# Wills, Trusts, & Estates by Corbin B.P. Dodge Fall 2012 Professor Siegel South Texas College of Law

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# Power to Transmit Property at DeaTh

Introduction

Technical Terminology

* **Escheat** - CL. Property of a person who dies w/out heirs to the estate 🡪 Goes to the state. Can’t pass by devise or descent
* **Devise:** A person dying testate (w/ will) *devises* real property to a devisee EX: Blackacre
* **Bequest:** A person dying testate (w/ will) *bequeths* personal property to legatees EX: Car
* **Descent:** Property not devised by will passes by intestacy
* **Joint Tenancy:** Joint tenants w/ *right of survivorship* EX: If A dies 🡪 B takes all property
* **Beneficiary Designations** EX: Retirement plan, IRA, Life Insurance
* **Executor**
  + **Duties**
    - **1) Inventory & Collect Assets**
      * Must take an inventory of the property to learn what is probate vs non-probate property
    - **2) Manage Assets During administration**
      * Personal property in home 🡪 Easy to manage
      * Livestock 🡪 Difficult. Must keep alive & find chores prior to O’s death
    - **3) Receive & pay claims of creditors**
      * Find valid vs. invalid claims EX: Fake creditors who read the obituary
    - **4) Clear title to any assets** EX: Ensure real property title clear before distributing
      * May be 9-18 months if estate tax return is due (next tax season)
    - **5) Distribute remaining assets to proper party**
* **Descendants:** Relationships by consanguinity (by blood). Narrow. Never includes spouse
* **Heir:** There are no heirs to the living. Broader. May include affinity (by marriage)
* **Collateral Relatives:** Neither ascendants or descendants but whom are related by blood to a common ancestor EX: Siblings

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| **Scenario** | **Who Takes?** |
| *In-class example* | Who are the descendants? A-F are lineal descendant’s (children, grandchildren)  Who are Teri’s heirs? Mark & A-F (possibly). Must know who’s alive. There are no heirs of the living.  F? F has no descendants. F has lineal relatives, *aka* lineal ascendants (parents, B, & whomever)  B? A, C, D (siblings). They’re collateral relatives. [If C died 🡪 E& F are nephews (collateral relatives)] |

Right to Transfer Property

* **Transferability §26.004**
* ***Hodel v. Irving***
  + **Pre-*Hodel*:** No right to make a will
  + **Rule:** 5th Amendment (taking w/out just compensation) curtails gov’t power to *limit* the right to convey property at death
  + **Effect:** Limits gov’t from decreasing property rights that can be transmitted at death
  + **Facts:** Fed gov’t fractioned property. Encumbered ability to sell bc can’t sell your 1/26th w/out permission from the other 25. The § abolished devise & descent, which was a takings violation. Protected right to transmit, not right to receive
* ***Shaw Family Archives v. CMG Worldwide*** (pg 10)
  + **Facts:** “Post-mortem right to publicity” in Marilyn Monroe’s property was posthumously created
  + **Holding:** It didn’t pass pursuant to the residuary clause
* **After-Acquired Property:** Property acquired after wills execution
* **Residuary Clause**
  + **Definition:** A catch-all of after acquired property that acts as a safety net to avoid intestacy
  + **Compare to *Shaw:***In *Shaw*, the right of publicity wasn’t created until after death
  + **Tip:** A properly drafted will contains a residuary clause for after-acquired property (*Shaw* pg 1

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| **Scenario** | **Who Takes?** |
|  | If I dies intestate?  Property transfers by intestacy  If A& B are dead, should it be evenly divided bw D, E, & F?  No, while C is alive, F gets nothing |
|  | If B & C are dead?  What happens if you have a right of publicity, but you haven’t devised it?  Apply TX intestacy scheme  If there’s a surviving spouse & no children or grandchildren?  Goes to SS Prop. Code §26.005  If there’s a surviving spouse (I) w/ children & grandchildren?  ½ to I | ½ to survivors. Thus, A/B/C gets 1/3 of ½ (1/6) |
|  | **Note:** It should equal 1 when you add up all the fractions  What if a child pre-deceases I?  No longer divided by 1/5 |
| *“I leave my car to A. I leave my jewelry to B. I leave my home to C.”* | How does this differ from the *Shaw* doctrine?  *Shaw* had a residuary clause (“& everything else”)  What if, after the wills execution, but prior to death, Redacre is acquired?  Redacre is after-acquired property |

Total vs. Partial Restraint on Marriage

**Total Restraint** 🡪 Invalid

**Partial Restraint** 🡪 Valid

**Test:** Reasonableness

**Policy:** Not all marital restraints are a violation of public policy

**Rule:** Partial restraint is valid dead-hand control that imposes reasonable restrictions on marriage *(Shapira v. U.N. Bank)*

* + To be invalid 🡪 Must have state action that violates the right
  + State probates the will 🡪 Not state action. Doesn’t trigger EP & DP
  + Having Daniel marry a Jewish girl doesn’t force Daniel himself to be Jewish

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| **Scenario** | **Restraint on Marriage? Valid?** |
| *$ to child if they don’t marry* | Total Restraint 🡪 Invalid |
| *$ to surviving spouse for life or until re-marriage* | Partial Restraint 🡪 Valid |
| *To child if obtains divorce* | Invalid. Against public policy |
| *Discretionary income to child (trust) w/ corpus (principal) to child if outlives spouse or divorce* | Valid. Still gives income, but recognizes need for support may increase if spouse dies. Doesn’t encourage divorce. |

Probate vs. Non-probate Property

Probate Property

* **Definition:** Property that passes through probate under the decedent’s will or by intestacy
* **Rule:** Absence of a will doesn’t exclude the possibility that it could still be probate property
* **Applies:** If will controls the disposition of property

Non-Probate Property

* **Definition:** Property that passes outside of probate through a non-probate mode of transfer. *Will Substitute*
* **Requirements**
  + File death certificate **&**
  + Beneficiary not identified by will EX: by policy designated
* **Modes of Transfer**
  + Joint Tenancy w/ right of survivorship (real or personal)
  + Life Insurance
  + K’s w/ payable on death provisions
  + Inter vivos trust *(see Trusts)*

**Functions of the Probate *Process***

* + - **1. Evidence of transfer of title to the new owner**
      * **Goal:** Distribute property to the beneficiaries
      * Distributed incorrectly 🡪 Breach of fiduciary duty
    - **2. Protects creditors by providing a procedure for payment of debts**
      * Death doesn’t expunge debts
      * **Insolvent Estate:** Debts greater than wealth of the total estate
        + **TX:** Creditors can’t touch $ to a named beneficiary of a life insurance policy
        + **Tip:** Don’t name the estate as the beneficiary of a life insurance policy
    - **3. Distribute property to those intended after the decedent’s creditors are paid**

Formal vs. Informal Probate

* **Formal Probate** *(aka dependent administration)*
  + **Definition:** Ct supervises personal representatives actions in administering the estate
  + **Disadvantage:** Potentially costly & time-consuming
* **Informal Probate**
  + **Definition:** Limited Ct supervision. Personal representative administers estate w/out Ct supervision *unless* an interested party asks for Ct review

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| Aaron Green Problem (pg 47) | |
| **Scenario** | **Questions** |
| **Facts**   * Died testate * *“To my wife, Martha, if she survives me; otherwise to my children in equal shares”* * Executor: Martha   **Property**   * Car $15,000 * Furniture $20,000 * Mutual Fund $10,000 * Joint Checking Account $3,000 * Life Insurance (Martha is beneficiary) $50,000 Non-probate * Pension Plan-survivors benefits (to Martha) * No real property. Rented apt   **Debts**   * Utility Bills $80 * Consumer charge accounts: Visa $600, Dept Store $250 * Funeral $8,000   Cemetery Lot $600 | Must it be offered for probate?  + Administrative Costs. Must be in state domiciled @ death w/in 3 yrs  1) Must there be an administration of the estate? Yes  Title-clearing? Car. In TX, may be able to transfer title by affidavit into Martha’s name to avoid probate  Debts? Martha may have to sell assets (might not be in cash @ death)  If she pays as executor 🡪 May have to create an estate bank account. Look at totality to see if necessary. Might not matter if only 1 recipient, Martha  Creditors may intentionally probate the will to protect from creditors who haven’t timely filed a claim  Taxes?   * + May have unpaid income tax   + There’s no estate tax     - Minimum estate size 🡪 <$5,000,000 (same # for gift tax, per donor)     - Per-donee annual exclusion for non-taxable gifts ($13K per done)       * EX: You have 3 kids & 3 grandchildren 🡪 Can make $13K gift to each w/out tax (usually in Dec-Jan)       * EX: If I gave Erick $1,000,000 🡪 Subtract $13K gift for taxed amount (aka taxable gift)       * Applicable exclusion amount for estate & gift tax is up to $50,000   2) Same as #1 but A dies intestate. State says where descendant survived by a spouse & children, ½ real estate goes to the spouse & ½ to children   * Martha 🡪 ½ * Children 🡪 ½ (1/4 each if 2 kids) * *Disclaimer:* Waiving the right to receive property, which emanates from intestacy scheme   + EX: Mom needs $ more than the kids so they disclaim * Title-clearing (TX)?  Transfer title to the car by affidavit, but all must sign if adults. DPS may allow mom to sign for child   3) Same as #1, but House $170,000 (subject to $85K mortgage) + Lot $16,000. Grantee is Aaron. Should the will be probated & the estate formally administered?   * Title Clearing? Mortgage   + *If will* 🡪§89C Will can transfer muniment of title to beneficiary. Streamlined to avoid probate   + *If intestate* 🡪§49   4) Same as #1 except he’s alive & no will. Does he need one? §38 & §45 are the default scheme  5) What if Aaron & Marth (dead) are joint tenants w/ right of survivorship?  Martha dies 1st 🡪 Aaron has right of survivorship 🡪 becomes probate property & intestacy laws apply. (bc beneficiary not appointed. Beneficiary was Martha but she died)   * Avoid by creating an order of succession * Take advantage of §145 Independent Administration   + §195 Will can direct that no bond be req’d:     - *“I hereby appoint \_\_\_\_\_ as independent executor of my estate & direct that no other action be taken in Ct in relation to the settlement of my estate other than the probating & recording of the will, & the return of an inventory, appointment, & list of claims of the estate.” [list of debtors & creditors]*     - **Tip:** This should be the default. Malfeasance can be remedied. Use Ct if they embezzle |

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| Howard Brown Problem | |
| **Scenario** | **Who takes?** |
|  | Can the property pass by inheritance or by joint survivorship?  Bank account & stock set up to pass by joint + survivorship  Can they avoid probate w/ trust & joint survivorship? Should the wills be amended?   * **First**   + **Just Debts Clause**     - **Effect:** Must be paid off immediately     - **Issues**       * Bankrupts estate       * Must apportion the debt out of the estate, starting w/ the residuary (disappoints other beneficiaries)     - **Tip:** Just debts is a litigation breeder. Avoid!     - T’s home was recently appraised at $500K w/ a $300K outstanding mortgage. T unexpectedly dies. Concerns?       * Forcing the mortgage to be paid immediately may bankrupt the estate & disappoint other beneficiaries bc the debt must be apportioned out of the estate     - What if Fed estate taxes are $400K, but executor said “pay all just debts?”       * May unduly burden the residuary, which would be apportioned out of the estate, starting w/ the residue. Avoid w/ tax apportionment clause * **Second**   + Is the executor apt valid? Are their powers broad enough?  Should name them “independent executor” * **Fifth**   + Too short. Who will care for the kids? Caregiver be bad w/ $ 🡪 Use trustee     - Caregiver & trustee can be different * **Third**   + Does it pay out to wife or sister? If wife dies 🡪 Pays to minors immediately 🡪 Need to set up trust   + **Tip:** Minor beneficiary 🡪 Use trust   + What about deaths w/in quick succession?     - *Issue:* What constitutes “survivor?”       * §47 120-hour rule       * There becomes a double admin       * **Tip:** Wills often contain a stated period of survival EX: “Survives by 30/60 days         + Avoids having to administer the same assets 2x in the case of 2 deaths w/in quick succession   + Should property be left outright to spouse (Wendy)?     - *Alternate Option:* Leave property to SS in trust       * *Benefits*         + Protects SS who’s bad w/ $ management         + Protects beneficiary who’s incapable of managing it (EX: Minors)     - What inquiry needs to be made about the children? Age * **Sixth**   + Is guardianship desirable? Pg 136-40 *below* |

* **Just Debts Clause**
  + **Effect:** Must be paid off immediately
  + **Issues**
    - May bankrupt estate. Must apportion debt out of estate, starting w/ residuary (disappoints other beneficiaries)
    - Litigation breeder. Avoid!
* **Tax Apportionment Clause**
  + Separate taxes from just debts (???)
* **Deaths w/in Quick Succession**
  + **§47 120-hour rule**
  + **Benefit:** 2 deaths w/in quick succession 🡪 Avoids *double admin* of the same assets (2x)
  + **Tip:** Wills often contain a stated period of survival EX: *“Survives by 30/60 days”*

Guardianship

Guardianship of the Person

* Desirable to care for orphaned children
* Automatically passes to surviving parent
* May be designated in will **or** if intestate 🡪 By Ct

Guardianship: Property Management

* **Effect:** Guardian of person doesn’t have authority to deal w/ child’s property & can’t change w/out Ct order
* **Tip:** Avoid. Like continuous probate until they turn 18
* **1. Guardianship of the Property**
  + **Duty of Guardian:** Income must be used to support the ward unless Ct-approved sale, lease, or mortgage (*Risk:* Ward may get less)
  + **Purpose:** Preserve property left to minors & deliver at age 18
* **2. Conservatorship**
  + **Conservator:** Guardian renamed conservator. Gets *title as trustee* to ward’s property & investment power (like trustee)
  + **Benefit:** Flexible. 1 annual Ct visit for accounting. Ct not involved unless minor contests conservators actions
* **3. Custodianship**
  + **Custodian:** Holds property for minors benefit
  + **Granted by**: UTMA (*Historical:* UGMA)
  + **Rule:** Property may be transferred to a person (includes donor) as custodian for minors benefit (includes devise, gift)
  + Donor may choose herself as custodian
  + **Facility of Payment Clause**
    - Assets may be distributed to custodian **or** parent/guardian
    - Fight to manage & reinvest property
    - **Best for:** Modest gifts (Large gift 🡪 use Trust)
* **4. Trusts**
  + **Requirements:** *see above*
  + **Benefits:** Most flexible & tailored to family circs, Can be postponed past 18
  + **Contingent Trusts**
    - **Applies:** When adult or no children
    - **Tip:** Good when estate plans provide for contingent trusts in case of a minor beneficiary if adult predeceases them

Duties to Intended Beneficiaries

* **Historical Rule:** Req’d privity of K bw atty & client. No recourse for bad will when client dead
* **Modern Exception to privity req’t:** Duty of reasonable care runs from drafting atty to intended 3P beneficiary *(Simpson v. Calivas)*
* **Majority:** Doesn’t require privity of K bw atty-client
* **TX Minority**
  + **Rule:** Req’s privity of K. Lack of privity be drafter & intended beneficiary prevents a malpractice action
  + **Exception:** TX will allow executor to represent
* **Jurisdiction**
  + Validity & construction of will 🡪 Probate Ct
  + Tort or K claim 🡪 Ct of General Jsd

# Intestacy: An Estate Plan by Default

The Basic Scheme

Introduction

* **Testate** - Dies w/ will that provides for disposition of their property at death
* **Intestate** - Die w/out will. *Law of* intestacy governs distribution of a decedent’s *probate* property
  + **Reasons to not have a will:** Fear death. Cost
  + **Policy of *Law of Intestacy***
    - Carry out probable intent (average decedent standard)
    - Protect family
  + **Disposition**
    - Personal Property 🡪 Decedent’s domicile at death
    - Real Property 🡪 Where it’s located
    - Probate Property 🡪 States § of descent & distribution

Share of Surviving Spouse

* **Majority:** Gets ½ share of estate
* **UPC:** If all decedent’s descendants are also descendants of SS **&** they have no other descendants 🡪 SS takes everything
* **UPC & ½ States:** No descendants 🡪 SS shares w/ descendants parents (if alive)

|  |  |
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| **Scenario** | **Who takes?** |
| H & W have 2 kids. W has 1 from previous marriage. | If H dies intestate, what’s W’s share under UPC §2-102?  The 1st $225,000 & ½ balance of the estate???  If W died? $150,000 + ½ balance of the estate???  If married for only 1 year? Irrelevant |

**Same-sex Marriage & Domestic Partners**

* **Domestic Partners**
  + Use law of intestacy
  + **Issue:** Unclear qualification criteria
* **Same-Sex Marriage**
  + **Issue:**Conflict of law (not all states recognize)
  + *Defense of Marriage Act (DOMA)*
    - Defined marriage as bw a man & a woman
    - *Purpose:* Avoid Fed recognition of same-sex marriage
    - *Full Faith & Credit Clause*
      * States must give effect to what other states recognize as valid
        + *Exception:* State doesn’t have to recognize if it conflicts w/ their policy

**Simultaneous Death**

* **Rules**
  + A person succeeds to the property of a descendant only if person survives decedent for an **instant**
  + Dies at same time 🡪 Presume beneficiary predeceased the descendant
* **Effect:** Neither inherits from the other
* **Joint Tenants & Community Property**
  + - **Rule:** ½ as if A survived. ½ as if B survived
    - **Common/Applies:** Spouses die when traveling together
    - **§2-104 & §2-702 120-Hour Rule (TX 🡪 Probate Code §47)**
      * **Rule:** Beneficiary dies w/in 120 🡪 Treats as predeceased. Rare
      * **Applies:** Default rule for intestate succession
      * **Benefit:** Addresses contemporaneous death not from common accident
  + **Rule:** Party whose claim depends on survivorship🡪 Must prove survivorship by a preponderance *(Janus v. Tarasewicz)*
* **Texas Intestacy Scheme: Probate Code §45 Community Property**

|  |  |
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| **Scenario** | **Who takes?** |
|  | H dies before W. What must W do to have H’s community property pass to her?   * W’s ½: Automatically hers (she already has it) * H’s ½:   + Goes to kids or other descendants §45(a)(1) **or**   + If the kids & descendants are also hers 🡪 She gets H’s ½   Under what circs won’t she inherit anything from H?  If H had a surviving child, unrelated to W (from a previous marriage) |

* + **Family Code §3.001 Separate Property**
    - Owned or claimed by spouse before marriage **&**
    - Spouse acquired during marriage by gift, devise, or descent **&**
    - PI recovery earned by spouse during marriage (but not lost wages)
  + **Family Code §3.002 Community Property**
    - Spouse acquired during marriage, except separate property
    - **Includes:** Income from separate property
  + **Property Code §71.001 Escheat**
    - **Definition:** Vesting of title to property in the state in an escheat proceeding
    - **Applies:** Person dies w/out heirs 🡪 real & personal property subject to escheat
  + **Probate Code §38 Persons who take upon Intestacy** 
    - Dies intestate w/out spouse
      * 1st Children & their descendants
      * 2nd No children (or their descendants) 🡪 Parents equally
        + Only 1 parent alive 🡪 to parent & siblings (no siblings 🡪 all to parent)
      * 3rd Siblings
      * 4th Grandparents
    - Dies intestate w/ spouse
      * w/ children: 1/3 to spouse, 1/3 to kids
      * w/out children
        + Personal property & ½ real property to spouse
        + Other ½ real property via descent & distribution (if none🡪all to spouse)
      * **Doesn’t Apply:** Community Property
  + **Probate Code §47 120-Hour Rule** 
    - Fails to survive 120 hours 🡪 Treat as predeceased

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| **Scenario** | **Who takes?** |
| **Alice is T (indicates probate !!!) & she dies on Monday. Betty dies on Wednesday. Analyze the following scenarios:** |  |
| *“I leave my diamond ring to my sister Betty”* | If not at least 120 hours 🡪 Treat as predeceased & goes through intestate succession |
| *“I leave my diamond ring to my sister Betty, if she survives me”* | *Issue:* Does “survive” alter the 120-hour rule?   * “Survive” applies even if just an instant * Betty is entitled to the ring 🡪 Her estate is entitled to the property (ring) 🡪 Betty’s probate property * *Disadvantage:* Double administration of the ring * **Tip:** Best to include a 30-45 day survival period than to just say “survive” |
| *“I leave my diamond ring to my sister Betty, if she survives Tammy”* | §47(c) 🡪 Still have 120-hour rule when conditioned. Ignores “survive” |

Shares of Descendants (pg 87)

* Consider if it goes to the descendants per capita vs. per stirpes at each generation
* \*\*\*
* Son & daughter-in-law are excluded as intestate successors
* **Issue:** Whether division of shares should begin at generational level (immediately below decedent) or at the closest generational level w/ a descendant of the decedent alive

English Per Stirpes

* **Aka:** Strict Per Stirpes *(By the Stocks)*
* **Key: 1st generation doesn’t require living taker !!!**
* **Nutshell:** Each line of descendants. Start w/ kids (even if dead **!!!**)
* **Application**
  + Treats each line of descendants equally
  + Property divided into as many shares as living children of designee **&** deceased children w/ living descendants
  + Children of each deceased descendant move into their parents position
* **History:** Primogeniture. Son represented dead father & grandson represented dead son
* **Choice of Law** 🡪 Can’t have
* **TX Decedent**
  + Personal property only
  + Real property 🡪 Another rule
* \*\*\*

Modern Per Stirpes

* + **Aka:** Per Capita w/ Representation *(Divide equally)*
  + **Nutshell: 1st generation requires living taker !!!** Start at 1st generation w/ SURVIVORS. Divide equally
  + **Application**
    - Decedent’s estate is divided into shares at generational level nearest to decedent where 1+ descendants of decedent are alive
    - A deceased descendant on that level 🡪 Represented by descendants using *English per stirpes*
  + **Analysis:** Did any children survive the decedent?
    - Yes 🡪 Same as *English per stirpes*
    - No 🡪 Estate divided equally (per capita) at the 1st generation of living takers (usually grandchildren)
  + **Majority:** 50% of states adopt
  + **\*\*\*** Note: If F died before A 🡪 F’s descendants would divide F’s 1/3
  + **TX: Per Capita w/ Representation**
  + Functional equivalent to *Modern per stirpes*
  + \*\*\*

Per Capita At Each Generation

* **Key: Treats each taker at each generation *equally* w/ other takers in that generation !!!**
* **Nutshell:** Similar to *Modern Per Stirpes* initially, then goes to 1st generation (new, more complex)
* **Application:** 1st divide at level where 1+ descendants are alive (like modern per stirpes) but shares of deceased persons on that level are treated as one pot & divided equally among next generational level
* **Applies:** UPC §2-106(b) (Wagner) & Remaining states
* **Policy:** Equally near, equally dear
* \*\*\*

Negative Disinheritance

* **Historical Rule**
  + Not possible by declaration. Had to give entire estate to someone else, otherwise intestacy ignored the provision
  + EX: *X shall receive none of my property*
* **Modern Rule** 
  + **Negative Will** – Treat a barred heir as if he disclaimed (predeceased) his intestate share
  + **TX §58(b)** Allows T to disinherit an heir
  + **[insert D]\*\*\*\***

|  |  |
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| **Scenario** | **Who takes?** |
| *“I hereby disinherit B w/ no affirmative disposition”* | Historical rule? Intestacy scheme  Modern rule? Treat B as predeceased |

Shares of Ancestors & Collaterals

Intestate decedent survived by a descendant

* **Rule:** Ancestors & collaterals don’t take

Intestate Decedent NOT Survived by a Descendant

* **Use:** 50% states & UPC
* **Rule:** 1st deduct spousal share. Remainder to parents
* **If no spouse or parents** 🡪 Collateral Kindred
  + **1st Line Collaterals** – Descendants of the decedent’s parents, other than decedent & their descendants
    - **If no 1st line collaterals**
      * *See Table of Consanguinity (pg 93)*
      * **1. Parental System OR**
        + To grandparents & their descendants (even if great-grandparents dead)
        + Excluded down each line
      * **2. Degree of Relationship System**
        + To the closest of kin, counting the degrees of kinship

**Degree of Kinship** (# of steps)

Count steps up from descendent to nearest ancestor of decedent & claimant

Count steps down for claimant to common ancestor

* + **2nd Line Collaterals** – Descendants of the decedent’s grandparents, other than parents & descendants
* **If no spouse or descendants** 🡪 to brothers, sisters, & their descendants
  + Nieces & nephews take by representation like §2-106(b) *per capita at each generation*
  + \*\*\*
  + \*\*\* (Remaining ¾ divided into 6 shares of 1/8 🡪 FGJ)(remaining3/8 divided into 5 shares of ¾ 🡪 LMNOP

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| **Scenario** | **Who takes?** |
| *“I hereby disinherit my brother B”* but makes an affirmative disposition.  *\*\*\** | Historical rule? B still inherits. T must have devised entire estate to brother  Modern rule? Treat B as if predeceased T.(B is treated like he disclaimed his share) |
| *Problem, pg 96* | Under UPC §2-103?  To descendants by representation   * + - \*\*\*     - \*\*\*     - \*\*\* |
| *Problem, pg 97* | How is C’s property distributed? *See In re Estate Griswald* |

Takers of Whole vs. Half-Blood

* **Majority & UPC §2-107:** Relative of half-blood is treated same as relative of whole blood
* **Minority (TX):** ½ blood gets ½ shares
* **Formula**
  + **Half’s Share** = 1/(H+2W) H=#half-bloods
  + **Whole’s Share** = 2/H+2W) W=# of whole-bloods
* \*\*\*

# Transfers to Children

Adoption

Adopted Children

* **Rule:** Adoption is irrevocable *(Hall v. Vallandingham)*
* **Family Law §5-308** Adopted 🡪 Terminates rights of natural parents & relatives. “Rebirth” into a diff relationship
* **TX Probate Code §40 Inheritance by & from an Adopted Child**
  + Adopted child is the child of the parents by adoption 🡪 Inherits from & through parents like natural child
  + Adoptive parents 🡪 Inherit from & through adopted child like natural parents
  + Natural parents 🡪 Can’t inherit from or through the adopted child
    - but child can inherit from & through natural parents unless adoption decree severs
* **RST 3 §2.5 Parent-Child Relationship (Intestate)**
  + Adopted child is child of their adoptive parents if:
    - Removed from families of genetics parents 🡪 Not a child of genetic parents
    - Adopted by relative of genetic parents **or**  
      by spouse/SS of relative of genetic parent 🡪 Remains child of both genetic parents *but see Equitable Adoption*
    - Adopted by a step-parent 🡪 Child of adoptive step-parent **&** of genetic parent married to the step-parent
  + Not adopted by step-parent 🡪 Not their child
  + Foster child 🡪 Not child of foster parents
  + Parent disinherits/refuses to acknowledge/abandons **or** parental rights terminated 🡪 Can’t inherit from child
* **UPC §2-114(b) Parent-Child Relationship**
  + **Rule:** Child is also child of other genetic parent for inheritance through parent, but not through the child
  + **Compare:** Like TX, but child can’t inherit from or through natural parent (automatically severs)
  + **Test:** Whether a parent-child relationship exists
    - Yes, PC Relationship 🡪 §2-116 Parent-child intestate succession
    - No PC Relationship bc adopted 🡪 §2-118(a) to adoptive parent & child
      * Not to genetic parents §2-119(a)
      * *Exceptions:* pg 101
      * \*\*\* Chart formal adoption of a minor (top of pg)  
        \*\*\* Chart formal adoption of an adult (top)

Adult Adoption

* **TX Majority:** Most intestacy §’s treat same as adopted child
* **Benefit:** Deny standing to will contestants (**BoP** on contestants 🡪 Must overturn adoption to gain standing)
* **Family Code §161.206(b)** Ct can terminate inheritance (PC relationship). Utilized (otherwise it’s an oversight)
* **Family Code §162.507**
  + Adopted adult can’t inherit from or through biological parent
  + Biological parent can’t inherit from or through adopted adult

Adoption & Interpreting Wills & Trusts

* **Historical**
  + **Early Cases:** Adopted child couldn’t take
  + **Later Cases: Stranger-to-the-Adoption Rule:** Adopted child could take if adopted *before* T’s death
* **Modern**
  + **Child:** Presume an adopted minor is included in a gift by T to “children, issue, descendants or heirs” (**RST3**)
  + **Adult:** May be adopted in the same manner of law for the adoption of a child & w/ same legal effect *(Minary Citizens Fidelity Bank & Trust)*

Adoption as a Special Power of Appointment

* **Purpose:** Adopt to create a child to come w/in a class gift
* **Adult**
  + **UPC §2-705(f):** Adopted child excluded from class gift to adoptive parents children, issue, descendants, or heirs by someone other than adoptive parent unless
    - Was adoptee’s step-parent or foster parent **or**
    - Adopted parent functioned as parent before they’re 18
* **Children “Adopted-Out”**
  + Adoptee not included in class gift to adoptee’s genetic parent’s descendants

Equitable Adoption

* **Definition:** Not formally adopted, but treat them as if they’re adopted
* **Aka:** Virtual adoption, adoption by estoppel
* **Rule:** Legal custodian doesn’t have right to consent to adoption bc retained by child’s parent or guardian *(O’Neal v. Wilkes)*
* **TX Majority** (*see* §40 Comments)
  + **Foster Child** can inherit from (not through) foster parents
  + **Foster Parents** can’t inherit from foster child bc no claim in equity, even if escheats (natural mom inherits)
  + **Notes on Majority Rules**
    - Many Cts refuse to apply it to testate estates
    - Treat equitable adoption like a breach of an adoption K. Foster/adoptive parents can’t benefit from their breach
    - Adoptive parent takes child into their home & cares for it as their child 🡪 Oral agreement to adopt is inferred
    - Genetic parents estopped from denying adoption

Requirements to Prove Adoption

* K bw persons competent to K for child’s disposition
* Agreement bw natural & adoptive parents **&**
  + Performance by natural parents to give up custody **&**
  + Lives w/ adoptive parents **&**
  + Partial performance by foster parents to board & care for child as theirs **&**
  + Intestacy of foster parent

Posthumous Children

* **Aka:** *En ventre sa mere*
* **Definition:** Conceived before, but born after father’s death
* **Rule:** Treat child as if born alive (from conception, not birth)
* **§41(a) Persons in Being Requirements to inherit:**
  + In being **&**
  + Capable of taking at time of intestates death
* **Posthumously Conceived**
  + **Aka**: *En ventre sa Frigidaire*
  + **Definition**: Born or conceived after father’s death
  + **Rule:** It’s a non-marital child (even if parents were married bc marriage ends at death)
  + *See Reproductive Technology*

|  |  |
| --- | --- |
| **Scenario** | **Who takes?** |
| Ivan died in 2011 survived by 2 minor kids, A & B who were born in 2008 & 2011. \*\*\* | What concerns do you have in re his property distribution (TX)?  Whether B was in being **&** capable of taking at T’s death §41(a) |

Non-Marital Children

* **Historical Rule**
  + Child born out-of-wedlock was *fuilius nullius* (child of no one) 🡪 Couldn’t inherit from parents
  + Child’s spouse & kids could inherit from child (otherwise escheat)
* **Modern Rule:** Treat as child. State can’t discriminate unless substantially justified by paternity test. Protected by EP Clause
* **Establishing Paternity**
  + Subsequent marriage of parents **or**
  + Father’s acknowledgement **or**
  + Clear proof after his death

Reproductive Technology

* + **Posthumous Reproduction**
  + **Rule:** Posthumously conceived child can enjoy inheritance rights of *issue* when surviving parent or rep. established:
    - * + Decedent genetically related to child (THRESHOLD) **&**
        + Decedent affirmatively consented to posthumous conception **&** support of that child *(Woodward v. Comm, pg 118)*
      * **Drawback:** §oL
      * **Most litigated cases:** Social Security benefits
    - **Legislative Reform**
      * **UPC §2-120 Requirements**
        + Consented while alive to posthumous conception **&**

Writing **or** by clear & convincing evidence

* + - * + Child in vitro w/in 36 months **or** born w/in 45 months of death
      * **RST 3:** Born w/in reasonable time after decedent’s death
* **In vitro Fertilization**
  + **Rule:** Children included in “issues/descendants” *(In re Martin B)*
  + **Focus:** Determined by intent in trust instrument
  + **UPC:** Focus for class gifts 🡪 Date of distribution
  + **When (RST):**  Date of parents death
  + **Surrogate Motherhood**
    - **Rule:**Genetic connection immaterial
    - **Arises from:**
      * W’s egg fertilized by H’s sperm or 3P donor
      * Surrogate mother’s egg fertilized by H’s sperm
      * 3P donor egg fertilized by H’s sperm or 3P donor
    - **UPC §2-121 Whether Parent-Child Relationship Exists**
      * **Requirement:** Child’s genetic mother **&** No other PC relationship exists **or**
      * Agreement w/ surrogate to be parent 🡪 If parent functioned as one w/in 2 yrs of birth
  + **Assisted Reproduction & Same-Sex Couples**
    - **UPC §2-120 Requirements to create PC relationship to inherit through birth mother**
      * Child by assisted reproduction (not gestational surrogacy) **or**
      * Written consent w/ intent for surrogate to be birth mother **or**
      * Functioned as parent w/in 2 yrs of birth

Advancements

* **Definition:** Prepayment of the child’s intestate share
* **Rule:**If child wished to share in the intestate distribution of a deceased parents estate:
  + Child must permit admin to determine distributive shares of property value given *while living* to the child by advancement
* **Historical** 
  + **CL Rule:** Lifetime gift by decedent to child 🡪 Presumed an advancement
  + **To avoid:** BoP on child to establish intent to make an absolute gift not counted against their share of the estate
  + **Policy:** Assume parent wishes to equally distribute assets among children (so lifetime gifts must be accounted)
* **Effect**
  + Child predeceases parent 🡪 Advancement deducted from shares of the descendants if other siblings are alive
  + Gift treated as advancement 🡪 Bring it into the *hotchpot* to account for it
  + Advancee dies before advancer 🡪 Treat as not an advancement
* **Modern Rules**
  + **Many States:** Reverse CL presumption. A lifetime gift is presumed *not* to be an advancement unless intent proves it was
  + **UPC §2-109(a), RST 3, TX Probate Code §44 Advancements**
    - **Advancements Requirements for Lifetime Gifts** (written & signal intent)
      * Contemporaneous writing that it is **or**
      * Writing for heirs acknowledgement indicates it is (doesn’t need to be contemporaneous w/ the gift)
    - **When:** Heir gets possession **or** when distributing estate (whichever occurs 1st)
      * Heir predeceases 🡪 Changes CL rule. Don’t consider unless express.
* **TX §44**

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| **Scenario** | **Who takes?** |
| Frank has 2 kids, dies w/ a $20K estate, having advanced Lynn $10K during his life. | \*\*\* Same, but presume intent to give A at least $40K.  A doesn’t have to return it & stays out of hotchpot + 50K/2 kids |
| **Advancee dies before advancer 🡪** Treat as not an advancement | \*\*\***\*\*\*** \*\*\*  1st add advancements & estate ($30K + $60K = $90K)  2nd Add $30K to each total (bc you divide advancement by 3)  3rd Subtract the amount advanced ($30K) 🡪 Thus, you only distribute $60K) |
| *Problems, pg 134* | O has 2 kids, A& B. O made regular gifts to B. What result, assuming they’re advancements? A inherits > B  O has 3 kids & deeds farm to A. O dies testate. Result? *See Thomas v. Thomas*  O gives B $20K bc ill. Advancement?  O pays C’s medical school tuition. Advancement? |

# Bars to Succession

Involuntary Bar to Succession: Homicide

* **Slayer Rule:** Title passes to slayer but equity holds him as a constructive trustee for heirs or descedent’s next of kin *(In re Eastate of Mahoney pg 145)*
* **Exception:** Donor can opt out EX: *“She gets my property even if she murders me”*
* **Majority: UPC §2-803**
* **Rule:** Bars killer from succeeding to non-probate & probate property. Treat killer as predeceased (like disclaimed)
  + **Purpose:** Deter wrongful conduct
* **Minority: UPC §2-114 Parent Child Relationship**
  + **Rule:** May be barred if nonsupport, abandonment, abuse or neglect of child/elder
* **TX Probate Code §41 Matters affecting & Not affecting the Right to Inherit**
  + **§41(d)** Convicted persons & suicides
  + **§41(e)** Parent-Child Relationship **!!!**
    - Discretionary w/ Ct **&**
    - Child under 18 **&**
    - Evil acts proved by clear & convincing evidence **&**
    - Evil conduct
      * Abandon & fail to support for 3 yrs **or**
      * Knowingly abandon pregnant mom **or**
      * Criminally responsible for death or serious injury of a child (doesn’t have to be intestate child)
* **Life Insurance Code §1103.051-52**: Proceeds go to contingent beneficiary

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| **Scenario** | **Who takes?** |
| Tom’s will named Robin & Sam as equal beneficiaries. Robin was also named beneficiary of his group life insurance. | What result if Robin intentionally kills Tom? (use TX Probate Code §41(d).  By case law, we don’t follow the §.  Use the constructive trust approach *(In re Estate of Mahoney*)  Title passes to Robin but hold in a constructive trust for decedent’s heirs or next of kin  Immaterial whether killer or accomplice life insurance ???   * **Life Insurance Code§1103.051-52**: Proceeds go to contingent beneficiary |
| A murdered O. | Result? \*\*\*\*\* |

Voluntary Bar to Succession: Disclaimer

* **Renunciation vs. Disclaimer:** Treat like disclaimer. It’s like “renouncing intestate share” vs “disclaiming your right to a gift”
* **Definition:** Heir of devisee can refuse to take property by disclaiming their share
* **Test:** Whether decedent died intestate. If yes 🡪 Heirs come through property & can disclaim
* **Applies:** Can disclaim intestate share, gifts, bequests, devises
* **Historical CL Rules**
  + **Intestate Successors**
    - Couldn’t prevent title from passing to him
    - Treated title as passed to heir, then to their next successor
    - **Effect:** Taxable gift
    - **Purpose:** Feudal property needed to have a taker
  + **Testate Successors:** Disclaimer could refuse to accept devise. No tax consequence
* **Majority Rule**
  + Disclaimer treated as predeceased. Property doesn’t pass to heirs or descendants.
  + **Rule:** A disclaimer can *not* direct where property goes **!!!**
  + **§oL:** w/in 9 months of creation of interest (vs minority: no time limit, Uniform Disclaimer of Property Interests Acts (UDPIA), which was absorbed into the UPC)
  + **Rule:** Disclaimers may be valid under the TX § but disallowed by UPC §2518
  + **TX Probate Code §37A Time for Filing a Disclaimer** (9-month Rule)
    - **Present Interest** 🡪 w/in 9 months of decedent’s death
    - **Future Interest** 🡪 w/in 9 months takers interest is indefeasibly vested
    - **Tip:** State law re disclaimer 🡪 9 months after interest created, *not* 9 months after disclaimed (Tax law trumps state law)
  + **TX Probate Code §37A(a) Persons who may disclaim**
    - Independent executor of a deceased person (May disclaim if disclaimant is dead **!!!)**
    - \*\*\*
      * Disclaimed interest passes only to the descendants of disclaimer who survive the time of distribution **!!!** Thus, if A disclaims her 50% interest, it’s divided bw O’s grandchildren

Qualified Disclaimers

* **UPC §2518(b)(4)**
* **TX Probate Code §25A (m) Qualified Disclaimer**

Partial Disclaimers

**TX Probate Code §37A(l) Partial Disclaimer** *“May disclaim in whole or part…fee estate in favor of a LE”*

Reasons to Disclaim

* **Avoid Creditors** \*main
  + **Majority:** Creditors can’t reach if disclaimed *before* filing bankruptcy **!!!**
    - **Doesn’t Apply:** IRS **!!!**
    - **Tip:** Disclaim before bankruptcy
  + **Minority:** Disclaimer can’t be used to avoid bankruptcy creditors
* **Federal Income Tax**
  + **Rule:** Disclaimer who had a right to property has them. Subject to federal tax liens, even if disclaimed *(Dye v. US pg 155)*
  + **Tip:**A beneficiaries creditors don’t have recourse against a beneficiaries interest in a discretionary trust
  + **TX Probate Code§37A Effective Date of Disclaimer** *“shall relate back”* 🡪 Treat disclaiment as predeceased the intestate

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| **Scenario** | **Who takes?** |
| *“I leave all my furniture to Annie, if she survives me by 30 days, & if not, to Ben.”* | If Annie disclaims bc she wants her daughter to have it? Property goes to Ben  If Annie takes & keeps? Transfer is subject to gift tax  If oldest child disclaims?May be diff under TX Probate Code §68 but it’s not triggered here |
| Irma executed a will leaving her property to Rohn *“if he is solvent, if not to Theresa.”* | Result?  If Irma had taken one of approaches, the IRS would have been out of luck:  Leave property to Theresa w/ request Theresa transfer some of it to dad if he’s solvent **or**  Leave property in a discretionary trust for Rohn & Theresa |

* **Medicaid**
  + **Historical English Poor Laws:** Couldn’t force you to pay if you couldn’t care for them
  + **Modern:** *Laws are constantly changing*
    - **Majority:** Legal obligation to provide for spouse & minor children if able, but not parents or siblings. May be disqualified if you give property away unless transfer home to spouse **or** trust to a disabled person
    - **Minority:** Must attempt to retrieve transferred property. Medicaid recipient dies leaving a probate estate or non-probate transfer 🡪 State may attempt to recover benefits conferred

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| **Scenario** | **Who takes?** |
| **EX: Art. II & V in Supplement**  *“I leave $100,000 to my husband if he survives me. In the event he disclaims this bequest, then the sum shall pass as part of my residuary estate.”*  *“All the RRR of my property, I leave to TX Commerce Bank, for the benefit of my husband & children.”* | If H disclaims?  It passes into provision V of the will  Are Articles II & V a Qualified Disclaimer?  No. But a spouse’s disclaimer may not be. |
| A acquired Redacre on Jan 1 of the current year. Title is passed in B’s name for life, remainder to C or her estate.  A is Bs parent. C is B’s child. | What happens if B timely executes a qualified disclaimer (§2518 in writing, etc)?  When, at the latest, can B & C execute timely disclaimers?  B must disclaim outright, in writing, w/in 9 months after creating the interest in A (Jan 1🡪 Sept 1)  When does C’s interest come into possession & enjoyment (TX)?  When preceding LE ends (B dies or C disclaims). UPC §2518 is similar. |
| *“I leave Blackacre to X”* REAL PROPERTY  *“I leave my 500 shares of Acme to Y”* PERSONAL PROPERTY | Disclaimer? X can disclaim all of Blackacre  Partial Disclaimer?Y can disclaim an undivided, specific % (portion)  Can X make a partial disclaimer & retain a LE in Blackacre but disclaim a remainder in FS?  TX §37A: Yes  UPC §2518: No bc terminates at death for tax purposes **!!!**  **Drafting Tip:** Leave Blackacre in LE & remainder will transfer at death |

# Wills: Capacity & Concepts

* **TX Probate Code §57 Who may execute a will**
  + Over 18 **or**
  + Lawfully married **or**
  + Member of the Armed Forces (at time of execution)
  + Mental Capacity
* **RST Requirements: *aka* the *Cunningham* Test of General Capacity**
  + Competent to make a will (capable of knowing & understanding…)
    - Nature & extent of their property **&**
    - Natural objects of their bounty **&**
    - Disposition they’re making **&**
    - Intent to the disposition
    - *They must also meet §57 requirements above*
* **Minority “Living Probate”** *aka anti-mortem probate*
  + Permits probate of a will during a T’s lifetime & authorizes an adversary proceeding to declare the validity of a will, testamentary capacity, & freedom from undue influence
* **Rule:** Every person is presumed sane, unless evidence rebuts the presumption of testamentary capacity *(In re Estate of Washburn, pg 159)*
  + **Majority:** Once proponent shows *prima facie* evidence 🡪 Contestant has burden of persuasion
  + **Minority:** BoP on proponent
* **Rule:** Mentally capable to make a will if they have sufficient intellect to make a decided & rationale decision re distribution of property. Feebleness, weak-mindedness, inability to care for oneself, & eccentricity irrelevant *(Wilson v. Lane, pg 161)*

Capacity

* **Majority:** Requires *less* mental ability than K, irrevocable gifts, or irrevocable trusts, but *more* than marriage
* **Vs. RST 3 Reqt’s to make a lifetime gift**
  + Capacity to make a will **&**
  + Understand the gifts & effects on their future financial security (& their dependents)
* **Policy:** Assure desires earned, prevent exploitation, protect family
* **Principal of Reciprocity:** When Ct considers fairness of a disposition

Insane Delusion

* **Delusion:** False concept of reality
* **Insane Delusion:** A belief not susceptible to correction w. evidence of its falsity
* **Rule:** May have sufficient mental capacity generally to execute a will but may be suffering from an insane delusion so as to cause a particular provision or the entire will to fail for lack of testamentary capacity. It must effect the disposition *(In Re: Strittmator)* ***Similar to:*** *Ct bias in Kaufman (same-sex), Moses (race)*
* ***Breedon v. Stone***
  + ***Causation Analysis:***General test for capacity to execute a will & the insane delusion tests are not mutually exclusive
  + **Rule:** An insane delusion must materially effect the will to be invalidated for lack of testamentary capacity
  + **Evidence of Mental Capacity, “Sound Mind:** Drugs, paranoia, etc
* **Analysis !!!**
  + **1) *Cunningham* test of mental capacity** *(see above)* **&**
  + **2) Insane Delusion Test**
    - Often involves a T who possesses his mental faculties, but suffers from paranoia & monomania
    - Not all insane delusions materially affect the making of a will
* **Majority Requirements**
  + Labored under an insane delusion **&**
  + Will/part of it was a product of the insane delusion
* **Minority:** Lower standard of causation
  + **Dead Man’s Statutes** – Prohibit testimony by an interested party of a decedent’s oral statement in support of a claim against the decedent’s estate
* **Goals of Analysis:** 1) Are they of sound mind; 2) How to best fulfill their testamentary intent
* **Tip:** Challenge a will on as many grounds as possible (EX: both testamentary capacity & insane delusion)

Undue Influence

**CONFIDENTIAL RELATIONSHIP + SUSPICIOUS CIRCS = Presumption of Undue Influence (burden-shifts) !!!**

* **Definition** - Ground of challenge that benefits a proponent (vs. contestant) **!!!**
* **Requirement:** Must have suspicious circs. Confidential relationship alone is insufficient. **!!!**
* **Effect:** Stricken the product of undue influence
* **Purpose:** Deter wrongdoers overreaching who attempts to take advantage of a donor bc of age, inexperience, dependence, physical or mental weakness
* **Note:** Wrongdoer not req’d to have been present
* **Important Element:** Susceptibility *(Lippor)*, Opportunity
* **RST 3**
* **TX**
* **Test:** Whether such control was exercised over T’s mind to overcome her free agency & free will & to substitute the will of another so as to cause T to do what she wouldn’t have done but for such control *(Lippor v. Westolow)*

What Influence is Undue?

* **Overreaching**
  + **Tip:** Power of Atty may be used for UI bc gives access to $
  + **Presumption of UI & Burden-Shifting:** Shifts burden to wills proponent (usually on contestant)
  + **Types of Confidential Relationships**
    - **1. Fiduciary** EX: Caregiver-patient, atty-client, red flag if beneficiary
    - **2. Reliant**
    - **3. Dominant-Subservient:** Historically same-sex relationship
* **Non-Traditional Relationships**
  + **Facts:** Older woman, younger man in atty-client sexual relationship
  + **Rule:** Presume UI in a fiduciary relationship where fiduciary’s a beneficiary & testatrix hasn’t received independent advice & counsel in making her will *(In re Will of Moses pg 186)*
  + **Tip:** Anticipate will contests by using on estate questionnaire
    - Affairs, non-traditional relationships, age diff, lack of marriage, may be challenged by the family
    - **To Prevent:** Explanatory letter
  + **Facts:** Same-sex relationship. Ct construed as dominant-subservient
  + **Tip:** Letter of explanation re disposition can aid the will proponents. Alternately, prof exam, video, family mtg, disinterested W’s, trust, outright gift
* **Suspicious Circs**
  + Secrecy or haste EX: New document surfaces at 15th hour
  + Reasonable person would think it’s unnatural, unjust, or unfair
    - Benchmark of unfairness 🡪 Intestacy §
  + Donors attitude toward others changed by his relationship w/ wrongdoer

Will-Contest Planning

* **What are the contest grounds?**
  + Lack of testamentary capacity (& insane delusion) \*often alleged together **!!!**
  + Undue Influence \*
  + Fraud (in the inducement **or** in the execution)
  + Tortious interference w/ an expectancy
  + **Tip:** Challenge on as many grounds as possible
* **What are the warning signs/invite will contest?**
  + Multiple blended families arising from multiple marriages
  + Short time frame bw development & death
  + New will radically departs from longstanding estate plan
  + T imposed conditions on bequest
  + T makes gifts to mistress
  + Unequal shares to beneficiaries of equal relations
* **What are the strategies?**
  + Some geared toward building a record
  + Some aimed toward secrecy
* **Precautionary Measures**
  + **Record Building**: Recorded video, Prof exam, Disinterested W, Intervivos trust
  + **Maintain Secrecy:**  Revocable inter vivos trust, Inter vivos gift (bc no notice req’t). Gifts aren’t revocable
    - Can have diff distribution while alive, then changes when you die
    - More transactions while alive = more likely to be upheld
  + **Sooth Feelings:** Family mtg, letter or video explaining (must be testator, not lawyer)
* **No-Contest Clauses** (pg 198)
  + **Effect:** Challenge will 🡪 Take nothing
  + **To Avoid:** Must give them a sufficient amount they could gain from a will contest (insurance to buy peace of mind)
    - EX: Make 1st will & give them $4K. Make 2nd will & give them $10K. If they contest will 2, they’d get less bc will 1 is the default
  + **Maj, RST, & UPC §2-517 & §3-905** ***Probable Cause Standard***
    - **Unenforceable if:** Just cause **&** Good faith **!!!**  🡪 Might not have a complete forfeiture
  + **TX Minority:** Does not shift the BOP **!!!**
    - **Not even legal action brought against an executor is a will contest !!!**
      * EX: Asking for an accounting 🡪 No a will contest so don’t need just cause to enforce a forfeiture issue
    - **Test of UI:** *See RST 3*
    - **Property Code § 112.28** mirrors **§64** but deals w/ trusts

Bequests to Attorneys

* **Rule:** Presume UI when atty-drafter receives a legacy, unless atty related to T **!!!**
* **Models Rules of Professional Conduct §1.8**
  + Atty must get clients informed contest to act as an executor or trustee (if drafting)
  + Best to advise of attys financial interest & have 3P independent counsel (not req’d)
* **Probate Code § 58(b) Devises & Bequests that are Void**
  + Bequests to beneficiaries proscribed by (a) are void unless related to T *(see table of consanguinity, pg 98)*
  + Gifts deemed void
    - To drafting atty (or their spouse, parent or descendant)
    - Atty who supervised the prep (or their spouse, parent or descendant)
  + **Exceptions**
    - Beneficiary is T’s spouse, ancestor, descendant
    - Beneficiary related to a beneficiary w/in the 3rd degree
    - Bona fide purchaser for value

Fraud

* **Definition:** T deceived by a deliberate misrepresentation & does what he wouldn’t have done but for the misrepresentation
* **Requirements**
  + Intent to deceive **&**
  + Purpose of influencing testamentary disposition
* **Effect:** Invalidate the part influenced by misrepresentation. Ct can’t simply refuse probate 🡪 May impose a constructive trust

Types of Fraud

* **Fraud in the Inducement**
  + **Definition**
    - Representation causes T to execute or revoke a will **or**
    - Refrain from executing or revoking a will **or**
    - Include provisions favoring the wrongdoer
  + EX: H induces O not to execute a will favoring A w/ a promise to convey property when H has no intent to convey
* **Fraud in the Execution** *(fraud in factum)*
  + **Definition:** Intentionally misrepresents the character or contents of the signed will, which doesn’t carry out T’s intent **!!!**
    - * EX: A signs will, is bling, but O brought document A did not intend to be hers
      * *Puckett v. Krida (pg 209)*
* **TX Probate Code § 10 Persons entitled to contest proceedings, fraud**
  + **Requirements for Fraudulent Inducement**
    - Material misrepresentation that was false Misrepresentation = Falsehood w/intent to deceive
    - Speaker knew it was false **or** reckless disregard for the truth
    - Intent it be acted upon
    - Reliance on the misrepresentation
    - Injury

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| **Scenario** | **Who takes?** |
| T’s will leaves everything to her niece, Joan. T’s 2nd will was executed in the hospital 2 days later. Before she died, T revoked her prior will & left everything to her friend Carol. A nurse testified that she heard Carol tell T a day before the execution, that Joan was dead. In fact, Carol knew Joan was alive. | What type of fraud? Fraud in the inducement  Remedy? Impose a constructive trust on Carol, for the benefit of Joan |

Duress

* **RST3:** Threatened or performed a wrongful act that coerced donor to make a donative transfer they otherwise wouldn’t make
* **Applies:** Overly coercive
* **Rule:** Heir or devisee under a will prevents T from making a will or deed in favor of another, by fraud, duress, or UI 🡪 They’re deemed trustee over the gift in favor of intended beneficiary *(Latham v. Father Divine)*
* **Constructive Trust:**  Equitable remedy. Prevents unjust enrichment of wrongdoer (disgorge wealth to favor proper party)

Tortious Interference w/ an Expectancy

* **RST Torts Requirements:** Interference involved conduct tortious in itself (fraud, duress, UI)
* **Doesn’t Apply:** Mental Incapacity, No-contest clauses
* **Who can claim:** Party who would have contested a will but prevented by another person’s fraud (*Schilling v Herrera pg 213)*
* **Not** a will contest. Instead seeks DAS from a 3P
* **§oL:** Begins when discovered or should have discovered
* **May Recover:** Punitive DAS
  + Durable power of atty - not recovered due to incapacity
* **Requirement:** Must have exhausted other remedies EX: Fraud #1 🡪 UI ; Fraud #2 🡪 Tortious interference
* **Attestation Clause**
  + Proves where they signed
  + Notion of what was done by the parties in compliance w/ the § of wills (rebuttable presumption)
  + Help W who can’t recall events exactly
  + Impeach W’s testimony if it doesn’t match the will
* **§59 Self-Proving Affidavit**
  + **Traditional:** 2 steps w/ double signatures (typically in pages behind will). Separate doc from the will
  + **TX**: 1 step will execution w/ single signatures (T, 2 W’s & notary). Part of the will
    - Signature on SPA, but not on will 🡪 SPA can act as will signature. Not a self-proving will bc no proof of duly executed
  + **Reasons to Include**  *3 diff functions. Self-proving never hurts*
    - Substitutes in Ct Testimony of W’s during probate
    - Saves time, $, & inconvenience during probate
    - Doesn’t strengthen the will
    - **How to Draft it** *see §*
    - **Rule:** W’s must first sign actual will. If will not formally executed 🡪May still admit to probate if substantially complies w/ formal req’ts *(In re Will of Ranny pg 253)*

# Wills, Formalities, & forms

Execution of Wills

Function of Formalities

* **Functions of Formalities**
  + **Ritual Function:** Performing a ceremony to impress the transfer & significance of statements
  + **Evidentiary Function:** Supply satisfactory evidence
  + **Protective Function:** Prophylactic to safeguard T
* **UPC §2-502 Execution | Witnessed & Notarized Will**
  + In writing **&**
  + Signed by T / someone in their conscious presence w/ their direction **&**
  + Signed by 2 W’s w/in reasonable time after witnessing the signing **or** T’s acknowledgement **or** Acknowledged by testator to a notary
* **UPC §2-502 Execution | Holographic Will**
  + Valid if signature & material are in T’s handwriting

Writing, Signature, & Attestation: Strict Compliance

* + **TX Traditional Rule:** Must be in strict compliance admit to probate Mistake in execution 🡪 Could be denied probate
  + **Lack of Proper Execution** is another method of contesting wills **!!!**
  + *In re Groffman pg 228*
  + **TX Probate Code §59 Requisites of a Will** [The Statute of Wills]
    - Writing, signed by T **or**
    - 2 W’s sign in T’s presence
    - **TX:** Not a substantial compliance state

|  |  |
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| **Scenario** | **Who takes?** |
|  | * + Must W’s sign in the presence of the testator (TX)? Yes   + Must T sign in the presence of the W’s? No (more relaxed TX rule, but not best practices)   + May the W’s attest by mark? No. Must subscribe name   + May W subscribe by proxy? No. Must sign in their own handwriting in presence of T |

* + **Rule:**  2 W’s don’t see T sign or acknowledge his signature 🡪 Invalid Will *(Stevens v. Casdorph pg 229)*
  + **Rule:** T doesn’t see W’s sign their names or acknowledge their signatures 🡪 Invalid Will *(Stevens v. Casdorph pg 229)*
* - Proponent shows clear & convincing evidence decedent intended it to be his 🡪 May probate *(In re Estate of Hall pg 259)*
  + What saved this will? *Harmless Error* & legislature adopted the *dispensing power* **[vs substantial compliance]**
  + **Rule:** Specifically purports to be the will of one person but signed by their spouse 🡪 Invalid Will *(In re Pavlinko pg 246)*
  + **Rule:** Identical mutual wills simultaneously executed w/ statutory finality 🡪 One may be admitted to probate even though both mistakenly signed the others will *(In re Snide pg 250)*
  + **Presence**
    - **Minority Line of Sight Test:** T must be able to see W’s sign if they try to look (Exception: Blind)
    - **Minority Conscious Presence Test:** T comprehends W is signing
    - **UPC § 2-502:** W’s not req’d to sign in T’s presence
  + **Signature**
    - **UPC §5-502 & All States:** T must sign (assisted, or a mark, cross, abbreviation is sufficient)
    - **Order of Signing**
  + **Majority, RST:** T must sign or acknowledge *before* W’s attest unless a single, continuous transaction
  + **Minority “English Wills:”** T must sign at the end of the will
  + **Writing & E-Wills**
    - **RST3:** Not req’d to be on paper. Only req’s permanent record
    - **UPC:** Agnostic. May be valid under substantial compliance or harmless error rule
  + **Interested Witnesses**
    - **Minority: UPC §2-505** A will is valid even if witnessed by an interested party
    - **Majority Purging Statutes**
      * **Rule:** Purge what W would receive that’s in excess of what they’d receive in intestacy, or sometimes, under a previous will
      * **Exception: Supervisory Will:** Must have 2 disinterested W’s witness the signing
  + **Recommended Method of Execution**
    - **Majority, UPC §2-506, & RST:** Valid if all formalities are req’d
    - **Tip:** Execute a will so it satisfies the formal req’s in all states (bc mobile society)
    - **Requirements to formally execute a will in all states** (pg 243)
      * Securely fasten together all pages
      * Atty confirms T read & understood it
      * …
  + **Walk through Will Ceremony**
    - **Tip:** Use paperclip when they sign so you can make copies w/out defacing it (to avoid probate litigation)
    - **First:** Atty asks T if the will is representative of their intent at the time
      * Is this your will?
      * Have you read & understand it? / Are you familiar w/ its contents?
      * Is this representative of your wishes at this time?
    - **Second,** T signs w/ W’s watching. Then, W’s sign in presence of T
    - Not statutorily req’d but good to do 🡪 Initial all pages before signature page. Prof gets W’s too
    - Safeguarding
      * Usually just 1 original
      * Make copies as needed
      * T’s safe deposit box or attys
      * **Note:** Where it’s going to be stored?

* + - **Rule:** Attenuating circs before & at T’s death, along w/ words, express intent to gift property at death 🡪 Can probate *(Kimmel’s Estate pg 269)*
      * **Holographic Wills** 🡪 Evidentiary function may show testamentary intent
    - **Probate Code §60**
      * *NO date Requirement*
      * Wholly in T’s handwriting **&**
      * Signed **&**
      * Sound mind (§57 testamentary capacity) & testamentary intent (shown by writing)
      * …
      * **TX is a 1st generation holographic will statute !!!**
      * *Signature:* No req’t for it to be at the end
        + EX: Last will & testament of Jen James
        + EX: I, Alfred Smith, do make this will
      * What if ½ typed, ½ written (TX)?
        + §60 Must be wholly in T’s handwriting **or**
        + **Surplusage Rule**

**Requirements:** Not necessary to complete the will **&** Doesn’t affect meaning

* + - **Effect:** Ignore surplus, not in T’s handwriting & see it has intent, capacity, etc

**Advanced Holographic Wills Rule [NOT TX!]** Testamentary intent 🡪 Printed portions of a will form can be incorporated into a holographic will *(Estate of Gonzalez* pg 274)

* + - * **Rule:** Second will doesn’t make a complete disposition 🡪 It’s a codicil the first will. A letter expresses testamentary intent where the evidence shows T believed he near death at the time of writing it & facts show intent to convey a specific item of property to a particular beneficiary *(In re Estate of Kuralt pg 280)*

|  |  |
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| **Scenario** | **Who takes?** |
| “I direct that after payment of my just debts, my property to be bequeathed in the manner following: (handwriting)” | Result if you apply the surplusage rule & only look at what’s in T’s handwriting?  In a first gen holographic wills state (TX), it would just be a list 🡪 Not a valid holographic will |

Revocation of Wills

* **§63 Revocation of Wills**
  + **Requirements**
    - Formally in writing **or**
    - T destroys, cancels **or** destroyed in T’s presence **&**
    - by operation of law (not in §63 but necessary) **!!!**
    - Must also have testamentary capacity **&** intent **!!!**
  + **Texas is a Non-Revival JSD:** Revoked in TX 🡪 Can’t be revived. Must re-execute **or** republication by codicil **!!!**
* **Rule:** A will is an *Ambulatory Document* bc can be modified or revoked by T while alive
* **“Executed w/ like formalities”** Complies w/ recognized methods (attested or holographic revocation)
* **Express Revocation Clause:** “I hereby revoke all prior wills & codicils” At beginning of will

Express vs. Implied Revocation

* Express Revocation by Subsequent Instrument **vs.**
* Implied Revocation by Inconsistency

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| **Revocation by Subsequent Testamentary Instrument** | | |
| **Executed in 2011** | **vs 2012 w/ no Revocation Clause** | **Who takes?** |
| *All to Mary* | *All to Fred* | All to Fred bc the inconsistent provisions of the 1st will are revoked |
| *Ring to Mary $20K to Mary* | *Ring to Jane*  *$30K to Jane* | Assuming there’s enough funds, Jane gets the ring & they both get $. Earlier will revoked only to the extent of inconsistent provisions. |
| *$20K cash to Mary* | *$30 cash to Mary* | Mary gets $30K. She could argue they’re supposed to be read together 🡪 Majority of Cts would use newest one bc $20K less to pass to residuary if read together |
| *All to Jim* | *House to Ann*  *Car to Betty*  *‘Ring to Carl* | House, car, & ring are revoked by inconsistency.  Ann, Betty, & Carl receive the items. Residuary to Jim. |
| *House to A Car to C*  *RRR to D* | *Tea set to E*  *RRR to X* | **Some states:** X takes remainder based on inconsistency bw initial & subsequent instruments  **TX Rule:** When later will makes a complete disposition 🡪 Revokes all prior wills by implication.  Revoke the will 🡪 All subsequent codicils are rendered ineffective |
| *All to A* | *Ring to B*  *Car to C* | In 2013, T destroys the 2012 will. What result?  Treat 2008 document as codicil. When destroyed, 2011 will invalid bc TX is a non-revival jsd  What if T destroys the 2011 document instead?  Non-revival jsd 🡪  Revival jsd 🡪 |

Partial Revocation by Physical Act (TX)

* **Rule:** Not allowed in TX. Strike-out ignored & will admitted to probate as originally executed
* **TX & Most Jsds** 🡪 No partial revocation by physical act **!!!**
* Xxxx
* **Revocatory Act:** Burning, tearing, canceling, obliteration or destroyed, even if didn’t touch the words
* **Rule:** Evidence a will was in T’s possession before death & not found among her personal effects at death 🡪 Rebuttable presumption T revoked her will *(Harrison v. Bird pg 286)*
* **BoP:** Proponent must rebut w/ clear & convincing evidence
* **§2-507 Revocation by Writing or Act**
  + A will or part of a will is revoked if:
    - Execute subsequent will expressly or by inconsistency
    - Revoke w/ intent & purpose **or**
    - Another revokes in T’s presence by their direction

**Rule:** T destroys her will death 🡪 Presume T revoked it & all duplicates (even though a duplicate may exist w/ another person)

* **BoP:** Proponent must rebut the presumption w/ clear & convincing evidence
* **Rule #1** To revoke a will other than by creating another duly executed will 🡪 1st will must be destroyed by cutting, tearing, burning, obliterating, or destroying it. *(Thompson v. Royall pg 290)*
* **Rule #2** If revoked by words that don’t quality themselves as a validly executed will 🡪 Words must physically come into contact w/ the words of the will (EX: This will is null & void) *(Thompson v. Royall pg 290)*

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| **Scenario** | **Who takes?** |
| **Typed & attested will**  *“To A, ~~B~~, & C, I leave my cherished Chevrolet Z-28”* | Striking out B is not effective. Can’t do a a partial revocation by physical act to an attested will  What if it was a holographic will? Valid revocation by physical act allowed. Must be in T’s writing |
| **Typed & attested will**  *“To A, B, & C, I leave my cherished Chevrolet Z-28”* | Complete obliteration. Not a partial revocation. Ineffective bc Ct doesn’t know whatwas there |

Dependent Relative Revocation & Revival

* **Issue:** To what extent will a revocation be regarded when there’s been a mistake in law or fact?
* **Definition:** If T purports to revoke his will upon a mistaken assumption of law or fact 🡪 Revocation ineffective if T wouldn’t have revoked his will if he’d known the truth
* **Nutshell:** DRR requires either: **!!!**
  + Mistake recited in the instrument **or**
  + An alternative plan of disposition that fails

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| **Scenario A** | **Scenario B** | **Who takes?** |
| Will #1 🡪 *Friend* Will #2 🡪 *$40K to nephew, RRR to friend* | *Will #2 🡪 40K to nephew, RRR to friend* | T executed valid will #1. Thereafter T tore up will #1 & executed will #2. Suppose some glitch & will #2 wasn’t validly executed completely. T dies survived by friend, nephew, & only child. What result?  A is better. DRR applies, disregarding valid revocation. Intent to revoke wasn’t absolute. It was contingent on will #2 being effective, a mistake of law |

* **Rule:** A codicil that revokes a prior will but only makes a change to refer to a beneficiary in a manner so there’s no mistake about his identity 🡪 Revocation effective if codicil is valid *(LaCroix v. Senecal pg 295)*
* **Rule:** T expresses an intent on reinstating a former will & no explanatory evidence 🡪 T deemed to have revoked his later will under mistaken belief he was reinstating his first will *(Estate of Alburn pg 300) (non-revival jsd like TX)*
* **§69 Will Provisions made before Dissolution of Marriage**
  + Divorce 🡪 Treat spouse & family as predeceased
* **TX Family Code §9.301 Pre-decree Designation of Ex-Spouse as beneficiary of Life Insurance**
* **TX Family Code §9.302 Pre-decree Designation of Ex-Spouse as beneficiary in Retirement Benefits**
  + - Decree must designate the other former spouse as beneficiary **or**
    - Redesignates them **or**
    - Desingnated in trust
    - **In sum:** § not literally applied. See *Aglehoff, pg 301*, *Keen v. Weaver,* &*Kennedy v. Plan Administrator.* Update the beneficiary designation. Don’t rely on revocation as a matter of law

**TX Probate Code §472 Revocation of certain non-testamentary transfers on dissolution of marriage**

* + Former spouse & their relatives are barred from trust benefits **&**
  + Barred from acting in a fiduciary capacity
  + Unless trust maintained by K or Ct order

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| **Scenario** | **Who takes?** |
| Will #1 *“I leave my cherished diamond broach to my friend of many years, Mary”*  Codicil *“I am revoking Mary’s bequest bc she’s dead.”* | T is mistaken bc Mary is alive. Apply DRR?  Yes. Apply DRR (absent fraud, duress, et) & let Mary take. |
| Typed & attested will with handwritten edit  *“I leave $25K to ~~Mary~~ (edit: Nancy) if she survives me.”* | 1st strike Mary’s name 🡪 Validly revokes from Nancy  2nd add Nancy’s name 🡪 It’s an unattested change. Jsds that recognizes holographic wills would say it’s invalid bc not a holographic will to begin with. But disregarding her intent to not distribute it to Nancy would disregard T’s intent. Neither Mary nor Nancy reccive the $25K/ bc no strong DRR case for Mary & Don’t give to Nancy bc T no longer had the intent to give it to her |
| *“I leave ~~$1,000~~ (edit $1,500) to my nephew Bud Charles”* | 1st strike 🡪 Valid  2nd change $ 🡪 Same rule as above: can’t give him $1,500, but can give him $1,000.  \*Better to strike it all out, then write it in own handwriting. This would 1st) validly revoke Will #1 & 2nd) Create a valid holographic will |
| T, a TX resident, is single & signs a will leaving all his property equally to his brothers & sisters. Several years later, he marries but never updates his will. | How would his property be distributed in the event of his death?  Does marriage revoke the will? No  What happens? T’s ½ of the community property & *all* his separate property goes to his brothers & sisters |
| Bob executes a will naming his 2nd wife as independent executrix & provides that she’s to take his entire estate if she survives Bob, & if she doesn’t, then the estate will pass in trust for the benefit of her minor children. | What result under TX law if Bob & his 2nd wife divorce?  Treat spouse & her minor children as pre-deceased (§69)  What if he named the trust for his children as contingent beneficiary to his 2nd wife?  What if he took out a life insurance policy naming his 2nd wife as beneficiary?  §69 doesn’t discuss insurance.  Use TX Family Code §9.301 Pre-decree Designation of Ex-spouse as Beneficiary of Life Insurance  What if he named his 2nd wife as a beneficiary of his retirement plan?  Not governed by §69 or §9.301 Use TX Family Code §9.302 Pre-decree Designation of Ex-Spouse as beneficiary in Retirement Benefits  What if he created a revocable trust w/ his 2nd wife as beneficiary. A trustee?  Apply TX Probate Code §472 Revocation of certain non-testamentary transfers on dissolution of marriage |

Components of a Will

Doctrine of Integration of Wills

* **Definition:** All papers presented at the time of execution, intended to be part of will 🡪 Integrated into the will
* **How-to Integrate:** Staple, sign, & initial each page. [for internal coherence: # provisions in order, use same font & size]
* **See also** Incorporation by reference
* **Idea:** Written material not physically part of the will text 🡪 Teat as being in the will
* **Requirements**
  + 1. Intent to Incorporate (evidenced by language)
  + 2. Incorporated writing must be in existence when T executes the will
  + 3. Incorporated writing must be reasonably identified
* **Issues:** Validity of incorporated writing instrument *(Allday v. Cage, pg 219)*
* **Types of Will to Integrate**
  + Duly Executed will **or**
  + Holographic will + Extrinsic Document
    - **Rule:** Can’t incorporate typewritten material
* **Rule:** Testamentary disposition in own handwriting on an invalid typed will & circs show intent to be a codicil to invalid will 🡪 Incorporate invalid will by reference into codicil *(Johnson v. Johnson pg 317)*

Republication by Codicil

* **Definition:** A will is treated as re-executed as of the date of codicil
* **Rule:** A document may be incorporated into a will by reference if:
  + Will reference to the document
  + Document existed at the time that will created, **&**
  + Document is sufficiently identifiable in the will *(Clark v. Greenhalge, pg 310)*
* **Example:** Will 🡪 Child born (pre-termitted child TX §) 🡪 Codicil

Acts of Independent Significance

* **UPC §2-512 Events of Independent Significance**
  + **Definition:**  Wills may dispose of property by reference to acts/events if significant apart from effect upon dispositions
  + **When act/event may occur:** Before/after execution **or** T’s death EX: Revocation
  + **Purpose:** Allows gift to be upheld
* **§58(c) Interests Which May Pass under a Will**
  + Legacy of **personal property** doesn’t include the contents unless expressly included
  + Devise of **real property** doesn’t include any personal property in it unless expressly included

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| **Scenario** | **Who takes?** |
| Sarah’s Will (2000) *RRR in trust for charitable beneficiary of Barney’s*  Barney’s Will (2001)  Barney dies in 2008. Sarah dies in 2009. | Should Sarah’s devise be upheld? If so, what theory?  Can’t use incorporation by reference bc trust didn’t exist when Sarah executed her will. Barney’s trust is an Act of Independent Significance that will allow the gift to be valid  What if Sarah died first?  Can’t uphold as an act of independent significance.  Can’t uphold as an incorporation by reference  Treat Barney as having a special testamentary power of appt so he could appoint to charities |
| **Bequest: Contents of the Object**  *“I leave X the contents of my safe deposit box on Wachovia Bank”* **vs.**  *“I leave S the contents of the right hand drawer of my bedroom dresser.”* | Which one is easier to validate?  The safety deposit box bc it’s smaller in scope. Significance of life-time security & other safe-keeping. Less people have access, even if dresser locked |
| **Bequest: The Object**  *“I leave my desk to my son Jeff, if he survives me by 30 days.”* **Vs.**  *“I leave my principal residence to my wife Betty, if she survives me by 30 days.”* | Does Jeff receive the contents of the desk?  No. Personal property doesn’t include the contents unless expressly included [§58(c)]  Is Betty entitled to the boat stored in the garage?  No. Real property doesn’t include the contents unless expressly included [§58(c)] |

* **Classification of Bequests**
  + Ademption (by extinction)
  + Ademption (by satisfaction)
  + Abatement
  + Apportionment
  + Exoneration (of liens)
  + Increase

Contracts Not to Revoke a Will

* **Joint Wills**: Single document containing wills of 2+ people. Litigation breeder (even if no problem w/ execution)
* **Reciprocal Wills** *(aka sweetheart wills)*
  + **Definition:** Separate wills w/ parallel dispositive plans
  + **Tax:** No concerns about tax planning unless above $5 million
  + **Rule:** Not automatically contractual
* **Contractual Wills**
  + Established if will written after 9/1/1979
    - 1. Express provision stating: K exists **&** Material K terms
    - 2. Provisions of a written agreement that’s binding & enforceable EX: Marital agreement
  + Avoid. Trust works better
  + **Apply:** Wills law first to respect revocation & K law 2nd to remedy the breach
    - **Remedy for Breach**
      * Impose constructive trust upon person who received property in favor of a person who should have received propert
    - **Revocability of a K**
      * While both are alive 🡪 Can revoke upon notice unless K provides otherwise
      * After one dies 🡪 Generally irrevocable
      * **Note:** Will remains revocable even though it breaches K

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| **Scenario** | **Who takes?** |
| Contractual Will 🡪 A dies 🡪 B signs new will in favor of D 🡪 B dies  Upon A & B’s death, it provides for C. | A predeceases. What result?  If joint will 🡪 Probate it. Property to survivor, B. C’s interest vests upon death of A or B  B signs new will in favor of D, which conflicts w/ 1st Kual will. Which will goes to probate?  New will. Impose a constructive trust on D to enforce a transfer of property to provide for the Kual wills beneficiary, C. |
| Contractual Will *“Upon A & B’s death”* 🡪 A dies 🡪 B signs new will 🡪 C dies 🡪 B dies | What result?  Probate original will. Property goes to survivor (B).  C’s interest vests upon death of A or B  What If the K beneficiary predeceases?  If C is alive 🡪 to C  If C predeceases 🡪 to C’s estate  **Rule:** Where there’s no breach, C doesn’t have to survive B (Compare w/ below) **!!!** |
| Contractual Will 🡪 A dies 🡪 C dies 🡪 B dies | B didn’t sign new will. Is the property paid to C’s estate?  **Rule:** When there’s no breach, C must survive B §47 (Compare w/ above) **!!!** |
| Contactual will 🡪 A makes new will, favors Z 🡪 A dies 🡪 B & Z are alive | A & B make a will to provide for survivor C. What if A makes a new will in favor of Z w/ out giving notice to B, then A dies survived by B &Z?  Breach bc lacks notice. New will in favor of Z done before anyone died. For TX, if A dies 🡪 will 2 is probated, the one in favor of Z  *See Estate of Johnson*  **TX Rule:** Impose a constructive trust **vs**  **English Rule:** Don’t impose a constructive trust |

* **Rule:** 3P beneficiaries of a mutual will don’t have a claim to a SS’s elective share *(Via v. Putnam pg 329)*

# Construction

Patent vs. Latent Ambiguity

Patent Ambiguity

* **Definition:** Appears on the face of a will EX: *“I leave ½ to A, ½ to B, & ½ to C”*

Latent Ambiguity

* **Definition:** Manifests itself only when the will terms are applied to T’s property or designated beneficiaries
* **TX:** Admits extrinsic for both patent & latent ambiguities
* **Plain Meaning Approach**
  + **Rule:** Extrinsic evidence is not admissible when the beneficiary of a will can be identified on the face of the will *(Mahoney v. Grainger pg 336)*
  + **Disadvantage:** Doesn’t always reflect T’s intent

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| **Scenario** | **Who takes?** |
| *“To my loyal & Trusted friend, Mary Jane, I leave \_\_\_.”*  *“After the payments of my debts & expenses, I leave all my cash to my cousin, Snow White.”* | Part I: Case law in TX says you can’t fill in blank  Part II turns on the meaning of “cash” T probably meant to include stocks, etc. Under the plain meaning approach, they would interpret it strictly as cash |
| *“I leave my horse to my nephew A”* | No apparent ambiguity, but what if multiple nephews? |

* *Mahoney (pg 337)* “to my heirs” vs “nearest relatives”
* *Arnheiter* “304 Harron” vs “317 Harron”
* Gibbs (pg 344) “Robert J Krause” vs “Robert W Krause”
* **Rule:** Description of a thing/person consists of several particulars & all do not fit one person or thing 🡪 May reject less essential particulars if remaining description clearly fits. Ct can’t correct or reform a will *(Arnheiter v. Arnheiter pg 343)*
* **Rule:** *(Estate of Gibbs)*
* **Rule:** T writes a will & later marries 🡪 Marriage revokes T’s will unless includes a provision concerning the contingency of marriage. Extrinsic evidence admissible to prove T’s intent when writer made a drafting mistake. Must be clear & convincing evidence the error induced T to execute a will he intended to be valid despite his prior marriage *(Erickson v. Erickson pg 345)*
* **Ct Correction for Lawyer Blunders**
  + Correct the error (benefit of a more liberal construction of correction)
  + Malpractice action

Death of Beneficiary before T’s Death

* **Lapse** - Devisee doesn’t survive T
* **Historical:** Falls into the residue
* **§68 Prior Death of Legatee**
  + **TX Anti-Lapse §:** If devisee is T’s descendant/predeceases T **or** dead at time of will **or** disclaimant 🡪 Devisees descendants take the devisees share. Divide Equally
  + **Requirement:** Descendants must survive by 120 hours (§47)
  + **Applies:** Wills, not will substitutes (bc devisee)
* **Rule:** Lapse not covered by Anti-Lapse § 🡪 Goes to residuary **!!!**
* **Applies:** Void gifts & to beneficiaries who predecease T. Extrinsic evidence is admissible to prove T’s intent if in light of the circs surrounding ] wills creation, the language is susceptible to 2+ meanings *(Estate of Russell pg 359)*
* **Avoid applying the anti-lapse §**: Must express intent **or** provide an alternate bequest *(Ruotolo v. Tietjen pg 367)*
* **TX Class Gifts:** Not a class gift if refers to a name or #

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| **Scenario** | **Who takes?** |
| *Stamp collection to A $25K to B*  *RRR to C* | All beneficiaries are unreated to T. What if A & B die before T?  Lapse bc A & B died before T  What would the result be under the common-law approach?  C takes bc falls into the residue  Same, but passed to C &D in equal shares & C also predeceases.  *Common-Law No residue of the residue rule-* C’s share goes to D (shares the residue)  Not subject to anti-lapse § bc devisees are unrelated |
| *“I leave 15K to my daughter A. If she predeceases me, this bequest shall lapse”* | Suppose A predeceases T, w/ children B & C surviving. What result? Substitute? (TX)  “Shall lapse” 🡪 No substitute §68© 🡪 Doesn’t apply if T provides otherwise This is lapse, not covered by the anti-lapse §, so apply the consequences of lapse 🡪 goes to residuary |
| *1. Mustang to my daughter Carla if she survives me.*  *2. RRR to my wife Molly* | Carla dies survived by her kids & Molly. Who gets the Mustang? (TX)  “If she survives me” expresses a contrary intent 🡪 Use §68(e) which says don’t apply the anti-lapse §  What if 1. Said *“Mustang to my daughter Carla?*  Goes to devisees descendants f the survive by 120 hours §68(a)  Same as #2, but T dies 2 days before Carla  Doesn’t meet the 120 hour rule 🡪 Goes to devisees descendants  T’s will is worded the same as #1, but leaves her entire estate to her husband George. Carla is killed in a car accident the next day. What result?  She didn’t survive 120 hours but the will only states “if she survives me” which overrides the 120 hour rule. 🡪 Passes to George’s estate |
| 1. *Specific bequest to my best friend, Lee Westwood’s former spouse*  2. *RRR to \_\_\_\_\_\_\_.* | *“Lee Westwood’s former wife”* 🡪 Indicates class gift  In 1, A, B, & C are the former spouses. A predeceases T, survived by A’s 3 kids, Huey, Duey, & Luey. Who takes under the class gift rule?  A’s share is divided equally bw B&C (not A’s kids)  What if all members of the class are unrelated to / predeceased T? (use class gift bird)  Goes to residue bc there’s a lapse of pre-residuary disposition  What if the Art. 1 beneficiaries were members of a class gift who were related to T pursuant to §68?  Anti-lapse §68(a) trumps the class gift rule  **A’s ½ share divided bw A;s 3 Kids** 🡪 1/9 1/9 1/9 | **Balance to B&C**  B🡪1/3 C🡪1/3  If the Art 1 beneficiaries were members of a class gift who were related to T pursuant to §68, & both died before the will was executed?  Anti-lapse §68 trumps the class gift (???) |
| *“To my brothers, Jack & Ted, I leave…”* | Is it a class gift?  *“brothers”* 🡪 Indicates class gift, but **not** a class gift bc refers to individuals by name |
| *“To my 3 sisters…”* | Is it a class gift? No bc #, not by name |
| *“To my sisters…”* | Is it a class gift? Yes |
| *\*\*\*\** | Is a spouse who pre-deceases T covered by the anti-lapse §? No |

Changes in Property After Executing a Will

* **4 Types of Bequests/Devises**
  + **Specific Bequest**
    - **Rule:** Subject to ademption (like revocation)
    - Ademption by Extinction only applies to a specific bequest **!!!**
  + **General Bequest**
    - **Rule:** Executor’s responsibility to fulfill. May have to sell assets to satisfy bequest
    - Classify as a general bequest is best way to avoid ademption by extinction if you had a specific bequest
      * Ademption by extinction 🡪 Ct more likely to apply as general
    - Rights as a beneficiary entitled to a more general asset
    - **Entitles you to:**
      * Value of shares at date of death **or**
      * Estate purchasing for you
  + **Demonstrative “Hybrid” Bequest**
    - Not covered by abatement (below)
  + **Residuary**

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| **Scenario** | **What type of Bequest?** |
| 1.*“I leave my stamp collection to my daughter, Claire, if she survives me.”*  2. *“I leave my son, Jeff, the sum of $5K, if he survives me.”*  3. *“I leave my son, Jeff, $5K from [specific account]”*  4. *“RRR to \_\_\_\_”* | #1? Claire’s is a specific bequest bc subject to ademption. It is pre-residuary  #2? Jeff’s is a general bequest. Executor may have to sell assets to satisfy the general bequest to Jeff for $5K. Thus, Jeff has a broader claim. It’s pre-residuary  #3? Demonstrative Hybrid Bequest  #4? Residuary bc everything after the disposition |
| **Scenario** | **What type of Bequest? Ademption?** |
| *1. “I leave* ***my*** *100 shares of Calloway stock to A.*  *2. “I leave 100 shares of Calloway stock to A*  *3. “I leave 100 shares of Close Corp to A”* | #1? **Ademption.** Specific bequest bc shares identified as T’s. More favorable to A bc A can compel executor to buy shares or get value at T’s death  #2? **No ademption.** General bequest even if T owned 100 shares (bc doesn’t say “my”)  #3? **Ademption.** Specific Bequest. Privately held. Can’t just go online & find value of shares. Diff bc no marked. If there’s ademption by extinction 🡪 Ct more likely to classify as a general bequest  Suppose the stock in #1 is the subject of a merger & each share of Calloway stock is exchanged for 3 shares of NewCo stock.  **Change of Form**. It just changed form & captures equivalent value 🡪 Avoids ademption |
| T’s will makes a specific bequest or devise of asset A. After T dies, the independent executor is unable to locate asset A. She tells you she doesn’t know if the property…. | Specific bequest. This is ademption by extinction (TX follows) |
| A has a piece of paper that leaves “intent” to give something | TX isn’t an **intention jsd** bc TX is under the **identity theory** |
| *I leave my antique roll-top desk to A.*  *RRR to B* | Result? So long as the proceeds are traceable to the assets that no longer exist, A has the right to receive proceeds. *See §70*  Suppose T sells the desk in Jan to a buyer for $10K cash. T dies in April. Who gets the cash from the sale?  A will argue she does bc the desk no longer exists 🡪 Reject  $ to B. A is subject to ademption by extinction & doesn’t get the desk or the $.  Suppose T entered an enforceable K for the desk but died before transferring the desk & getting the $. Result?  A subject to ademption by extinction even though desks still in the estate. It shifted under the **doctrine of equitable conversion**. Thus, right to enforce K becomes property & purchaser has right to enforce K against estate |

Abatement

* **§322B Abatement of Bequests**
  + Decedent’s property is liable for debts & expenses (other than estate taxes) **&**
    - Property not disposed of by will (intestacy) **least protected**
    - Personal property of the residuary \*
    - Real property of the residuary \*
    - General bequests of personal property \*
    - General devises of real property \*
    - Specific bequests of personal property \*
    - Specific devises of real property **most protected (aim for this as a drafter)**
* **EX:** Expenses of last illness, income tax, property tax (he stressed property tax!!!)

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| **Scenario** | **Type of Bequest? Result?** |
| *“I leave X $11K to be paid by the sale of my IBM stock.”* | Stock is worth $800 at T’s death.  Demonstrative Hybrid Bequest. UPC would treat the $200 shortfall as a general bequest |
| *“I leave X $1K* ***first*** *to be paid by the sale of my IBM stock.”* | Not demonstrative. |
| T’s will leaves $3K to A, $9K to B, RRR to C | What’s the issue if executor informs you that he only has cash or property worth $8K?  Abatement problem bc don’t have the $ to dispose of.  A&B take first. C’s out of luck bc he’s the residuary taker & is least protected under §322B (order of abatement)  What type of abatement?  This is apportionment-like concept (aka allocation) 🡪 **Pro-Rata Abatement**  They each get their pro-rata share prepared apportionally  So…if $8K 🡪 A gets $2,000. B gets $6,000 |

Apportionment

* **Estate Tax Apportionment**
  + **§322A Apportionment of Taxes**
    - Representative shall charge each person interested in the estate a portion of the estate tax
    - Except get deduction/exempt: Surviving spouse **or** $ left to charit
    - **TX adopted Equitable Adoption**, shifting the tax burden to recipients (rather than residue-CL rule)

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| **Scenario (death in the current year)** | **CL** | **vs. Equitable Apportionment** |
| A. Real estate | $3.5 million to A  B. Stock | $2 .1 million to B  C. RRR | $1.4 million to C | -$700K tax  CL?  Taxable Estate = $7 million Estate tax = $700K  Comes out of the RRR, so C gets $700K | $350K taxed  $210K taxed  $140K taxed  Under Equitable apportionment?  Apply straight 10% |
| A. Real estate | $2.75 million to A  B. Stock | $2.75 million to B  C. RRR | $500K to C  It’s a $6 million estate. C is T’s spouse or a qualified charity | Taxable Estate = $5.5 million Estate tax = $175K |  |
| 1. Bequest  2. Devise  3. RRR  T left a will & life insurance | Would life insurance be taxed? Yes. Federal gross estate includes probate & non-probate property. Life insurance beneficiaries should pay their pro-rata portion of the estate  How can we tell T intended that all taxes, both probate & non-probate be paid out of the residuary estate when there’s no mention of non-probate property in the general tax clause?  Bc the clause is ambigious. *2 scenarios:*  *1. Re-allocated to an equitable apportionment out of the residuary, so pre RRR are relieved, but still have a pro-rata portion out of the non-probate property. In prof’s opinion it shouldn’t be shifted to the residue*  *\* He’s passionate about (see Creighton Law Review Article)* | |

Exoneration

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| **Scenario** | **Who takes?** |
| *“I leave my interest in Greenacre to my sister, Belle, if she survives me by at least 60 days.”* | What add’l info is needed about Greenacre?  Is she encumbered by a mortgage? Greenacres value? What’s her interest? Date of the will?  If FMV was $500K & Mortgage wsa $50K?  **CL:** Belle would receive it free & clear bc paid out of residuary  The greater the mortgage 🡪 greater the opportunity to upset the disposition  Executor can exonerate up to the amount of personal property  **TX §71A(a)** |

**Missed Class 10/28**

* **Rule:** Donor manifests intent to impose upon herself enforceable duties of a trust 🡪Insufficient to only express intent to be a donor *(Hebrew University Assoc v. Nye pg 563-66)*

# Trusts

Inter-vivos Trusts (Revocable Trust)

Revocable Trusts

* **Historical:** Settlor doesn’t retain all powers of normal stock ownership & has fiduciary duty to beneficiary as trustee 🡪 Valid. Beneficiary takes trust property upon settlor’s death & formally executed *(Farkas v. Willliams pg 398)*
* **Modern:** Beneficiary lacks standing to challenge trust during grantor's life *(Linthicum v. Rudi pg 403)*
  + Grantor has right to income, right to revoke, & can be trustee
  + Non-probate transfer
  + If silent on revocation 🡪 Must show intent to revoke
    - **TX §112.xxx(c):** Trust written 🡪 revocation must be written
* **Life Insurance**
  + Divorce & remarry w/ intent to change life insurance designation 🡪 Must be in writing *(Cook)*
  + **TX Family Code §9.301** - Revocation on divorce applies to insurance proceeds. Can be implied
* **Multi-party Accounts**
  + **TX Probate Code §438A Convenience Account:** A can withdraw for creators benefit
  + **TX Probate Code §439 Requirements to Create a Written Survivorship Agreement**
    - Party who dies must sign **vs**
    - §451-2 Community Property (Jt) 🡪 Both must sign
    - Jt w/ survivorship 🡪 Didn’t create right of survivorship. Authorizes payment, not recipient *(Shaw & Henderson)*
      * No Joint tenancy w/ right of survivorship
  + **Payable on Death K’s**
    - **Definition:** Form of multi-party bank account
    - **Original Payee:** Party(s) who create account. They control until death
    - **POD Payee:** Recipient of account benefits. Controls after original payees death
    - **Compare**
      * Partnership agreement provides for payment of partner’s interest to a beneficiary upon death 🡪 Valid even if doesn’t comply w/ statute of wills *(Estate of Hillowitz pg 409)* **vs**
      * Valid holographic codicil references & republishes prior invalid will 🡪 Validates prior will as to date of the codicil *(In re Estate of Atkinson pg 407)*
    - **TX Probate Code §450 Payment or Transfer at Death**
      * Validates POD K’s. Non-testamentary
  + **Pour-Over Wills** *(Pg 443)*
    - **Definition:** Benefits of will pour over into trust
    - **TX:** §58(a) Abolished pour over trust
  + **Historical Incorporation by Reference:** Trust must exist before or concurrently w/ will
  + **TX §58A Interest which my Pass Under a Will**
    - Competent to make a will 🡪 May devise & bequeath estate, right, title, & interest. May disinherit
    - Trust doesn’t have to exist at time **!!!**
      * Trust doesn’t have to satisfy § of wills
  + **Realty:** All parties must sign for recipient to transfer or revoke

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| **Scenario** | **Who takes?** |
| **Pour-Over Will:** *Income to O for life. Remainder to A.*  **Will** *“I hereby revoke the trust. All trust assets to B”*  Assume revocable trust says it can be revoked by a lifetime writing delivered to trustee | Will A or B entitled to the trust assets?  Is the will the lifetime writing? Yes  Can it be delivered to trustee?  If settlor is trustee 🡪 Delivery satisfied  If 3P trustee 🡪 Must deliver to revoke |
| **Pour-Over Will:** *Income to O for life. Remainder to A.*  **Will silent as to revocation:** *“Trust revoked & assets to B”* | Revocable?  Silent 🡪 May revoke if there’s intention to revoke |
| **A & B create a POD account for C** | Who controls the account?  A&B are original payess. Control account  C is POD Payee. Entitled to funds remaining upon the death of the survivor of A &B  Grantor’s |
| A creates a POD account for B &C | What if A dies first?  B& C can take unless POD account expressly provides for survivorship bw B &C |
| A acquires land w/ A’s funds but title is iissued to A & B. Several years later, A wants to sell the property | What if A wants to sell or revoke? Concerns?  All party’s must sign |
| What type of account should be set up if creator wanted to give A power to make withdrawals for creators benefit during life if creator was unable to but not give A any ownership rights during creators life or on death? | A can withdraw for creators benefit |
| H uses community funds to open H as trustee for W trust ban account. | What if creator wanted exclusive control over the account during life, but any amount on deposit at death payable to A?  Can create a totten-trust for community funds §438(c) **or** a POD account §447  What if H dies first? All to W as trust beneficiary (her ½ & his ½).  What if W dies first? H gets his ½. W’s ½ goes by intestacy or W’s will |
| Creator wants to give A the ability to make withdrawals during creators lifetime & have the account balance pass at death to the survivor. T goes to the bank & deposits $13K in a new account in trust for T’s minor grandchild. | What type of account should be set up?  A totten-trust.  What are T & grandchild’s respective interests?  T can control funds. If T doesn’t withdraw during life 🡪Funds POD to minor grandchild |
| A & B are joint owners. A contributed 40% of the account balance & dies first. | May not automatically create a jt tenancy w/ right of survivorship.  It’s a multi-party account  **TX:** No presumption that jt account is a survivorship account  Balance will pass by will or intestate §439 & §436 |
| 1. A & B payable to either or survivor **or**  2. A & B Jt w/ survivorship | 1. B entitled to all property. Party who dies must sign  2. Community property 🡪 Both must sign |

* **Community Property Survivorship Agreements (Amendments to §439 & §452)** 
  + Community property survivorship agreements not req’d to meet same survivorship agreements req’ts bw non-spouses *(Holmes v. Beatty)*
  + **Purpose of REPTL:** Reverses *Holmes*: "Survivorship agreement isn’t inferred from mere fact it’s a joint account or designated JT TEN, Joint Tenancy, joint, etc"
  + Parallel language added to §439 (non-community property multi-party accounts)
* **§67 Pretermitted Children**
  + **Definition:** Children born after wills execution not otherwise provided for **&** who aren’t also children of SS
  + **Pre-Amendment:** Can exclude SS from receiving anything from decedent to provide for the pretermitted child
  + **Purpose:** Balance bw the pretermitted child (& not cause a disinheritance) & the surviving spouse
  + **Effect of Amendment:** Amounts passing to the pretermitted child can’t reduce amount passing to SS by more than half
  + Status as pretermitted child might be overrun if codicil created after child born (bc birth pre-dates codicil)

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| **Scenario** | **Result?** |
| *T had no other children at time will executed* **or**  *No provision made for the children* | Pretermitted child takes share of estate the child would have inherited (§38) if T died intestate & unmarried owning only that portion of the state not left to the pretermitted chil’d other parent |
| *T had other children at time will executed* | Bequest made to other children Pretermitted child’s share of the estate is limited to the share left to the other children |
| T does will 1 in year 1 leaving property to T’s sister. T’s children, A & B, receive nothing.  Child C, sister, is born in year 3 | What result?  Give pretermitted child their share of the estate limited to share left to other children  Suppose T transfers $500K cash to trust?  1/3 to C. 2/3 to sister. A&B get nothing. Takes wealth from sister & gives to C.  Suppose T transfers $500K cash to trust for C. Does it change?  No. Lifetime gifts to pretermitted child don’t effect their entitlements.  1/3 to C. 2/3 to sister  Instead, T purchases a $500K life insurance policy & names C as beneficiary?  All goes to sister. T treated as having provided for pretermitted child through non-probate transfer that takes effect at T’s death §67(d)(2) |
| Will leaves §30K to A & B. C is an after-born pretermitted child | What does C get? Treat C as receiving equal share as A & B. Each gets $30K |
| Will leaves $10K to A, $20K to B | What should C get & from whom?  Pro-rata dimunition. Divide both A & B’s share into 3rds. 3/3 from A + 6 2/3 from B = $10K  So A gets 6 2/3, B gets 13 1/3, C gets 10 |
| T & spouse reside at 1122 Mockingbird Lane. T’s will leaves the home to her brother. | Can this be done in Texas?  Usually, T has testamentary power over their separate property & their share of community property. Here, the devise is subject to the rights of the surviving spouse. Brother receives an interest in the property  **It depends on where it is - what is homestead?**  If 200 acres 🡪 Rural  If 10 acres 🡪 Urban.  **Also depends on Family Allowance**  SS & minor children are entitled to allowance for support for 1 year, to the extent the SS’s separate property & property of children is inadequate |

**Widow’s Election**

**Applies:** When T tries to dispose of their ½ share

**Purpose:** Protect SS from testamentary transfer of community assets

**Effect:** T can accept or reject

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| **Scenario** | **Does it Trigger the Widow’s Election?** |
| *“I give, devise, & bequeath all of my property, real & personal, tangible & intangible, separate & community to C.”* T is married. | Triggers Widow’s Election |
| *“I give, devise, & bequeath all property owned by my spouse & I, real & personal, tangible & intangible, separate & community to C* | Doesn’t trigger widow’s election |

Testamentary Trust

* **Definition:** Trust created under a will

Advantages of creating a trust (transfer of property)

* **Asset Management**
  + Young beneficiary may benefit from asset management
  + Custodial arrangements end at 18 or 21 (majority), or later (even for life)
* **Choice of Law Benefit**
  + Geographically disbursed holding 🡪 Don’t have to deal w/ each states rules
  + **Applies:** Only to inter vivos trust
* **Tax Advantages**
  + Trust 🡪 Parts w/ legal ownership
  + Potential of moving income-producing asset into trust (if irrevocable trust)
    - Trust may potentially be a tax-paying entity
    - Beneficiary responsible for $ received
    - Trust subject to marginal raters of tax
      * Loss advantage to split income to avoid tax on it at a higher marginal rate
      * Revocable trust 🡪 No income splitting. No tax advantages **!!!**
        + But protects them if they need $ later
* **Rule:** Grantor can be trustee. Grantor, beneficiary & trustee don’t have to all be diff
  + **Problem:** Merger issue if grantor & beneficiary are the same

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| **Scenario** | **Who takes?** |
| G creates a trust providing for income to be paid to G for 5 years w/ the corpus to be paid to G at the end tof the 5 year term. G names himself trustee | Issue?  G can be trustee but there may be a merger issue w/ G being both the grantor & the beneficiary |
| G 🡪 Income  Remainder 🡪 Corpus to X | Could G be the sole trustee?  Yes, if another is the remainderman |

Requirements

* **§112.001 Methods of Creating a Trust**
  + **Requirement: #1**
    - Property O holds in trust for another
    - Property O’s inter vivos transfer to another as trustee for 3P
    - Property O’s testamentary transfer *same, diff types*
    - Appointed as trustee for 3P *same, diff types*
    - Promise to another held in trust for 3P
* **§112.002 Intent to Create a Trust**
  + **Requirement #2**: Must manifest intent to create a trust
* **§112.003 No consideration req’d to create a trust** (use K law)
* **§112.007 Capacity of Settlor**
  + Same as will. Must have intent.
* **§112.008 Capacity of Trustee**
  + **Requirement #3:** Must have legal capacity
  + Trustee is corporation 🡪 Must have power to act as trustee in the state
  + ….
  + Settlor may be trustee
* **Necessity of Trust Property (Trust Res Req’t)**
  + **Rule:** Promise to make a gift 🡪 Not a declaration of a trust *(Unthank v. Rippstein pg 569)*
  + **Rule:** Future profits- No trust res until trust comes into being (when property received) *(Brainard v. Comm, pg 572)*
    - Future profits interest 🡪 Insufficient
    - Gifts of future profits 🡪 Sufficient
    - Promise to make trust 🡪 Insufficient
  + **Rule:** Subject of a valid gift doesn’t have to be physically present & in donors possession…**but** a document purporting to make such a transfer must express intent to make an irrevocable present transfer *(Speelman v. Pascal pg 572)*
  + **§112.005 Trust Property [Trust Res Req’t]**
    - **Definition:** Trustee’s contingent right to receive the insurance proceeds
    - **Requirement #4:** Trust must have trust property EX: Cash, land, securities, etc
* **§112.009 Acceptance by Trustee**
  + Deed of trust 🡪 Provide signature line for trustee & settlor
  + Trustee doesn’t accept 🡪 Incurs no liability
* **§112.004 Statute of Frauds**
  + Real property 🡪 Must be in writing
  + Personal property 🡪 Can have oral trust if:
    - Neither settlor nor beneficiary **&**
    - Expresses intent to create trust (may be oral)

**Necessity of Trust Beneficiary**

* + Once you accept being a trustee 🡪 Have fiduciary duty 🡪 fiduciary liability
  + Must have 1+ beneficiaries (even if unborn or not ascertained) EX: Future Children
    - Private trust 🡪 Must be definite and ascertainable
  + **Rule:** A power differs from a trust in that it’s not imperative & leaves act to be done at donee’s will. Private trust (unlike a public trust) must have an identifiable beneficiary or class of beneficiaries indicated in the will who can go to Ct & claim the bequest *(Clark v. Campbell pg 579)*

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| **Scenario** | **Who takes?** |
| G dies testate & her will leaves $50K to A w/ the desire that he use the $ to take care of B. | Is there an enforcement obligation?  No, only precatory language. Precatory language is insufficient. Must also have intent.  If intent wasn’t to create a trust, how to fix?  Add “*but do not legally require”* that he use the $ to take care of B  Do they have to use words “trust” & “trustee” to show intent?  Easier to call it a trust. Is A to hold assets for the use & benefit of B…  What happens if an express trust is created, but there’s no trustee named?  Ct appoints trustee |
| C borrowed $ for A. | Can C use the debt to create a trust for the benefit of C’s child, B?  Can’t transfer liabilities by putting a prepayment obligation on the trust  Can A use the debt to create a trust for the benefit of A’s child, D? |
| Grandma devises land to granddaughter. | She wants to fill trust res req’t in granddaughters interest. Allowed?  No. It’s no more than an expectancy  Must have coalescence of INTENT & PROPERTY INTEREST |

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| **Scenario** | **Who takes?** |
| O grants Grandma land in a will & also creates an inter vivos trust | Land 🡪 Uses residuary under trust terms |
| O grants a life insurance policy payable to… O also creates an inter vivos trust | Is there an expectancy interest?  No. O could change the beneficiary designation |

Powers of Appointment *(pg 581)*

* **General Power of Appointment**
  + **To Determine:** Yourself, your estate, your creditors, **or** creditors of your estate
    - Otherwise it’s a special/specific power of appt (to descendants-can’t protect the $ themselves)
* **Inter vivos & Testamentary Powers of Appt**
* **What is a Valid Exercise?**
  + **§58(c) Exercise of Power of Appointment**
    - T can’t exercise power of appt through residuary clause unless:
      * Specific reference in will **or**
      * Written indication of intent to include property subject to the power in the will

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| **Scenario** | **Power of Appointment** |
| G🡪 Income to A, Remainder to B C’s given the right to distribute such amounts of trust principal as C wishes to give her lineal descendants | Who is G?  Grantor of the trust [Donor of the Power]  Who is C?  Grantee of the trust [Donee of the Power]  Who are the lineal descendants?  Class of Appointees [Objects of the Power]  Could A be given the power of appointment?  Yes. More common  Could C be given the above right w/ respect to her friends?  Yes. Can exercise a power of appointment to a class of appointees that aren’t definite & ascertainable **!!! but if holder of the power is trustee…**  (vs beneficiaries which **must** be definite & ascertainable)  EX: *“To C to appoint among friends”*  What if C were trustee?  **Rule:** Power must be given to C in their individual capacity EX: *“To C, as trustee, to appoint amongst friends”* 🡪 Invalid  Trust law says you **can’t** have a trust in favor of an indefinite class |
| A gives B a testamentary power of appt. X, Y, & Z are A’s lineal descendants:  *Ring to X. Car to Z. RRR to Z* | Valid?  No. Further specificity req’d |
| T’s Will  *Ring to A. Car to B. Acme Trust Building to Z’s children, if she so chooses. If she fails to choose, then shall pass by residuary clause*  *RRR to C*  Z’s Will  *TPP to W. Acme Trust Building to daughter, X. $ to Y. RRR to S* | §58(c)(2) Must be a written indication that T intended to include the property subject to the power in the will |

Honorary Trusts

* **Rule:** A valid honorary trust may exist where donor gives another a dog for the purpose of caring for the dog. Bequest doesn’t violate RAP when donor sets a portion of $ to be used daily if time that doesn’t exceed RAP *(In re Seawright’s Estate pg 582)*

Secret & Semi-Secret Trusts (TX)

* **Rule:** Trust that’s not sufficiently declared on its face to be a trust 🡪 Can’t use to defeat heirs rights by extrinsic evidence *(Oliffe v. Wells pg 593)*
* **Secret Trust:** Doesn’t disclose intent to make a trust 🡪 Impose constructive trust
* **Semi-Secret Trust**: Says hold in trust but doesn’t identify beneficiary 🡪 Impose a residuary trust for their successors in interest
* **TX Minority:** Doesn’t combine secret & semi-secret trusts

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| **Scenario** | **Result?** |
| *“Residuary estate to Reverend Elcozer “to distribute in such a manner as in his discretion shall appear best calculated to carry out the wishes which I expressed to him or may express to him”* | If secret trust 🡪 Impose a constructive trust  If semi-secret trust 🡪 Impose a residuary trust for their successors in interest |

Oral Trusts for Disposition at Death

* **Rule:** Oral trust may be proven by oral testimony *(In re Estate of Fornier, pg 589)*
* **Rule:** If oral agreement & refuses to transfer back after promised 🡪 Can impose a constructive trust  *(Hieble, pg 596)*
* **Rule: \*\*\*\*** *(Pappas, pg 596)*
* **§112.004 Statute of Frauds** *(see above)*

|  |  |
| --- | --- |
| **Scenario** | **Result?** |
| A deeds realty to B. B orally promises to hold it in trust *“for A for life, then to C”* | What if B refuses to transfer the property to C aftter A’s death?  Ct could impose a constructive trust bc unclean hands  How can B’s oral promise be enforced?  May grant a revocable inter vivos trust  The constructive trust remedy can apply where:  Grantee promises to hold property for a 3P **or**  Grantor promises to return property to grantor |
| G 🡪 Trust income to A, quarterly | What authority does A have?  A also has authority to distribute corpus to his lineal descendants TX Prop. Code §181.051 |

# Rights to Distributions from a Trust Fund

* **Settlor:** Person who creates a trust or contributes property to a trust. Can be +1 person. Grantor & trustee = Settlor

Types of Trusts

Mandatory Trust

* **Definition:** Trustee must make specified distributions to an identified beneficiary

Discretionary Trust

* **Definition:** Trustee has discretion over distribution
  + Can be sole & un-controlling. Ct can review. Must act in good faith, not arbitrarily
  + Settlor can post-pone & delegate to trustee the decisions of whom to distribute to
* **Rule:** Trustee who holds discretionary power to pay principal for beneficiaries “comfort, support & maintenance” has a duty to inquire into beneficiaries financial resources to ascertain his needs *(Marsman v. Nasca pg 598)*
  + Can conservatively distribute $. Paid when shouldn’t 🡪 Liable. Be conservative, worst case is Ct orders it to be paid.
* **Trust Pursuit Rule**
  + **Definition:** Allows party harmed to go after them but **not** against a bona fide purchaser for value
  + **Remedy:** May impose a constructive trust on the remainderman for the $ that should have been paid
* **Property Code §114.031 Liability of Beneficiary to Trustee**
  + - Misappropriation
    - Express consent for liability
    - Failed to repay a loan
    - Failed to repay a distribution greater than they’re due
    - Breach K to pay $ or deliver property to trustee
* **Rights of Beneficiary’s Creditors**
  + **Traditional Law**
    - **Pure Discretionary Trust:** Trustee had absolute, sole, or uncontrolled discretion
    - **Support Trust:** Obligated to distribute for beneficiaries needs
      * Beneficiary couldn’t allocate his interest
      * Creditors can’t reach the interest
      * Word ‘support’ insufficient to create

Spendthrift Trust

* + **Definition:** Imposes a disabling restraint on beneficiaries & their creditors
  + **Rule:** Ct can make exceptions to a spendthrift provision that bars creditors *(Shelley v Shelley, pg 618)*
  + **Property Code §112.035 Spendthrift Trusts**
    - **Requirement:** Expressly state it’s a spendthrift trust (majority)
    - **Best Practice:** Include entire spendthrift clause
  + **UTC §503(b)(b) Exceptions**
    - Can’t protect trust from alimony **&** child support
    - **Policy:** Avoid burdening state w/ the cost
    - **Doesn’t Apply:**Can’t reach corpus (bc discretionary)
  + **Policy:** Can’t restrain only creditors *(Scheffel v Krueger, pg 616)*
  + **Stock Spendthrift Clause:** *“No principal or income to be payable or to become payable under any of the trusts created by this instrument shall be subject of anticipation or assignment by any beneficiary thereof, or to the interference or control of any creditors of such beneficiary or to be taken or reached by any legal or equitable process in satisfaction of any debt or liability of such beneficiary prior to its receipt by the beneficiary.”*
  + **§151 Rule:** All trusts are revocable unless expressly made irrevocable Silent 🡪 Revocable. Creditors can reach

|  |  |
| --- | --- |
| **Scenario** | **Result?** |
| G gives $ to T. T grants:  *Income to A.*  *Remainder to B* | How to determine it’s a discretionary trust?  Language, intent  Could income be paid annually to A, but have other income be discretionary?  No. Rule says A can’t receive both income & discretionary corpus  Is income to be paid out or for trustee to decide? |
| G 🡪 Trust income to A, quarterly | What authority does A have?  A also has authority to distribute corpus to his lineal descendants TX Prop. Code §181.051 |

* **Family Code §154.005 Payments of Support Obligations by Trust**
  + Ct may order payment for support of a child (even if spendthrift)
  + If discretionary trust 🡪 Support can be compelled from income (not corpus)

|  |  |
| --- | --- |
| H’s will for W: *“My trustee shall be authorized to pay the trust income or principal, or both, at any time & from time to time, in such amounts as my trustee may deem necessary or appropriate in its sole judgment to provide for the proper support, maintenance, and medical care of my spouse.”* | Could the beneficiary (W) also be a settlor?  W is beneficiary & trustee. As trustee, she can make distributions to herself 🡪 Creates a possibility W could be settlor. |
| O transfers property *“to X in trust, t pay the income annually during A’s life. To A to be A’s support. Upon A’s death, principal to B.”* 1 year later, A assigns (in writing) the right to trust income from C (cousin). Thereafter, X, w/ no notice of the assignments, distributes $5K income to A. A had a falling out w/ C & refuses to pay C. Instead, A buys stock for herself, which is now worth $10K. | How do you advise C?  Just bc it says it’s a support trust doesn’t make it one.  Motive was for support but *“pay all the income”* indicated it’s not bc it’s probably not all that’s necessary.  If C argues it’s a support trust 🡪 Reject. Written assignment is valid 🡪 C entitled to the $10K. Even if stock dropped, C could still recover the $5K he was due |

Medicaid Trust Planning

Self-Settled Trust

* Parent/Guardian establishes trust for disabled child
* Use income to supplement state support **w/** **provision** to reimburse state from trust corpus upon their death

Third Party Trust

* Discretionary, supplemental Medicaid needs. Can disburse income/corpus not provided by the state
* **Discretionary Spendthrift Trust:** Supplement state support w/ remainder to others upon disableds death (relaxed rule)
* EX: Put grandma in better nursing home than Medicaid
* **§112.052 Termination**
  + Trust continues only until certain period expires **or**
  + Certain event
    - Purpose fulfilled, became illegal, or impossible
    - Circs unknown or unanticipated by settlor **or**
    - Modifying admin non-dispositive terms prevents waste or impairment **or**
    - Necessary to achieve settlors tax objective & doesn’t change intent **or *Claflin Doctrine***
    - Continuing the trust isn’t necessary to achieve any material purpose **or**
    - Not inconsistent w/ material purpose
* **Tip:** TX rule is the base. General rules are merely extra pts (UPC & minority jsds). Use the call of the question to clarify how to use rules. Fair game if we discussed in class. Unlikely to be on the exam if not mentioned **!!!**

# Practice Exam (Fall 2012)

QUESTION 1

Tom and Susan married in 1960. At the time of their marriage, Susan had one child from a previous marriage, and Tom had two children from a previous marriage. Four additional children were born to them during their marriage.

In 1991, Betty, the oldest child of the marriage of Tom and Susan, had a child, Charles, born out of wedlock. Tom and Susan adopted Charles. Tom died without a will on July 15, 1999. Susan died without a will 72 hours later on July 18, 1999. Their property consisted of the following: a home Tom and Susan had purchased with their earnings during their marriage; Tom and Susan had a joint bank account with a right of survivorship in each in the total amount of $100,000 they had accumulated from their earnings during their marriage; and a $200,000 life insurance policy Tom had purchased

on his life, naming Susan as the beneficiary. Tom and Susan are survived by Charles and all their children, including the ones from their previous marriages.

**To whom and in what proportions should the estates of Tom and Susan be distributed? Explain fully.**

QUESTION 2

In April 2000, Jim Smith, a lifelong citizen of Texas, executed a will that met with all

formal requirements. The dispositive provisions of the will stated:

I, Jim Smith, being of sound mind and body and over the age

of 18, do hereby make and publish this my last will and testament.

\* \* \*

I bequeath all property, both real and personal, that I may own or have an interest in at the time of my death to my only child, Cynthia, provided that, during my lifetime, Cynthia marries my lifelong friend, Sam Jones. I believe that Sam will make a fine husband and a fine father to Cynthia’s five-year-old son and my grandson, Troy.

If Cynthia fails to marry Sam during my lifetime, then I bequeath all my property, both real and personal, to Sam.

Cynthia was aware of the provisions of Jim’s will. Despite the fact that she disliked Sam and resented her father’s insistence, she married Sam in November 2000. Her resentment grew and, on March 1, 2001, just before Sam and Jim were to leave on a hunting trip to the Big Bend Country, she punctured the brake fluid lines in Jim’s pickup truck, hoping the brakes would fail and Jim and Sam would be killed in the resulting collision.

On the drive to the Big Bend Country, the brakes failed. Jim’s truck crossed over the dividing line in the highway and collided head on with another vehicle. Sam died instantly. Jim was rushed to a San Antonio hospital in critical condition. Fearing he was about to die, Jim called a nurse and two hospital attendants to his room and, in their presence, said, “I know my daughter, Cynthia, had something to do with causing my truck to go out of control. I don’t want her to get any of my property. I now want to give all my property to my grandson, Troy, on my death.” Jim died 10 hours after he made this statement. He is survived by Cynthia and Troy.

Cynthia confessed to the murder of Jim and Sam. On May 11, 2001, while Cynthia was in prison, her lawyer filed Jim’s April 2000 will for probate on Cynthia’s behalf. The nurse who had heard Jim’s near death statement learned of the probate proceedings and reported Jim’s near death statement. A guardian ad litem was appointed for Troy, and Jim’s near death statement was introduced as part of the probate proceedings. Troy’s guardian claims Troy should take Jim’s entire estate.

**How and to whom should Jim’s estate be distributed? Explain fully.**

QUESTION 3

Client is married to Husband and they have four children, Arthur, Brenda, Charles, and Dawn. Neither Client nor Husband has children by other partners. Arthur has already died survived by one child, Randy. Brenda has already died survived by two children, Sam and Teresa.

Determine the proper intestate distribution for the property of Client assuming she were to die today survived by the indicated individuals. Assume that Client has both separate and community property and owns both real and personal property.

* **Can bring probate code. Notes must be in own handwriting. Bring simple calculator**