is diff. from trust is that in totten trust, only a settlor may withdraw the funds.

→Disadvantage of ability to revoke: if you can put it back into your pocket then it is going to be in your gross estate and it will be taxed. Also, your creditor can come after you for that property.

### Farkas

if a settlor has retained the power to revoke, is there anything created in life (to a potential or actual beneficiary) which would make it a valid will substitute. Gen. Rule- if an obligation is created in life time, then there is a valid will sub. The ability to revoke doesn't mean that an obligation was not occurred. So if the obligation is established, then the money goes to beneficiary regardless whether it is revocable. Just b/c he doesn't want W to withdraw it anytime doesn't mean that there is no valid will substitute.

F bought stock as trustee for William as beneficiary. The income tax is paid by the

settlor. Would it be included the gross estate for tax? Yes b/c he can revoke. Ct: belongs to william.

If the court had held diff. in Farkas, the 99% of the American trusts would all end.

### Pilafas

Does the presumption of revocation by physical act which applies to a last will intestatement also apply to a valid inter vivos trust? NO. but cf. revocation to operation of law. A settlor may establish revocation but if procedures are not met, then no revocation.

Will divorce revoke inter vivos trust? Yes, analogize it to revocation of operation of law

### Reiser (very important case)

Issue: if I establish a revocable inter vivo trust (a revocable will substitute) and at the date of my death, there are insufficient funds in my estate, all bona fide creditors can take from revocable trust to satisfy only to the extent of the debt. So if revocable, then creditors and spouses (no pretermitted children) can get to you during life time or over the beneficiary after your death. So every time bills come from creditors, they go to beneficiary of will substitutes.

### ***2. Pour-over wills***

create a valid inter vivos trust and then execute valid last will and testament and then pour it into an already created inter vivo trust. Does inter vivos trust has to be in existence b/f the existence of will? UPC says no, need not to be in existence at the time of execution in order to be a valid pour-over trust. but if by incorporation by inference, then yes. The will still have to go to probate b/f going to the trust. The inter vivos will have to go into probate (?).

### Clymer

A professor wanted to benefit BU and Clark U. got married and became successful. She established inter vivos trust with two sections. One is marital trust so can get marital tax deduction which exempts federal and state tax on anything going to your survival spouse. Part B provided life income for the husband, then her life income for her nephew and nieces, and then to BU and Clark.

She divorced him afterward and dies 2 years later and inter vivos trust was still in existence. Ct: b/c the first part of trust was to qualify as a marital deduction the woman implied that if the marriage is not in existence then he would not get anything

b/c he is not married to him anymore. Revocation by operation of law may be done to inter vivos trust by implication of condition. They didn't revoke b/c of the statute, but b/c of her intent.

In UPC, the revocation by Oof Law, there doesn't have to be based on condition and implication, just as long as divorced, the will substitute is revoked.

The 2<sup>nd</sup> trust – is also revoked. There is no words concerning marital here, but since no life income was to be paid upon settlor's death, so it must be testamentary trust (but it was an inter vivo trust) and the revocation by operation of law also applies. (this doesn't really make sense, ct on drug). So, treat husband as predeceased and so the next one to take is relatives (niece and nephews). Ct said that niece and nephews should be interpreted broadly and allows extrinsic evidence, and since she only have step nephews, they allowed the life income trust to go to them. UPC may not have changed this b/c there is an intent and intent can overturn statutes.

### 3. use of revocable trusts in estate planning

importance of estate plans:

1. last will
2. living will- (incorrectly referred to health care directive)
3. durable power (of attorney)- give ability to someone to make decisions to you (endures after my incapacity). Parents are very concerned about 2 and 3.
4. living trust: inter vivos trust (any trust you established your life time).  
Testamentary trust can only piggyback on a valid will.
  - a. revocable
  - b. irrevocable
5. totten trust
6. guardian: guardian is appointed by court for kids and that is what the diff. from durable power.
7. Conservator: one who administers money, the diff. bw it and trustee is that conservator does not have the broad range of power of a trustee. They can be the same person
8. Joint accounts: diff. bw joint accounts and totten trust is that in joint accounts both people can get to the money, not totten
9. Medicare/medicaid span down: medicare is age dependent and medicaid is poor dependent and so span down.
10. Gifts: you can't have medicaid span down or living trust w/o gifts. If a trust is revocable there will be estate tax but if it irrevocable, there will be a gift tax.

Consequence during life of settlor

1. property management by fiduciary:
  2. keep title clear, did you intend there to be a gift or trust.
  3. Settlers would have to pay all taxes (estate or gift)
  4. Dealing w/ incompetence: a process of long term care- create a inter vivo trust saying take care of me, this is not a will and not get publicity b/c it doesn't go probate. S/B/B2 ---->(r or I) to T like Mars corp. man w/ 15 billion
- Costs: 2 things that comprise estate is will or intestate. If will substitute, no inherent tax and no probate.
- Delays: speed is what people like, always look for liquidity.
- Creditors: creditors of revocable trust may take the revocable trust to satisfy the debt.
- Publicity: like mars corp.
- Ancillary probate: you don't do ancillary jurisdiction

Avoiding restrictions protecting family members (**augmented estate**): may not use inter vivos devices to defeat the claims of a spouse but may use them to defeat the claim of the child (or pretermitted child)

ex. Man has affair but everything in will substitute to the girl friend.

## **SEC. E. Planning for incapacity**

### ***1. the durable power of attorney***

only kicks in when you are incapacitated, but how and who determines incapacity?

#### Franzen

If you have a **general** power of attorney, does that give you the ability to terminate a trust? If there is no word durable, as soon as I am incapacitated or die, the general power of attorney ceases.

Facts: old man and lady fearful of what will happen to them when they get old. Established a trust w/ liquid assets. They had house and other assets but did not mention it. The old man dies, the lady's brother took her to a nursing home and tries to amass her property. He tried to terminate the trust created by the old man, the trustee (the bank) was not willing to give up. The brother argues that he has the power to terminate. Does gen. Power of attorney has the right to terminate a inter vivos trust? Ct: yes, and he agrees but he fears the case afterward say that only can terminate if specified but can have a catch all phrase after specificity. He wants us to use durable all the time b/c it allows you to do it after one is dead or incapacitated.

## **Chap. 6 Construction of wills:**

### **SEC. A. interpretation of wills**

Integration or interpretation of a will- cts like the plain meaning of the will.

### Mahoney-

the plain meaning rule- a person benefiting under a will and everyone comes in to say that the name refers to someone else, ct says that the plain meaning of the name is the person named so get over it. Strict construction of Mahoney rule.

At the time the testator wrote the will, she was confused of who her heirs are. The 4 methods of heirs determination, this one is the next of kin. The aunt claims that she is the next of kin but the testator really meant the cousins b/c she implied plurality and there was only one aunt. But b/c of the plain meaning rule, the aunt wins.

### Flemming

A person left all his property to Flemming and he signed and 3 witnesses. The attorney come out and said that the guy said to him that the will was a fake and he did it only to take an objective w/ her. His intent was deficient so the lawyer can't assent this will and now we are only left w/ 2 witnesses. This is a 3 witness jurisdiction and the will goes down to the drain. This is referred to as a sham will.

### Estate of Russell

In a holographic will, the woman leaves her property to a man and her dog. But she does have a niece which can take under intestate succession. The man came out and said that she meant the man take care of the dog and we have evidence that she want the man to take care of the dog. The dogs lapsed (died) b/f the lady. The niece said that no, man get half and since the dog lapsed, the niece gets the rest half, we are tenants in common. The man said that he should get all. The man is relying on extrinsic evidence that she intended all property to go to him at the same time he will take care of his dog.

Assumption 1 and 2: 1. To the man and take care of her dog

or 2. Man is in trust of the dog. In the first one, the man would get all thing, in the second, the niece would.

Issue: should man be in trust of the dog?

Ct: the dog lapsed and that half amount goes to estate and the niece get the other half. There is nothing in there that gives us confusion and there is no clear and convincing evidence that says that she intended the man to get everything. Ct likes the fact that the family gets something too. The tenants in common approach is better than the trust arg.

→ When there is identifiable person in the will but everyone knows that it is the other person the testator meant- ct allows extrinsic evidence whenever they want the other

people take:

1. latent ambiguity- bring in extrinsic for language latent have to exist so parole evidence may be admitted. Bring clear and convincing evidence against a case like Mahoney and give it to whomever testator wanted to give to.
2. the primary intent rule- not ambiguous but clear statement, if you may muster clear convincing evidence 75%, you can overcome clear writing.
3. Revocation by physical act- DRR- intent to revoke is conditional on a probate of a second instrument as long as:
  - a. the physical act is not too pronounced (use pencil is fine) and
  - b. the two instruments are similar.

## ***2. Correcting mistakes (revocation by operation of law)***

two type of statutes, one on the statute in restatement and one in NJ the probable intent. If you can bring clear and convincing evidence to show intent, then can rebut (?).

### Erickson

Man wants to get last will and testaments before marriage. He writes in the will that everything goes to the wife if she survives otherwise to the three daughters. There was no mention of prenupt agreement.

As soon as you see marriage in two time frame, should automatically think of pre-terminated spouse. Marriage has happened after the execution of the will and no provision. 3 children want revocation by operation of law so she would be treated as predeceased. Wife says: right, we should have executed the will after marriage. But the fact that there was such close proximity b/w the execution of the will and marriage is sufficient evidence that the testator did not want the statute to apply. She may not have been pre-terminated spouse b/c of the statute, but she could have gotten right of election under intestacy.

Father: The proximity could have been clear and convincing evidence. If they had adopted restatement, they would not have problem. Ct did not do that. Ct: mistake by the lawyer and that mistake can be subject of a new trial to determine if this is the true intent of the testator. So they got away from reading the will and the plain meaning rule but focus on the mistake of the lawyer.

Question:

Dependent relative revocation would be overcome by doctrine of mistake where you can prove by clear and convincing evidence to revive a prior will.



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ex death dist.

you die in the land of lapse, as long as there is no condition of survivorship, you would apply antilapse statute. In the land of lapse there is no such thing as last will and testament. So, ‘

when hypo like that, ask:

1. whether there is a valid will
2. against rule of perpetuities
3. how to distribute at C line
4. vested or contingent

#### Allen v. Tally

A question of survivorship. Do words of survivorship limit the applicability of an antilapse provision. I give my things to LIVING brothers- does that mean the antilapse provision apply. Ct: only the living one take, everything there is there for antilapse, but the intent is that they be alive.

Rule of administrative efficiency is that if there are siblings born in period 3, they would not take, this is about the increase in class.

New UPC says that survivorship means nothing b/c ?

#### Jackson v. Schultz

A man falls in love and married a woman with children by prior marriage. He never adopted them and in his will: I give everything to Bessie and her heirs. Bessie dies in area 2, then his property escheat to his estate. Ct didn't apply the antilapse statute b/c it can't. the court then asked what "and" means. If it is changed to "or," it would be words of substitution, the court said that they are equal and changed word of limitation to word of substitution.

#### Dawson v. Yucus

The will says that the land should give back to my late husband's family. Did that create a class gift? Can't apply antilapse if one is not a relative. So the woman who wanted to give the land to the side of his family and can't do so b/c the family on his side is deceased and the court figured that she intended a class gift (Jean and all other in that side of family).

Holding: the property would have gone into her residuary or estate.

The court is not willing to do voodoo as the Jackson case would. The Jackson case

changed the word and to or.

### In re Moss

Testatrix had a trust to pay the income to wife for her life and after her decease, to eliz and the child and other nieces and nephews who shall attain the age of 21. Eliz. Died during the two time frame (1891) and the testator died in 1893. There are other nephews and nieces who survived the wife. So does the fact that eliz died during that two time frame means they all lose? No, the surviving ones take. This is not an antilapse case. What would have happened if she had issue? Then her issues would take her share. An issue can be ingestion or by marital. Holding: use antilapse statute if there is issue, but if no issue, give to other members of the class.

Will substitutes are now provided for in the new UPC. In New UPC, if one dies in area 2 such as eliz. Ask whether she is a relative and whether there is an issue.

→ Antilapse is a testamentary device. It doesn't apply in irr. Inter vivos trust, but if the donee has a special test. Exclusive pa and she exercise the pa in the last will and testament, then antilapse apply. Only apply to the relatives of the testator **and** the predeceasing party. and you have to have a valid will to apply antilapse.

If in antilapse- if the donor say may appoint among children, and donee did but the child predeceases him, then under common law, the child's issue can't take b/c the donor intended the child only. But under new upc, everyone hold hands and allow the issues to take.

## **Chap. 7 restrictions on the power of disposition: Protection of spouse and children**

### **SEC.A. rights of the surviving spouse**

Spouses are protected under pre-termitted spouse statutes. Whenever a marriage takes place after the execution of the will (area 2), the spouse may be a pre-termitted spouse, has share or may have the right of election (1/3 of the estate or 50,000 dollars and a % based on how long you have married) the second alternative is new UPC, the old states still use 1/3.

Issue: why should property be so unequal in terms of protection of spouse at death and at divorce. At death, gets less than at divorce.

B/c the in the last 30 years, marital property distribution has developed rapidly to address gender discrimination but in the wills field, we are 30 years behind. Problem resolves in common law jurisdictions, 8 or 9 are community states and the rest are

common law. Community property is from Spain: all property acquired during marriage is held by both parties in an undivided system which belongs to both at divorce and death. Common law: property acquired during marriage, title of property may be titled in the name of one of the marital party. it is determined where you domiciled at your death.

## **2. Rights of surviving spouse to support**

a. Social security is only payable to surviving spouse, if spouse dies, then too bad.

Can't deprive spouse of social security.

b. Private Pension Plans on the other hand, can be bequeathed to others by will substitute and defeat the claim of the spouse. However, in divorce, I would not be able to do that.

c. Dower is abolished for the right of election. Curtsy is for male.

The elective share and its rationale- intestacy is often described the first 200,000 dollars and half of the augmented estate. Under New UPC, it can be that, but it is diff. if there are children or parents from one ind. You want intestacy, under intestacy, you always get the most.

Election will be one third of the augmented estate, more than likely, that is what we are going to find. However, there is a supplemental payment (?) New UPC is better b/c it corresponds the marital division of property.

d. Homestead: real or personal property which is exempted from probate. Can't deprive spouse of that.

c. Family allowance: when the money is in probate, you can go to the court and ask for allowance

d. Dower: a woman's right in the property

Curtsy is the man's right in the property

Very few states retain these words and use right of election, but electing against the will is not going to help if there isn't much in will.

The elective share- the amount is diff. from the amount in intestacy. Election and intestacy are two diff. things.

Augmented estate: 3 kind, probate estate, revocable estate and absolute estates (are irrevocable will substitutes made less than 2 years more than 10,000 dollars).

Augmented estate: allow PE and RE to be added to absolute estate for election purpose and may add a percentage, but the catch is that the absolute portion can only be used for calculation purpose and can't be taken away from the receiver to satisfy

the spouse, but can take away from PE or RE.

New UPC- augmented estate includes the below 3 category-

Probate E (10,000) and Reclaimable Estate (ws, 400,000)                      Absolute Gift  
(money given away w/in two year and at least 10,000)

Under New UPC, a spouse can take 50,000 dollars and a percentage based on the length they are married out of the augmented estate. We drop the word probate estate and replace it w/ augmented estate. If the spouse is one of the beneficiary under the ws or others, she then must deduct that amount from augment estate. The spouse shouldn't have her cake and eat it too. How do we get 1/3 of 510,000 to get 170,000. Start w/ probate and radical abatement (?)

Hypo 2: if PE is 10,000 and RE is 100,000 and AG is 400,000, she can only use the AG amount for calculation but can't take from the AG, so she is going to lose.

You give 1/3 of augmented estate. How does augmented estate play in a intestate succession? The spouse will get the first 200,000 and one half of the augmented estate. This is only applicable to spouse. He loves this augmented system. But often they would want to deal w/ illusory and fraud transfer. But he doesn't like the fact that the court has the discretion of what is illusory. Ct is less likely to define money given to his family as illusory as oppose to give money to other lovers.

Under the old rules (old UPC), the only thing a spouse can get is 1/3 of 10,000 as elective amount. Simply b/c of death, you can defeat the spouse claim of property. The New UPC is so complicated that nobody can understand it, but NY has the best of the statute. All the statutes are based on the NY statute, even New UPC.

#### In re estate of cross

the best interest test. If the spouse does not like life estate, the spouse has right of election, and this concerns the ability of incompetent spouse to elect.

A wife is 80 years old and is in nursing home. Man last will and testate all to his son, her stepson. Wife is not pre-termitted spouse. Whether wife may elect against the life estate (is the right of election personal to a surviving spouse or is it transferable to someone acting in the spouse's best interest). Ct: it is transferable to someone acting in spouse's best interest. What should he have her do b/f she became incapacitated? Sign a disclaimer, a waiver is important in medicaid spin down. If not, a guardian may be appointed and stop the whole will.

New UPC- election may be done but the money must be placed in a custodian account for the spouse's benefit but then return to the estate of her husband's estate. This is b/c the right of election is only under the presumption that she knows what she is going to do w/ the estate.

### In re Coopers:

Two men living together in committed relationship. Unable to marry each other. One dies and leaves a last will and testament. The surviving one argues that he should be able to elect against the will b/c he is a functional surviving spouse. The court said no, there is nothing such as functional surviving spouse. Committed partners (same or opposite sex) are not surviving spouse. But b/c someone said that she is the spouse doesn't make it so. In Hawaii, there is reciprocal beneficiary. These are people unable to marry but if they are validly registered, they have the right to elect against the will of the partner, and all benefits w/ the marriage, but it is not marriage b/c it would not travel. Reciprocal beneficiary doesn't mean that you are married. The reciprocal beneficiary doesn't travel. So if you registered in Hawaii, you move to VA, then no. someone who is married can't have reciprocal beneficiary. Canada has also adopted this.

### ***Property subject to the elective share***

#### Sullivan

About will substitute and the ability of a husband establishing a trust where he has tremendous power and use that to avoid spouse's right of election. Decision is absolute in accord w/ Reiser. Man established inter vivo trust which provide him life income and can revoke the trust anytime he wish but if he dies w/o revoking, the trust would be distributed b/w two men who were not his spouse. Issue: can he avoid spouse's right of election? This is reclaimable estate. The fuss is about which of the estate is the property or the trust in, PE or RE or AG.

gift causa mortis- I give you something on my death bed and I give you something, but if I recovered and I want it back, you would have to give it back.

### In re Reynolds

The woman had a husband when she died and was under medicaid assistance (after a spin down). However, when they did the medicaid trust, she kept a power under the trust a power to consume, invade or dispose of the principal. She was afraid that all her children would die and leave only grand children (?).

**Waiver**- A pre-nupt agreement (disclaimer or release). Unif. Premarital act has been adopted in 14 states- pre-nupt agreement will be valid if:

1. in writing
2. complete disclosure

### 3. agreement must be fair

#### In re Estate of Garbade

She said that the agreement was unfair b/c she only got it two hours b/f wedding and nobody told her that she didn't have to sign it and she wasn't represented by attorney. But the fact that 100,000 life insurance was paid to her. She only married to him for 2 years. And in consideration of the asset the man has, that was fair. The court applied a presumption of the validity of the agreement and she has not prove enough to rebut it.

#### ***4. Rights of surviving spouse in community property***

→ Augmented estate plays no role in community property states. In community property, anything acquired during marriage is community marriage. The longer the marriage, the larger the property. Under right of election, if husband dies, how much can wife elect for? She gets her own property b/f marriage and half of community property. Cf. intestacy in a community property state. In intestacy, the spouse gets all her property and all cp. She then takes the first 200,000 and then one half of his property. If kids are all theirs, then she can take all. If he has parents, he can take ? and ? percentage.

Ratable abate

→ The right of election: election must be done w/in 9 months from finding the will and it can be done by others if that was in the best interest of the surviving spouse.

→ What law controls at the death?

The law of situs controls real property and law of domicile controls personal property, but they still have to administer the property w/ the rule of where the property was acquired (that is whether it is administered under community property or common law, the right of election, the forms of wills). Property is classified as to distribution is administered where the property was acquired.

#### ***6. Spouse omitted from premarital will (that is pre-terminated spouse)***

When marriage happen during the two time period, that will be pre-terminated spouse b/c state will presume that you forgot about her.

#### Estate of Shannon

A man wrote a will in 1974 and married woman in 1976, dies in 1988. If there is marriage in 2, then there is pre-terminated issue, if someone dies in 2, there is anti-lapse. If someone dies in area 3 (after death and before distribution), the issue will be

vesting. Woman survives by 5 days, then simultaneous death, survived by Son. Son is P here. Whether woman is pre-termitted spouse? Yes. Have to have will to have pre-permitted spouse or antilapse, or it is just intestacy. Pre-permitted heir is not just for a child but for any issue subsequent. Cf. New Hampshire. Pre-termitted heir should only apply to area 2, but some allow 3. Can apply to non-marital child and adoption (adoption will be treated as birth). What other recourse does a child have? Nothing, so you can disinherit a child. Can do so by waiver, or deprive them of standing by giving them exactly what they would take in intestacy.

## **SEC. B Rights of issue omitted from the will**

### Azcunce

A man write last will and testament in 83, who makes no reference to a kid born in 84. He executes a codicil in 86 (b/f he dies). So now we have pushed the kid to area 2 to area 3. Now the kid can't be pre-termitted heir. Ct: the fact that the kid was born b/f the codicil keeps the child from pre-termitted heir. She would have been fine if there was no codicil.

### Espinosa

Should the lawyer who executed codicil be liable to the kid b/c of negligence? Ct: no, potential beneficiary can't sue, only those in privity.

UPC- how much does the kid get? If there are no children in existence of A line, then the amount the kid who was born in 2 was the intestate portion. However, if there are children in existence at A line and they are given something, the kid will share what they got in equality. If kids are given to things of diff. value, the court will add all those together and give the left out kid the average value of all the items. The court tries to put equality.

Pretermitted heir:

### In re estate of Laura

Whether issue of grandchildren is allowed to take? A child born and then dies in area 2 but survived by issues, 2 children. One grand child also dies in area 2 but leaves issues as a great grand children. The two seeks to be pretermitted heir. In his will, he specifically crossed out the children, and indicates that he doesn't intend to give any pretermitted heir, even though he didn't specify issue specifically. So, the great grandchildren do not take. The rule is that the testator can have the power of disinheriting pre-termitted heir.

Some states only allow those born in area 1 or 2 or both. The way to handle is put

1(+) in areas for pretermitted heir, (-) for anti-lapse.

→ Pretermitted spouse always has right to elect or take under intestacy. The most a spouse can take is under intestacy. If marriage in 2 time frame, can have a codicil and that will push you to area 1. Can sign a prenupt disclaiming or releasing right to elect. You can't elect as pretermitted if you have sufficient will substitute.

Community property- if a dies, spouse gets all her separate property, half of the community property and half of the spouse's share. If elect, only 200,000 and one half of the augmented estate.

Pretermitted heir- you have forgotten a child w/o will substitute. They get an intestate portion. To determine that, you gotta do the intestate chart. If the spouse get 200k and one half, then the heir here would take half of the father's augmented share, if there are 3 kids, they would share (this is old upc)

Under new upc- people hate this. If decedent has no issue in existence when writing the will and have not provided for the in will substitute, they still take under intestate portion. But if A has given just one child something, and there is no pick up rolling stone phrase, all 3 must share the value of the watch. So there are 4 children, if the watch is 20 dollars, that one child gets 20 dollar, and other 3 get one fourth of the 20 comes from the residuary estate.

Determine who the client is and see if good under new or old upc.

Can't be pretermitted heir or spouse if there is will substitute.

Pretermitted child, if the child was born in area 1, have to see the statutes if allow area

### **Chap. 8 Trusts: Creation, Types, and Characteristics.**

Trust: trustee holds legal title and they are the ones in charge. As long as they don't violate public policy, then it would be valid. How do you know whether a conditional giving is a trust or a gift. "I give you and you should be nice to A" It can be argued as an inducement of the gift, but not a trust.

3 kinds of trust: private, charity, and honorary.

Honorary beneficiaries: pets and cemeteries.

If the settlor himself is the beneficiary, there is no trust but a merger S/T/B, but if he names himself and one other person as beneficiaries, then it would be a valid trust S/T/B1 & B2.

No trust fails for want of trustee. You can't make up settlors or beneficiaries, but can make up trustee.

There is a legal duty in a trust but not in legal life estate.

Does the duty of sale accompany a trust? Reinstatement of proceeds of sale, borrowing money? Leasing? Yes waste? (meaning if I create a life estate w/ A being the remainder, A is going to be concerned, when waste happens, then the conflict b/w life estate and remainder exist). Do I have the responsibility or right to bring suit?

## **SEC. A. Creation of trust-**

### ***1. intent to create a trust-:***

#### Jimenez:

a grandmother loved her granddaughter so she gave money to her son and said that this is for grand daughter's education money. There is nothing in writing but clear and convincing evidence that this is for educational. The father put it in the custodial account. So the issue is whether this is a trust or a gift to the g/daughter? The father thought that this is a gift instead of trust even though he named himself as the custodian. So, the court needs to decide whether there is a trust which created legal responsibility on the father or simply a gift? Ct: there was a trust intended and created and the father did not respond appropriately to the status he created. He didn't keep records and spent on expense b/y the purpose. Don't need to have writing to create a trust. A trustee has a fiduciary duty and serious. Must keep a good record.

#### The Hebrew Univ.

We are looking at whether there is intent to create a trust? 13 years of litigations and only lawyers win in this situation. A couple collected books and contracted that they would agree to give books away. The books were still in Conn. And she died. H: this is a inter vivos trust and where she and husband are the settlors, she is the trustee, and we are the beneficiaries. The estate of the her estate says no, show me proof. H: we didn't sign anything with her. But we do have a memo she signed that approved news article. D: You don't have any legally enforced duty, there is no intent. There was no formality and falls into estate. Ct: there was no valid trust created, the books fall into the residuary estate.

The friendship will do you in, so remember to sign agreements.

She could have agreed that the books will arrive w/in a year (other words, there need to be enforceable duty). It is like saying, we will do lunch, you say, ok, call me. you will not have duty to do lunch, but if A said, lets do lunch at... in ..., you say ok, then you have a duty.

## Heb. Univ. II.

The court said when she went to Jerusalem and met with Univ. and signed the memo. She made a constructive delivery of the book, the constructive delivery is sufficient to create a gift. Thus, there was an inter vivos gift. It is like giving someone a car, but couldn't deliver it at the time but give him the key, that is constructive delivery. The H attorneys changed tactics said that if it is not a trust, in the alternative, it is a gift. Trust is harder to prove than constructive delivery of gift.

### ***2. the res – the necessity of trust property***

must be identifiable

#### Unthank

An ind. Writes a letter (immediately think whether this is a holographic will, wholly in handwriting, dated and signed, or material portion in handwriting and signed).

But it must have a death clause, but not a love letter (knowing that all would end ... is this death clause)?

He died and the estate said that P is not going to get the money b/c there is no inter vivos trust b/c there is not inter vivos trust property. There was no money set aside for that. This was fortuitous with no res, so gotta say 200 a month from where?

Can't say 200 up to 5000, but can give, 5000 and you get 200 a month.

So if he says 100 to A for ..., if there is left over after the purpose was done, money result back to settlor. Occur by operation of law.

→ Constructive trust: happens when there is a bad deed. but may not use a constructive act to remedy a mistake. Primary intent is what we look at and that is what we look to fix a mistake.

#### Brainard- stand same as Unthank

So, he said, "I am going to invest on your behalf, and the money that I made will be yours" at the end of year, he said that I made investment, but I didn't get the income and thereby lowering his income tax. Ct: he can't do it even if tax law allowed him b/c there never was a res needed for an effective trust. We have trust, settlor and beneficiary and intent, but the phrase, "I am going to invest for you" not "I am going to take my dell stock and invest for you" then there would be identifiable res. The first phrase has no identifiable res, that is like I am going to give you 200 but from where? Be specific.

In both of the cases, there is an expectancy.

Pascal-

There was a valid trust, even though there is an expectancy as the previous two cases. A man owned a contract which provided that he would get all the income from my fair lady for Shaw. He became involved w/ a woman and wanted to provide something for her so he wrote her a letter promising the profits that will take place in the future. The expectancy is allowed to be proper res b/c there is a contract based on an existing piece of art. Can be determined.

**3. Necessity of trust beneficiaries**

Clark v. Campbell

If the settlor retained any incident of ownership, it would be included in the gross estate.

There must be someone w/ equitable interest who are specific by clear and convincing evidence, can't just say friends. Or else the trust would be invalid. cf. latent ambiguity. Or else Anytime we have latent ambiguity we look at whether there is. .. Indefiniteness will kill beneficiary.

In this case, the property would pass to residuary estate if there was a valid residuary clause, or else go into his estate.

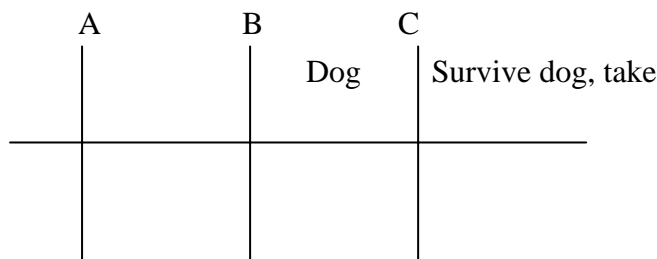
In re Searight's Estate

Whether a dog may be a valid beneficiary. Ct: yes.

We can have honorary trust but we gotta watch out for rules of perpetuities.

Settlor left 1,000 to take care of the dog and at the death of the dog, the money will be divided equally among a list of people who are living at that time (requirement of survivorship of the dog). Private is about human, charitable is about a group, honorary for non-human.

Rules against perpetuities-



The vesting occurred at C line, vesting occurs if they survive. Suppose Dog was 10 at B line. Under RAP, all interest must vest within a life in being and 21 years. But a dog is not a live in being. So the only live in being we can use is the life of the settlor. So the interest must vest w/in 21 years after he dies. Is there a possibility that C line may occur more than 21 years after the death of testators? If there is a

possibility that the dog could die more than 21 years, it violates the rule against possibility. So, don't worry about others lives, just the dog and the settlor. The court avoid this problem by saying that if we take at the B line 1000 dollars and distribute it to the dog, the most we can do will run out in 4 and half years, and in that way, the vesting will occur then, thus, the trust did not violate r/a/p. What we should do to make the trust valid is to add a clause "but in any case, the trust shall invest w/in 21 years after the effective date of the trust." But if the pet could really live more than 21 years, "I direct at the death, my trustee choose infants from a hospital as the live being in this trust. At the death and after 21 years of the last one to die, the interest shall vest" it doesn't matter if these infants do not get any benefits.

#### ***4. Necessity of a written instrument***

→Oral inter vivos trust of land

You can't argue something on oral against the deed. This is for the statute of fraud. If you transfer someone a house w/ oral agreement that he would return the house and he later wouldn't, there is nothing you can do.

Now, when you have a valid deed or will involving real property and someone asserts an oral trust, the fuss is all about how you go ahead to prove the oral trust.

Constructive trust: there is a bad act, such as those under undue influence. You have to have a confidential relationship to the contestant to the proponent of the will. 5 types of confidential relationship (supra). The contestant must show that to whom the land was given was in a confidential relationship w/ the settlor and it would be unjust enrichment for the grantee to keep the land. Assumption of unjust enrichment attaches when there is confidential relationship that he would have to rebut. He can say that I have done so many for them and this is the way (the land) to compensate me for what I have done.

#### Hiebel

Oral arrangement w/ real property. On his exam, as soon as see wife or kid, immediately think of pre-terminated. W/ real property, immediately think of unjust enrichment and the issues related here. The mother gave a house to the son w/ the oral trust that if she had terminal cancer, he would keep. The mother got better and want the house back, the court allowed saying that if it wasn't b/c of terminal cancer, the mom would not have given the house, and she doesn't. this would give unjust enrichment.

→Oral trust of will for disposition at death

### Olliffe

Woman leaving money to minister tell him to use it as charitable works, but never defined what charitable deeds are. He said that all thru her life, she had told him what charitable works she had wanted and he had confirmed w/ her. Ct: the oral arrangement is unenforceable b/c there is nothing in the latent ambiguities. If the case took place today, it would have been better.

### **SEC. C. Discretionary Trusts**

Discretionary trust – I give one million to A for the care of B and C (so A has discretion).

### Marsman

A woman wrote that the lawyer has discretionary power for the trust to the husband. The stepdaughter (daughter of wife from previous marriage). She became concerned that the husband needed the money but the lawyer was not giving enough to him for the mortgage. The stepdaughter said that we will buy the house and you can have life estate. This is good b/c Kappy married another girl. Kappy died and the stepdaughter want to move in the house. The wife got a lawyer arguing that it is the lawyers' fault that Kappy and his wife had to sell the house to the stepdaughter, therefore, the deal should be set aside. So, the lawyer was in trouble b/c he breached his fiduciary duty in failing to provide sufficient funds to kappy. He has an affirmative duty to provide as a trustee but not wait for Cappy to ask him for money. Ct: agreed that he is guilty, but he is not liable b/c there is a provision in the trust that any breach is forgiven unless willful. The sale of house is valid b/c they weren't involved in the trust. The court may decide how much should have been paid to Kappy and those will go into his estate and the wife would get it.

### **SEC. D. Creditor's Rights: Spendthrift Trusts**

Spendthrift trust- it is a clause in an inter vivos trust or a testamentary trust which says that a trustee may seize income or principle to a beneficiary if it appears the creditor's of the beneficiary could get at it. The rationale behind the validity of spendthrift clause is that money belongs to the settlor and he should be able to turn it off if he wishes.

Opposition: You should not be able to let Settlers do that b/c you have created attractive nuisance b/c people now would be next to the beneficiary, marry him or lending him money b/c he appeared rich but yet, should anything happens, the creditor can't get remedy b/c the beneficiary was cut off.

### Shelley

Shelly rule is: spendthrift are ineffective against a good public policy claim. This is

similar to augmented estate, first have to use up the income.

Tort victims would be a good policy and alimony or child supports are good policies.

Know the pros and cons of spendthrift and the public policy.

### O'Shaughnessy

May the IRS to force the trustee to give O the money when the settlor says "trustee MAY give the money"? may implies discretion. Ct: no, the money still belongs to the settlor. The trustee pays directly to k-mart so the creditors get the money but not the IRS.

Medicaid- as a qualifying medicaid recipient for long term care, only assets which are mandatory, discretionary are not considered assets of the beneficiary.

### **SEC. E. Modification and Termination of Trust**

If I am the beneficiary or the settlor of the trust, but I don't want it anymore, I want the money now, a trust can be terminated:

1. a settlor may terminate a trust if he has retained the power to revoke (so a trust is automatically irrevocable unless state otherwise).or all beneficiaries agree w/ the settlor to terminate trust.
2. a trustee may terminate a trust only if the trustee has been given power to do so by the settlor (ex. Trustee may distribute so much of the income of the principle – which gives discretion and this give him the power to terminate)
3. beneficiary may terminate if he work in tandem (both agree to terminate) with the settlor or if all the material purposes have been accomplished (ex. Settlor died, I am the beneficiary, the purpose is JD, there is a lot of remainder, I now can terminate the trust b/c the purpose is done, but if the purpose is for the care & welfare for the rest of my life, then can't terminate).

### In re Stuchell

3 siblings and trust is there for their support. Dilemma is one of the sibling is mentally handicapped and requires costly extensive care for the rest of his life, the other siblings realize that they may be able to qualify for state medicaid, and the money coming from the trust may disqualify him for medicaid, so they want to terminate his share of the trust for the purpose of his benefit. If it can be terminated, he would be able to get better treatment. Ct: no, there is still material purpose, that is the care and welfare (they are saying that we are not going to be terminated just b/c it is better for the beneficiary).

Disagree w/ the ruling b/c if you can prove that it is advantageous for beneficiary,

then doesn't that show the intent of the settlor b/c settlor want the best for the beneficiary.

Could termination be allowable if can show by clear and convincing evidence that this would have been the intent of the settlor b/c it is better for beneficiary.

Can disagree with this ruling by using substantial compliance and primary intent.

→Claflin rule is that beneficiary may never terminate trust w/o settlor if the purpose is undone.

### In re Estate of Brown

P is saying that the only way to do that is that they get all the money now. Trustee here does not want to terminate b/c he want his money. Trustee has the power to terminate b/c he has the power to distribute. The court support the trustee.

>Changing trustee is the best way to terminate trust. But need to establish certain thing to change.

Uniform Trust Act on the removal of trustee, only been adopted by 2 states, but most states statutes follow this.

A trustee may be removed by the ct on its own initiative or on petition of a settlor, cotrustee, or beneficiary. The court may remove if:

- a. the trustee has committed a material breach of trust (commingling, record keeping)
- b. lack of cooperation among cotrustees substantially impairs the administration of the trust
- c. the investment decisions of the trustee, although not constituting a breach of trust, have resulted in investment performance persistently and substantially below those of comparable trusts
- d. b/c of unfitness, or inability to administer the trust, removal of the trustee would be in the best interests of the beneficiaries (alimnet)

## **Chap. 9 Building Flexibility into trusts: Power of appointment**

### **SEC. A. introduction**

A settlor creates a trust and transfer res. Donor creates a power and transfers power of appointment. Very seldom is the donee the trustee. The donor creates the power and donee exercises the power. Then beneficiary will be the object or the appointee. Object is a potential appointee, and appointee is the person that is chosen.

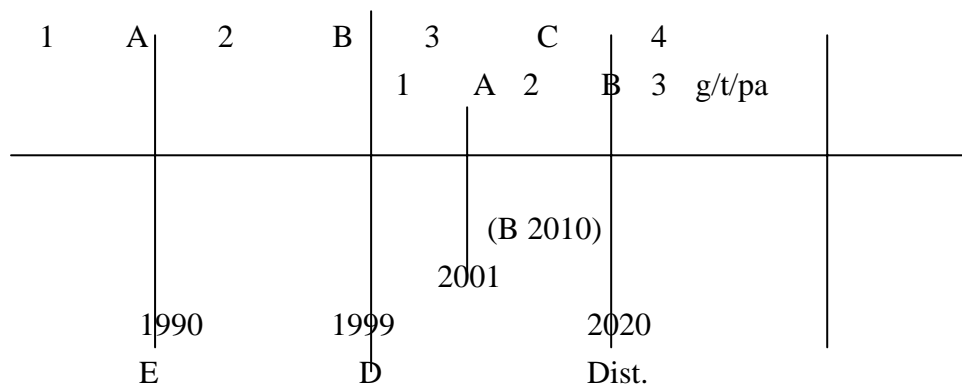
Alternative beneficiary is taker in default. Exercise means that the donee must do something.

Inter vivos or testamentary- that refers to when the donee may exercise. If at live, It is inter vivos, or testamentary after death.

1. General- donee may exercise in favor of himself, his creditors, or his estate
2. Special- anything other.
  - a. Exclusive (donee may pick and choose)
  - b. non-exclusive (give equally, share and shares alike).

Ex. Give one million dollar to A as she shall appoint among my heirs at law. This is special, inter vivos (can appoint b/f I die), exclusive b/c she may choose and pick one. But if say give one million to A as she shall appoint among my heirs at law share and shares alike. This then becomes non-exclusive.

One can give a life estate and at the same time qualify for tax deduction. I give her life estate and in her will, she may appoint among the children. she has a special non-exclusive testamentary power of appointment.



Hypo 1:

Ask whether first there is a valid will and last testament?

One million dollar to A for life and then A shall appoint in a valid will intestament.

A has general testamentary power of appointment. A dies at the C line, but for A, A dies at the B line. For purpose of this trust, this is the C line for the donor. Two charts overlap. If A left power of appointment in 2001 to B but B dies at 2010, there is a problem of anti-lapse. Even though it is in area 3, but for A, it is in area 2.

Hypo 2:

What if we make it into special testamentary exclusive pa. I have 5 kids and give

One million to A and upon death appoint among the 4 siblings. Appoint to B but B predeceases. May we apply antilapse in an exercise in a special exclusive testamentary power of appointment? 99% says no, but NJ or UPC says yes.

Antilapse should not apply to people who were not intended to be benefited.

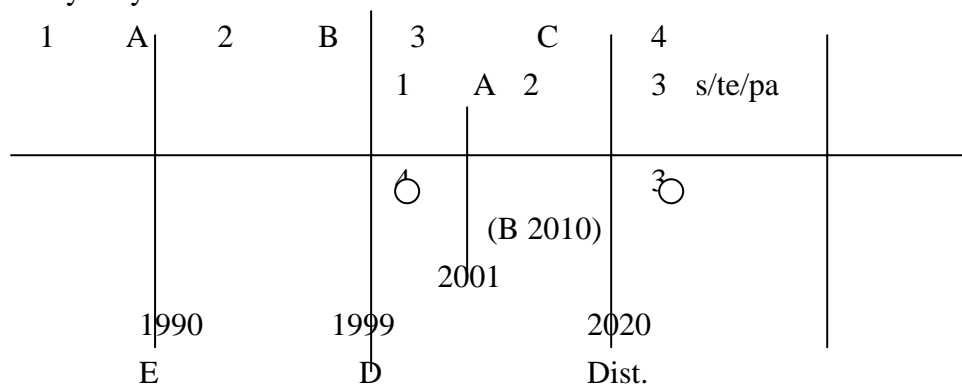
Antilapse would not apply if donee appointed during life, antilapse only apply after

death.

Was the will valid? Then was it a valid power of appointment? If one is a relative of a donee, if not, then antilapse doesn't apply, but if one is the relative of the donor, antilapse will apply (this last phrase is only under UPC) UPC allows the relative of appointee Stepchildren are relatives under UPC.

Implied Trust- Donor by creating a special group, had implied to benefit other members of the group if A does not exercise it properly.

If there is a taker in default and A screwed up, then you will not apply implied trust, everybody will take



Hypo:

A appoints B in will but B dies in 2, How do we use implied trust now that we have B with 3 kids and 3 siblings alive and well? If there is a contingency being chosen, the contingency is only resolved in A line for A. B is excluded b/c she was not alive the moment the contingency was draw. So,

Hypo:

What if now it is non-exclusive? Give 1/4 to B's estate 1/4 to all 3 siblings.

Contingency: one million to H when she turns to 40

Non-contingency: one million to H at age 40, if h dies at 35, still pay her at 40 b/c it was not contingent upon her being alive.

Vested subject to defeasance: one million to H to life income and in will and last testament to his siblings share and share alike.

Whenever you have vesting, it goes to the estate but if you have anti-lapse, the object goes to issues.

What if we are back to gen. PA? A is still done but he gives to B for life and to B's children for life, and at the death of last children, then divided upon all issues. This violates the rules against perpetuities, so he screwed up. Is it reclaimable under UPC? Yes, available to his creditors? Yes, so just by exercising power, even though it violates RAP, the power does not go back to donor but donee's estate.

### ***General power of appointment-***

#### Irwin v. long

Husband has a gen. Inter vivos P/A, there was a divorce and the spouse argue that I am taking half b/c it is marital property. Ct: it is not, power belongs to the donor, the appointment belongs to donor until donee exercise it. In a new UPC, gen. Power are included in augmented estate, they are marital estate if in augmented estate.

General inter vivos PA is not marital property until it is exercised. If it not property for the spouse b/f exercised, is it property for the creditors? There is a hierarchy of needs. NY hold yes only b/c it is general inter vivos, but no if it is testamentary. But IRS can get it if you exercise or not.

### **SEC. B. Creation of power of appointment – the problem is the ambiguity of language**

Usu. the question is what is created, only 3 options. Trust, gift, or P/a

#### Nelson

Issue: So, did he give a gift (fee simple) or the power of appointment that if she didn't exercise, it would default to the foster daughter?

Foster daughter: the money she did not spend b/f death are not exercised and it goes to default.

Wife's estate: no, this is a gift, you get behind us.

Ct: you can't give a gift and then restrict it, so it was a fee simple.

He thinks that what he wanted was that it is an alternate taker situation. He gives it to his wife, but if she predeceases him, then goes to the foster daughter.

### **SEC. C.-Release of a power of appointment**

Statute may allow release b/c of tax reasons. If a P/A is testamentary, you can't release it. But if it is inter vivos, even if special, then may release.

#### Seidel

A couple, the wife divorced the donor, when they divorce, she coerces him to promise to exercise the p/a which he had in favor of their children and her. almost

immediately, he remarries and died with last will and testament in which he exercises P/A in favor of the 2nd wife.

Is the agreement he promises to exercise in favor of the children enforceable against the power of appointment? No it is not b/c the agreement was not inter vivos but he had a gen. Testamentary p/a. The children could sue the estate but can't take any assets in the power b/c the power was gen. Testamentary and therefore, not available to creditors. Whether or not the agreement is an effective release. No, can only do so allowed by the donor, so all the agreement donee signed don't mean a squad if the donor does not authorize him to do so.

Why can't they take from the fund but only from the estate? B/c the NY statute says that the creditor of a donee of gen. Appo. May not take.

Was the statement by which he promised to exercise in favor of the kids a release of the P/a? ct: no, if he had not released (exercised), it would be for the benefit of the kids.

Here, there is an exercise in the will which is valid. But if the will is invalid, there would be take in default, so should argue that the kids have standing and that the will is invalid b/c of formalities or intentionalities. (this is what I should do in the exam).

## **SEC. D- Exercise of a power of appointment**

### ***1. exercise by residuary clause in donee's will***

An open-ended residuary clause- I give and bequeath, no reference to any p/a. compare this to P. 684, I give and devise... he refers to a power there. Does an open-ended residuary clause exercise a power of appointment? Why not ask general or special? 99% of the states follow common law rule, that is an open-ended does not exercise a power of appointment. At least one state hold that an open-ended does exercise of power, that is NY.

#### Beals

A wealthy old father created a trust and created trust for life for his daughter.

Issue: what type of trust is created? Gen. Test. Pa.

Isabella has a gen. Testamety power of appointment and she is the donee. She executes an effective release. She released the gen. power to exclude herself. She still has the special exclusive P/a. statute allowed her to release. She did not expressly exercise her power. The residuary clause of her will provided that the rest, residue and remainder of my property to the issue of her sister per stirpes. Are the issue of her sister allowed to take? she did not refer to any power. The sister's kids are going to take all appointment if the will was effective. If not, it is going to go to estate. So, they wanted the open-ended residuary clause to be effective. So we look

first to which law to apply. Ct: the law of NY should govern the question whether I exercised the power and if it does, NY adopted a rule that a special power of appointment is exercised by a testamentary disposition of all of the donee's property. Donee (I) live in Mass. and it would not apply. But Donor was in NY, and it applies. So, the two kids of Margaret (the sister) got to take.

Ct: I thought power was her own and thus felt no need to separately refer to it.

→3 rules concerning when open-ended residuary clause exercises a Pa?

Open-ended residuary is "all the remainder I am entitled to I give to A" it doesn't point to pa.

1. common law rule- an open-ended residuary clause doesn't exercise pa- majority rule.
2. Ny- it does exercise pa.
3. New upc- the presumption is that it does exercise pa except that the donor has a taker in default. Taker in default doesn't matter in capture, it means nothing in reference to general power, only matters in open-ended residuary power.

## ***2. Ineffective exercise of a power***

→Implied trust- A give 1 million to B to appoint to A's four daughters in the last will of B. B appointed to C's children and appointed incorrectly. The question is- there was special exclusive appointment and he exercises incorrectly, who should get the appointment? So, treat him as a trustee and a trustee who screwed up so we will have a new trustee and give to the right ones. What if one daughter died in are 3 (after A dies but b/f distribution) leaving everything to D. there was a contingency by selection by B, since the contingency existed up to B's death. Thus, if it is non-exclusive, each of the daughter may get something, in this case, use the B line to determine who to take. Since the daughter who died in 3 was alive at B line, her interest is vested and we give it to her. But she is not there, so whom do we give? Not issue (only give to issue if it lapse), so D get to take. There is no antilapse issue here, antilapse would apply when donee exercised in favor of the person who predeceased.

Graph:

→Capture- one million to B as he shall appoint in his last will and testament (gen. Test. Pa). B give it to C for life and her child for life and shall vest when the last kid dies. This is against the rule of perpetuities. So B screwed up. So instead of giving it back to the donor, B is going to get it, so capture means that Donee takes,

and this rule applies even if there is a taker in default (?).

PA is always about picking and choosing. Not that for trustee. Exercising ineffectively give to taker in default in existence at the point of the creation (b/c their interests were vested then). We can't use antilapse in pa, can only use antilapse in a will. capture only applies to general power of appointment, implied trust applies only to special pa.

Implied- applies only where donor gives special power and donee ineffectively exercised the power (ex. Give to her issue, but she gave to wcl), then give back to donor's residuary estate, or can step into donee's shoes and exercise in her stead.

- taker in default clause? If not
- give to spouse or issue in existence when donee exercised.

Capture-. Donee ineffectively exercises, goes to donees' augmented estate

- donee's residuary clause, if no resid. Clause,
- intestate succession.

### **SEC. E. failure to exercise a power of appointment**

#### Loring v. Marshall

What happens when the principle is not distributed? Donor provided life income for the brother and sister and the two nephews. Bro and sis and one nephew died (w.o issue) in area 3. The other nephew died at 1936 and that would be the c line. Cabot, the last one to die appoint to his son. But the writing is income, so where does the principle go?

This is special exclusive testamentary power with a valid will that doesn't violate the r/a/p. Of what did the appointment consist? Of income. there is no disposition of the corpus (the principle), so the issue is where does the corpus go? Taker in default, the 3 institutions seemed like that they would be takers in default. The ct didn't apply take in default b/c it wanted the assets to stay in the family. The trust principal went to the executors of the estate of Cabot. *\*This issue will be on the first question of exam.* what do you do when you have ineffective power of appointment. If it was ineffective, where does it go if the donee doesn't exercise or screws up, then we put in another donee and ask what would the donor have wanted → there might be other possible appointee or taker in default. If there is no taker in default or appointees who fits description, then goes back to donor's estates.

### **Chap. 10 Construction of trusts: future interests**

#### *Gift to classes*

Class gift- an identifiable group capable of increase and decreasing.

If *increase*, then we apply the rule of administrative convenience.

Hypo:

If A dies and provides for 1 million of B's children. When he dies, B is alive, 76 and has one child. There is a possibility of more children. But if there is a child meeting the description who could demand his share, the class is closed even though there could be more to demand b/c it would be adm. Inconvenience to wait.

A child in gestation is a child, but if the child dies w/in 5 days, there would not be simultaneous death problem. You give and you give and move on. If no child was born when A died, then all kids born later will share.

Graph:

Hypo2:

What if 1 million to B for life and then to her children? does the rule of administrative close at A line or C line. C line b/c we have no reason to close at A line. Anytime, you have a C line, you have a reason in keeping the class open.

**Decrease** in class:

Hypo:

1 million dollars to B's children to be paid at B's death (C line). If she dies at 2000 and the settlor died in 1990, B has a child who died b/f 90 (area2) and one died after 90 b/f 2000 (area 3), and 3 children left.

Is this vested property? Yes b/c absence of conditions. No condition of survivorship here so how many shares will we divide a million dollar? 4. When there is death occurring in area 1 or 2, have to think about whether there the settlor is a relative of the kid died b/f the last will. If a relative, then distribute it to 5, if not, see when the will is vested, then dist. it to 4. Antilapse will only apply if there is a will. One who died in area 3, we will give to her estate.

Graph:

Hypo2: If 1 million to B for life and to her children who survive (contingent). Will antilapse or vesting apply? No.

Dewire

The income of the trust payable to widow for life, then to son and 3 children of the son plus 3 (there is 6 children of the son) one grandson died and survived by a daughter. The daughter is an issue but not a child, then do we continue to give income to her or we take it and give to other children? ct: we continue to give her b/c it comports to the intent of the settlor.

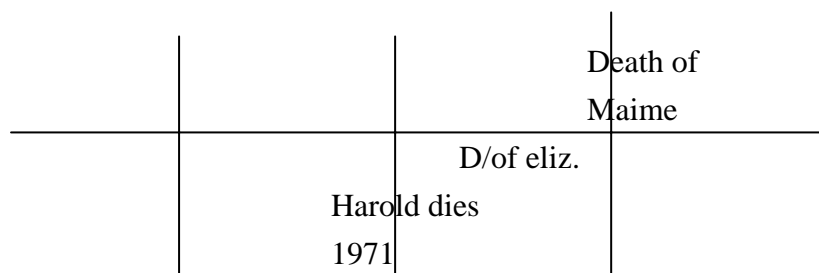
→any child who has been adopted is a child. But adopted child’s status w/ natural parent is severed. Exception: If you adopted a step child, she can keep her relationship with her natural parents, so she can inherit from step father, natural father, and natural mother. This is done so b/c the law wants to encourage adoption, that natural parent is willing to give up.

Minary

A settlor established a trust for his son. He provides his son for life and then to his son’s issue but he has no issue. He has a wife he likes very much. So the man adopts his wife so to make her the issue. The statute allows for this but the court said no, this was not intended to be the purpose of adoption and so the wife cannot take.

→Non marital children share equally with marital children but settlors may exclude them.

Woodworth



3 possibilities: contingent, vested, and vested subject to defeasance. This case is vested subject to defeasance.

Provide life income to Maime and to Elz. if she survives Maime, if not to her heirs. Eliz. Has no issues and the siblings say that we get it all b/c neither Eliz. Nor her heirs survived C line. To whom does the property go? Siblings or heirs at law (Eliz.’s husband and the regions of Ucal.) as soon as you see parenthesis in area 3, there is a vesting issue. Eliz.’s interest is never vested but subject to defeasance, but it was never defeased. What is heir at law? Whoever your intestate heirs are. In this case, it

would be her husband. The heir at law who was not defeated by Eliz. Heirs at law comes from instate statute, not from the will. The issue is: Did the husband who was the heir at law have to survive Maimie? No, he doesn't. the court determines at the death of Eli (B line). New UPC determines at the death of Maime C line).

***Increase in class membership: The class closing rule (the rule of admin. Convenience***

Lux

Point of distribution at the future. If you are selling the property you are def. Ending the trust. So, the distribution in this case is when grandchildren reach 21 year old. Why doesn't this violate RAP? b/c the life in being is the children, but at the same time, the class close at C line when the youngest grandchild turns 21. She left out 2 words is how do you know that the youngest turned 21? The child can have more. Ct: At anytime the youngest grandchild then living turns at 21, the class closes. As soon as the point is met, at that point, the class closes. You would keep the child in gestation as a child, but no others even if the child could have more grandchild.

**Chap. 11 Duration of Trusts: The rules against perpetuities**

Standing at the creation of interest, is there any possibility any interest will fail within a life in being plus 21 years.

Elements:

1. Vesting: the right is vested as the day of death, B line, A line doesn't matter b/c wills ex. Can be destroyed. But if there is inter vivos trust and irrevocable, you would start at A line, not if it is revocable. Must know when to start and then ask whether it violates Rap. Begin at the donor's creation of Pa when it is a gen. Testamentary power of appointment or special PA b/c donor retains control. Start at donee's exercise of PA when gen. Inter vivos PA.
2. Lives in being: to A for life and then to his children then living. Antilapse would not apply to A. A has 2 kids when donor dies. What is the C line (distribution)? A's death. A had more kids after donor dies, they will take. If one died, he would not take b/c this is not vested. So, there is no vesting and no antilapse. Lives in being must be in being must be at the creation of the trust.
3. measuring life would be A. always look to when is distribution. Why? B/c it is when vesting occurs. Then ask whether there is
4. coterminality- measuring lives are exactly the same as the lives in being. That is what we want. There is no possibility that a measuring life is not a life in being. There is no possibility of non-coterminality.

Graph:

Hypo:

to A for life and then to his children for life and the death of the last of them, to their grandchildren then living. This is contingent, so Death would now be the C line b/c that is when vesting occurs. But if no condition (to A and his kids), then vested at B line when donor dies. Can have an increase in the class but can't have a decrease. Is it possible that A can have a measure of life that is not in being? Yes. Then, there is a dorp kick. It violates RAP b/c A could produce a measuring life who could live longer than any life in being plus 21 years. Vesting then could occur after the statutory period. We look at the possibility of him having more kid, if he had surgery, then that is ok. Adoption or stored sperms would not be taken into consideration.

5. Fix it- second look doctrine. reformation- either by statute or by common law, they would fix the problem. Wait and see option- wait and see what actually happened, if A doesn't have anymore children or if he has, wait and see who is the last one to die.

Hypo: Donor creates a valid gen. Test. Pa, ask whether the will was valid, and is there possibility that the power could be exercised b/y the rap. Give A the pa and when he dies, he exercises it in favor of this children and then to his grandchildren then living. When does vesting occur? Do the gc of A take vested interest? No, they only get it when they survive the children of the A's children. if A had a kid in area 3, he violated the rule and then we apply the doctrine of capture and give to A's estate. A did not know that you have to go back to the creation of the Donor, But applying the second look doctrine- wait and see apply to regular trust and second look applies to PA. We look at the distribution from donee's exercise.

You will not have RAP problem if you put in the instrument, direct trustee to do whatever necessary to comply w/ RAP "but in any event, the right will vest w/in 21 years after the live in being."

Many states are abolishing the rap and it is b/c of banking lobbying, all is in dynasty trust and there is no movement in the money.

Something that says over 21 years is a red flag, but not the kiss of death.

who are the measuring life? Those people who bring about the vesting of the

occasion. So if give A to life, then to A's children, and then to A's grandchildren then living. The measuring life is A's children b/c the grandchildren's lives are not yet vested. Against rap? if A has a possibility of having more children at that time, then that is RAP. ask whether A is able to have another measuring life who is not life in being at the time the interest is created. adoption or technology won't be taken in to consideration of having possibility of additional measuring life for RAP. fertile

**SEC. B. The requirement of no possibility of remote vesting**

Fertile octogenarian- having possibility of additional measuring in life. So, the court now adopted wait and see, in actuality. Won't void the trust at the B line, wait and see.

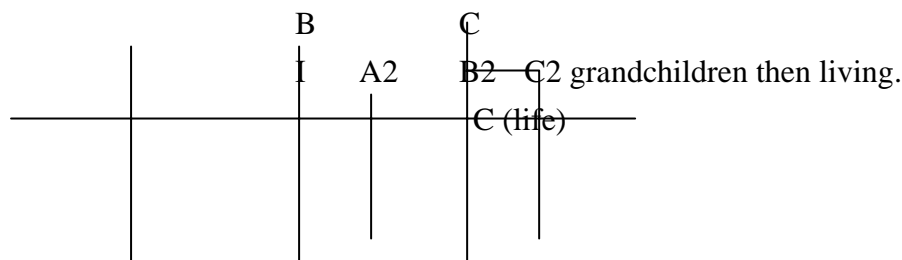
- \*Increase in class- think of administrative class
- \*Decrease in class- think of antilapse or vesting.

I give ability to A to appoint anyone in his last will and testament. First ask whether my will is valid and what kind of power is it? Antilapse issue? A relative? If it is a relative? If not?

**Residuary Clause-** Donee exercises, "all the rest residue and rest of my estate I give to my children for life and to my grandchildren then living." The issue here is whether or not an open-ended residuary clause will exercise power of appointment. The majority rule is not. NY- minority rule, does. UPC- does exercise unless donor has left a taker in default. The donor

Is it possible that drop kick (have another kid) can happen? If no, so no RAP. b/c there is co-terminality.

Is possible for A to have more children who is measuring life not in being but who can live 21 years after the death of the life in existing then? If you start at B1 line, it will violate, but if we start at B2, then we won't.



When we apply wait and see to PA, it is called the second look doctrine.

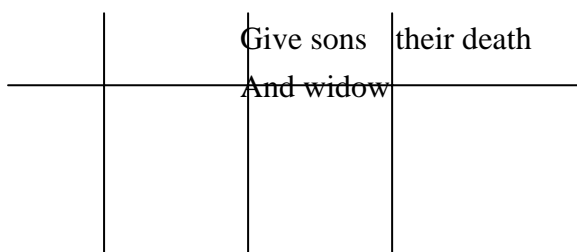
Coterminality- first identify who the lives in being are, then look at when vesting

occurs. If the measuring life (those who measure when vesting occur), then ask whether there could be an increase in measuring life, if yes, then there is no coterminality b/c can have increase in measuring life who was not life in being.

***The unborn widow***

Dickerson

The unborn widow or status person. A woman provided his sons and one son's widow (no name, status person). The C line is the death of them. We know who the widow is at B line. But is it possible that his widow could die b/f the son and the son remarries? If she was born after the trust is created, she is a measuring life who was not a life in being, then there is coterminality problem. So, avoid the status provision.



**The slothful executor:** the interest is to vest when the executor distribute. One may do that when one doesn't know who the executor is, but this might avoid RAP. so avoid status language.

**SEC.C. Application of RAP to class gift**

***1. the basic rule: all or nothing***

Rule of administrative convenience: anytime anyone can demand his share, the class closes. Case 7 at 807 To A for life, then to A's children the to give A's grandchildren. There is a violation b/c grandchildren can increase after a measuring life died. We can amend and save this under the rule of admin. Convenience, say A has 3 children and only have one grandchildren, the class would close.

It doesn't matter that there is no contingency here, use Adam. Convi. But if there is contingency here, then can't save b/c can't use Adam. Conv.

Ward (admin. Convenience)

Executed a will and a codicil a year after w/ a taker in default. Philip here is a life in being b/c the codicil says any additional child born. The court found it in violation b/c it is possible the parents could have a child who can be a brother and sister and is

it possible that this bro. Or sis. To have a child 21 years after their death.. Once you have a possibility of fertile octogenarian, then it violates.

Amend: Since the trust in the codicil is void, we treat it as having no effect, then we got a valid will with a codicil, who takes under the taker and default, the children.

Philip is born after the remarriage, the court says that he can't take, ct closed the class at B line b/c any attempt to keep it open would violate the rule of admin. Convenience and RAP. so, no philip but only those children in existence take.

Graph:

Two ways to avoid rap violation for class gifts. 1. Close the class when one can take under the rule of convenience. 2. Subclass- cramer- if you would have children afterward, you allow those only lives in being to take. They are sort of them same. But they are diff in concept. Is it better to take under residuary or intestate legatee.

### ***3. exceptions to the class gift rule***

#### ***gifts to subclasses***

##### Cramer (subsets)

No PA issue involved. Man dies and will effective. Give life estate to his wife and life estate to his adopted daughter H. At h's death, the income go to her children then living or the issue of them if they were dead, and then upon the death of each of the children or issue, the share of the one so dying shall go to the persons who shall then be her heirs at law. The children of Hannah is the measuring life and if Hannah had lived, there was a possibility of drop and kick and there is no co-terminality.

Now, why can't we just cut off? No, b/c M and H (H's children in existence) can't take but their children. in the above case, we knew who the heirs are, but here, we don't know who the heirs are until their death. So, what do we do? Treat the trust in subsection, each of the children of Hannah had a vested interest at B line, but any after born children (Deput and Horace, so their heirs don't get anything) are excluded from the person able to take. But Mary and Hugh's heirs each get half. These two cases teach us how to fix it to help our client.

Graph:

### **SEC. D. Application of the rule to powers of appointment**

Look back doctrine: first ask-

1. what kind of power?

a. G IV- if it is GIV, then you don't go back b/c donee almost has absolute power

- b. GTest/ Special- then go back and
- 2. Ask to which line do I go back? If :
  - a. iv/irr- go back to A line
  - b. iv/rev/will- B line

### Harris

A mother established a trust fund during her life time. 2 section, income for daughter and corpus for daughter. Income portion is revocable by donor. But no revocability in corpus. Mary born by the daughter. The daughter died w/ valid will and testamentary (we should always watch out of the open ended residuary clause). She provided for life income for Mary and that Mary would get the corpus after 30 years (that would be fine b/c it would be vested) but she went on to put contingency that she be living. So, then vesting would be at C2 line when mary dies. If vesting is at the C2 line, Mary is the measuring life. **But here, there is a Gen. Test. Trust, we gotta ask the 2<sup>nd</sup> question, what kind of instrument created the power?** Inter vivos irrevocable trust, b/c there is no revocable provision for corpus, so now, we gotta go back to A line of the donor. Standing at the creation of interest at A line, there is a possibility of RAP violation. Mary was the measuring life but not life in being.

Graph:

Ct was trying to move it to B line (but you really can't). Ct: If you got a vested interest, even though you continue to make it contingent, the interest is still vested (he says this is voodoo). When the daughter exercised interest at C1 line, she made vesting at her death in Mary. Ct created a subclass and eliminated any interest in Mary or her decedent (like the Cramer case). Mary took a vested interest to be paid after 30 years, if she wasn't living then, goes to her estate.

If mary has vested interest at C1 line, why is it ok under the RAP? b/c the daughter is the measuring life and she was a life in being.

The ct could apply Cypress (try to accomplish as much as donee wants to) if they wanted to? The court could drop 30 and make it 21 say that daughter and decedents could take w/in 21 years after the daughter's death.

Capture ignores taker in default.(?)

If the client is the intestate heirs of the daughter, then we want to apply the capture rule instead of fixture. So, we gotta know which one is good for us.

Delaware tax trap- In Delaware, you never look back.

### **SEC. E. Saving Clauses**

Cy pres clauses- comply as much as possible with the intent of the settlor/donor.

Wait and see – see what happens in actuality

The uniform statutory rule against perpetuities - all interest vest as it should or 90 years from creation. Some cases allow 90 years from the exercise if it is a power. Never violate the RAP if you put a clause such as “All interest will vest w/ life in being plus 21 years.”

### Wold

This is special test. Exclusive P.A. special b/c can't appoint to herself or creditors.

This is also a dynasty clause b/c this will not be incorporated in her gross estate when she dies and can't give to her spouse, must stay in the bloodline. She wants to benefit her grandchildren.

Father established an irr iv test. Pa for daughter. Daughter has s/t/e/pa and she wants to benefit to her grandchildren. The measuring lives here are the children of the donees since she can't have anymore children after her death, there is no coterminality problem. But two questions to ask? First, what kind of power is conferred on the donee. S/t/e/Pa without taker in default, so then a lot of restriction on donee. To which line do I go for rap. here, we have to go back to A line, standing at the creation at A line, is there a possibility that the interest will vest after 21 year of the death of the measuring life. At A line, the daughter could have drop kicked and there would be coterminality problem. 3 saving principle:

1. cy pres (last para. Of 831 is an ex. Of ny cy pres statute)
2. wait and see/second look (pa)
3. across the board 90 yr rule (upc)- it has no reference to lives, it is just plain 90 yrs. Wald case asks us 90 yrs from what? It is 90 yrs from the exercise of the donee, not from the creation by the donor.

The 90 yr rule fosters dead hand control b/c here, the period could be the daughters' life (say 70 yrs + 90 yrs) that is 160 yrs!

\*sometimes, maybe it would be good not to fix rap and allow capture to take place or if it is special trust and then we would have taker in default and subject to defeasance issue. Don't give him a buffet unless he makes you the judge, just tell him what is the best for the client.

⇒ If you have 90 yrs in dynasty trust can you have generation skipping tax? Yes.

dynasty is a mean where you can keep property in a bloodline for a long period of time. Ex. If you are in a state where they abolished rap, you can give exclusive test. Power, you don't have to go back to the creation by the donor b/c there is no rap concern.

- ⇒ abolition of the rule against perpetuities. He doesn't like the abolishing of rap or the 90 yr rule. In Britain, it was filled with dynasty trust, people were not willing to invest in innovative things but only those big stable ones b/c they want to be lucrative. CA adopted the 90 yr rule. Britain rule adopted 125 yr rule. But the bank is not going to say, hey it is over after 125 yrs.

→ Any general power would be included in augmented estate.

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