

WILLS, SUCCESSION, AND TRUSTS

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INTRODUCTION

➤ *History of Wills & Succession*

- People die owning property upon their death. Historically, many methods developed for determining who owned a person's property when that inevitable event occurred. This led to modern intestacy laws, later to wills, and the evolution of probate avoidance techniques.

➤ *Law Governing Wills & Succession*

- Wills and succession law is state law and there are often significant variations among the states. Therefore, attorneys must ascertain and apply the specific law of their states.
- The Uniform Probate Code (UPC), a comprehensive code that governs all aspects of intestacy, wills, and estate administration, has been adopted in a significant number of states but not the majority. Nonetheless, many states have adopted parts of the UPC or used it as a model for their own statutes.

INTESTATE SUCCESSION

➤ *Reasons People Die Intestate*

- Up to 75-80% of Americans die without a will. The common reasons include:
 - Lack of awareness.
 - Disregard of estate planning.
 - Indifference to estate planning.
 - Cost.
 - Time and effort required.
 - Complexity.
 - Lack of property.
 - Fear of mortality.
 - Privacy concerns.

➤ *When Intestacy Occurs*

- Intestacy occurs in two situations:
 - "As to the person" where the decedent died without a valid will.

- “As to property” or “partial intestacy” where the decedent died with a valid will but the will did not dispose of all the decedent’s property.

➤ *Background and History*

- An intestate’s property will first be used to pay debts, taxes, funeral expenses, and administration expenses. The remaining property is distributed based upon the state’s law of descent and distribution.
- Each state has an intestacy system that determines how property will be distributed. This distribution disregards all evidence of the intestate’s intent.
- Historically, the common law treated real and personal property differently. The two types of property were handled by separate courts: real property by the Crown and personal property by the church.
- In some states, there is still a difference in the intestate distribution of real and personal property.

➤ *Terminology*

- Descent: Succession to real property.
- Distribution: Succession to personal property.
- Heir: A person entitled to take under the statutes of descent and distribution.
- Heirs Apparent/Presumptive Heirs: People who would become heirs after the death of a living person.
- Ancestor: A person related in an ascending lineal line, such as a parent or grandparent.
- Descendant: A person related in a descending lineal line, such as a child or grandchild.
- Collateral Relative: A blood relative who is not in a direct lineal line either above or below, such as brothers, sisters, uncles, aunts, and cousins.
- Consanguinity: A relationship by blood.
- Affinity: A relationship by marriage.

➤ *What Happens Upon Intestate Death?*

- An interested person applies to the court for the appointment of a personal representative, either an administrator (male) or an administratrix (female).
- The personal representative will take an oath, file any required bond, and then obtain letters of administration from the court.
- The administrator has a fiduciary duty to collect the intestate’s probate assets, manage the assets, pay off debts, and distribute the remaining property to the heirs.

➤ *Surviving Spouse Protection*

- Historically, the common law did not consider a spouse to be an heir because a spouse was not a blood relative. Two concepts arose to protect a surviving spouse:
 - Dower: A widow was entitled to a life estate in one-third of the real property which the husband owned during the marriage.

- Curtesy: A widower was entitled to a life estate in all of the wife's real property. However, the right was conditioned upon the widower having fathered at least one child with his wife.
- Most states have eliminated or significantly altered dower or curtesy.
- All states now include the spouse as an heir, but there are variations regarding the amount received.
- In common law marital property states, a surviving spouse may be protected by having a right to *elect against the will* through a *forced share* statutory provision. The surviving spouse is protected in community property states because the surviving spouse owns an undivided one-half interest in the community property.
- Other modern protections for a surviving spouse often include:
 - Homestead: Some or all of the family home may be free from creditors and/or available for the surviving spouse and possibly minor children to occupy.
 - Exempt personal property: The surviving spouse and possibly minor children may be able to keep certain personal items such as cars, furniture, and clothing free of the claims of the decedent's unsecured creditors.
 - Family allowance: The court may grant a support allowance for a statutorily provided period.

➤ *Descendants*

- If there is no surviving spouse, the descendants inherit everything. If there is a surviving spouse, the descendants inherit all property that does not pass to the surviving spouse.
- If all of the children of an intestate are alive, they take equal shares.
- If one or more the intestate's children have already died leaving surviving descendants, states adopt one of three main methods to determine the distribution of property.
 - *Per stirpes* or *strict per stirpes*
 - ◆ Shares are created initially at the first generation below that of the intestate, even if no one from that generation is still alive. One share is created for each surviving member of that generation and one share for each deceased member leaving a surviving descendant. The share of a deceased heir passes to the deceased heir's descendants.
 - *Per capita with representation*
 - ◆ Shares are created at the first generation below the intestate with survivors rather than the first generation. If there are no survivors of a particular generation, that generation is not the one used to divide into shares; shares are divided at the first generation in which there are survivors.
 - *Per capita at each generation*
 - ◆ This modern method and the one the UPC adopts divides shares at the first generation with survivors and then gives equally related persons from lower generations equal shares.

➤ *Adopted Children*

- The law of adoption was unknown to the common law of England because English society was based upon blood relationships. Therefore the law of adoption developed in the United States.
- Generally, an adopted child and his or her descendants inherit from the parents by adoption and their kin as if the child were the biological child of the parents by adoption. Likewise, only the parents by adoption inherit from and through the adopted child.
- Jurisdictions vary as to whether adopted children will also inherit from and through their biological parents. In some states, it depends on whether the child was adopted as a minor or as an adult.
- There are two types of adoption:
 - *Formal or Statutory Adoption*: The normal intestate inheritance rules apply to this type of adoption.
 - *Adoption by Estoppel or Equitable Adoption*: The “adoptive” parents agreed to adopt the child and held the child out as adopted, but never formally completed the adoption process. Jurisdictions vary whether they recognize this form of adoption and if such a child inherits in the same way as a formally adopted child.

➤ *Stepchildren*

- Generally, stepchildren do not inherit. A few states permit stepchildren to inherit as heirs under certain circumstances. Note that a stepchild could be treated as a child because of adoption by estoppel.

➤ *Non-Marital Children*

- At common law, children born out of wedlock could not inherit from their biological parents. The United States Supreme Court had difficulty determining whether such treatment of non-marital children violates the Equal Protection Clause of the Fourteenth Amendment. In 1977, the Court decided the treatment violated the equal protection clause in *Trimble v. Gordon*. However, the court retreated from its decision the next year in *Lolly v. Lolly* by allowing more stringent standards to apply to non-marital children who attempt to inherit from their fathers based upon reasons such as efficiency, reducing false claims, and the orderly administration of estates.
- Today, most jurisdictions permit a non-marital child to inherit from the biological mother no differently than a child born during a valid marriage. States vary in the process a non-marital child must take to inherit from the biological father. For example, some states require proof of paternity by clear and convincing evidence such as DNA.

➤ *Advancements*

- An advancement is a prepayment of an inheritance while the heir-apparent is still alive. It is an irrevocable gift intended to be an anticipatory distribution of the prospective heir’s interest in the donor’s estate.
- At common law, gifts to presumptive heirs were presumed to be advancements. Under modern law, most states presume that transfers to heirs-apparent are absolute gifts. In these

jurisdictions, the onus is upon the non-advantee heirs to prove that another heir received an advancement.

- In some states and at common law, oral evidence is sufficient to prove that an advancement has occurred. In most jurisdictions, however, written evidence of an advancement is now required to prove the advancement.
- States vary in how to determine the value of the advancement. Some states use the property's value at the date of death, but other states and the UPC use the value of the property as of the date of the gift.
- If an advancement exists, the value of the advancement is hypothetically placed into the estate resulting in the advantee receiving a reduced share from the estate.

➤ *Ancestors and Collaterals*

- Ancestors and collaterals come into the intestate distribution scheme only if the intestate has no descendants.
- First-line collaterals: Parents, siblings, nieces, and nephews will take if the intestate dies unmarried without descendants. The majority of states allow parents to share equally if they are both alive. However, states vary when one parent is dead and the other is alive. Some states give everything to the surviving parent, while other states give the surviving parent half of the estate and give the other half of the estate to the intestate's siblings.
- Second-line collaterals: If there are no first-line collaterals, property goes to the grandparents, aunts and uncles, and their descendants. Jurisdictions vary regarding how they distribute property to second-line collaterals:
 - *Parentelic system*: Distribution rises up per generation and then down through that generation, repeating the process until heirs are found.
 - *Degrees of relationship*: Property passes to the closest relatives by counting degrees of relationship. There are two systems to determine how these degrees of relationship are counted:
 - ◆ *Civil law*: Count the number of steps up from the intestate to the nearest common ancestor and the number of steps from that ancestor to the living heir. The degree of relationship is the total number of those steps, and the relative with the smallest number inherits.
 - ◆ *Canon law*: Steps are counted the same way as with the civil law method, however, the degree of relationship is not the sum of the steps but rather the smallest number of steps from the common ancestor.
- The law goes to great lengths to find heirs, regardless of how distantly related. Some of the remote relatives who become heirs are considered *laughing heirs* because they most likely did not even know the intestate and are "laughing all the way to the bank."
- If no heir is found at a certain specified level, some states provide that no further search for remote heirs is conducted and the property escheats to the state government.

➤ *Half and Whole Blood*

- The modern view, adopted by the UPC, treats half and whole blooded relatives the same with all receiving full shares.

- Some states follow an approach that allows half-blooded relatives to take only if there are no whole-blooded takers. Other states follow the *Scottish Rule* where each half-blooded heir takes only half as much as each whole-blooded heir.

➤ *Improper Conduct*

- Murder: There are two approaches to prevent a murderer from inheriting from the victim.
 - *Slayer statutes* prohibit heirs who murder an intestate from inheriting and treat the heir as if the heir predeceased the intestate.
 - *Constructive trusts* are a common remedy used in states where there is no slayer statute. A constructive trust is equitable remedy to prevent unjust enrichment without changing the normal distribution scheme. Legal title passes to the murderer, but equity treats the individual as a constructive trustee for the other heirs.
- Other killing: Jurisdictions are divided on how to treat an heir who does not murder the intestate but kills the intestate in some other way such as manslaughter or negligent homicide.
- Forfeiture: At common law, crimes like treason were grounds for forfeiture of a person's property to the government. Forfeiture has been abolished in most states but may exist for certain offenses.
- Civil Death: At common law, a person's property would go to the person's heirs if the person was convicted of a serious crime. Civil death has been abolished in most, if not all, states.
- Corruption of the Blood: This common law concept prevents a person from inheriting if the person was convicted or imprisoned for certain crimes. Corruption of the blood has been abolished in most, if not all, states.
- Suicide: At common law, suicide caused the intestate's property to pass to the government. Under modern law, there is no difference in determining the heirs of a person who commits suicide.
- Child Abandonment: In some states, the abandonment of a minor child will prevent the parent from inheriting from the minor child.
- Other Disqualifications: Some states provide other disqualifications on grounds such as committing adultery or physically or financially abusing the intestate.

➤ *Survival*

- At common law, a split-second survival of the heir was sufficient. Most jurisdictions now impose a statutory survival period with the most common period being 120 hours.
- If an heir biologically survives but does not legally survive the intestate, then the intestate's property passes as if the heir predeceased the intestate.

➤ *Transfer of Expectancy*

- A person may not convey the person's expectancy to inherit from a living person because the interest is a mere expectancy. However, the heir apparent may create a contract supported by consideration to transfer the heir's inheritance upon the intestate's death.

➤ *Assignment*

- Once the intestate dies, the heir has a right to the property that the heir will inherit and may assign or transfer the inheritance even before receiving it from the intestate's estate.

➤ *Disclaimers*

- An heir may not be forced to accept property the heir is unwilling to accept. An heir might forego an inheritance if the property is undesirable or has an onerous burden, to avoid the property being taken by the heir's creditors, or to reduce the heir's future gift or estate tax liability.
- Disclaimer requirements vary among jurisdictions. Here are some general characteristics most states follow:
 - The heir must not have exercised any dominion or control over the property.
 - The disclaimer must be in writing.
 - The disclaimer must be acknowledged by a notary.
 - The disclaimer must be delivered to the executor in a timely fashion.
- A disclaiming heir is treated as if the heir predeceased the intestate and the property is distributed accordingly.

➤ *Equitable Conversion*

- Equitable conversion is a change in the nature of property so that for certain purposes real property is considered personal property or personal property is considered real property.
- This concept is important in intestacy in states that determine heirs of real property differently from heirs of personal property. For example, the intestate has signed a contract for the sale of real property but dies before closing the contract. Equitable conversion allows the seller's interest to pass as personal property while the buyer's interest would pass as real property.

➤ *Escheat*

- If no heir can be found for a person who dies intestate, the property escheats to the state government.

➤ *Aliens*

- Under modern law, the status of being a non-United States citizen does not prevent an heir from inheriting.

➤ *Choice of Law*

- Marital Rights: Ownership of property acquired during marriage is governed by the marital property law of the domicile of the spouses at the time the property was acquired.
 - Common law system: The earnings of each spouse during the marriage belong to that spouse and pass to the deceased spouse's heirs.

- Community property system: The earnings of each spouse belong equally to each spouse regardless of which spouse earned them. Accordingly, only an intestate's one-half of the community property and the intestate's separate property pass by intestacy.
- Succession Rights: Personal property is governed by the law of the intestate's domicile at the time of death. Real property is governed by the law of situs (location) of the real property.

➤ *Locating Heirs*

- The administrator has the responsibility of ascertaining the identity and location of the heirs so that a proper distribution can be made. The administrator can fulfill this duty by using self-help or by utilizing a professional.

➤ *Express Disinheritance*

- Under the law of most states, the only way to disinherit an heir is by using a will that disposes of all of a person's property. However, a few states permit *negative wills* allowing a person to disinherit an heir without expressly leaving the property to others.

WILLS

➤ *Introduction*

- A person may avoid having the person's probate assets pass to heirs by executing a valid will that disposes of all of the person's property.
- The ability to execute a will is not guaranteed by federal or state constitutional law. Accordingly, a will must normally be executed in strict compliance with all statutory requirements. The UPC includes a substantial compliance exception that excuses harmless errors but only a few states have adopted this provision.

➤ *Terminology*

- Testator/Testatrix: A person who dies leaving a valid will.
- Last Will and Testament: At common law, a will disposed of real property and a testament disposed of personal property. Most jurisdictions no longer make this distinction.
- Devise: A gift of real property.
- Devisee: A person receiving a devise.
- Bequest: A gift of personal property.
- Legacy: A gift of money.
- Legatee: A person receiving a legacy.
- Beneficiaries: All the people who take under a will.

➤ *What Happens Upon a Testate Death?*

- If a person dies with a valid will, an interested person (e.g., executor, beneficiary, or creditor) will apply to the court for the will to be probated (declared valid). If another interested party believes that the will is invalid, the party may challenge the will's validity.

- A will usually names an executor or executrix to carry out the will. An executor may have to take an oath or post a bond to serve and will then receive letters testamentary.
- As a fiduciary, the executor is held to a high standard of care and must collect and manage probate assets, pay debts, and distribute any remaining property to the beneficiaries.

➤ *Requirements of a Valid Will Generally*

- 1. Legal Capacity: The most common requirement is to be 18 years old or older, but some states have exceptions to this requirement such as being married or in the military.
- 2. Testamentary Capacity: The testator must be of sound mind when he or she executed the will. States vary, but the basic elements of testamentary capacity are:
 - The testator must understand that the testator is making a will.
 - The testator must understand the effect of a will, i.e., dispose of property upon death.
 - The testator must know the general nature and extent of the testator's property.
 - The testator must know the natural objects of the testator's bounty, i.e., the testator's heirs.
 - The testator must be able to do all elements simultaneously and form a reasonable judgment from them about property disposition.
- 3. Testamentary Intent: The testator must intend the instrument being executed to be the document that states the testamentary desires which are effective upon death. The document must do more than be a letter of instructions and must show some evidence of testamentary intent on the face of the instrument.
- 4. Formalities: A will must comply with statutory formalities to be effective. These formalities may change depending on what type of will the testator is creating (attested, holographic, or nuncupative). Some states have *savings statutes* that protect the validity of a will made under the formalities required by a different state where the testator executed the will or was domiciled at that time. Formalities are required for four main reasons:
 - Show that the testator deliberately created the will.
 - Reduce the chances of perjury or forgery.
 - Make it more difficult for undue influence to affect the will.
 - Increases the testator's confidence that the testator's plans will be carried out.

➤ *Attested Will Formalities*

- The normal requirements for an attested will include being:
 - in writing,
 - signed by the testator, and
 - attested, usually by two witnesses.
- Writing: There is no formal requirement for what a will is written on or with.
- Signed: A signature is any mark the testator makes or adopts with present intent to authenticate the will. Thus, initials, a mark, or a nickname may be sufficient. Most states allow proxy signatures so that someone can sign the testator's name at the testator's direction and in the testator's presence.

- Witnesses:
 - Witnesses must have legal capacity and attestation capacity.
 - The standard number of witnesses is two.
 - Some states require *publication*, that is, that the witnesses must know they are attesting to a will. No state requires the witnesses to know the contents of the will.
 - Most states do not allow the witnesses to make a mark or use a proxy when signing/attesting to the will; they must sign the instrument themselves and use a full signature.
 - Witnesses are generally required to *subscribe* or sign under the testator's signature. Some jurisdictions take a strict approach to attestation and invalidate a will that a witness signs in the wrong place. However, many states allow the attestation to appear anywhere on the will.
 - States vary with regard to who needs to do what in whose presence.
 - ◆ Most states require that a witness is within the conscious presence of the testator, a lenient standard that does not require the testator to physically watch the witness attest.
 - ◆ States vary as to whether the witnesses must see the testator sign the will or hear the testator acknowledge a prior signature.
 - ◆ States vary as to whether the witnesses must be in each other's presence when they witness.
 - Jurisdictions have different approaches where a witness is also a beneficiary to the will. Some common approaches include:
 - ◆ Void the entire will.
 - ◆ Void the gift which the witness would have received unless it is the same or smaller than a share the witness would receive by intestacy.
 - ◆ Do nothing and allow the potential conflict to be a matter of credibility when evaluating the witness's testimony.
 - A witness should have the following characteristics if the testimony of the witness is expected:
 - ◆ Familiar with the testator.
 - ◆ Younger than the testator.
 - ◆ Healthy and unlikely to die before testator.
 - ◆ Easily located.
 - ◆ Favorably impress a court and a jury.

➤ *Self-Proving Affidavit*

- Self-proving affidavits substitute for the witnesses' testimony in court during the probate of the will. Statutes authorizing self-proving affidavits have been enacted in almost every state and are a useful way to speed up the probate process and save on costs.
- States vary on how they implement self-proving affidavits, with some including the affidavit within the will itself and others requiring the affidavit to be a separate document.

- If a will is lacking signatures, but the self-proving affidavit does have signatures, there are two main approaches. Only a few states follow a strict approach where the will fails because the self-proving affidavit is a separate document and cannot bootstrap the will. The majority of states follow a liberal approach, which allows the signatures on a self-proving affidavit to substitute for the missing signatures on the will. In these cases, the self-proving affidavit may be ineffective.

➤ *Will Execution Ceremony*

- Will execution ceremonies provide many advantages to a testator. The ceremony has a positive psychological effect on the testator and provides a structured setting that ensures all formalities are followed.
- A will execution ceremony takes the following steps:
 - The presiding attorney proofreads the will prior to the ceremony to ensure there are no errors.
 - The testator, witnesses, and notary are gathered in one place and seated strategically so that all documents can be seen by all those present.
 - Introduction of all parties and explanation of the ceremony.
 - Attorney asks the testator questions to establish testamentary capacity and intent.
 - The testator executes will, signing at the end and initialing each page.
 - The witnesses attest at the end of the document under the testator's signature and initial each page.
 - The testator and the witnesses sign the self-proving affidavit at the end of the will or as a separate document.
 - The attorney will have the testator complete other documents that are appropriate to the testator's estate plan such as trusts, powers of attorney, guardian designations, etc.
- After the will execution ceremony, the presiding attorney should speak with the client to ensure that the client remains satisfied with the will's contents. The attorney should also discuss what the client wants to do with the original will and make plans to safeguard it.
- Finally, the attorney should give the testator post-will instructions that inform the individual to update the will regularly and avoid making self-help changes.

➤ *Holographic Wills*

- Holographic wills are instruments entirely in the testator's handwriting. In about half of the states, holographic wills do not require witnesses.
- In states that dispense with witnesses for holographic wills, three approaches exist as to when a holographic will is considered sufficiently in the testator's handwriting.
 - *Intent approach*: If the testator intends any nonholographic material to be part of the will, the will is deemed nonholographic.
 - *Surplusage approach*: Under the majority approach in the United States, a court disregards nonholographic material if doing so does not alter the testator's dispositive scheme.
 - *Material provision approach*: A will is deemed holographic as long as the most important words are in the testator's handwriting.

➤ *Statutory Wills*

- Some states have statutes that provide a form will. There is serious debate as to whether this form of will expands legal access or causes problems for testators and their beneficiaries.

➤ *Nuncupative Wills*

- A nuncupative will is an oral or spoken will. Historically, the nuncupative will was utilized because people could not read or write. Most jurisdictions no longer recognize nuncupative wills.

➤ *Conditional Wills*

- A conditional will is a will that is to operate only if a stated event actually occurs or does not occur.
- Most states have a presumption that wills are not conditional unless the intent to make it conditional is expressly stated in the instrument.

➤ *Conditional Gifts*

- A testator may condition a specific gift on the occurrence or non-occurrence of a stated event, the conduct of the beneficiary, or the truth of a given statement.
- There are two basic types of conditions:
 - A *condition precedent* is a condition where the event must occur before the beneficiary may claim the gift.
 - A *condition subsequent* is a condition where the beneficiary keeps the gift unless the condition is violated. Breach of the condition causes the beneficiary to be divested of the property.
- Courts will follow the testator's intent as reflected in conditions unless doing so is illegal or violates public policy.

➤ *Combination Wills*

- *Joint Wills*
 - A single testamentary document containing the wills of two or more persons, usually spouses.
 - Historically, joint wills were popular because they saved time and money by consolidating a will for spouses into one document. Under modern law, joint wills present more problems than creating separate wills for each testator and should always be avoided.
- *Reciprocal Wills*
 - This common type of will creates separate testamentary documents for each testator, usually spouses, with each instrument containing parallel disposition plans.
 - Reciprocal wills are often called "sweetheart wills."
- *Contractual Wills*

- A contractual will is a will executed pursuant to a contractual agreement to dispose of property in the way the parties specified.
- Many legal issues arise from contractual wills.
 - ◆ How is the contractual nature of a will established? Historically, all available evidence could be used. The modern approach is to restrict the type of evidence allowed. Usually a writing is necessary to establish that the will is contractual. This writing could be in a separate document or within the will itself.
 - ◆ May the contract be revoked? Generally, the contract may be revoked during the parties' lifetime. Upon either of the parties' death, the contract is irrevocable although the will remains revocable.
 - ◆ What if the contract is breached? A court may create a constructive trust as a remedy to prevent unjust enrichment and provide the contractual beneficiaries with their inheritance. A court could also use a quantum meruit remedy to provide the beneficiary with the reasonable value of the consideration provided for the improperly revoked gift.

➤ *Malpractice and Professional Responsibility*

- Mistakes made in a will:
 - Mistakes made during the testator's life may often be corrected by the attorney before any issues arise. However, mistakes discovered after the testator has died cannot usually be corrected and the faulty disposition scheme will be applied to the beneficiaries as written.
 - Jurisdictions follow two basic approaches when an unhappy beneficiary or intended beneficiary sues the drafting attorney for malpractice.
 - ◆ The traditional/common law approach bars beneficiaries from being able to bring suit because they lack standing. Standing is lacking because there was no privity of contract between the attorney and beneficiaries.
 - ◆ The modern approach disregards privity or treats the beneficiaries as beneficiaries of a third-party contract and provides an avenue for beneficiaries to bring a lawsuit.
- Attorney who drafts the will designated as a beneficiary:
 - Under professional responsibility rules, an attorney is prohibited from and may be disciplined for drafting a will which gives the attorney or the attorney's parent, child, sibling, or spouse of one of the prior individuals a gift unless the gift is unsubstantial or the testator is related to the donee.
 - Some state statutes will void the gift to the attorney and other close relatives unless the testator is related to the beneficiary.
- Estate planning for spouses:
 - When representing and developing an estate plan for both spouses of a marriage, there is a potential issue of conflict of interest especially given the high divorce rate. Attorneys who decide to represent both spouses should provide proper oral and written disclosures.
- Keeping an original will:

- It is always prudent to inform the client of the potential benefits and issues that could arise from who keeps the original will. In some jurisdictions, the attorney may be prohibited from suggesting that the attorney retain the will.
- Serving as attorney and personal representative of the estate:
 - Serving as both the attorney and the personal representative for an estate may lead to ethical issues due to the differential in fees.

➤ *Classification of Testamentary Gifts*

- By type of property:
 - Devise: A gift of real property.
 - Bequest: A gift of personal property.
 - Specific bequest: A gift of a specific item or particular fund distinguishable from the rest of the estate. The gift is measured at the time the will was made.
 - Specific bequest of a general nature: A gift of specific property but is described in general terms rather than precisely. It is measured at the time of death.
 - Legacy: A gift of personal property that is not sufficiently described to be specific, usually an amount of money.
 - Demonstrative legacy: A gift of a sum of money payable out of a designated fund.
 - Residual gift: A designation of where the remainder of the property goes after all other gifts are paid.
- By type of beneficiary:
 - Private: A gift for the benefit of noncharitable beneficiaries.
 - Charitable: A gift for a charitable purpose such as the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, or for governmental or municipal purposes.

➤ *Ademption by Extinction*

- Ademption by extinction is the failure of a specific gift when the property gifted in the will is not in the estate at the time of the testator's death because, for example, it was sold, destroyed, given away, or stolen.
- Generally, if a specifically gifted asset is not found within the estate, there is no remedy for the beneficiary. However, exceptions to ademption by extinction may exist such as:
 - When a change in form rather than a change in substance occurs.
 - When only a portion of the gifted asset has adeemed.
 - Involuntary conversion or sale made by a guardian when the testator lacks capacity.
 - If the estate contains a substantially equivalent asset, the UPC allows the beneficiary to receive this asset.
- Special rules apply to gifts of corporate stock. Unless the gift of stock contains words of identification or possession, the gift is likely to be treated as general and not subject to ademption.

➤ *Ademption by Satisfaction*

- When an item subject to a testamentary gift is given inter vivos to the beneficiary, the gift is satisfied and thus adeems.
- A gift of money to a legatee raises ademption issues. Under modern law, a writing is often needed to prove that an inter vivos gift of money to a legatee was intended to reduce the legacy's size.

➤ *Exoneration*

- Does a beneficiary of a specific gift receive the gift (1) free of liens, mortgages, and other debts or (2) just the equity in the item?
- Under common law, there was a presumption that a testator would not want to burden the beneficiary with a debt and that part of the gift was an implied gift of money to pay off all debts against the property.
- However, exoneration has the potential to drain the residual property of the estate, frustrating the testator's intent. Thus, some states provide the exoneration will not occur unless the testator expressly so provided.
- This problem can be solved with direct language in the testator's will specifying whether debts against specifically-given assets are to be paid with other estate funds.

➤ *Changes in Value*

- A change in value of a specifically-given gift is irrelevant because the beneficiary receives the item regardless of whether its value has increased or decreased after will execution.
- There are special rules regarding stocks:
 - Events such as stock splits, stock dividends, mergers, consolidations, and reorganizations will usually result in a larger raw number of stocks. However, the beneficiary will be able to receive the additional shares because the percentage of ownership in the company has not changed.
 - If the testator purchases any new shares on the open market, the beneficiary will not receive these newly acquired shares.
- Legacies may have a change in value depending upon whether there is a pre-death or post-death accumulation of interest.
 - Pre-death interest is not included in the legacy and instead passes to the residual beneficiary.
 - The common law rule for post-death interest accrual is that the beneficiary of a legacy will receive interest starting one year after death. The UPC rule allows the beneficiary to receive the interest accrued one year after the appointment of a personal representative.
 - The rate of interest may be stated in the will. State law will determine the rate if the will is silent.

➤ *Lapse*

- Lapse is when a gift fails because the beneficiary predeceases the testator. When a beneficiary has predeceased the testator, the following priority order is followed to determine the recipient of the gift.
 - First, look to the will to determine whether it has a provision for what happens to the gift.
 - Second, if the will is silent, then an anti-lapse statute or cy pres may intercede and provide a substitute taker of the gift.
 - Third, if an anti-lapse statute and cy pres do not apply, then the property passes under the will's residual clause.
 - Finally, if there is no residual clause, the property passes under intestacy.
- Most states have *anti-lapse statutes* that prevent lapse from occurring by substituting the descendants of the predeceased beneficiary. However, states vary widely on how broad or narrow the statute applies. Narrow statutes apply only to gifts to the testator's lineal descendants, while broader statutes apply to parents, siblings, more distant relatives, and even to those with no relationship to the testator.
- A partial lapse in the residual clause is addressed by two approaches. The orthodox approach provides that the lapsed portion of the gift passes by intestacy. The modern approach implies survivorship language and distributes the lapsed share among the remaining residual beneficiaries.
- When a lapsed gift is charitable, the court will attempt to retain the gift's charitable nature before allowing the gift to fail. If the testator had a general charitable intent, the court will use the doctrine of cy pres to distribute the gift to a similar charitable organization.

➤ *Class Gifts*

- The beneficiaries of a class gift are designated by a generic term (e.g., children, grandchildren, siblings) rather than by individual names. If there is a mix of general and specific language, the specific language usually controls.
- If the testator fails to state the time at which the class closes, most courts determine the closing at the earliest of two events: the natural closing of the class, when it is impossible for anyone else to join the class, or by the rule of convenience, the first time when any member is entitled to demand distribution.
- Class gifts have historically included the testator's own adopted children within a class gift to children. However, the courts followed the stranger-to-the-adoption rule which raised a presumption against inclusion of other adopted individuals.
- Modern courts are inclusive in determining class membership. However, it is important to draft a will specifying how to qualify for class membership. Additionally, anti-lapse statutes usually apply to class gifts, but survivorship language in the gift will likely control.

➤ *Abatement*

- Abatement refers to determining which gifts fail when the estate has insufficient property to pay all debts, expenses, taxes, and gifts.
- The typical abatement order is as follows:

- First, any property passing by intestacy.
- Second, the residual property.
- Third, the general gifts.
- Fourth, the specific gifts.
- Some states give priority to real property gifts within the categories. Within a classification, abatement occurs pro-rata.
- Testators may circumvent the normal order by providing an abatement order in their wills.

➤ *Apportionment*

- Apportionment is charging each recipient of estate property and taxable nonprobate assets a proportional amount of the federal and state estate tax due because of the property received.
- Traditionally there was no apportionment and thus estate taxes were paid according to the normal abatement order. The modern view and majority view is that estate taxes are apportioned so each recipient bears his or her “fair share” of the estate taxes.
- Federal law mandates apportionment regarding assets such as life insurance and general powers of appointment.
- Express instructions may be placed into the will to ensure that the testator’s intent is followed regarding apportionment.

➤ *Survival*

- A beneficiary of a will must outlive the testator by the statutorily mandated time period which is often 120 hours. Testators often increase the survival period because they would rather control who receives the property if the beneficiary dies before being able to enjoy the property than have it pass through the deceased beneficiary’s estate.
- If the beneficiary doesn’t survive the testator by the statutory or will mandated time, the beneficiary is treated as predeceasing the testator. The property then passes by the terms of the will or anti-lapse statutes.

➤ *Disclaimer*

- A beneficiary may decide not to take the gift under the will by following the procedures set forth in the applicable disclaimer statute. A disclaiming beneficiary is considered to have predeceased the testator.

➤ *Will Revocation*

- By operation of law:
 - Marriage:
 - ◆ In a few states, marriage voids a pre-marriage will.
 - ◆ In common law marital property states, the surviving spouse is given a right to a share in the deceased spouse’s estate regardless of what the surviving spouse receives under the will. The computation of the *elective* or *forced share* amount varies significantly among the states. A surviving spouse will have a statutorily provided time period to decide to exercise the right.

- ◆ In community property marital property states, there is no need for surviving spouse protection because the deceased spouse's will has no power to dispose of the surviving spouse's share of the community property.
- Divorce:
 - ◆ Traditionally, divorce did not affect a will and the ex-spouse could be a beneficiary.
 - ◆ The modern majority approach is that all provisions in favor of the ex-spouse are no longer effective. The ex-spouse is considered as predeceased and the property goes to contingent beneficiaries instead.
 - ◆ Some states expand the voiding statutes to cover gifts to all relatives of the surviving ex-spouse who are not related to testator (e.g., ex-step children and ex-parents-in-law).
 - ◆ Automatic voiding usually does not occur until a final divorce order has been decreed; mere separation or filing of a divorce petition is insufficient.
- Pretermitted Children:
 - ◆ A pretermitted child is a child born or adopted after will execution. In a few states, the term may also include a child not mentioned or provided for in a parent's will even if the child was already born or adopted when testator executed the will.
 - ◆ Pretermitted children are given a forced share of the estate in certain circumstances on the presumption that the testator would have made a provision for these children if the testator had thought about it.
 - ◆ States vary significantly with regard to when a pretermitted child is entitled to a forced share and the size of that share. Typically, a pretermitted child will not receive a share if the testator left the estate to the pretermitted child's other parent.
- By physical act:
 - There are four main requirements to revoke a will by physical act:
 - ◆ The testator must have the mental capacity to revoke.
 - ◆ Testator must have the intent to revoke.
 - ◆ A physical act of destruction by the testator or possibly a proxy sufficient under state law.
 - ◆ A concurrence of the capacity, intent, and physical act.
 - Some jurisdictions allow for partial revocations by physical act (e.g., mark-outs and interlineations). Other jurisdictions do not allow this practice for fear of fraud.
- By subsequent writing:
 - ◆ A testator may revoke a will or a clause in a will by a written document that meets the requirements of a will.
 - ◆ A will may be partially or completely revoked by inconsistency when a subsequent will makes a different property disposition than the prior will.
- Other will revocation issues.
 - The burden of proof is normally on the applicant to prove that the testator did not revoke the will.
 - Most courts have a presumption of non-revocation if the applicant proves that the source of the will is normal (e.g., safe deposit box, safe, filing cabinet, trusted family member,

friend, or attorney) and there are no suspicious circumstances surrounding the will or its discovery.

- If an original will cannot be found, there is a presumption that the testator destroyed it with an intent to revoke. However, most states will allow an applicant to admit a lost will to probate if they can meet additional proof requirements showing non-revocation.
- Revival.
 - What is the legal effect on a prior revoked will when the testator revokes the subsequent will which revoked the prior will? Jurisdictions follow three approaches regarding revival:
 - ◆ The revival approach – If an instrument that revokes a prior will is revoked before the testator’s death, then the revocation clause never took effect and the prior will is “revived.”
 - ◆ The majority approach – There is no revival because the revocation clause of the subsequent will took effect immediately even though the dispositive provisions are not effective until death.
 - ◆ The intent approach – The court examines evidence to ascertain the testator’s actual intent.
- Conditional Revocation.
 - Express conditional revocation occurs when a testator states in the revoking instrument that a revocation is to be effective only upon the happening or nonhappening of a named event, and the revocation operates only if the condition is fulfilled.
 - Implied conditional revocation, or *dependent relative revocation*, occurs when a testator validly revokes a will, but that revocation is dependent upon the validity of a subsequent will. In other words, the revocation of the first will was impliedly conditioned on the validity of the second will. Implied conditional revocation depends heavily upon testator intent, the similarity of the prior will with the subsequent will, and whether it appears the testator would prefer the prior will over intestacy.
- Republication.
 - Republication is the method of treating a prior will as if it were executed now such as by the execution of a codicil or the testator’s reexecution of the prior will.
 - Republication may have significant legal consequences, such as preempting pretermitted children or renaming an ex-spouse as a beneficiary, because the will is treated as being executed on the date of republication (codicil) rather than the will’s original execution date.
- Multiple Originals.
 - Attorneys should never execute duplicate originals of a will. If all originals are not found, did the testator destroy one with the intent of revoking all or to avoid confusion which may occur if more than one will is located?

➤ *Will Interpretation and Construction*

- Interpretation and construction of the will may be necessary to ensure that the correct property goes to the proper persons intended by the testator in the will. A will is normally not interpreted or construed if the testator’s intent is clear.

- There are two main types of people who raise interpretation issues, the executor who wants to do the right thing and avoid liability and the beneficiaries who seek to receive as much property as possible.
- Basic rules of construction:
 - A testator who has left a will with a residuary clause indicates an intent not to die intestate.
 - Among contradictory provisions in a will, the latest provision prevails.
 - An interpretation resulting in the least unequal distribution among takers of equal degrees of relationship to the testator is preferred.
 - A court will construe a will as a whole, not in parts.
- Ambiguity.
 - Patent:
 - ◆ Patent ambiguity refers to a will provision that is ambiguous on its face, that is, it does not convey a sensible meaning.
 - ◆ Extrinsic evidence may be used to determine the testator's intent. However, the court will not use extrinsic evidence to fill in blank spaces or add provisions.
 - Latent:
 - ◆ Latent ambiguities are will provisions that convey a sensible meaning on their face but can't be carried out without clarification.
 - ◆ Courts are very willing to admit extrinsic evidence to resolve latent ambiguities.
 - No apparent:
 - ◆ In these situations, a party is arguing that a provision with no apparent ambiguity should be changed because it goes against the testator's intent, or some mistake has been made.
 - ◆ Jurisdictions are divided as to whether the court may "reimagine" a will provision that is not ambiguous. The liberal approach provides that it is acceptable to admit extrinsic evidence to determine testator intent. The traditional approach is the *clear meaning rule* which takes the unambiguous language on its face and does not admit extrinsic evidence to alter it.
- Integration.
 - *External* integration is establishing the testator's complete will by piecing together all the testamentary documents, the wills and codicils.
 - *Internal* integration refers to the continuity and relationship within the instrument's body to ensure that the will fits together as one instrument and that no pages have been placed into or removed from the will.
- Incorporation by reference.
 - The testator may incorporate a document by reference which legally inserts the entire referenced document into the will.
 - There are three main elements to validly incorporate a document by reference:
 - ◆ The testator must intend to incorporate the extraneous document into the will,
 - ◆ The extraneous document must be in existence at the time the will is executed, and

- ◆ The document must be sufficiently identified in the will.
- Some states and the UPC have a special technique that allows testators to use a signed, written document for the disposition of tangible personal property even though this document was not in existence at the time of will execution.
- An important function of incorporation by reference is to republish prior wills by reference via codicils. In jurisdictions that allow for holographic wills without witnesses, a holographic unwitnessed codicil may not republish an invalid non-holographic will because it would then lose its holographic nature.
- Facts of independent significance.
 - A fact of independent significance is something that has a legal purpose independent of disposing of property at death. Accordingly, it does not need to be executed with the formalities of a will to impact the transfer of property at death.
 - Examples of facts of independent significance include the identification of class members, inter vivos trusts, and other non-probate transfers.
- Precatory language.
 - Precatory language are words which give a serious request but which are not binding or mandatory. Language such as “I hope,” “I recommend,” and “I wish” are examples of precatory language.
 - Precatory language generally has no effect on restricting how a beneficiary uses gifted property. However, it may be given effect if it is in regard to administrative matters the executor must perform.
 - Attorneys should avoid using precatory language and instead utilize separate documents if the testator wants to give suggestions to family, friends, and others.
- Dead persons statutes.
 - Dead persons statutes are evidentiary rules that limit the admissibility of testimony of what a deceased person said or did if such evidence is coming from a party to the action.
 - The traditional view disqualifies such testimony. The modern view admits such evidence and makes its veracity a credibility question for the fact-finder to determine.
- Drafting advice
 - Use plain language.
 - Try to keep sentences as concise as possible.
 - You can and should utilize forms when writing wills, but always be wary as they may lack individualization, contain unnecessary boilerplate language, and not reflect up-to-date local law.

➤ *Will Contests*

- Will contests are challenges to a decedent’s will where an interested party challenges the will’s authenticity and would prefer a prior will or intestacy to govern the distribution of the decedent’s property.
- The opportune time to bring a will contest is prior to the will being admitted into probate because the proponent has the burden to prove the will is valid. However, will contests rarely

occur prior to probate because contestants are not aware of a contestable will prior to its being probated. Thus, in most cases the burden of proof will fall upon the contestant.

- Will contest grounds:
 - Failure to meet requirements for a valid will.
 - ◆ Lack of legal capacity.
 - ◆ Lack of testamentary capacity.
 - ◆ Lack of testamentary intent.
 - ◆ Failure to satisfy formalities.
 - Insane delusion.
 - ◆ An insane delusion is an uncorrectable belief of a state of supposed facts that (1) do not exist, and (2) no rational person would believe. A mere illogical or false belief is not enough to be an insane delusion.
 - ◆ To have a successful will contest, a contestant must show that the testator's testamentary capacity was clouded by the insane delusion by showing a nexus between the delusion and the property disposition.
 - Undue influence.
 - ◆ Undue influence occurs when a testator's testamentary capacity is subject and controlled by a dominant influence or power.
 - ◆ There are generally three elements for a contestant to prove undue influence:
 - ◇ The influence actually existed and was exerted.
 - ◇ The influence overpowered the testator's mind at the time the will was executed so the will reflects the influencer's desires rather than the those of the testator.
 - ◇ The testator would not have executed the will but for the influence.
 - ◆ Direct evidence is difficult to obtain to prove undue influence. Accordingly, courts rely heavily upon circumstantial evidence to determine whether undue influence exists such as:
 - ◇ Whether the distribution is unnatural without a good reason.
 - ◇ Whether there was an opportunity to exercise undue influence.
 - ◇ Whether the relationship between the testator and the alleged undue influencer would allow for the exertion of undue influence.
 - ◇ Whether the testator's age, health, and intelligence would make the testator susceptible to undue influence.
 - ◇ Whether the beneficiary was connected with the making of the will.
 - ◆ Mere opportunity to exert undue influence is insufficient to prove that undue influence existed.
 - ◆ Mortmain statutes previously limited gifts to charity made close to the time of death to prevent charities, especially those that are religious-based, from taking advantage of individuals who may be on their deathbed. However, most states do not have mortmain statutes as courts have determined they violate the Fourteenth Amendment's equal protection clause.

- ◆ In many states, if an attorney drafts a will naming him or herself as a beneficiary, a presumption of undue influence arises. In some states, this presumption may be rebutted, but in many other states, the gift to the attorney is automatically void unless the attorney is closely related to testator.
- Duress.
 - ◆ Duress has the same elements as undue influence. However it connotes physical manipulations such as the threat or use of force, violence, or withholding food and medicine.
- Fraud.
 - ◆ There are four basic elements to fraud in a will context:
 - ◇ A false representation made to the testator.
 - ◇ The representation was known to be false by the person who made it.
 - ◇ The representation was reasonably believed by the testator.
 - ◇ The false representation caused the testator to execute a will that the testator would not have executed but for the misrepresentation.
 - ◆ *Fraud in the factum*, or fraud in the execution, is where the testator is deceived as to the instrument's identity or contents. Fraud in the factum removes the testator's testamentary intent because the testator does not realize the testator is signing a will or what it contains.
 - ◆ *Fraud in the inducement* is where the testator is deceived as to some extrinsic fact and makes the will based on the erroneous fact. The testator knows the testator is executing a will but its provisions are impacted by the fraud.
- Mistake
 - ◆ *Mistake in the factum* occurs where the testator is in error to the identity or contents of the instrument, but there was no evil conduct causing the mistake. A mistake in the factum causes the will to be ineffective because the testator lacked testamentary intent.
 - ◆ *Mistake in the inducement* occurs where a testator is mistaken as to some extrinsic fact and makes the will based on that erroneous fact, but no deception from anyone caused that result. No remedy is usually available if there was a mistake in the inducement.
- Remedies.
 - The most common remedy is for the court to deny probate. This will lead the distribution scheme to follow a prior will or intestacy.
 - Most of the time, the entire will is considered invalidated. However, a will contest ground could impact only a portion of the will under rare circumstances.
- Factors triggering will contests.
 - Disinheritance of close family members in favor of distant relatives, friends, or charities.
 - Unequal treatment of children, especially if some children receive nothing and the children who receive large shares do not have special needs.
 - A sudden or significant change in a testator's disposition scheme.

- An imposition of excessive restrictions on gifts to beneficiaries who are also heirs.
- A testator who is elderly or disabled.
- A testator who behaves in a peculiar manner.
- Will contest avoidance techniques.
 - Include *In terrorem*, no-contest, or forfeiture provision.
 - ◆ The will provision provides that a beneficiary who contests the will loses all or most of the benefits given under the will.
 - ◆ An *in terrorem* provision is the most common contest avoidance tool because it is low cost, low risk, and has a high probability of effectuating testator intent.
 - ◆ Many courts take a negative view of *in terrorem* provisions and, while they do not usually invalidate the provisions, they strictly construe them.
 - ◆ Many jurisdictions have caselaw or statutes which limit the application of *in terrorem* provisions to will contests brought in good faith and with probable cause.
 - ◆ There are a few practical steps an estate planner should take when drafting an *in terrorem* provision:
 - ◇ The clause should create a substantial risk for the beneficiary.
 - ◇ The clause should clearly indicate the conduct triggering forfeiture.
 - ◇ The clause should name an alternate recipient of the property that is subject to forfeiture.
 - ◇ The clause may indicate whether good faith and probable cause contests will trigger forfeiture.
 - Explain the reason for disposition?
 - ◆ This technique may assist in preventing will contests because it gives a reason why some beneficiaries are receiving more than others and can justify testator's decisions. However, it is also prone to backfire if a beneficiary doesn't like and can rebut the testator's reasons.
 - Avoid mean-spirited language.
 - ◆ A testator should avoid bitter or hateful language because such language encourages will contests and could cause the estate to be sued for *testamentary libel*.
 - Use holographic will.
 - ◆ Wills entirely in the testator's own handwriting benefit from an aura of validity because it shows that testator was competent enough to write the will.
 - Enhance will execution ceremony.
 - ◆ Video-record the will execution ceremony.
 - ◇ A video-recorded will execution ceremony preserves excellent evidence of the testator's capacity, intent, and the contents of the will and shows compliance with will formalities. However, the video may also expose difficulties with the testator's condition or the ceremony.
 - ◆ Select witnesses carefully.
 - Affidavit acquisition.

- ◆ Affidavits from individuals familiar with the testator around the time of will execution may provide good evidence showing that the testator had testamentary capacity and may be useful in refreshing the witnesses' memories.
- Document transactions with testator in writing.
- Preserve evidence.
 - ◆ Gather evidence such as the testator's medical records, letters, e-mails, and texts, which may help show the testator's capacity and reason for property disposition.
- Preserve prior will if preferable to intestacy.
- Repeated wills.
 - ◆ The testator may re-execute the same will on a regular basis to create many fallback prior wills.
- Make disposition of property more traditional.
- Simultaneous gift to heir.
 - ◆ A testator may make an inter vivos gift to a disinherited beneficiary at the same time that a will is executed. This discourages a disinherited beneficiary from bringing a claim because they would have to agree that testator had capacity or else return the gift received.
- Contract with heir not to contest.
- Non-probate transfers.
 - ◆ They may be more difficult to contest than a will and may have been created at many different times requiring a contestant to prove, for example, lack of capacity on many different dates.
- Ante-mortem probate.
 - ◆ Some states allow a will to be probated while the testator is still alive. Doing so provides absolute certainty that the will cannot later be contested.

ESTATE ADMINISTRATION

➤ *Introduction*

- Main reasons for a formal process after a person dies:
 - Interested parties need proof that they are the new owners of the decedent's property by virtue of being heirs under intestacy or being beneficiaries under a will.
 - Decedent's creditors need to be paid.
- The estate administration process differs significantly among the states. Thus, it is always important to study local law and follow it correctly.

➤ *Basic Estate Administration Process*

- The proper applicant.
 - To begin estate administration, someone must start the process; it does not happen automatically and is not court-initiated. The person who begins the process is called the

applicant and normally has a pecuniary interest in the decedent's estate or is the named executor. A person may also be able begin the process to protect estate property.

- Locate the will.
 - An applicant must make a reasonable search to determine whether the decedent had a valid will, or died intestate. Typical search locations include the decedent's home or office, safe deposit box, family members, friends, attorney, and the clerk of the court of any county where the decedent has lived (many states permit a testator to file the will with the court for safekeeping).
- Prepare application according to state law.
- File application and original will with the court with proper jurisdiction and venue.
- Court clerk issues required citations.
- The court probates the will or determines heirs.
 - The court will conduct either an adversarial or ex parte hearing to determine whether the will is valid and whether administration is necessary according to state law.
 - To determine whether a will is valid, the court has a hearing where the witnesses testify or the will's self-proving affidavit substitutes for that testimony.
 - If the will is valid, some states permit the will to be probated as a *muniment of title* and no administration is required typically because there are no unpaid debts.
 - If the will is valid and administration is needed, the court will appoint an executor.
 - If the decedent died intestate, the court determines the identity of the heirs. If there is no need for estate administration, this *determination of heirship* may be all that is required to prove that property passed from the decedent to the heirs. If administration is needed, the court will appoint an administrator.
 - Some states have *universal succession* where property passes directly to the heirs and beneficiaries, and no estate administration is required. Creditors pursue payment from the beneficiaries and heirs rather than the estate.
- Types of administration.
 - There are many different types of estate administration that will be determined by the testator, court, or personal representative depending on the jurisdiction.
 - ◆ *Dependent administration* is the traditional type of administration where the court supervises all steps and the personal representative must get permission for most actions.
 - ◆ *Independent administration*, also known as informal or nonintervention administration, allows the personal representative to work without court supervision unless an issue requires court involvement.
 - ◆ Summary administration or short-form administration methods may be available for small estates or those with few debts.
- Qualification of personal representative.
 - Oath of office: The personal representative is required to take an oath that he or she will faithfully carry out the position's duties.

- Post bond: Bond is required under the law of many states unless the testator waived bond in the will. In other states, bond is required only if the testator required bond in the will or the court finds that bond is needed to protect the beneficiaries or heirs.
- Issuance of letters.
 - An administrator receives *letters of administration* and an executor receives *letters testamentary*.
 - Letters are typically one-page documents issued by the court which the personal representative uses to prove to others that the person has authority to act as the decedent's representative.
- Collect and protect decedent's probate assets.
- Manage decedent's probate assets.
- Inventory and appraisalment.
 - A major duty of the personal representative is to prepare an inventory of all probate assets and provide a fair market value for each item.
 - Traditionally, the court is involved in the process. However, modern statutes permit the representative to value assets without assistance, and if necessary, to hire appraisers.
 - Inventory and appraisements help creditors identify which assets are available to be sold and used to pay their claims debts, and helps beneficiaries and heirs identify their entitlements.
- Protect certain property from creditors.
 - The personal representative must set aside certain property for a surviving spouse and minor children at the beginning of the administration process to protect it from creditors.
 - ◆ Homestead: The family home typically receives some type of protection. The amount of this protection varies significantly among jurisdictions. In some states, the homestead claimant may also have an occupancy right that trumps the heirs and will beneficiaries.
 - ◆ Exempt personal property: Certain personal property such as household items and clothing may be protected.
 - ◆ Family allowance: The court may have the authority to grant an allowance for the support of the surviving spouse and minor children for a statutorily provided period of time. In some states, the amount is fixed by statute. In others, the amount is based on the needs of the claimant.
- Notice to creditors.
 - The personal representative must alert the decedent's creditors that the decedent has died and that the court has appointed a personal representative. Jurisdictions vary regarding how the representative must inform creditors and how they submit their claims.
 - Many states have *nonclaim statutes* that restrict an unsecured creditor's ability to recover on a claim once the creditor receives notice unless the creditor timely submits the claim.
- Pay creditors according to the statutory priority order.
- Provide reports and accountings.

- Many states require the personal representative to make annual reports and accountings of actions taken involving the estate property to the court. In other states, accountings are required only if an heir or beneficiary makes a proper request.
- Distribution and closing estate.
 - If estate property remains after paying creditors and other claimants, the personal representative distributes the balance to the heirs or beneficiaries.
 - State law may require the personal representative to file a final accounting with the court.

NON-PROBATE TRANSFERS

➤ *Introduction*

- Non-probate assets transfer outside of the probate process. In other words, they do not pass to the heirs or beneficiaries but instead under their own terms.
- The major reasons an individual may want to use these techniques include:
 - Probate can be time consuming.
 - Probate is a costly endeavor in some states.
 - Probate (e.g., will contents, estate property and its value, identity of heirs and beneficiaries) is open to the public and may cause privacy concerns.
 - Some non-probate transfers may reduce taxes.

➤ *Inter Vivos Gifts*

- The simplest way for a person to have no probate property is to give it away while alive.
- Elements of an inter vivos gift:
 - The donor needs to have present donative intent, not a future intent.
 - The donor must transfer/deliver the asset to the donee.
 - The donee must accept; acceptance is presumed unless the property has an onerous burden.
- A key benefit of inter vivos gifts is that they allow for the immediate transfer of the property along with its burdens and benefits to the donee. The donor may also wish to take advantage of the federal annual gift tax exclusion of \$15,000 per donee as of 2020.
- The key disadvantage is that inter vivos gifts are irrevocable.

➤ *Gift Causa Mortis*

- A gift causa mortis is an inter vivos gift made in contemplation of death. Most jurisdictions do not require that the donor be on the donor's deathbed, but they do require that the gift be given in fear of a death that is imminent or impending.
- A gift causa mortis is revocable by the donor and, in most jurisdictions, it is automatically revoked if the donor survives the peril.
- Attorneys are rarely if ever, consulted prior to a donor making a gift causa mortis. They are not part of an estate plan.

➤ *Trusts*

- Property transferred to an inter vivos trust will pass under the terms of the trust and not through the settlor's estate.

➤ *Concurrent Ownership*

- Tenancy in common.
 - Each tenant in common owns his or her share of the property. A deceased tenant's share passes through the deceased tenant's estate and thus holding property as tenants in common does not avoid probate.
- Joint tenancy.
 - A joint tenancy has the survivorship feature so that a deceased tenant's share passes to the surviving joint tenants. In some states, the survivorship feature must be expressly stated; it is not implied from holding property as joint tenants.
- Tenancy by the entirety.
 - A few states recognize this special form of co-ownership between spouses. Tenancies by the entirety have the survivorship feature.

➤ *Multiple Party Accounts*

- Joint account.
 - During life, parties to a joint account own in proportion to their net contributions. However, any party may withdraw any or all of the funds in the account.
 - Upon death, funds in the joint account pass to the surviving joint owners. Some states require the survivorship feature to be expressly stated; it is not implied from holding the account as joint tenants.
- Trust account.
 - A trust account (sometimes called a *Totten* trust) is not a real trust, it is an account at a financial institution in the form of "A in trust for B," or "A, trustee for B."
 - Upon the "trustee's" death, the funds pass to the surviving "beneficiaries."
- Pay on death account.
 - Funds remaining in a pay on death account when the depositor dies pass to the surviving pay on death beneficiaries.
- Under the law of most states, multiple party accounts are used as the last resort to pay creditors.
- Virtually all states do not allow the disposition of multiple party accounts to be modified by a will.
- Jurisdictions are divided on whether a divorce from a joint tenant or pay on death beneficiary revokes the survivorship or the pay on death feature.
- Advantages of multiple party accounts:
 - Transferring property to the survivorship party/beneficiaries quickly upon death.
 - Depositors give up little to no control over their funds while alive.

- Accounts have virtual no set-up or administrative costs.
- They may be used to make slight alterations to an estate plan without having to execute a new will.
- Disadvantages of multiple party accounts:
 - Fear of a party to a joint account making unanticipated withdrawals.
 - No professional management of property that would be attained if the property was put into a trust.

➤ *Contracts*

- Contracts that direct payment of money upon death include life insurance, pension plans, retirement plans, 401ks, IRAs, and similar arrangements.
- Life insurance
 - A policy holder makes premium payments while alive in exchange for the insurance company's promise to make a payment of money, the proceeds, to the named beneficiary upon the insured's death.
 - To obtain life insurance on a person, the policy purchaser must have an insurable interest in that person's life. Everyone is deemed to have an insurable interest in his or her own life and also an insurable interest in people such as a spouse and children. Businesses have insurable interests in their key employees.
 - Most states have laws that prevent a beneficiary of a life insurance policy from receiving the proceeds if the beneficiary kills the insured.
 - Most states provide that divorce from a beneficiary voids the designation of the ex-spouse as a beneficiary.
 - Many individuals name a trust as the beneficiary of their life insurance proceeds so that they have more control over how money is managed and spent after they die.

PLANNING FOR INCOMPETENCY AND DEATH

➤ *Introduction*

- It is extremely important to plan for a client's temporary or permanent inability to manage property and make health care decisions.
- Statistically, clients under the age of 60 are more likely to become disabled than die in the next year.
- Goals of disability planning:
 - Manage property and make financial decisions.
 - Make health care decisions.
 - Prevent the loss of the estate due to lost income and expenses.

➤ *Property Management*

- Durable power of attorney for property management (financial power of attorney).

- A durable power of attorney is a formal method of creating an agency relationship. The principal is the person granting the authority and the attorney-in-fact or agent is the person receiving the authority.
- Durable means that the agency retains the authority even after the principal becomes incapacitated.
- All jurisdictions recognize a durable power of attorney for property management and many provide statutory forms that may be used.
- The benefits of having a durable power of attorney include avoiding a gap in property management, reducing the need for guardianship, and allowing the principal to choose the person making financial decisions.
- Self-designation of guardian of estate.
 - Many states permit a person to indicate whom he or she would like to have appointed as the guardian (conservator) of the estate rather than having the court appoint a guardian according to a statutory priority order.
 - Some states permit a person to disqualify persons from being a guardian even though they would otherwise be eligible.
- Wage replacement insurance.
 - This insurance does not pay the same amount as actual wages but instead typically pays 60%-80% of salary. Otherwise, the person would lack the incentive to return to work.

➤ *Health Care Decisions*

- Statutory surrogates.
 - If a person does not plan, states often provide a statutory priority order of individuals who have the authority to make the person's medical decisions.
- Medical power of attorney.
 - The majority of states authorize durable powers of attorney for health care or medical powers of attorney in which a person designates a person to make his or her medical decisions.
 - It is imperative that the principal discuss with the agent what actions they would like taken if there is a medical emergency or time of disability.
- Self-designation of guardian of the person.
 - Many states allow a person to predesignate an individual to serve as the guardian of the person just like they permit self-designations of guardians of the estate.
- Long-term care insurance.
 - Long-term care insurance is designed to pay for a person's care when the person is confined to a nursing home or other facility. Additionally, this insurance may cover home care.
 - Long-term care insurance is expensive, so many people cannot afford the insurance and have to rely on Medicaid and other government benefits instead.

➤ *Death Planning*

- Directive to physicians.
 - Also known as a living will, advance directive, or natural death statement, these are documents expressing a person's desire not to be kept alive by artificial, life-sustaining procedures when the person is in a terminal condition.
 - Many states have statutory forms that must be completed, along with formalities, for a living will to be effective.
- Assisted suicide.
 - Assisted suicide occurs when a person needs help, usually from a medical professional, in procuring the means to commit suicide. Once obtained, the person self-administers the lethal agent.
 - Most states consider assisted suicide a crime, but approximately six states authorize physician-assisted suicide under strict statutory requirements.
- Anatomical Gifts.
 - All states have a version of the Uniform Anatomical Gift Act, which creates a system for individuals to designate themselves as organ donors.
 - Organ donation has the potential to extend the life of others through direct transplantation or research. However, some people are afraid of organ donation thinking that the donor's death could be hastened for the benefit of another person who needs a transplant.
 - Anatomical gifts may be made by people other than the donor, such as a spouse or adult children. Therefore it is important for persons who do not want to donate their organs to inform their close family of their intentions.
 - Anatomical gifts are typically made via a gift card or registration on an Internet site. A gift may also be made in the donor's will but this is not an advisable technique as the will is unlikely to be viewed until it is too late to make a donation.
- Disposition of body
 - State law may permit a person to indicate a preference for burial or cremation and other funeral-related matters such as the type of ceremony and its details.

ESTATE PLANNING OVERVIEW

➤ *The Big Picture*

- All the material we have just went over needs to be considered together to craft an effective estate plan for a client.

➤ *Ascertain the Client's Intent*

- Who does the client want to receive the property?
- When are recipients of the property supposed to receive it?
- How is the property going to be used?
- Whom does the client want to be managing the property?

- Is the client's estate large enough that tax planning is needed?
- What plan does the client wish to make for financial and medical decisions if the client becomes disabled?
- What arrangements for death and body disposition does the client wish to make?

➤ *Gather Information*

- It is important to gather full information from the client so that you may create an intent effectuating estate plan.
- Legal research may also be required for you to ascertain what you may or may not do for your client.

➤ *Select the Proper Estate Planning Techniques*

➤ *Document Preparation and Execution*

- Ensure that all documents are prepared in compliance with the client's intent and applicable laws. Then, make certain the client properly executes them complying with the required formalities such as witnesses and notarization.

➤ *Protect Document and Review Estate Plan*

- Documents need to be preserved in a safe place where they can be found when needed.
- Encourage your client to review and update the estate plan on a regular basis to reflect changes in facts, intent, and the law.

EXAMINATION APPROACH & STRATEGY

➤ *General Advice*

- When taking a Wills & Succession exam, utilize the following framework when attempting to organize and answer questions.
- Most questions will end with a request for you to distribute assets of an estate properly.

➤ *Analytical Framework*

- Handle non-probate assets first because they pass outside of intestacy or the will.
- Ascertain whether the decedent died intestate or testate. Remember that a person can die partially testate so you may have to analyze both will and intestacy issues.
- If the person dies intestate:
 - Identify the heirs looking for issues that may determine whether a person qualifies as an heir.
 - Ascertain the share of each heir.
- If the person dies testate:
 - Determine if the instrument meets all the requirements of a valid will.

- Ascertain whether the testator validly revoked the will.
 - Determine the beneficiaries of the will and their shares, paying attention to changes to the gifted property and the named beneficiaries.
 - Consider whether the will needs to be interpreted or construed.
 - Analyze possible grounds to contest the will.
- Address issues regarding estate administration.

➤ *General Exam Advice*

- Read questions carefully.
- Focus on the questions asked and only go through the parts of the analytical framework pertinent to what is being asked.
- If the exam contains multiple-choice questions, find out if there is a penalty for guessing. If not, take a reasoned guess on questions about which you are unsure.

➤ *Essay Question Advice*

- Before you start writing, outline and organize your answer.
- Be sure to answer the exact question that is asked; do not change the facts.
- Watch out for questions that have key facts missing that are needed to answer the question. Then, make alternate assumptions and answer under each one.
- Remember, it is the quality of your answer that counts, not the quantity.
- Budget your time wisely.
- Identify the issues. Some questions will have only one, while others have many.
- Answer the question using the correct and relevant rules of law.
- Do a thorough analysis applying the law to the facts and circumstances in the question. Then reach a logical conclusion.

TRUSTS

➤ *Terminology*

- **Settlor:** The person who causes the trust to come into existence by supplying the initial trust property and splitting the legal and equitable title to the property. The settlor may also be referred to as the “trustor,” “grantor,” or the “donor.”
- **Trustee:** The person who holds legal title to trust property and is subject to the fiduciary responsibilities associated with a trust.
- **Legal interest:** The interest held by the trustee which gives legal ownership of property which brings responsibilities and no direct benefit from holding the title.
- **Beneficiary:** The person who receives equitable title and the benefits of the trust property pursuant to restrictions the settlor established in the trust. The beneficiary may enforce the trust if the trustee engages in improper conduct.

- Equitable interest: Also called the beneficial interest, this interest is held by the beneficiary.
- Trust property: The property transferred in trust form also referred to as the “principal” of the trust, the “corpus” of the trust, the trust “res,” or the trust “estate.”

➤ *Uses of Trusts*

- To provide for and protect trust beneficiaries.
 - A settlor wants to bestow benefits on worthy individuals or organizations but doesn't want to make an outright gift to ensure that the settlor's intent for the gift is followed.
 - A settlor may want to protect individuals such as minors, individuals who lack management skills due to mental or physical incapacity, individuals who the settlor feels lack the experience to handle the property, and “spendthrift” individuals who are prone to spend money in an excessive or frivolous manner.
 - The trust structure protects beneficiaries from pressure from family and friends to provide them with gifts.
- To provide the settlor with flexibility in asset distribution.
 - Unlike an outright inter vivos or testamentary gift which give a donee total control of the property, a trust allows the settlor to place restrictions on how, when, and under what circumstances the beneficiary receives property provided the restrictions are within legal bounds.
- To protect against the settlor's own incapacity.
 - Once determined to be incapacitated, a person can no longer deal with the person's own property and a guardian may need to be appointed.
 - Guardianships are costly and embarrassing, and may lead to the use of the incapacitated person's property in a way that the person had not intended.
 - A *standby trust* is a way for a person to establish a trust in which the settlor maintains initial control, but upon settlor's incapacity, a successor trustee steps in to manage the property.
- To obtain professional management of property.
 - The settlor may select a trustee with expertise in managing trust property that the settlor or beneficiaries would lack.
 - Professional trustees often have greater investment opportunities as well as being able to diversify funds for greater return.
- To avoid probate.
 - An inter vivos trust avoids probate allowing the property to reach the beneficiaries' hands more quickly than under a will.
 - The probate process is extremely public as all documentation is part of the public record. A trust, on the other hand, can often be kept off of the public record.
- To obtain tax benefits.
 - Proper use of a trust may achieve income, gift, and estate tax savings.

General Comments

- Trusts function under state law and most states have comprehensive trust codes.

- The law discussed in this outline is based on the common law, the Second and Third Restatement of Trusts, and the Uniform Trust Code. Accordingly, it may not be the same as your state's laws.
- While a trust can be advantageous, it may not be right for your client. Be sure to review all the facts of your client's case and determine whether the effort and cost to create, administer, and manage the trust do not outweigh the benefits.

➤ *Trust Creation Overview*

- Trust intent.
 - The settlor must intend to split legal and equitable title and impose fiduciary duties on the trustee for the benefit of the beneficiary.
- Capacity.
 - The settlor must have the capacity to make a conveyance of property in trust form.
- Statute of Frauds compliance.
 - A writing may be required for a trust to be enforceable.
- Purpose.
 - The purpose of the trust must not be illegal or against public policy.
- Trustee.
 - A trustee must hold legal title and be obligated to deal with the property for the benefit of the beneficiaries in a fiduciary capacity.
- Beneficiary.
 - The trust needs a beneficiary to hold the equitable interest to the property.
- Rule Against Perpetuities compliance
 - The duration of a private trust cannot exceed the period permitted by the state's Rule Against Perpetuities.

➤ *Trust Intent*

- A trust is created only if the settlor manifests an intention to create a trust.
- There are two elements of trust intent:
 - A split of legal and equitable title, and
 - The imposition of enforceable duties on the holder of that legal title.
- Courts will look at many factors when determining settlor intent including:
 - Whether the words used are imperative or mandatory, or just precatory.
 - The definiteness of the description of the property.
 - The definiteness of beneficiaries.
 - The relationship and financial situation of the parties.

- The origins of the trust intent requirement arise from the common law of *uses* which were used in England until the English Parliament enacted the Statute of Uses in 1535 to end abuses of the system.
- An exception to the Statute of Uses developed for the active use which allowed for a trust/use as long as the trustee's holding of property was actually utilized to perform a power/duty relating to the property for the beneficiary's benefit. This is where the modern basis for the two-pronged trust intent test began.
- Most states have a version of the Statute of Uses which operates to terminate passive trusts where there is an attempt to split title without imposing responsibilities.
- Any combination of parties is permissible, as long as the sole trustee is not the sole beneficiary.
- Assuming that a trust has been created, there may be a situation where the legal and equitable title reunites into one person after being split such as when the trust terminates. This situation is called merger.
- Distinguishing trusts from other legal relationships is fairly easy if you remember the two elements of trust intent. It is important to identify the different relationships because trust law differs drastically from other areas of the law. The following areas of the law are often confused with trusts:
 - Agency,
 - Bailments,
 - Conditions subsequent,
 - Custodianships,
 - Debt relationships,
 - Equitable charges,
 - Personal representatives of a decedents' estates,
 - Outright gifts,
 - Guardianship,
 - Power of appointment, and
 - Security arrangements.

➤ *Methods of Express Trust Creation*

- During the settlor's lifetime – the *inter vivos* or *living* trust.
 - The *self-declaration trust*, or the *declaration trust*, is where the settlor declares the settlor to be trustee of property for the beneficiary and retains its legal title.
 - The *transfer* or *conveyance* in trust, where the settlor transfers the legal title to the trust property to somebody else as the trustee; the settlor may retain or convey away the equitable title.
- Upon settlor's death – the *testamentary* trust.
 - The condition precedent for a testamentary trust to be valid is that the settlor's will is valid and properly probated.
- Consideration.

- Consideration is not needed for the creation of a trust because a trust is a conveyancing relationship rather than a contractual agreement.
- An agreement to create a trust in the future would have to meet all the requirements of a contract, including consideration.
- When the trust property itself consists of a promise, the promise needs to be an enforceable contract to have value.

➤ *Statute of Frauds*

- Trusts should always be in writing containing the trust's basic terms such as the beneficiaries' identity, the property, and how the property is to be used.
- State law may allow some trusts, such as trusts of personal property, to be oral.
- The Statute of Frauds is designed to protect the donee of an outright gift from a donor making a false claim that the gift was actually one in trust.
- Unless prevented by other law, a trustee may carry out an oral trust even if it is unenforceable because there is no writing.
- Some states require that if a trust is created in a written instrument, all amendments and modifications, as well as a revocation, must be in writing.
- Although notarization is not typically required for a valid trust, it is often a good idea because many states require instruments to be acknowledged before they can be filed in the public records.

➤ *Rule Against Perpetuities*

- The Rule Against Perpetuities (RAP) invalidates trusts in which the ability to ascertain the identity of the beneficiaries in whom equitable title will vest is delayed beyond a specified period of time, usually 21 years after the death of the lives in being at the time of trust creation.
- The time of trust creation is typically computed as follows:
 - Irrevocable inter vivos trust: When the settlor declares the trust or conveys the property to the trust.
 - Revocable inter vivos trust: When the trust is no longer revocable or settlor dies.
 - Testamentary trust: When the settlor dies.
- Many states no longer follow the traditional RAP and instead adopt one of these approaches:
 - *Wait and see* which looks at how the vesting actually occurs rather than how it could occur even under extremely unlikely circumstances.
 - Lengthening the perpetuities period.
 - Authorizing the courts to reform the trust using *cy pres*.
 - Abolishing RAP and allowing *dynasty trusts* which may last indefinitely.
- Most trusts should contain a *savings clause* that provide an alternative beneficiary in case the trust violates RAP.
- There are three basic parts of a trust that must comply with RAP:

- A condition which triggers the effectiveness of a trust.
- Distribution of property to beneficiaries during the existence of a trust.
- Distribution of property to the remainder beneficiaries because of trust termination.

➤ *Trust Purposes*

- A trust may be created for any purpose that is not illegal, tortious, or contrary to public policy.
- Jurisdictions use two approaches to determine the legality of a trust purpose.
 - Intent approach (majority approach): A trust is illegal if the existence of the trust could induce another person to commit a crime even if the trustee does not have to perform an illegal act.
 - Actual use approach (minority approach): This approach analyzes how the trust property is actually used rather than on the motives of the settlor. As long as the use of the property does not violate the law or public policy, then the trust is valid.
- There is a complex problem regarding trusts that contain discriminatory provisions. Many settlors desire to create trusts that limit benefits to persons of a particular gender, religion, sex, race, or national origin, but these may be contrary to modern law.
- A trust cannot typically be used to defraud creditors. A conveyance done with this intent may be set aside under the state's fraudulent transfer laws.

➤ *The Settlor*

- The settlor is the person who creates the trust by splitting title to the property and imposing enforceable trust duties on the trustee.
- To be a settlor, the person must have capacity. In most cases, the settlor must have the same capacity as a person who makes an inter vivos gift or, in the case of testamentary trusts, the capacity to execute a will.
- The majority view in the United States is that a settlor may retain extensive powers over the property. As long as someone other than the settlor has a beneficial interest, regardless of how weak or subject to divestment, the settlor may serve as the trustee and a beneficiary.

➤ *Trust Property*

- A trust must contain property to be a valid trust.
- Trust property may consist of almost any type of property: real and personal, present and future interests, tangible and intangible, and legal and equitable property. Only non-transferable property cannot be placed in a trust.
- The property must be clearly identified and currently owned; an expectancy is not a property interest and thus cannot be placed into a trust.
- One of the most important steps in the creation of a trust is the delivery of property to the trustee. Many trusts fail because the settlor never completes the transfer of trust property to the trustee.

➤ *The Trustee*

- The trustee holds legal title to the property in the trust and is subject to a wide range of fiduciary duties.
- The trustee has no beneficial interest in the property and thus the property cannot be reached by the trustee's creditors and does not pass to the trustee's heirs or beneficiaries when the trustee dies.
- An individual trustee must have the legal capacity to take, hold, and transfer property.
- A corporate trustee must meet the specific requirements imposed by local law.
- A trustee may also be the settlor and a beneficiary, as long one person is not the sole trustee and sole beneficiary.
- A person named as a trustee is not required to accept the position of trustee.
- A person may accept the position of a trustee by signing either the trust instrument or a separate written acceptance. A person is also deemed to have accepted the position if the person exercises trust powers or performs trust duties.
- If the named trustee has died or refused to serve, the trust instrument may have designated an alternate trustee or provided a method to select a new trustee.
- If the trust instrument is silent, the court will typically appoint a trustee upon the petition of an interested person. A court will not allow a trust to fail for want of a trustee.
- A trustee may also need to post bond. Some states presume that bond is required unless the settlor waives bond. Other states presume that bond is not needed unless the settlor expressly requires it or the court deems it necessary.
 - The settlor should consider the costs and benefits when determining whether to waive bond because bond premiums take trust property away from beneficiaries but bond also protects the beneficiaries from an evil trustee.
- A trust may have more than one trustee. The benefits include more expertise, greater oversight, and better management of the trust than if there were only one trustee. However, multiple trustee may make trust management cumbersome and may increase fees.
- States are divided on how trust powers are exercised if there are multiple trustees. Some states require all trustees to consent while others permit a majority to exercise a power.
- If a vacancy occurs when there are multiple trustees, the instrument may provide for filling the vacancy. The court will normally not appoint a trustee unless no trustee remains.
- A trustee may resign following the process set forth in the trust instrument or as mandated by state law.
- The court may forcibly remove a trustee if the trustee violates a fiduciary duty.

➤ *The Beneficiary*

- The beneficiary of a trust holds equitable title to the trust property.
- The beneficiary must be a legal entity with the capacity to take and hold property.
- The settlor may be a beneficiary. The trustee may be a beneficiary as long as the sole trustee is not sole beneficiary.

- In a private trust, there must be clearly ascertainable beneficiaries.
- Multiple beneficiaries are allowed who may have concurrent or successive interests.
- Beneficiaries may be designed by a class provided membership in that class is clearly ascertainable.
- Honorary or purpose trusts are trusts set up to provide benefits for non-human, non-charitable purposes.
 - All states have statutes authorizing trusts for the care of pet animals.
 - States vary as to whether other purpose trusts are enforceable.
- Incidental beneficiaries are people who indirectly receive benefits because of the operation of a trust. They are generally not recognized as having sufficient interest to enforce the trust.
- A beneficiary of a trust may disclaim the interest in a trust.
 - Reasons that a beneficiary may disclaim:
 - ◆ The property may be undesirable or have an onerous burden.
 - ◆ To prevent the beneficiary's creditors from taking the property.
 - ◆ To reduce the beneficiary's gift or estate tax burden.
 - Courts presume that a beneficiary will accept a gift. Thus, the beneficiary must follow state and federal law to disclaim the interest in the trust.
 - A beneficiary must not have exercised control over the property or accepted benefits from the trust.
 - A disclaimer usually requires certain formalities such as:
 - ◆ In writing.
 - ◆ Acknowledged by a notary.
 - ◆ Delivered to the trustee in a timely fashion.
 - A beneficiary may execute a partial or total disclaimer.
 - Once effective, a disclaimer is irrevocable.
 - Disclaimed property passes as if the person disclaiming predeceased the transfer under the terms of the trust.
- There are two main restrictions placed upon beneficiaries that prevent them from being able to transfer their interest, voluntarily or involuntarily.
 - The beneficiary's interest is usually restricted to his or her life.
 - The trust contains a spendthrift provision that prevents (1) the beneficiary from transferring the beneficiary's interest in the trust and (2) the beneficiary's creditors from reaching the beneficiary's interest in the trust.
- In the rare case that the settlor does not impose restrictions on the beneficiary's ability to transfer equitable title, the following issues may arise:
 - The method of transfer may differ depending on whether the trust corpus is personal or real property.
 - A beneficiary may assign the interest to two different people and create an issue of priority of assignment.
 - ◆ The English view – The transferee who first gives notice to the trustee has priority.

- ◆ The American view – The person who received the assignment first has priority.

➤ *Spendthrift Trusts*

- Spendthrift provisions do two things:
 - Prevents the beneficiary from transferring his or her right to future payments of income or principal.
 - Prevents the beneficiary's creditors from subjecting the beneficiary's interest to the payment of their claims.
- While spendthrift provisions are aimed at protecting those who lack the ability to manage their beneficial interest properly, they can protect anyone's equitable interest in the trust.
- Spendthrift provisions protect the equitable interest of the property only while it is in the trust. Therefore, once the trustee has distributed trust funds to the beneficiary, those funds no longer have spendthrift protections and may be transferred or obtained by the beneficiary's creditors.
- Because of the overwhelming benefits of a spendthrift provision, virtually all trusts include them.
- State law may restrict the enforcement of spendthrift provisions in certain situations.
 - The settlor is also the beneficiary. A settlor cannot shield the use of his or her own property from creditors. However, a growing number of states allow for self-settled spendthrift trusts if certain statutory requirements are satisfied.
 - Claims for necessities may prevail over spendthrift provisions because courts want to encourage creditors to supply necessities without fear of not getting paid.
 - Claims for alimony and child support payments.
 - Federal tax claims.
 - Tort claimants.

➤ *Discretionary Trusts*

- A discretionary trust limits the beneficiary's interest by giving the trustee the discretion whether to make payments to the beneficiaries and in what amounts.
- Settlers often create discretionary trusts for beneficiaries whose future needs cannot be predicted with accuracy.
- Giving the trustee discretion to select who gets how much and when, based upon the trustee's judgment or based on specified factors such as health, education, or medical care, more faithfully follows the settlor's intent than a mandatory distribution trust.
- The beneficiary of a discretionary trust has no interest in the income or principal of the trust until the trustee chooses to make a distribution. Consequently the beneficiary cannot compel payment unless the trustee is breaching the terms of the trust.
- A discretionary trust must have a non-discretionary interest entitled to the remainder of the trust assets when the trust terminates.
- Because the beneficiary has no interest in the property until distribution, the beneficiary's creditors have no claim to the trust property until a distribution has been made.

- If the settlor is also the beneficiary, the settlor's creditors may reach the maximum amount which the trustee could apply to the settlor.
- Some jurisdictions may allow courts to reach certain parts of a discretionary trust for alimony or child support payments.
- Although the settlor has granted the trustee discretion, that discretion is not unlimited. Courts require trustees to act in good faith when determining the amounts to distribute and can intervene if they find the trustee abused discretion.
- If the court finds that the trustee has abused discretion, the preferred remedy is for the court to instruct the trustee on the trustee's duties and direct the trustee to act according to those duties. However, if the trustee continues to abuse discretion, the court may exercise its own discretion.

➤ *Support Trusts*

- The settlor may impose a restriction on the use of trust property so that it may be used only for the beneficiary's health, education, maintenance, and support. This is often called a *HEMS provision*.
- A support trust can be mandatory or discretionary.
- There are key considerations when a settlor creates a support trust.
 - What is support? Is it enough for only basic necessities, to maintain current lifestyle, or to enhance living conditions?
 - Does support also include support of the individuals whom the beneficiary is legally obligated to support?
 - Should or must the trustee consider other income and assets of the beneficiary?

➤ *Charitable Trusts*

- A charitable trust is established for charitable purposes such as the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, and for governmental or municipal purposes.
- Most of the rules applicable to private trusts also apply to charitable trusts; however, there are some special rules.
- A charitable trust requires a sufficiently large or indefinite class of beneficiaries. There are situations where small groups are permitted because of their impact on the community such as prizes for individuals who have greatly benefited society through their achievements in science, medicine, and similar fields.
- Some states have mortmain laws which limit gifts to charity under specified circumstances. However, these laws are falling out of favor because many courts deem them unconstitutional as violating the Fourteenth Amendment.
- A charitable purpose must be unselfish and have an altruistic motive.
- The court, not the settlor, determines whether a trust purpose is charitable.
 - Many courts apply the "generally accepted standard" which provides that a charitable purpose is one that the community generally agrees is charitable.

- Courts are more likely to uphold trusts that advance ideas and concepts, but these are usually general concepts and not the settlor's own unique ideas.
- Trusts to accomplish the whims of the settlor are usually not charitable.
- For religious purposes, courts often follow a more liberal standard upholding the trust unless it involves criminal activity or violates public policy.
- Charitable trusts may qualify for special tax benefits if the settlor structures them properly.
- Enforcement of a charitable trust is usually done by the state's Attorney General.
- Cy pres, or the doctrine of equitable approximation, may be applied to supply missing charitable trust beneficiaries.
- Charitable trusts are not bound by the Rule Against Perpetuities.
- Trusts may have both private and charitable beneficiaries.

➤ *Pour Over Wills*

- A pour over will is a will that has a dispositive provision leaving property to a previously existing inter vivos trust.
- Historically, the common law shunned pour over wills. However, with the development of incorporation by reference doctrine, a testator could incorporate the inter vivos trust document into the will. This caused a significant problem as the terms of the trust were "frozen" as of the date of will execution; later trust amendments or a revocation would not impact the trust created by the incorporation.
- A more modern approach developed which treated the trust as a fact of independent significance. This permitted trust amendments made after will execution to govern the poured over property. A problem still remained in that the inter vivos trust must actually exist, that is, be funded prior to the testator's death.
- The newest version of the Uniform Testamentary Additions to Trusts Acts does not require the trust to be funded prior to the testator's death; initial funding may be the poured over property. In addition, post-death amendments to the trust will govern the poured over property which is important if a testator pours over into a trust created by another person.

➤ *Life Insurance Trusts*

- A life insurance trust arises where the beneficiary of the life insurance policy is a trust, rather than a person. This helps assure the settlor that the policy's proceeds are utilized according to the settlor's intent.
- The settlor should consider the following:
 - Is the trust funded with additional property besides the contract right to receive the life insurance proceeds? Doing so enhances the likelihood that premiums are paid but requires the settlor to part with additional property.
 - Is the trust revocable or irrevocable? Irrevocable trusts have an enhanced likelihood of receiving tax benefits and protecting the beneficiary but they remove the settlor's ability to make changes to the trust.

TRUST ADMINISTRATION

➤ Overview

- The trustee should take the following steps upon discovering being named as a trustee.
 - Decide whether or not to accept the trustee position.
 - ◆ The trustee may accept the trust by signing the trust or a separate written agreement, or by beginning to perform trust duties.
 - ◆ Until acceptance, the trustee has no fiduciary duties.
 - Post bond if required.
 - Register the trust if the trust is in one of the few states that impose this requirement.
 - Obtain possession and control of the trust property.
 - Ascertain the identity and location of beneficiaries.
 - Follow the instructions of the trust and applicable state law regarding investments, management, and distributions.
 - Exercise a high degree of loyalty by avoiding conflicts of interest and self-dealing.
- Earmark, safeguard, and avoid commingling of trust property.
 - ◆ Doing so helps ensure that the trustee does not mix the trustee's own property with that of the trust which could make it available to the trustee's creditors or successors in interest.
 - ◆ The common law was very strict in holding the trustee personally liable for all losses that occurred to property not earmarked. Under modern law, courts are unlikely to impose liability on trustees for losses due to general business conditions that would have occurred even if the property had been earmarked.
 - ◆ Many states provide an exception for corporate securities allowing them to be held in nominee form (e.g., in a brokerage account).
 - ◆ Unlike with earmarking, the trustee is normally strictly liable for all losses if commingling occurs, even if the losses are not due to the commingling.
 - ◇ Corporate trustees, however, are usually authorized by statute to commingle trust property into *common trust funds* for greater investment power and diversification.
- Support the trust.
 - ◆ The trustee is required to defend all attacks on the integrity or administration of the trust, unless competent counsel indicates otherwise.
 - ◆ If the trustee provides a reasonable defense, the trust pays the trustee's attorney fees and court costs. This encourages trustees to fully defend trusts without an onerous burden.
 - ◆ The trustee also has a duty to seek an appeal, unless there is no reasonable ground for reversal.

➤ *Standard of Care and Trust Investments Generally*

- A trustee must perform all of the trustee's duties using the applicable standard of care and is liable only if the trustee violates the standard of care.
- Traditionally, the standard of care for trustees was the *prudent person standard*, that is, the care and skill that a person of ordinary prudence would exercise in dealing with his or her own property in regard to permanent disposition, not speculation.
 - Each investment was evaluated using these factors:
 - ◆ Income.
 - ◆ Appreciation.
 - ◆ Safety.
- The modern rule is the *prudent investor* or *portfolio* standard which takes a "total asset management" approach, where the appropriateness of investments is based on the performance of the entire trust portfolio rather than individual investments.
 - Investments are viewed as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
 - A prudent investor could decide that the best investment strategy is one that allows some appreciation to occur, while also incorporating some investments that are less safe but may make greater returns and probable income.
- If a trustee has a higher degree of skill than that imposed by the law, the trustee must exercise that higher skill level.
- A trustee may not attempt to defend actions by claiming that the trustee has less skill than a prudent investor.
- Changing the standard.
 - The settlor may lower the standard of care.
 - The settlor may exculpate the trustee for negligent breaches but not those that are intentional, knowing, or reckless.
- Settlers may include a *directed trust* provision requiring the trustee to exercise certain trust powers, such as what investments to make, as directed by a person designated in the trust instrument.

➤ *Investments*

- Historically, the trustee could make only very safe investments such as government obligations and first mortgages in real property.
- Over time, states developed "statutory legal lists" which listed proper investments for a trustee to make.
- Most states then adopted the prudent person standard which considered only income, appreciation, and safety.
- Now, almost all states have modernized the standard with the prudent investor rule which increases the factors the trustee must consider to include:
 - Trust purposes.

- Trust terms.
 - Distribution requirements.
 - General economic conditions.
 - The possible effect of inflation or deflation.
 - Tax consequences.
 - The role of each investment within the portfolio.
 - Income expected.
 - Appreciation expected.
 - Other resources of the beneficiaries.
 - Need for liquidity.
 - Need for regular income.
 - Importance of preserving trust property.
 - Any special relationship or value of an asset to the purposes of the trust or a beneficiary.
- A trustee has a duty to diversify trust investments so that if one particular investment goes bad the entire trust is not lost.
 - However, in some special circumstances, a trustee does not have to diversify if attempting to further the purposes of the trust (e.g., a family farm or business).
 - The trustee has an ongoing duty to review investments.
 - If the trustee is a successor trustee, then the new trustee may need to sue the old trustee for any loss caused by a breach of the investment duty.
 - The trustee has a duty to invest and manage the trust solely in the interest of the beneficiaries. Therefore, *social investing*, or considering other factors than just monetary safety and growth, may be problematic if it does not yield the same returns that non-social investing would yield.
 - The settlor is free to provide express instructions on the types of investments a trustee can or cannot make.

➤ *Trustee Powers*

- Sources of trustee powers:
 - Provided by the settlor in the trust instrument.
 - Supplied by trust legislation using approaches such as:
 - ◆ Default powers which the trustee automatically obtains unless limited by the settlor or the court.
 - ◆ Statutory powers that the settlor may incorporate by reference into the trust.
 - ◆ Generic statement that trustees have whatever powers are necessary to deal with trust property in the same manner as a prudent person.
 - Implied by law.
 - Decreed in a court order.

➤ *Trust Distributions*

- Trustees are under an almost absolute and unqualified duty to make payments and distributions to the correct beneficiary.
- However, some jurisdictions have narrow exceptions for certain mistakes of fact, provided that the trustee takes all necessary steps to get the property back from the improperly paid person.
- Some states provide alternate distribution options if the beneficiary is a minor or incapacitated.
- The court may allow for a deviation from the settlor's instructions only if the court believes that the settlor's main intent and objective would be frustrated by strict adherence to the original instructions.

➤ *Delegation of Duties*

- A trustee may have the power to delegate some duties to agents and co-trustees. However, it is important to remember that the settlor chose a trustee because the settlor has confidence in that person's judgment and integrity.
- Under traditional rules, the trustee was able to delegate only ministerial duties, like secretarial and janitorial jobs, but not discretionary duties, like selecting investments and managing trust property.
- The Uniform Prudent Investor Act takes a different approach. The trustee may delegate any investment or management decision provided a prudent trustee of comparable skills could properly delegate under the same circumstances.
 - The trustee must exercise reasonable care, skill, and caution in selecting the agent, establishing the scope and terms of the delegation, and reviewing the agent's actions periodically.
 - Although modified in some states, the general rule is that if the trustee delegated properly, the trustee is not personally liable to the beneficiary for the agent's actions.
- The general rule in a multiple trustee trust is that a trustee is not liable for breach of duty by a co-trustee unless:
 - The trustee participates in the breach.
 - The delegation to the co-trustee was improper.
 - The trustee approves or conceals the breach.
 - The trustee fails to use reasonable care to administer the trust which enables the breach by the evil co-trustee.
 - The trustee fails to take steps to compel redress.

➤ *Duty of Loyalty*

- A trustee owes the beneficiaries a duty of undivided loyalty and utmost good faith in all trust matters.
- Loyalty duties are based on the common law and are often codified.

- The trustee will be personally liable for any breach of the duty of loyalty regardless of whether the trustee acted in good faith or did not personally benefit. Courts adopt the *no-further-inquiry rule* regarding a breach of loyalty duties for the following reasons:
 - To guard against the trustee having any possible selfish interest in trust transactions.
 - To deter trustees from self-dealing.
 - To avoid having the court make a determination of whether the self-dealing was done in good or bad faith; breach of duty is treated as *constructive fraud*.
- Avoid self-dealing:
 - A trustee cannot buy assets from the trust for the trustee's own self, and the trustee cannot sell the trustee's personal assets to the trust.
 - ◆ This prohibition is broadly construed and includes not only the trustee, but also a wide range of individuals associated with the trustee such as family members and business associates.
 - A trustee may not lend trust funds to him/herself or any person closely associated with the trustee.
 - ◆ States often provide an exception for bank trustees who may be authorized to loan to themselves by depositing trust funds in their own institutions.
- Avoid conflicts of interest:
 - A trustee may not invest in stock or other property that the trustee also owns or manages.
 - A trustee may not sell property to another trust of which the trustee is also a trustee.
 - A trustee must be loyal in dealing with the beneficiary even when engaging in non-trust-related business by making full disclosures of all applicable law and facts.
 - The trustee needs to be cautious about employing him or herself as an agent (e.g., an accountant or lawyer) for the trust.
- A settlor may allow self-dealing by expressly including a clause waiving duties of self-dealing in the trust instrument. Courts strictly interpret these provisions and may invalidate the waiver if they determine that it violates public policy.

➤ *Contract Liability of the Trustee*

- A trustee frequently enters into contracts in the performance of the trustee's investment and managerial duties. Unless the trustee takes special precautions to avoid liability, the trustee may be personally liable for a breach of contract.
- To recoup damages paid to a contract claimant, the trustee must prove that the trustee properly entered into the contract for the benefit of the trust and then seek reimbursement from the trust property hoping there is sufficient property for the reimbursement.
- While the common law would not allow a contract plaintiff to sue the trustee in the trustee's representative capacity and the contract plaintiff could not recover directly from the trust property, modern law permits direct action and recovery.
- Methods for a trustee to attempt to avoid personal liability to contract plaintiffs include:

- Reference to the trust instrument in the contract. This is not advisable as it is unlikely to give the contracting party sufficient notice about the trust and its terms to allow the trustee to avoid liability.
 - Express provision in the contract. This is the most effective way to ensure that the trustee does not have personal liability.
 - Signing “as trustee.” In some jurisdictions signing “as trustee” is prima facie evidence of an intent to exclude the trustee from personal liability.
- There are specific rules relating to negotiable instruments that are contained in Article 3 of the Uniform Commercial Code.
 - Generally, the trustee cannot be reimbursed by the beneficiaries if the trust lacks sufficient property to reimburse the trustee.
 - The contract claimants cannot bring claims against the beneficiaries because the trustee is not the beneficiaries’ agent.
 - Some states place a special notice responsibility on contract plaintiffs requiring them to notify the beneficiaries before being entitled to judgment against a trustee.

➤ *Tort Liability of the Trustee*

- The trustee may act tortiously by negligently hurting someone or converting the property of another in the belief that the property belongs to the trust.
- A trustee may also be liable for the acts of the trustee’s agents or employees under the theory of respondeat superior.
- At common law, a tort plaintiff had to sue the trustee personally and could not sue the trust directly or sue the trustee in a representative capacity.
- If the plaintiff were successful, the trustee could seek reimbursement from the trust only if the trustee had not engaged in willful misconduct and only if the trust property were adequate.
- Many states now allow a tort plaintiff to sue trustees in their representative capacity so that they can recover directly against the trust property and have expanded avenues for trustees to receive reimbursement and exoneration from the trust.
- Some states go even further by absolving a trustee of personal liability to the injured party unless the trustee was personally at fault, thereby limiting the principle of respondeat superior.
- A trustee should purchase insurance to protect against tort recoveries. The cost of premiums may come from the trust as a legitimate expense.
- Charitable immunity may protect some charitable trustees from tort liability. However, many states have abolished this protection.

➤ *Principal and Income*

- The trustee has a duty to allocate receipts and expenses to be fair and impartial to all the trust beneficiaries.
 - Income beneficiaries want immediate distributions of property. These beneficiaries do not receive any of the remainder and thus do not have an interest in saving trust property

for a later date. Thus, they want assets invested in high yield items and are unconcerned about appreciation.

- Remainder beneficiaries receive the trust property that remains when the trust terminates. These beneficiaries are in it for the long run and would like to see high-value investments that grow the trust fund and are unconcerned about income.
- Most states have adopted a version of the Uniform Principal and Income Act which explains what property is allocated to income and principal unless the settlor has otherwise provided.
- Receipt allocation general rules:
 - Proceeds of the sale of a trust asset are principal, both the return of the amount invested and any capital gain.
 - Rent received from trust property is income.
 - Loan repayments are principal.
 - Interest on lent money is income.
 - Eminent domain awards are principal.
 - Insurance proceeds are principal.
 - Cash dividends on corporate stock are income.
 - Stock dividends, shares from stock splits, reorganizations, and mergers are principal.
 - With regard to mineral royalties, under the Uniform Act 10% of each royalty payment is allocated to income and 90% to principal. However, some states make significant changes to this allocation rule.
 - Timber that is removed that does not exceed the rate of new growth is allocated to income, and timber that is removed in excess of the regrowth rate is allocated against principal.
 - Royalties from intellectual property such as patents, trademarks, and copyrights are allocated 10% to income and the remaining 90% to principal.
 - Under the prudent person rule, retaining non-income earning property was likely to be a violation of the trustee's fiduciary duty. Thus, a portion of the sale proceeds would be allocated to income to make up for the lost income. Under the prudent investor rule, however, investing in non-income producing property may be prudent and thus when this property is sold, all proceeds are principal.
- The 1997 Uniform Act includes a new and controversial power which allows the trustee to adjust between principal and income under specified circumstances after considering factors such as the following:
 - The nature, purpose, and expected duration of the trust.
 - The settlor's intent.
 - The identity and circumstances of the beneficiaries.
 - The need for liquidity, regularity of income, and preservation and appreciation of capital.
 - The assets held in the trust including whether a beneficiary uses the asset or whether it was purchased by the trustee or received from the settlor.
 - The trustee's ability or inability under the terms of the trust to invade principal or accumulate income.
 - The anticipated tax consequences of an adjustment.

- Expenditure allocation general rules:
 - Wages for employees are allocated against income.
 - Insurance premiums are allocated against income.
 - Regular income tax is allocated against income.
 - Capital gains income tax is allocated against principal.
 - Trustee compensation is allocated equally against income and principal.
 - Ordinary repairs are allocated against income.
 - Capital improvements are allocated against principal.
 - Interest paid on trust debts is allocated against income.
- Unitrust approach:
 - Some settlors adopt a unitrust approach to avoid the hassle of accounting and allocating receipts and expenses between the income and remainder beneficiaries.
 - The unitrust approach allows a settlor to set a fixed percentage for the current beneficiary to receive based upon the value of the trust property annually.
 - Under a unitrust, both current and future beneficiaries have the same goal: increasing the value of the property.

➤ *Accounting*

- Regular accountings allow beneficiaries to see how the trust is being handled so they can enforce duties owed by the trustee.
- Accountings could be required by state statute, expressly by the trust instrument, upon request by the beneficiary, or under a court order.
- An accounting usually consists of a list of all trust property, all receipts and disbursements, and all trust transactions.
- A trustee may wish to render an accounting on a regular basis even if one is not required because it leaves a good impression that the trustee is doing the trustee's job correctly and notifies the beneficiaries on how the trust is operating.
- The trustee should keep trust records in the applicable accounting format from the time of trust creation to make rendering of an accounting a quick and easy process.

➤ *Trustee Compensation*

- At common law, there was a presumption that trustees were not compensated unless expressly provided by the trust instrument.
- Under modern law, the trustee is entitled to reasonable compensation from the trust for acting as the trustee, unless the settlor provided a for a different compensation determination method in the trust instrument.
- The court looks to the following factors to determine reasonable compensation:
 - Gross income.
 - The success or failure of trust administration.
 - The trustee's special skills and experience.

- The degree of loyalty the trustee exhibited.
- The amount of risk and responsibility the trustee assumed.
- Time spent.
- The custom in the community.
- Character of the work involved.

➤ *Trust Modifications*

- Court modification of trusts.
 - Deviation.
 - ◆ A court may permit a trustee to deviate from the settlor's instructions in the trust instrument if it determines that the settlor would have consented to the change if the settlor had anticipated the circumstances.
 - ◆ Deviations usually occur when the purposes of the trust have been fulfilled, have become illegal, have become impossible to fulfill, or have become detrimental to the trust.
 - ◆ The court may authorize a wide array of revisions such as changing the trustee, permitting the trustee to perform acts not authorized or forbidden by the trust instrument, prohibiting the trustee from performing mandatory acts, modifying the terms of the trust, or terminating the trust.
 - ◆ Courts will not authorize changes to dispositive provisions of the trust such as the identity of the beneficiary.
 - Cy pres
 - ◆ Cy pres applies only to charitable trusts and allows a court to determine a beneficiary where an organization can no longer be the charitable beneficiary of the trust.
 - ◆ Cy pres is a doctrine of equitable approximation. A court will determine the settlor's general charitable intent and select a new beneficiary based upon that intent.
 - ◆ The court will examine extrinsic evidence to discover the settlor's intent.
 - ◆ Only if no general beneficial intent is found will the trust property revert to the settlor or the settlor's successors.
- Party modification
 - Under the law of most states, inter vivos trusts are presumed revocable and thus the settlor may make any changes the settlor so desires. However, if the settlor made the trust irrevocable, the settlor may not amend the trust.
 - A trustee generally has no power to modify or amend the trust.
 - Generally, a trust may not be terminated by a beneficiary if doing so would be contrary to the trust's material purpose.
 - ◆ However, if no material purposes remain, then a beneficiary might be able to compel termination under the *Claflin rule*.
 - ◆ The court will almost always determine a material purpose exists if the trust has a support provision, a spendthrift provision, or provides payments at certain ages or upon certain dates/events.

- If all the beneficiaries and the settlor agree to the termination of a trust, they may be able to compel trust termination, even if a material purpose remains.
- Courts look favorably on family settlement agreements as a matter of public policy to resolve trust disputes.

➤ *Trust Termination*

- Events causing trust termination:
 - The most common reason a trust terminates is because of the express terms of the trust. The settlor will usually tie trust termination to a specific date or on a specific event.
 - A trust will end if legal and equitable title merge.
 - No trust exists if the property is exhausted.
 - A court may terminate a trust using its deviation powers.
- Trustee actions upon termination:
 - The trustee retains trust powers for a reasonable period of time necessary to wind up the affairs of the trust.
 - The trustee must deliver the trust property to the remainder beneficiaries.

TRUST ENFORCEMENT

➤ *Procedural Matters*

- To enforce a trust, a party must have standing as an *interested person*.
 - Beneficiary.
 - Trustee.
 - Third party, if special interest not shared by general public.
 - Normally a settlor does not have standing to enforce a trust. However, the settlor may have standing if the settlor is also a trustee, a beneficiary, or has the power to revoke the trust.
 - The Attorney General of the state normally may enforce charitable trusts.
- Proper court:
 - Jurisdiction.
 - Venue.

➤ *Remedies Against the Trustee*

- Money damages:
 - It may be possible to recover damages even when the trustee has not breached the trust if the trustee profited from being the trustee, other than the trustee's compensation.
 - Any loss or depreciation in value of the trust estate as a result of a breach of trust.
 - Any profit made by the trustee through the breach of trust.
 - Lost profits that would have accrued to the trust if there had been no breach of trust.

- Depending on the jurisdiction, punitive damages for an intentional breach of fiduciary duty.
- Co-trustees are normally jointly and severally liable for a breach by a trustee and a beneficiary may recover the full amount from any one of them. However, an innocent co-trustee may be able to get contribution or indemnification from the evil trustee.
- Remove the trustee from office:
 - Courts are hesitant to do so when there has not been bad faith because it goes against settlor's intent for the trust. Further, courts are unlikely to remove a trustee for mere disagreements regarding trustee discretion.
 - Typical grounds for removal include:
 - ◆ Violating or attempting to violate the terms of the trust, trust statutes, or court order.
 - ◆ Becoming incapacitated.
 - ◆ Becoming insolvent.
- A decree to carry out the trust.
- An injunction.
- An appointment of a receiver.
- A requirement to post or increase bond.
- Court advice and instructions:
 - Determine applicable law.
 - Construe the trust instrument.
 - To determine a question arising in the administration of the trust.
- Attorney's fees against the trustee.
- Jurisdictions often make intentional, knowingly, and reckless conduct by a trustee a separate crime and treat a trustee taking trust property as theft.

➤ *Remedies Against the Beneficiary*

- Misappropriation or wrongfully dealing with trust property.
- Consenting to or participating in a breach of trust with the trustee.
- Failure to repay a loan of trust funds that was authorized under the trust instrument.
- Failure to repay a distribution from the trust that was in excess of the amount to which the beneficiary was entitled.

➤ *Remedies Involving Trust Property*

- Tracing.
 - Tracing permits the beneficiary to recover the actual trust property or its proceeds from the trustee or a non-BFP third party for the benefit of the trust.
 - Tracing is an important remedy because the property is actually trust property and therefore not subject to the trustee's creditors or other claimants.

- The beneficiary may have to elect between tracing to the trust property or recovering money damages because a double recovery is not allowed.
 - Commingled funds provide the most difficult situation for a beneficiary attempting to trace property.
 - ◆ Courts presume that the trustee first spends money from a comingled fund that is not subject to the claim of the trust, but that later deposited money (unless it is additional money taken from the trust) is the trustee's own money and thus is not traceable.
 - Subrogation.
 - Subrogation arises when the actual asset cannot be recovered but the trustee has impermissibly used trust funds to pay for a personal debt.
 - The effect of subrogation is that equity will reinstate the debt and place beneficiaries in the same position as the original creditor whose debt was paid off with the trust funds.
 - If that creditor was secured or had a priority position, the beneficiary may now use that benefit against the trustee.
 - Marshaling.
 - The court will order a creditor who has the right to recover out of either of two funds, to resort first to the fund that will not interfere with the rights of the beneficiaries whose only recourse is to one of the funds.
- *Bona Fide Purchaser*
- At common law, if a person knew the person was dealing with a trustee, the person could not be a bona fide purchaser.
 - Under modern law, however, it is often possible to be a bona fide purchaser, even if the person knows the person is dealing with a trustee, as long as the person pays value and does not have notice of the breach of trust.
- *Remedies Against Third Parties*
- If a third party breaches a contract with the trustee or causes a tort that results in damage to or loss of trust property, the third party may be liable to the trust.
- *Enforcing Charitable Trusts*
- Normally the Attorney General enforces charitable trusts for the benefit of the community.
 - Some jurisdictions have a special notice provision that requires the plaintiff to notify the Attorney General of the lawsuit. Otherwise, the Attorney General may be able to set aside any settlement or judgment.
- *Barring Remedies*
- The settlor may have authorized the conduct which allegedly constitutes a breach of trust in the trust instrument.
 - A beneficiary may have given prior approval to the trustee or ratified the conduct that would otherwise be a breach of trust.
 - The consent of one beneficiary will not bind non-consenting beneficiaries.

- Acceptance of benefits flowing from a known breach will likely amount to an implied ratification or estoppel. However, mere silence is not likely to be a ratification.
- The court has the ultimate authority to relieve a trustee from any or all of the duties, limitations, and restrictions that may exist, either under the trust instrument or under trust statutes.
- The applicable statute of limitations may bar recovery.
 - The statute of limitations normally begins to run from the date the beneficiary knows or should have known by the use of reasonable diligence that the trustee had breached the trust rather than from the date of the breach.
- An interested party may be barred by the equitable doctrine of *laches* where the beneficiary has sat on his or her rights too long to the trustee's detriment.

OTHER TRUSTS

➤ *Trust Accounts ("Totten Trusts")*

- A trust account is not a real trust, it is an account at a financial institution in the form of "A in trust for B," or "A, trustee for B."
- The trust account belongs beneficially to the trustee. Each trustee owns the account in proportion to his or her net contributions.
- Unlike a real trust, a trust account has no split of legal and equitable title. The trustee is a depositor with full rights to the property.
- Beneficiaries who survive all trustees receive the funds in the account.
- The account is a non-probate asset.

➤ *Resulting Trusts*

- A resulting trust arises from the settlor's intent which instead of being expressed by oral or written words, is deduced from the settlor's actions and conduct.
- Only the settlor benefits from a resulting trust, or, if the settlor is deceased, the settlor's successors in interest.
- Typical situations giving rise to a resulting trust include:
 - Trust corpus remains when the trust ends and the trust instrument does not provide for the disposition of the excess.
 - The failure of an express trust where the settlor conveyed the legal title but the trust fails for some reason.
 - Purchase money resulting trust when a buyer purchases a product, pays the consideration, and the item ends up in the hands of a third party without the intent for the transfer to be a gift or loan. The buyer is in effect the settlor and beneficiary of the interest and the third party who has possession of the property only has legal title to the property.

➤ *Constructive Trusts*

- A constructive trust is not a trust but instead is an equitable remedy to prevent unjust enrichment.
- Equity will turn the holder of legal title into a trustee when the person cannot in good conscience retain the beneficial interest in the property.
- A constructive trust is a remedy and not an intentional relationship between the parties and therefore must be requested in a court action.
- The plaintiff must identify the particular property subject to the constructive trust. Mere proof that a defendant has been guilty of wrongdoing against the plaintiff and that the defendant has assets that could satisfy the plaintiff's claim is an insufficient basis to establish a constructive trust.
- The types of conduct that give rise to a constructive trust fall into three categories:
 - Fraudulent conduct.
 - Abuse of a confidential relationships.
 - Unperformed promises made in contemplation of death.

EXAMINATION APPROACH & STRATEGY

- Identify type of alleged trust
 - Inter vivos
 - ◆ Declaration
 - ◆ Conveyance or transfer
 - Testamentary
 - Private
 - Charitable
- Determine validity of trust
 - Trust intent — The settlor must intend to split legal and equitable title and impose fiduciary duties on the holder of legal title (trustee) to benefit of the holder of equitable title (beneficiary).
 - Capacity — The settlor must have the capacity to make a conveyance of property in trust form.
 - Statute of Frauds compliance — In certain situations, the settlor's trust intent must be documented by a written instrument.
 - Purpose — The purpose of the trust must not be illegal or against public policy.
 - Property — The settlor must place property into the trust and the trust must continue to hold property.
 - Trustee — A trustee must ultimately hold legal title and be obligated to deal with the property for the beneficiaries' benefit.
 - Beneficiary — The trust needs a beneficiary to hold the equitable title to the property. The settlor may either retain equitable title and become a beneficiary or transfer it to a

third party. Private trusts need clearly ascertainable beneficiaries and charitable trusts need charitable beneficiaries and purposes.

- Rule Against Perpetuities — The duration of the trust must comply with the applicable Rule Against Perpetuities.
- Determine traits of trust
 - Revocable or irrevocable?
 - Limits on beneficiary's interest
 - ◆ Spendthrift
 - ◆ Discretionary
 - ◆ Support
- Can trust be changed?
 - By Court
 - ◆ Deviation
 - ◆ Cy Pres
 - By Parties
 - ◆ Settlor
 - ◆ Beneficiaries
- How can trust be terminated?
- Propriety of trustee's actions during administration
 - What powers did the trustee have and did the trustee exceed them?
 - What was trustee's duty of care and was it breached?
 - Did trustee invest properly?
 - Did trustee account for what trustee did?
 - Did trustee violate fiduciary duties of loyalty, good faith, and no self-dealing?
 - Is trustee liable to third parties in tort or contract?
- Potential Remedies
 - Against trustee?
 - Against other beneficiaries?
 - Against trust property
 - Against third parties
 - Are remedies barred?
- Other trust-like arrangements
 - Trust bank accounts
 - Resulting trusts
 - Constructive trusts