

That WILLS, TRUSTS, AND ESTATES OUTLINE

§1: THE PROBATE PROCESS

§1.1: THE TRANSFER OF THE DECEDENT'S ESTATE

I. PROBATE AND NONPROBATE PROPERTY

A. **G/R: Probate and Nonprobate Property**: all of the decedent's assets at death can be divided into probate and nonprobate property.

A(1). **Probate Property**: is property that passes under the decedent's will or by intestacy.

1. Distribution of probate assets under a will or to interstate successors may require a court proceeding involving probate of a will or a finding of intestacy followed by appointment of a personal representative to settle the probate estate.

A(2). **Nonprobate Property**: is property passing under an instrument other than a will, which became effective before death. Nonprobate property includes the following:

1. **Joint Tenancy Property**: under joint tenancy, the decedent's interest vanishes at death. The survivor has the whole property relieved of the decedent's participation and no interest passes to the survivor at the decedent's death.

a. In other words, joint tenancy is real estate ownership with two or more people sharing a tenancy; the survivor gets the property at the death of the other spouse because of the right of survivorship.

2. **Life Insurance**: life insurance proceeds of a policy on the decedent's life are paid by the insurance company to the beneficiary named in the insurance contract.

a. Life insurance is a contract which is executed and effective during the lifetime of a person, it is effective during life because there are duties that must be performed during life, i.e., paying the premiums.

b. The Life Insurance company does not have to pay money until the insured dies because benefits do not pass until the insured person dies.

i. A life insurance policy cannot be changed by will because the policy normally requires that written notice be filed with the insurance company and/or beneficiary before it can be changed.

3. **Contracts with payable-on-death provisions**: decedent may have a contract with a bank, employer, or some other person or corporation to distribute the property held under the contract at the decedent's death to a named beneficiary.

a. To collect property held under a payable-on-death contract, all the beneficiary need do is file a death certificate with the custodian holding the property.

b. Payable-on-death contracts, such as tax deferred compensations and pension plans, cannot be changed by will because federal law requires consent of the spouse before int can be transferred to someone other than the spouse.

i. Partnership contracts, mortgages, and similar contracts may pass to the spouse.

ii. Savings bonds often contain survivorship provisions also.

4. **Interests in Trust**: when property is transferred in trust, the trustee hold the property for the benefit of the named beneficiaries, who may have life estates or remainders or other types of interests.

- a. A trust is a temporal division of property with a future interest and is subject to the rule against perpetuities.
 - b. The property is distributed to the beneficiaries by the trustee in accordance with the terms of the trust instrument.
 - c. *Inter vivos Trusts*: an inter vivos trust (a trust created during life, i.e.) is nonprobate property.
 - d. *Testamentary Trust*: a testamentary trust (a trust created in a will), however, is a matter subject to probate.
 - e. *Poor-Over-Provisions*: are provisions which are created in an inter vivos trust, but contain terms which go into effect and are added to the principle of a testamentary trust.
7. Bank Accounts: usually require that the holder of the account must designate who will be the beneficiary of the money upon the holder's death.
- a. With joint savings accounts, if one spouse dies, the money automatically transfers to the surviving spouse.
6. Distribution of nonprobate assets does not involve a court proceeding, but is made in accordance with the terms of a contract, trust, or deed.

A(3). **G/R: Difference between Probate and Nonprobate Property:**

- 1. Probate property is any property the decedent has passed under a will or intestacy.
 - a. Intestacy is any property that is not disposed of by will.
 - b. A will is an instrument describing how a person wants his property to be distributed after death.
 - i. A will is a revocable ambulatory document.
- 2. Nonprobate property is property passing under an instrument other than a will.

B. **G/R: Distribution of Nonprobate Property:** the distribution of nonprobate property does not involve a court proceeding; the only thing that is required is that the death certificate be filed with the proper entity.

- 1. Nonprobate matters are not a matter of public records; whereas, will are a matter of public record and must be filed on record with the county.
- 2. Nonprobate property is not as technical to create or distribute; whereas, a will is a technical document, with technical procedures for distribution of the property.

C. **POSSIBLE EXAM QUESTION:** a will is an ambulatory document because...

A. *Answer:* it is revocable anytime before death.

D. **POSSIBLE EXAM QUESTION:** True or False, the property distributed under a testamentary trust is non-probate property.

1. *Answer:* False, it is probate property.

II. ADMINISTRATION OF PROBATE ESTATES

A. **G/R: Terminology:** when a person dies, and probate is necessary:

- 1. ***Personal Representative:*** the first step when probate is necessary is the appointment of a personal representative to oversee the winding up of the decedent's affairs.
 - a. The principle duties of the personal representative are:
 - i. to inventory and collect the assets of the decedent;
 - ii. to manage the assets during administration;
 - iii. to receive and pay the claims of creditors and tax collectors; and

- iv. to distribute the remaining assets to those entitled.
 - v. Personal representatives are appointed by, under the control of, and accountable to a court, generally referred to as a probate court.
2. **Executors**: if the decedent dies testate and in the will names the person who is to execute (i.e. carry out the terms of) the will and administer the probate estate, such a personal representative is called an executor.
 3. **Administrators**: when the person in charge of administering the estate is not named in the will, the personal representative is called an administrator.
 - a. The court will appoint an administrator of the estate pursuant to a statutory list, in Wyoming the list is:
 - i. spouse, children, parents, brothers, sisters, next of kin, creditors.
 4. One of the advantages of writing a will is that the testator can designate who is to administer the estate.
 - a. If a person dies intestate or leaves a will that fails to name an executor who qualifies, the administrator is selected from a statutory list of person who are to be given preference, typically in the following order: surviving spouse, children, parents, siblings, or creditors.
 5. A person dying testate **devises** real property to **devisees** and **bequeaths** personal property to **legatees**.
 - a. Under the Restatement of Property, “I give” is an adequate substitute for “devise and bequeath.”
 6. When intestacy occurs, different words are used to describe what happens to the intestates' real property and what happens to his person property.
 - a. Real property descends to heirs;
 - b. Personal property is distributed to next of kin.
 - c. Today, in almost all states, a single statute of descent and distribution governs both real and personal property. Thus, today the word “heirs” usually means those person designated by the applicable statute to take the decedent’s intestate real and personal property.
 7. **Testate**: a person dies with a will that devises real property to the devisees and bequeaths personal property to legatees.
 8. **Succession**: the process of becoming beneficially entitled to the property of the decedent.
 9. **Heir**: a person entitled by statute to the property of the intestate decedent.
 10. **Descendant**: a person related to an intestate or to a claimant to an intestate share in the lineal line.
 11. **Decedent**: the dead person.
 12. **Collateral**: a relative who traces relationship to an intestate through a common ancestor but who is NOT in the lineal line of decent.
 13. **Collateral in Half Blood**: person related to an intestate through only one common ancestor.
 14. **Escheat**: property escheats to the state if no relative of the intestate is in entitled to inheritance [UPC §2-105].
 15. **Attested will**: a will signed by a witness.
 16. **Holographic will**: will entirely in the handwriting of the testator.
 17. **Codicil**: testamentary instrument ancillary to the will.

B Summary of Probate Procedure

B(1). **Opening Probate**: in each state, the administering of the decedent’s probate estate is governed by a collection of statutes and court rules giving meticulous instructions for each step in the process.

1. Probate: is the name given to the court which administers the decedent's estate.
 - a. There are summary probate procedures for distributing an estate which meets the statutory requirements.
2. Probate performs three functions:
 - a. it provides evidence of transfer of title to the new owners by a probated will or decree of interstate succession;
 - b. it protects creditors by requiring payment of debts; and
 - c. it distributes the decedent's property to those intended after the creditors are paid.
3. **G/R: Primary or Domiciliary Jurisdiction Rule:** the will should first be probated, or letters of administration should first be sought, in the jurisdiction where the decedent was domiciled at the time of death.
 1. If real property is located in another jurisdiction, *ancillary administration* in the jurisdiction is required.
4. Each state has a detailed statutory procedure for issuance of letters of testamentary to an executor, or letters of administration to an administrator authorizing the person to act on behalf of the estate.
 - a. Under the Uniform Probate Code (UPC) probate can occur through either ex parte probate (informal probate) or notice probate (formal probate), with the person asking for the letters having the ability to choose either formal or informal probate.
 - b. *Informal Probate:* [UPC §3-301]: without giving notice to anyone, the representative petitions for appointment.
 - i. The petition contains pertinent information about the decedent and the names and addresses of the spouse, the children and other heirs, and if a will is involved, the devisees.
 - ii. If the petition is for probate of a will, the original will must accompany the petition; the executor swears that to the best of his knowledge the will was validly executed and proof of witnesses is not required.
 - iii. A will that appears to have the required signatures and that contains an attestation clause showing that the requirements of the execution have been met is probated by the registrar without further proof [UPC §3-303].
 - iv. Within 30-days after appointment, the personal representative have the duty of mailing notice to every interested person, including heirs apparently disinherited by the will [UPC §3-705].
 - c. *Formal Probate:* under the UPC is a judicial determination *after notice* to interested parties. Any interested party can demand formal probate.
 - i. A formal proceeding may be used to probate a will, to block an informal proceeding, or to secure a declaratory judgment of intestacy.
 - ii. Formal proceedings become final if not appealed.
 - d. No proceeding, formal or informal, may be initiated more than 3-years from the date of death [UPC §3-108].
 - i. If no will is probated within 3-years after death, the presumption of intestacy is conclusive.
 - ii. The three-year statute of limitations of the UPC changes the common law, which permits a will to be probated at anytime, perhaps many years after the testator's death.
5. *Time for Contest:* the time for contesting probate of a will is dependent upon a statute in the particular jurisdiction. The period of limitations for filing a will contest is ordinarily jurisdictional and is not controlled by any fact not provided by statute.

- a. If the constitutional and statutory requirements for notice are complied with, when the period of limitation passes, the probate court no longer has jurisdiction to revoke probate and probate of a will thereby becomes final.
- b. In Wyoming, a will must be challenged within 3-months.
- c. Notice of probate can be given by:
 - i. publication;
 - ii. by certified mail to certain persons; and
 - iii. by actual notice.
 **After notice is given, the will can *only be contested within 30-days* of actual notice, and 3-months after publication, whichever is shorter.

6. *Barring Creditors of the Decedent*: every state has a statute requiring creditors to file claims within a specified time period; claims filed thereafter are barred. These are called “nonclaim statutes.” There are two basic forms of nonclaim statutes:

- a. they bar claims not filed within a relatively short period after probate proceedings are begun (generally two to six months); or
- b. whether or not probate proceedings are commenced, they bar claims not filed within a long period after the decedent’s death (generally one to five years).
- c. **G/R**: the due process clause requires that known or reasonably ascertainable creditors receive actual notice before they are barred by a short-term probate statute running from the commencement of probate proceedings [*Tulsa Professional Collection Services, Inc. v. Pope* 485 U.S. 478 (1988)].
- d. A one-year statute of limitations running from the decedent’s death, barring creditors filing claims thereafter, is believed to be constitutional even without notice to creditors. Most states have such a statute; *see* UPC §3-803.

C. **G/R**: Supervising the Representative’s Actions: in many states the actions of the personal representative in administering the estate are supervised by the court. This supervision can be time consuming and costly.

- 1. The court must approve the inventory and appraisal, payment of debts, family allowance, granting options on real estate, sale of real estate, borrowing of funds and mortgaging of property, leasing of property, proration of federal estate tax, personal representative’s commissions, attorney’s fees, preliminary and final distributions, and discharge of the personal representative.
- 2. In some states, the practice is for the personal representative to handle all these matters informally without court order, provided the interested parties are adults and will approve the fiduciary’s account and release the fiduciary from liability.
 - a. If minors are involved, judicial supervision is necessary.
- 3. The UPC, authorizes unsupervised administration as well as supervised administration.
 - a. If any interested party requests supervision, the probate court supervises the personal representative; but if no party demands it, administration is independent of the court.
 - b. Under independent administration, after appointment, the personal representative administers the estate without going back to court. The representative has broad powers of a trustee in dealing with the estate property and may collect assets, pay creditors, continue any business of the decedent, and distribute the estate—all without court approval [UPC §3-715].
 - c. The estate may be closed by the personal representative filing a sworn statement that he has published notice to creditors, administered the estate, paid all claims, and sent a statement and accounting to all known distributees [UPC §3-1003].

d. If at any time during independent administration an interested party is dissatisfied with the personal representatives actions, he may compel the representative to obtain court supervision [UPC §3-501].

D. G/R: Closing the Estate: the personal representative of the estate is expected to complete the administration and distribute the assets as promptly as possible. Even if all the beneficiaries are amicable, several things that must be done may prolong administration.

1. Creditors must be paid.
2. Taxes must be paid and tax returns audited and accepted by the appropriate tax authorities.
3. Real estate or sole proprietorship may have to be sold.
4. Judicial approval of the personal representatives action is required to relieve the representative from liability, unless some statute of limitations runs upon a cause of action against the representative.
5. The representative is not discharged from fiduciary duties until the court grants discharge.

**The MECHANICS of the probate procedure should not be on the exam.

§2: INTESTACY: AN ESTATE PLAN BY DEFAULT

§2.1: THE BASIC SCHEME

I. INTRODUCTION

A. Terminology: Intestacy statutes commonly use the following terminology:

1. Decedent: the dead person;
2. Descendants or Issues: kids, grandkids, and so on strait *down* the line;
3. Ancestors: parents, grandparents, and so on strait *up* the line;
4. Collateral Kin: everyone else who is not strait up or down the line (e.g. aunts, uncles, cousins, nieces, nephews, etc...).

B. G/R: Distribution of Probate Property: the distribution of probate property of a person who dies without a will, or whose will does not make a complete disposition of the estate is governed by the statute of descent and distribution of the pertinent state.

1. Generally, the law of the State where the decedent was domiciled at death governs the disposition of personal property; and
2. the law of the State where the decedent's real property is located governs the disposition of such real property.
3. *Policy*: the policy of the intestate statutes is to carry out the intent of the decedent by mimicking reality as closely as possible.

C. G/R: Parents as Heirs: under all intestate succession statutes, parents are not heirs if the decedent leaves a child.

1. *Policy*: the policy behind this is that a parent is supposed to care for their children, and not vice versa; in addition, the economic reality of creating human capital occurs by passing money downwards.

D. W.S. §2-4-101: Rule of descent; generally; dower and curtesy abolished:

- (a) Whenever any person having title to any real or personal property having the nature or legal character of real estate or personal estate undisposed of, and not otherwise limited by marriage

settlement, dies intestate, the estate shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts, in the following course and manner:

(i) If the intestate leaves husband or wife and children, or the descendants of any children surviving, one-half (1/2) of the estate shall descend to the surviving husband or wife, and the residue thereof to the surviving children and descendants of the children, as hereinafter limited;

(ii) If the intestate leaves husband or wife and no child or descendants of any child, then the real and personal estate of the intestate shall descend and vest in the surviving husband or wife.

(b) Dower and the tenancy by curtesy are abolished and neither husband or wife shall have any share in the estate of the other dying intestate, save as herein provided.

(c) Except in cases above enumerated, the estate of any intestate shall descend and be distributed as follows:

(i) To his children surviving, and the descendants of his children who are dead, the descendants collectively taking the share which their parents would have taken if living;

(ii) If there are no children, nor their descendants, then to his father, mother, brothers and sisters, and to the descendants of brothers and sisters who are dead, the descendants collectively taking the share which their parents would have taken if living, in equal parts;

(iii) If there are no children nor their descendants, nor father, mother, brothers, sisters, nor descendants of deceased brothers and sisters, nor husband nor wife, living, then to the grandfather, grandmother, uncles, aunts and their descendants, the descendants taking collectively, the share of their immediate ancestors, in equal parts.

D. **UPC §2-101: Intestate Estate:**

(a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as proscribed in this code, except as modified by the decedent's will.

(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his intestate share.

E. **UPC §2-103: Share of Heirs Other than Surviving Spouse:** any part of the intestate estate not passing to the decedent's surviving spouse under Section 2-102, or the entire estate if there is no surviving spouse, passes in the following order to individuals designated below who survive the decedent:

(1) to the decedent's descendants by representation;

(2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;

(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;

(4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or

descendant of a grandparent on either the maternal or paternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

E(1). **UPC §2-103: Share of Heirs Other than Surviving Spouse**: any part of the intestate estate not passing to the dead guy's surviving spouse under §2-102 [see below], or the entire estate if there is not surviving spouse, passes in the following order to persons who survive the decedent:

(1) ***Kids***: to the dead guy's kids by representation (see below);

(2) ***No Kids THEN Parents***: if there is no surviving kids, equally to the dead guy's parents if both are alive (or if one parent is dead to the surviving parent);

(3) ***No Kids or Parents THEN Brothers and Sisters***: if there is no surviving kids or parents, then to the brothers and sisters by representation;

(4) ***No Kids, Parents, Brothers or Sisters THEN***:

1. ½ of the estate goes to:

a. the paternal grandparent, if alive, if *not THEN*;

b. to the aunts and uncles, in alive, if *not THEN*;

c. to the cousins taking by representation.

2. Other ½ goes to:

a. to the maternal side in the same manner.

3. If there is no surviving grandparents, or aunts or uncles on one side, then to the other side in the same manner.

F. **UPC §2-105: No Taker**: if there is no taker under the provisions of this Article, the intestate estate passes to the state.

G. **G/R: Constitutional Considerations**: Intestate succession laws are acts of the states, not of individuals. Under the 14th Amendment state must act so as to provide citizens with due process and equal protection of the laws.

1. This means, among other things, that intestate succession statutes must bear a rational relationship to a permissible end, or state objective.

II. SHARE OF SURVIVING SPOUSE

A. **Generally**:

1. ***Primary Policy***: the primary policy involved in framing an intestacy statute is to carry out the probable intent of the average intestate decedent.

2. Under current law, the single most common statutory provision is to give the surviving spouse a one-half share if only one child or issue of one child survives, and a one-third share if more than one child or one child and issue of a deceased child survive.

3. The UPC is considerably more generous than are the current provisions for the surviving spouse under most state intestacy laws.

a. Under the UPC §2-102, if all of the decedent's descendants are also descendants of the surviving spouse, and the surviving spouse has no other descendants, the surviving spouse takes the entire estate to the exclusion of the decedent's descendants.

i. Giving everything to the spouse and nothing to the children, under these circumstances, is a novel statutory solution.

ii. The provisions under subsection (3) and (4) giving the surviving spouse less when either spouse has a child by previous marriage is also unusual.

4. If there is no descendant, most states provide, as does the UPC, that the spouse share with the decedent's parents, if any. If no parent survives, the spouse usually takes all to the exclusion of

collateral kin, as the UPC provides, but in a number of states the spouse shares with brothers and sisters and their descendants.

B. UPC §2-102: Share of Spouse: the intestate share of a decedent's surviving spouse is:

(1) the *entire estate if*:

(i) no descendant or parent of the descendant survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first \$200,00, plus three-fourths (3/4) of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first \$150,000, plus one-half (1/2) of any balance of the intestate estate, if all decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first \$100,000, plus one-half (1/2) of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

B(1). UPC §2-102: Share of the Spouse:

(1) the ENTIRE ESTATE IF:

(i) no kids or parents left living at the time of death;

(ii) all of the dead guy's kids are also kids of the surviving spouse (and the surviving spouse has no other kids).

(2) 1st \$200K [plus 3/4 of any balance] if the dead guy has no kids but still has parents alive.

(3) 1st \$150K [plus 1/2 of any balance] if:

--all the dead guy's kids are also kids of the surviving spouse; AND

--the surviving spouse has 1 or more kids from a different person.

(4) 1st \$100K [plus 1/2 of any balance] if:

--dead guy has one or more kids from different person.

C. WS §2-4-101(a)(i): if dead guy leaves spouse and kids (or grandkids) 1/2 of the estate goes to surviving spouse and other 1/2 goes to kids or grandkids.

C(1). WS §2-4-101(a)(ii): the surviving spouse gets THE ENTIRE ESTATE IF: dead guy has no kids or grandkids.

D. G/R: Marriage Requirement: to recovery an intestacy statute, the surviving *wife* must have been legally married to the decedent.

1. *Exception*: Hawaii and Vermont, do not require persons to married if they establish reciprocal beneficiary status, which allows for some rights by unmarried persons (it is more like joint tenancy or tenancy by the entirety than intestacy).

a. Civil Unions: Vermont has a civil union statute which allows same sex couples to be obtain the "status" of a married couple and enjoy all the same rights of marriage as married persons. The intestacy statutes in Vermont apply to civil unions.

E. G/R: Termination of Marriage: in most jurisdictions, spouse remain spouses until the final dissolution of the marriage, i.e., the final divorce decree is entered.

1. *Caveat*: some states allow for one spouse to "abandon" another, and if abandoned for the allotted statutory period. The marriage is considered terminated.

- F. **G/R: Simultaneous Death**: when a person dies simultaneously with his or her devisee then:
1. **Classical Rule**: at common law, a person could only inherit or be a beneficiary under a will if that person survived the decedent for **at least one instance**.
 - a. The question at common law then, was which person predeceased the other.
 - b. Evidence would have to be entered, and then once a determination was made the spouse's heirs or devisees who survived longer would take.
 2. **USDA**: under the Uniform Simultaneous Death Act, where there is *no sufficient evidence* of the order of deaths, the beneficiary is deemed to have preceded the benefactor.
 - a. The Act further provides that if two joint tenants, A and B, dies simultaneously, one half of the property is distributed as if A survived and one-half is distributed as if B survived.
 - i. The same rule is applied to property held in tenancy by the entirety or community property.
 - ii. In other words, where title to property depends on the order of death, and there is **no sufficient evidence** of who died first, the property is divided as each had survived the other (i.e. split the property then divide).
 - b. UPC §§ 2-104 and 2-107 provide that an heir or devisee of a life insurance beneficiary who fails to survive by 120-hours (5-days) is deemed to have predeceased the decedent.
 - a. The USDA also requires survivorship by 120-hours, paralleling the UPC.
 - c. Under both the UPC and the USDA a claimant must establish that survivorship by 120-hours by **clear and convincing evidence** (as opposed to the sufficient evidence standard).
 3. Wyoming has enacted the USDA.

F(1). **G/R: Determining Death**: dual standards for determining when legal death occurs are used [use as counterarguments if in a jurisdiction that has not adopted the USDA]:

1. **Brain Death**: [modern standard] a person is legally dead on the date that he is medically determined to have sustained brain death, rather than when his heart stopped functioning.
 - a. The widely accepted characteristics of brain death include:
 - i. unreceptivity and unresponsivity to intensely painful stimuli;
 - ii. no spontaneous movement or breathing for at least an hour;
 - iii. no blinking, swallowing, and fixed and dilated pupils;
 - iv. flat EEGs taken twice with at least a 24-hour intervening period; and
 - v. absence of drug intoxication or hypothermia.
 - b. The court does not have an established criteria for brain death, but rather, the court merely requires that the diagnosis of death under either standard be made in accordance with **usual and customary standards of medical practice**.
2. **Common Law Standard**: in most instances death can determined based upon the irreversible cessation of circulatory and respiratory functions.
**[Janus v. Tarasewicz]*.

F(2). **G/R: Survivorship Burden of Proof**: survivorship is a question of fact, which must be proven by a preponderance of the evidence by the party whose claims depends on survivorship (i.e. the person claiming money has the burden of proof).

1. In cases where the question of survivorship is determined by the testimony of *lay witnesses*, the burden of sufficient evidence may be met by evidence of a positive sign of life in one body and the absence of any such sign in the other.

2. In cases where death is monitored by *medical professionals*, their testimony as to the usual and customary standards of medical practice will be highly relevant when considering what constitutes a positive sign of life and what constitutes the criteria for determining death.

*[*Janus v. Tarasewicz*].

F(3). **G/R:** if a person does not like the way the law treats simultaneous death, they can always change it in their will.

G. Diagrams and Examples:

III. SHARES OF DESCENDANTS

A. **G/R:** Shares of Descendants: in all jurisdictions in this country, after the spouse's share is set aside, children and issue of deceased children take the remainder of the property to the exclusion of everyone else; hence, in every jurisdiction, after the spouses' share is set aside the descendants (the kids) and their descendants (the grandkids) are the one's that take the estate by representation.

1. When one of several children had died before the decedent, leaving descendants, all states provide that the child's descendants shall represent the dead child and divide the child's shares among themselves.
2. Son-in-laws, and daughter-in-laws, are excluded as intestate successors in virtually all states.
3. Wyoming has representation built into its intestacy statute in **W.S. §1-4-101(a)(ii)**.

B. **G/R: Representation:** the principle upon which the issue (all persons descended from a common ancestor [offspring]) of the decedent take or inherit the share of the estate which their immediate ancestor would have taken or inherited, if living. The taking or inheritance *per stripes*.

1. **Modern Per Stirpes:** In most American jurisdictions, representation is done the following way: the states divide the decedent's estate into shares at the *generational level nearest* the decedent where one or more descendants of the decedent are alive and provide for representation of any deceased descendant on that level by his or her descendants.

a. Thus, representation is used only to bring the surviving descendants of the deceased descendants (i.e. grandkids) upon to the level where a descendant is alive. This system is called the modern *American per stripes* method, inasmuch as it is followed in a substantial majority of American jurisdictions.

b. **Thus, in modern per stirpes the generation with all people dead are skipped and equal division begins in the generation with the first living person.

2. **Strict Per Stirpes:** the English per stirpes (*strict per stirpes*) is to divide the property into as many shares as there are living children of the designated person and deceased children who have descendants living.

1. The child of each descendant represent their deceased parent and are moved into his position beginning at the *first generational level* below the designated person.

2. **In strict per stirpes equal divisions always starts at the generation closest to the dead guy. Thus, you always start with the first generation no matter what.

3. **Modern Per Capita Per Stirpes [UPC §2-106]:** the initial division of shares is made at the level where one or more descendants are alive, but the shares of the deceased persons on that level are treated as one pot and dropped down and divided equally among the representatives on the next generational level.

a. The per capita at each generation system is applied to the descendants of the parents and grandparents of the decedent, when they are entitled to take, as well as to the descendants of the of decedents. [UPC §2-106(c)].

b. **Thus, under the UPC you start in the generation with the first live guy, and divide equally at that level. Then divide combine what the dead guys would get, and put it into the pot and divide equally between the next generational level with a live persons. And keep doing this until the pot is all gone.

i. In other words, it is per capita at each generational level because you do a per capita division at each generational level. Hence, go to the first generational level with a live guy and divide equally (even among the dead); then put all of the money left over (because of the dead guy's shares) into a pot, and then divide equally again the next generational level with a live guy.

4. **Wyoming's method [W.S. §2-4-101(c)]:** it appears that Wyoming uses a strict per stirpes, however, it is hard to interpret what "their parents" and "collectively" means.

C. **UPC §2-106: Representation:**

(b) [dead guy's kids]: if a dead guy's intestate estate passes by *representation* to his kids, the estate is divided into equal shares between:

(i) surviving kids in generation with 1-surviving kid; AND

(ii) dead kids in same generation who left kids.

--Each kid in generation one gets one share, *THEN*

--what is left is combined and divided between grand kids.

D. **G/R:** Negative Inheritance: UPC §2-101(b) authorizes a negative will; thus, the barred heir is treated as if he disclaimed his intestate share, which means he is treated as having predeceased the intestate.

1. Wyoming's statute is silent on whether there can be negative disinheritance.

E. **DIAGRAMS AND EXAMPLES**

IV. SHARES OF ANCESTORS AND COLLATERALS

A. **G/R:** ancestors and collateral kin never share if there are descendants (kids or grandkids); hence, in order to find collateral takers you have to look up and out of the family tree [in most states, parents take before brothers and sisters].

1. Thus, it is only when there are no descendants or surviving spouse that the collateral kin take.

a. In most states, the mother and father take as a class; brothers and sisters (and their descendants) take as a class;

b. In Wyoming, mothers, fathers, brothers and sisters are all *in the same class* (which is different from most states).

a. In addition, aunts and uncles (and their descendants) AND grandfather and grandmother are ALL in the same class, which creates huge distribution problems. The root generation is determined by strict per stirpes.

B. **G/R:** Shares of Ancestors and Collaterals: when the intestate is survived by a descendant, the decedent's ancestors and collaterals do not take.

1. When there is no descendant, after deducting the spouse's share, if any, the rest of the intestate's property is usually distributed to the decedent's parents, as under the UPC.

2. If there is no spouse or parent, the decedent's heirs will be more remote ancestors or collateral kindred.

a. *Collateral Kin:* all persons who are related by blood to the decedent but who are not descendants or ancestors are called collateral kindred.

b. *First-in-Line Collaterals:* descendants of the decedent's parents, other than the decedent and the decedent's issue, (e.g. brothers and sisters) are called first in line collaterals.

c. *Second-Line Collaterals:* descendants of the decedent's grandparents, other than the decedent's parents and their issue, (e.g. aunts and uncles) are called second-line collaterals.

3. **G/R:** if the decedent is not survived by a spouse, descendant, or parent, in all jurisdictions intestate property passes to brothers and sisters and their descendants.

a. The descendants of any deceased brothers and sisters (e.g. nieces and nephews) take by representation in the same manner as the decedent's descendants.

4. **G/R:** if there are no first in line collaterals, the states differ as to who is the next in the line of succession:

a. *Parentelic System:* under the parentelic system, the intestate estate passes to grandparents and their descendants, and if none to great-grandparents and their descendants, and if none to great-great-grandparents and their descendants, and so on down each line (parentela) descended from an ancestor until an heir is found.

i. In other words, go up to the grandparents look for someone that is alive, if none, go up to the great-grandparents, look for someone that is alive, until someone is found and when found they are the taker.

ii. This is the system Wyoming uses.

b. *Degree of Relationship System:* under the degree of relationship system, the intestate estate passes to the closest of kin, counting degrees of kinship. To ascertain the degree of relationship to the decedent to the claimant you count the steps (counting one for each generation) up from the decedent to the nearest common ancestor of the decedent

and the claimant, and then you count the steps down to the claimant from the common ancestor. The total number of steps is the degree of relationship.

i. This method uses the table of consanguinity [p. 92 text].

(A) To use this table, look at the deceased person, count up and then down, and if it is a first cousin it is the Fourth degree.

--The person found with the degree closest to the deceased takes.

G. **G/R: Half-Bloods**: the rule excluding half-bloods from inheritance has been abolished in America.

1. In a large majority of states, a relative of half-blood (e.g., half-sister) is treated the same as a relative of whole-blood. This is the position of the **UPC § 2-107**.

2. In a minority of jurisdictions, a half-blood is given a half share.

3. In a few states, a half blood only takes when there are no whole-blood relatives of the same degree.

4. **W.S. §2-4-104**: persons of half-blood inherit the same share they would inherit if they were whole blood, but stepchildren and foster children and their descendants do not inherit.

H. **G/R: Illegitimate Persons**: the Supreme Court has declared many illegitimacy statutes unconstitutional. The basic standards the Court uses is:

1. *Intermediate Scrutiny*: is used for discriminatory classifications based on illegitimacy because it is immutable trait and it is wrong to punish the child for the irresponsible liaisons beyond the bond of marriage.

2. **g/r**: laws that provide a benefit to all marital children, but not to non-marital children are *per se* unconstitutional.

3. **g/r**: laws that provide a benefit to some non-marital children, while denying the benefit to other non-marital children are evaluated on a case-by-case basis under intermediate scrutiny.

H(1). **W.S. § 2-4-102: Rule of Descent; Illegitimate Person**:

(a) The rule of descent of all property, real and personal, of any illegitimate person dying intestate in this state and leaving property and effects therein, shall be as follows:

(i) to the widow or surviving husband and children as the property and effect of other person in like cases;

(ii) if no children, then the whole estate vests in the surviving husband or widow.

(iii) if no children or surviving spouse, then the estate will vest ½ in the mother; and ½ in her children (taking the share of their deceased parent);

(iv) if none of the above, to the next of kin of the mother, in the same manner as a legitimate person.

**This statute completely cuts off the father's share in the illegitimate person's estate.

** The statute does not define an "illegitimate person"; hence, it is not known whether a person who establishes a parent child/relationship under the UPA would enable the father's side to inherit.

I. DIAGRAMS AND EXAMPLES:

§2.2: TRANSFERS TO CHILDREN

I. MEANING OF CHILDREN

I(A). Posthumous Children

A. **G/R:** Posthumous Children: where, for purposes of inheritance or of determining property rights, it is to the child's advantage to be treated as in being from the time of conception rather than from the time of birth, the child will be so treated if born alive.

1. Courts have created a rebuttal presumption that the normal period of gestation is 280-days (ten lunar months).
 - a. If the child claims that conception is dated more than 280-days the burden of proof is usually on the child.
2. **UPA §4:** The Uniform Parentage Act, §4 presumes that a child born to a woman within 300-days (rather than 280 days) after the death of her husband is a child of that husband.
3. A posthumous child is a child conceived before and born after the death of its father.

B. **W.S. §2-4-103:** Posthumous Persons: persons conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent.

I(B). Adopted Children

A. **Generally:** adoption was not part of the common law; and hence, it owes its existence to statutory enactments throughout the nation.

1. **Domiciliary Rule:** the adoption of laws of the state where the adopted person is domiciled when he dies determine his intestate succession.
2. If the adoption statutes do not confer a certain right, do not assume that one exists.

B. **G/R:** Right to Receive Property: the right to receive property by devise or descent is not a natural right but a privilege granted by the State.

1. Every State possesses the power to regulate the manner or term by which property within its dominion may be transmitted by will or inheritance and to prescribe who shall or shall not be capable of receiving property.
2. A state may deny the privilege altogether or may impose whatever restrictions or conditions upon the grant it deems appropriate.
*[*Hall v. Vallandigham*].

C. **G/R:** Adoptive Persons Rights: family law generally entitles an adopted person to all the rights and privileges of a natural child insofar as the adoptive parents are concerned.

1. *Caveat*: adoption does not confer upon the adopted child *more* rights and privileges than those possessed by a natural child. [Except: in dual inheritance states].
 - a. To construe an adoption statute so as to allow dual inheritance would bestow upon an adopted child a superior status.
 - i. In some states, dual inheritance is expressly disavowed by statute.
*[*Hall v. Vallandigham*].

D. **G/R:** State Approaches to Adoption: there are three basic statutory schemes for treating the inheritance rights of an adopted child, which vary considerably from jurisdiction to jurisdiction.

1. Clean-Cut Severance States: in some states, an adopted child inherits *only from* adoptive parents and their relatives; that is, the adopted kid becomes the kid of the new parent and the adoption is considered a “rebirth” into a completely different relationship.

a. *Policy*: this method may be better from a policy standpoint because in most instances adoptive kids cannot find their new parents, and adoption agencies do not like it when persons try and find out who their rightful parents are.

2. Dual Inheritance States: in other states, an adopted child inherits from *both adoptive parents AND natural parents and their relatives*;

3. UPC Approach: under the UPC, and in some states, an adopted child inherits from adoptive relatives and also from natural relatives *if* the child is adopted by a stepparent.

E. **W.S. 2-4-107: Determination of Relationship of Parent and Child**:

(a) If for purposes of intestate succession, a relationship of parent and child shall be established to determine succession, by through or from a person:

(i) An adopted person is the child of an adopting parent and of the natural parents for *inheritance purposes only*. The adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and natural parent;

(ii) An adopted person *shall* inherit from all other relatives of an adoptive parent as though he was the natural child of the adoptive parent and the relatives shall inherit from the adoptive person’s estate as if they were his relatives.

(iii) In cases not covered by paragraph (i)...a person born out of wedlock is a child of the mother. That person is also a child of the father, if the relationship of parent and child has been established under the UPA.

*This creates a **dual inheritance system in Wyoming**, in which an adoptive person can inherit from the natural parents and the adoptive parents and their relatives.

**However, it does not appear that the natural parents can inherit from the adoptive kid; thus, Wyoming has a downward flowing dual inheritance system.

F. **UPC §2-113: Individuals Related to Decedent Through Two Lines**: an individual who is related to the decedent through two lines of relationship is entitled to **only a single share** based on the relationship that would *entitle the individual to the larger share*.

G. **UPC §2-114: Parent and Child Relationship**:

(a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, and from a person, an **individual is the child of his natural parents**, regardless of their marital status. The parent and child relationship may be established under the UPA.

(b) An **adopted individual is the child of his adopting parent** or parents and NOT of his natural parents, *but* adoption of the child by the spouse of either natural parent *has no effect on*:

(i) the relationship between the child and that natural parent, or

(ii) the right of the child or a descendant of the child *to inherit* from or through the other natural parent.

(c) Inheritance from or through a child by either natural parent or his kindred is precluded *unless* that parent has openly treated the child as his, and has not refused to support the child.

*Under subsection (b), an adoptive kid inherits from adoptive relatives and also from natural relatives if the child is adopted by a stepparent.

Parents can also inherit from their adopted kid **only if they’ve openly treated them as their kid and paid child support.

H. **G/R:** Denial of Downward Flowing Inheritance for Adopted Persons: some courts have held that denial of an adopted person's right to inherit *through* the adoptive parents from ancestors or collateral kin of the adoptive parents as unconstitutional because it is an irrational distinction, denying equal protection of the laws to adopted persons [*MacCallum v. Seymour*].

I. **G/R:** Children Born by Reproductive Technology: the courts are not in agreement on who is the mother or father, and the rights of children born by reproductive technology (e.g. surrogate motherhood).

1. **W.S. § 14-2-103(a)**: provides that if a woman is artificially inseminated with semen donated by a man who is not her husband, the husband is treated as the natural father if he consents. [subsection (b) provides that the donor is treated as not being the natural father].

J. **G/R:** Adult Adoption: only a few adoption or inheritance statutes draw any distinction between adoption of a minor and adoption of an adult.

1. Occasionally, the adoption of an adult may be useful in preventing the contest of a will. The only persons who have standing to challenge the validity of a will are those persons who would take if the will were denied probate.
 - a. If the testator adopts a child, testator's collateral relatives cannot contest the will, since they now can inherit nothing by intestacy.
 - b. Hence, if a person wishes to leave property to a friend, under some circumstances it might be wise to adopt the friend as a child.
2. Adult can be adopted in most jurisdictions, after the age of majority, without the natural parents consent.

K. **G/R:** Same Sex Partners and Adopted Children: generally, an adopted child by same sex parents, one which conceived the child through artificial insemination, and the other who adopts the child, can both obtain post-adoptive rights and therefore, the adopted child can inherit through both mothers [*Adoption of Tammy*].

I(C). Nonmarital Children

A. **Generally**: at common law, a child born out of wedlock could not inherit from anyone.

1. The Supreme Court has held unconstitutional, as a denial of equal protection, statutes denying a nonmarital child inheritance rights from his father.
 - a. The Court held that state discrimination against nonmarital children was a quasi-suspect class, and therefore, the state must demonstrate that any classification based on illegitimacy is *substantially related to a State interest*.
 - i. A valid state interest is obtaining reliable proof of paternity; however, a total disinheritance from the father is not related to this interest.
- *[*Trimble v. Gordon*].
2. In the wake of *Trimble* most States reformed their intestacy statutes [some, like Wyoming adopting the UPA] to liberalize inheritance by nonmarital children. Most permit paternity to be established by evidence of:
 - a. the subsequent marriage of the parents;
 - b. acknowledgement by the father;
 - c. by an adjudication during the life of the father; or
 - d. by clear and convincing evidence after the father's death.

B. **G/R: Definition:** “Parent and Child relationship” means the legal relationship existing between a child and the child’s natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations [W.S. §14-2-101(a)].

C. **G/R: Mechanics of Establishing Paternity: UPA Presumptions:** [W.S. §§ 2-4-102; 2-4-105]: the UPA sets up presumptions, which deem that a person is a parent, then that person is presumed to be the parent, *unless* he or someone else rebuts the presumption. There are four main presumptions:

1. **Marital Presumption:** [14-2-102(a)(i)-(ii)]: during or within 300-days; or before a voluntary promise:

a. If the mother or father challenges the marital presumption with a reasonable time, or 5-years after the child’s birth; if they fail to do so they are presumed to be the parent.

i. The Wyoming Supreme Court has held that the reasonable time standard is that the person has to challenge the paternity upon discovering that it is wrong; hence, the 5-year period is the ceiling and not the floor (i.e. cannot be challenged after 5-years).

ii. Even if a person brings the suit within the time period, the courts are loath to allow a person to challenge paternity through genetic testing.

b. The child can have the marital presumption set aside within 3-years after the age of majority; hence, he must do it by age 21.

i. The State also has the ability have the marital presumption set aside within 3-years after the person reaches the age of majority.

c. If any other man (including the ones listed below in the following presumptions) wants to come in and establish that he is the rightful father, and establish the parent-child relationship, he *must* do it within 6-months of the child’s birth (i.e. right away).

i. If the other man does not establish paternity within 6-months, he will not be able to establish paternity.

ii. If the man loses the proceeding, he is required to pay for the entire proceeding.

2. **Holding Out:** [14-2-102(a)(iv)]: while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural father. This gives rise to a presumption of paternity.

a. That statute says the father can bring an action to rebut or establish paternity *anytime* [WS 14-2-104(b)].

3. **Formal Acknowledgement of Paternity:** [WS 14-2-102(c)]: the parents, after the child is born (in the hospital) sign affidavits saying that are the parents. This presumption is different from all the other presumptions because:

a. After signing, the can withdraw the acknowledgement only within the next 60-days; and

b. once the 60-day period is passed, the presumption becomes irrebuttable (even if there is clear and convincing evidence that that person is not the real father).

c. **Exception:** the only way to get around this irrebuttable presumption is to show that one of the signatories signed through duress, fraud, or mistake.

i. The Wyoming Supreme Court allowed this presumption to be rebutted after the 60-day period where a women was pregnant when she met a man and told him that he got her pregnant then he signed the affidavit—fraud.

ii. There have been no cases of duress or mistake, but they are equitable contract doctrines and difficult to prove.

4. **Genetic Match Presumption: [14-2-105]:** if, after genetic testing, the man is 97% or more statistically probable to be the child's father, then the only way paternity can be set aside is by *clear and convincing evidence*.

- a. In action to establish paternity, the action if brought by the state or the child must be brought no later than 3-years after he reaches majority (i.e. 21-years old); or
- b. If brought by any other person it must be brought within five years after the child is born.

C(1). UPA Presumptions Chart:

<u>PRESUMPTIONS</u>	<u>ACTION</u>	<u>TIME</u>
marital [§102]	establish challenge	anytime ch/s = maj. + 3 m/f = RT/ 5 yrs. any man = 6 mons.
Holding Out [§102]	establish challenge	anytime anytime
Formal Acknowledge [§102]	establish challenge	anytime signatures = 60days anyone else = never
Genetic or [§105] No presumptions	establish	ch/s = maj. + 3 yrs. anyone else = 5 yrs.

Key: ch = child; s = state; m = mother; f = paternal father; RT = reasonable time;

C(2). The analysis under the UPA:

1. Is it possible for the child to establish paternity:
 - a. The kid must assert that a person, other than his purported father, is his father before he is 21.
 - b. The holding out [the man must have held the kid out as his own] presumption is the only one, which can be established by the kid anytime.
 - c. So when the putative father dies, it is usually hard for the child to establish paternity.

D. G/R: UPA Effect on Probate Matters: [WS §14-2-105(b)]: the UPA is subject to the probate code, and has no effect on the probate code (such as extending the time when a right of inheritance or right to succession may be asserted); hence, because the probate code requires paternity to be established within 10-years after the decedent's death, the child trying to establish paternity also has to deal with that time limit.

E. G/R: Nature of Rights in Semen: semen is not to be considered "persons" under the law; and an interest in semen is not an interest under general property law either; rather, semen occupies an interim category that entitles them to special respect because of their potential for human life. It follows that

any interest that a person has in sperm is not a true property interest; however, they do have an interest in the nature of ownership to the extent that they have decision making authority concerning the disposition of the sperm, within the scope of the policy set by law.

1. Thus, a person can have an interest in sperm, in the nature of ownership, to the extent that a person has decision-making authority as to the use of sperm for reproduction.

a. Such an interest is sufficient to constitute property under the probate code [in California].

2. The court held that the sperm itself was not a property interest, in and of itself, but that there is a property interest in *deciding how to distribute genetic material*. Thus, it is not a property right in the sperm itself, but an interest in deciding what happens under the will, and a person has a right to control the destiny of his own genetic material.

1. The gamete provider has a right to decided how distribute his own sperm [i.e. such as leaving vials of it for a women to inseminate herself with after death] via will and the State cannot interfere with that right.

*[*Hetch v. Superior Court*].

F. G/R: Post-Mortem Artificial Insemination: [Uniform Status of Children of Assisted Conception Act §4(b)]: an individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm is *NOT* a parent of the resulting child.

1. *Remember*, however, this is the default rule and can be changed via will, such a in *Hetch*.

II. ADVANCEMENTS

A. Generally: when a person dies intestate, one of the things the administrator has to do is determine if any lifetime gifts have been given to the heir.

1. At communal law, any lifetime gift to a child was *presumed* to be an advancement, in effect, a prepayment of the child's intestate share.

a. To avoid application of the doctrine the child had the burden of demonstrating that that the lifetime transfer was intended to be an absolute gift that was not to be counted against the child's share of the estate.

B. G/R: Common Law Presumption of Advancements: if any child wishes to share in the intestate distribution of a deceased parent's estate, the child must *permit* the administrator to include in the determination of the distributive shares the value of any property that the decedent, while living, gave the child by way of an advancement.

1. When a parent makes an advancement to the child and the child predeceases the parent, the amount of the advancement is deducted from the shares of such child's descendants if other children of the parent survive.

2. **Hotchpot:** If a gift is treated as an advancement, the donee must allow its value to brought into *hotchpot* if the donee wants to share in the decedents estate. The hotchpot takes the amount that was advanced to the child by gift and then is divided by the number of kids, before the kid with the advancement's amount is deducted from his share.

a. EX: Decedent leaves no spouse, three children and an estate worth \$50K. One daughter, A, received an advancement of \$10K.

i. To calculate the shares of the estate, the \$10K gift is added to the \$50K, and the total of \$60K is divided by 3 (the number of kids) = \$20K each.

ii. A has already received \$10 of her share; thus she receives only \$10K of the estate.

- iii. Her siblings each take \$20K
- iv. *Note:* if A had been given property worth \$34K, as an advancement, A **would not** have to give back a portion of this amount. A would just stay out of the hotchpot and decedent's \$50K would be divided equally between the other two kids.

C. **G/R:** Statutory Changes to the Common Law Rule: largely because of problems of proof associated with the donor's intent engendered by the advancements doctrine, many states have reversed the common law presumption of advancement. In these states a lifetime gift is presumed not to be advancement unless it is shown to have been intended as such.

1. In other states, like Wyoming, statutes declare that a gift is not an advancement unless it is declared as such in a contemporaneous writing signed by the decedent or acknowledged in writing by the heir to be an advancement. [**W.S. 2-4-108**].
2. Thus, under the modern statutes there is a *presumption against advancement*.

D. **W.S. §2-4-108(a):** Advancements Generally: any property that an intestate persons gives to an heir or descendant is an advancement only *if*:

1. declared by the intestate in a contemporaneous writing; OR
 - a. The decedent has to give a writing *contemporaneous* writing stating that the gift is an advancement, this means it **must be done at the time of delivery of the property**. It cannot be on the deathbed.
 2. Acknowledged in writing by the heir:
 - a. This writing by the heir does not have to be done contemporaneously.
- *This statute is very strict and demonstrates that the statute is intended to protect the heir more than the decedent.
**This statute is nearly identical to UPC §2-109, which has been criticized for almost doing away with the law of advancements, but most commentators generally think this is a good thing because of the inherent problems in trying to prove the decedent's intent.

E. **UPC §2-109:** Advancements:

(a) If an individual dies intestate as to all or a portion of his estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir [spouses, lineal descendants, and collateral kin] is treated as an advancement against the heir's intestate share **ONLY IF**:

- (i) the decedent declared in a **contemporaneous writing** or the heir **acknowledged in a writing** that the gift is an advancement; or
- (ii) the decedent's contemporaneous writing or the heir's written acknowledgement otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.

(b) For purposes of subsection (a), property advanced is **valued** as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, *whichever first occurs* [this means that if a trust is set up with a future interest and the donor dies, then the gift is valued at the time of death].

(c) If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise [this means the advancement is not taken into account in determine the share of the recipient's issue].

F. **POSSIBLE EXAM QUESTION:** Mable, a dying old lady, on her death bed, writes complying with all the formal requirements of a will, the “gift was an advancement to Molly.” Is this an advancement?

1. *Answer:* NO. This is not a will, it is a negative disinheritance, and therefore Mable died intestate and Molly gets her *entire* intestate share because it was not a “contemporaneous writing.”

G. **Diagrams and Examples:** [Computing Advancements]:

II(A). Transfers of an Expectancy

A. **G/R:** Heirs Apparent: in the eyes of the law no living person has heirs; the persons who would be the heirs of A, a living person, if A died within the next hour, are not the heirs of A but the *heirs apparent*.

1. These persons have a mere expectancy. This expectancy can be destroyed by A’s deed or will. It is not a legal “interest” at all.
2. Not being an interest, an expectancy cannot be transferred at law; however, a purported transfer of an expectancy, for adequate consideration, may be enforceable in equity as a contract to transfer if the court views it fair under all the circumstances.
 - a. Equity scrutinizes such transactions to protect prospective heirs from unfair bargains.
3. In other words, there are no heirs until a person dies. They are mere heirs apparent and have but an expectancy in property, which is not a legal interest, which means that it cannot be transferred.

III. MANAGING A MINORS PROPERTY

A. Generally: transfers to minors raise special problems because a minor does not have the legal capacity to manage property.

B. G/R: Guardians of the Person: a *guardian of the person* has responsibility for the minor child's custody and care. As long as one parent of the child is living, and competent, that parent is the natural guardian of the child's person.

1. If both parent's die while the child is a minor, and their wills do not designate a guardian, a court will appoint a guardian from among the nearest relatives.
 - a. This person may not be the person the parent's want to have custody of the child.
2. There are two principal reasons why a parent with a minor child should have a will:
 - a. to designate a guardian of the person in case both parents die during the child's minority; and
 - b. to deal with the management of the child's property because a guardian of the child has no authority to deal with the child's property.

C. G/R: Property Management of a Minor: there are three alternatives for property management of a minor's property available:

1. guardianship (or conservatorship);
2. custodianship (only available through creation of a will); and
3. trusteeship(only available through creation of a will).

C(1). Guardianship or Conservatorship: the guardian of property, who does not have title to the ward's [minor kid appointed to oversee] property, usually cannot change investments without a court order.

1. *Guardianship:* The guardian has the duty of preserving the specific property left the minor and delivering it to the ward at age 18, unless the court approves a sale, lease, or mortgage.
 - a. The guardian ordinarily can use only the income from the property to support the ward; the guardian has no authority to go into principal to support the ward, unless the court approves.
 - i. Strict court supervision over many of the guardian's acts is burdensome and time-consuming and each trip to court cost money. In some instances, the ward ends up with less property at the end guardianship than at the beginning.
2. *Conservatorship:* In many states, guardianship laws have been reformed. The guardian of the property has been renamed conservator and given "title as trustee" to the protected person's property, as well as the same investment powers as a trustee.
 - a. Appointment and supervision by the court is still required, but the conservator has far more flexible powers than a guardian, and only one trip to the courthouse annually for an accounting may be necessary.
 - b. Article V of the UPC is representative of modern conservatorship laws.

C(2). Custodianship: a custodian is a person who is given property to hold for a benefit of a minor under the state Uniform Transfers to Minors Act [UTMA].

1. To provide a convenient procedure for making gifts to minors, who have no legal capacity to manage or sell property, every state has enacted either the Uniform Transfers to Minors Act (1983) or its earlier version, the Uniform Gifts to Minors Act (1966).
2. Under these Acts, property may be transferred to a person (including the donor) as *custodian* for the benefit of a minor. A devise or gift may be made to "X" as custodian for the minor under the name of the state [Wyoming] UTMA," thereby incorporating the provisions of the state's uniform act and eliminating the necessity of drafting a trust instrument. Hence, the creation of a custodianship is quite simple.
3. **UTMA §14(a):** under the UTMA §14(a) the custodian has discretionary power to expend: for the minor's benefit so much or all of the custodial property as the custodian deems advisable for the benefit of the minor, without court order and without regard to:

- (i) the duty or ability of the custodian personally or any other person to support the minor; or
- (ii) any other income or property of the minor, which may be applicable or available for that purpose.

4. To the extent that the custodial property is not so expended, the custodian is required to transfer the property to the minor on his attaining the age of 21 or, if the minor dies before attaining the age of 21, to the estate of the minor.

5. **UTMA §12:** the custodian has the right to manage the property and to reinvest it. However, the custodian is a fiduciary and is subject to the standard of care that would be observed by a prudent person dealing with the property of another.

- a. The custodian is not under the supervision of a court—as is a guardian or conservator—and not accounting to the court annually or at the end of the custodianship is necessary.
- b. This is convenient for modest gifts of property, however when large amounts of property are involved, a trust is usually preferable.

C(3). Trust: the third alternative is to establish a trust for a child. A trust is the most flexible of property arrangements.

- 1. A testator can tailor the trust to specifically to the family circumstances and the testator's particular desires.
- 2. Under a guardianship or conservatorship the child must receive the property at age 18 or 21, respectively; but a trust can postpone possession until the donor thinks the child is competent to manage the property.

**Well deal with trust later in the outline.

C(4). Cash Gifts: if the testator wants to make a cash bequest to a beneficiary who is now a minor and does not want to create a custodianship or trust, the will can provide that any cash bequest to a minor beneficiary can be distributed to the beneficiary's parents.

D. G/R: Conservatorship in Wyoming: conservatorship in Wyoming is governed by Chapter 3 of the probate code—appointing a conservator:

- 1. Neither the guardian, nor the kids, have the right manage the child's property, they are not legally entitled to; therefore, if a guardian is appointed the court will have to supervise and it will be an onerous and time consuming process.
- 2. In a will, during the persons life, all that is needed to do in order to establish a custodianship is:
 - a. Declare “that any property held for the minor should be governed by the UTMA” and this will put into effect a custodianship, which will leave the court out of the process, unless the minor challenges the custodians action.
 - b. The custodian has to transfer all property back to the child when he turns 21; and the custodian can manage and invest money for the kids, but he is a fiduciary and held to the standard of professional fiduciary; therefore, if the screw up, they will be liable to the children.
 - i. Thus, a person should think hard before becoming a custodian.
 - c. The custodian may deliver or expend all for the child all the property he feels is advisable under the Wyoming statutes or expend as little as he feels is advisable, however, the court upon petition of an interested party, or the minor, may order them to pay out for the benefit of the minor.

3. *Magic Words*: the magic words for creating a custodian in Wyoming are “To Little Meglet (or however, insert name) as custodian of Meglet, under the UTMA of the Wyoming statutes.”
4. When a will or trust is created, all this can be changed, however, the donor (and the lawyer) must be careful not to violate the rules against perpetuities when they are giving property to their kids.

§2.3: BARS TO SUCCESSION

I. HOMICIDE

A. **Generally**: there are two bars to intestate succession, each of which will be dealt with in turn: homicide and disclaimer.

1. In a number of jurisdictions, statutes have been enacted which in certain instances, at least, prevent a person who has killed another from taking by descent or distribution from the person he has killed [*In Re Estate of Mahoney*].

B. **G/R**: Methods of Distribution in the Absence of a Statute: in those state that have no statute preventing a slayer from taking by descent or distribution from the estate of a victim, courts have taken three approaches:

1. *Title Passes to Slayer*: legal title passes to the slayer and may be retained by him in spite of his crime.
 - a. The reasoning for so deciding is that the devolution of property of a decedent is controlled entirely by statutes of decent and distribution;
 - b. *further*, that denial of inheritance to the slayer because of his crime would be imposing an additional punishment on his crime not provided by statute, and would violate the constitutional provision against corruption of the blood.
2. *Common Law Slayer Rule*: the legal title will not pass to the slayer because of the equitable principle that no one should be permitted to profit by his own fraud, or take advantage and profit as a result of his own wrong or crime.
3. *Constructive Trust Rule*: legal title passes to the slayer, but equity holds him to be a constructive trustee for the heirs or next of kin.
 - a. This disposition of the question presented avoids a judicial engrafting on the statutory laws of decent and distribution, for title passes to the slayer; but, because of the unconscionable mode by which the property is acquired by the slayer, equity treats him as a constructive trustee and compels him to convey the property to the heirs and next of kin of the deceased.
 - b. Hence, the only duty of the slayer as constructive trustee is to pass title to the next of kin or heirs of the decedent, as if the slayer predeceased the victim.
 - c. **Caveats to the Constructive Trust Rule**: the principle that one should not profit by his own wrongdoing must not be extended to every case were a killer acquires property from his victim as a result of killing:
 - i. *Insanity*: one who has killed while insane is not chargeable as a constructive trustee;
 - ii. *Vested Interest*: if the slayer has a vested interest in the property, it is property to which he would have been entitled if no slaying had occurred and *the principle to be applied* is that he should not be compelled to surrender property to which he would have been entitled if there had been no killing.

iii. *No Additional Criminal Penalties*: the doctrine of constructive trust is involved to prevent the slayer from profiting from his crime, but not an added criminal penalty.

iv. *Intentional Killings/Voluntary Manslaughter*: the application of the constructive trust doctrine where a devisee or legatee murders the testator, is **limited to** voluntary manslaughter and intentional killings (1st or 2nd degree murder).

(A) Voluntary manslaughter is an intentional and unlawful killing, with a real design and purpose to kill, even if such killing be the result of sudden passion or great provocation.

(B) Involuntary manslaughter is caused by an unlawful act, but not accompanied with any intention to take life.

(C) It is the intent to kill, which when accomplished, leads to the profit of the slayer and brings into play the constructive trust to prevent unjust enrichment of the slayer by intentional killing.

*[*Estate of Mahoney*].

C. **UPC §2-803**: provides that in a criminal case the killer is treated as having disclaimed the property.

1. Under the UPC disclaimer statute, UPC §2-801, the disclaimant is treated as predeceasing the decedent.

2. *Civil Cases*: [**§2-803(g)**]: §2-803(g) provides that a criminal conviction of felonious or intention murder is conclusive.

a. Acquittal, however, does *not preclude* the acquitted individual from being regarded as the decedent's killer under this statute.

i. In the absence of a conviction, upon application of an interested party, the court must determine whether, under a *preponderance of the evidence standard* (not the criminal law standard of beyond a reasonable doubt), the individual would be found criminally accountable for the killing.

(A) If so found, the individual is barred.

D. **W.S. §2-14-101**: Taking of Life Precludes one from Inheritance or Insurance Benefits: [this is different from the UPC statute in several ways]:

(a) No person who *feloniously takes* or procures another to take the life of another shall inherit from or take by devise or legacy from the deceased person any portion of his estate.

--The Wyoming Supreme Court has held that "feloniously takes" means intentional killing.

--This statute also says "procures another to take the life of another" so hit-men and hired killings are covered; whereas, the UPC contains no like provision, although the drafters of the UPC would probably imply one.

(b) No beneficiary of any policy of life or accident insurance or certificates of membership may be issued by any benevolent association or organization, payable upon the death of any person, who in a like manner takes or causes to procure the another to take the life of another shall take the proceeds of such policy or certificate.

--This rule applies to life insurance proceeds but does not say anything about other nonprobate transfers; such as, inter vivos trusts or gifts, joint tenancies, etc...).

--The Wyoming Supreme Court has also held that if the life insurance beneficiary killed the person, the policy does not go to the contingent beneficiary, it goes into the estate and is distributed to the heirs.

(c) In every instance mentioned in this section all benefits that accrue to any such person upon the death of a person whose life is taken shall become subject to distribution among the heirs of the deceased persons according to the rules of descent and distribution...[and the insurance company is not liable for if it distributes the property to a wrong person].

*It is not known whether this statute treats the slayer as predeceasing or disclaiming; it not clear, but the language of the statute seems to indicate that the slayer is not treated as predeceasing the victim.

II. DISCLAIMER

A. **G/R: Common Law Rule**: under common law, when a person died intestate, title to real and personal property passes to the decedent's heirs by operation of law. Any intestate successor cannot prevent title from passing to him or her.

1. Nonetheless, if the heir refused to accept (or more precisely keep) the common law treats the heirs renunciation as if title had passed to the heir and then from the heir to the next intestate successor.

2. On the other hand, if the person died *testate* the devisee can refuse to accept the devise, thereby preventing title from passing to the devisee.

a. Any gift, whether inter vivos or by will, requires acceptance by the donee.

*[*Troy v. Hart*].

B. **G/R: Statutory Changes to Common Law Rule**: in order to permit people to disclaim property without adverse tax consequences, and to eliminate the difference between disclaiming an intestate share and a devise, almost all states have enacted disclaimer legislation that provides that the disclaimant is treated as having predeceased the decedent.

1. Thus, the decedent's property does not pass to the disclaimant, and the disclaimant makes no transfer of it.

2. Individuals generally disclaim in order to avoid adverse tax consequences.

a. EX: Megan is really old, however she got a big inheritance from her late husband LaMar, the famous lawyer. If she is going to die in the near future, she probably does not want to take on the big inheritance and pay the taxes (something the smart fucking lawyer should have thought of and created a trust for the kids) on it when she is going to die in the near future anyhow. Thus, she could disclaim, avoid having to pay inheritance tax, and let the 6-kids fight it out.

b. Another reason people disclaim is because no one wants the property (such as land with a toxic waste dump on it subject to CERCLA liability); or

c. to avoid creditors that are after a person (i.e. avoid having liens attached to the inheritance).

C. **G/R: Standing**: a person cannot challenge a will unless they are a taker. A person cannot disclaim, to create standing in a will contest.

D. **Internal Revenue Code §2518**: only "qualified disclaimers" will avoid gift tax liability by the disclaimant. If a person disclaims and the disclaimer is not "qualified" a gift tax results.

1. §2518 requires a qualified disclaimer to be made within **9-months** after the interest is created or **after the donee reaches 21**, whichever is *later*.

E. **UPC §2-801(d)(1): Disclaimer**: the disclaimed interest devolves as if the disclaimant had predeceased the decedent, but by law or under the testamentary instrument the descendants of the

disclaimant would share in the disclaimed interest by representation or otherwise were the disclaimant to predecease the decedent, then the *disclaimed interest passes by representation*, or passes as directed by the governing instrument, to the descendants of the disclaimant who survive the decedent.

1. **Remember:** under the UPC's representation statute [§2-106], the interest is divided per capita at each generational level.
2. **Example:** [insert #17]:

F. **G/R:** Wyoming's Disclaimer Statutes: [WS §§ 2-1-401 through 2-1-405]:

1. §2-2-401: gives any person the right to disclaim an interest in property;
2. §2-2-402: defines disclaimer as "an irrevocable and unqualified refusal by a person to accept an interest in the property."
3. §2-2-403: outlines the qualifications and effective dates: To qualify:
 - a. there shall be a *written* refusal to accept the interest in property;
 - b. disclaimer to be made within **9-months** after the interest is created or **after the donee reaches 21**, whichever is *later*.
4. §2-2-404: Disposition of a claimed interest:
 - a. if the transferor is alive, it reverts back to him;
 - b. the interest disclaimed passes under the residuary clause of the will if he is dead;
 - c. if the transferor died intestate, the interest passes under the laws of distribution and descent.
 - d. if the interest disclaimed would have passed through the right of survivorship, the interest shall pass as though the disclaimant was not a survivor.
5. §2-4-405: allows a disclaimer on behalf of a disabled person.

G. **G/R:** Constructive Trusts and Disclaimer: if an individual is receiving welfare from the state (such as Medicaid) the person cannot disclaim an inheritance in order to maintain his status as a welfare recipient and avoid paying his debts to the government, thereby unjustly enriching himself and his heirs who would take the inheritance. In such instances the court will impose a constructive trust on the individual and hold the inheritance in constructive trust until his debts to the state are satisfied, and the person is not unjustly enriched.

1. *Constructive Trusts:* a constructive trust is a remedy employed by the courts to convert the holder of legal title to property into a trustee for the one who in good conscience should reap the benefits of the possession of the property.
 - a. The remedy is applied by operation of law where the circumstances render it inequitable for a party holding title to retain it.

b. The purpose of imposing a constructive trust is to prevent the unjust enrichment of the title holder.

i. The doctrine of unjust enrichment applies where the defendant upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

ii. This policy against unjust enrichment is the theory behind the restitutionary remedies. Those remedies serve to deprive the defendant of benefits that in equity and good conscience he ought not keep, even though he may have received those benefits quite honestly in the first place, and even though the plaintiff has suffered no demonstrable loss.

*[*Troy v. Hart*].

§3: WILLS: CAPACITY AND CONTESTS

§3.1: MENTAL CAPACITY

I. WHY REQUIRE MENTAL CAPACITY

A. **W.S. § 2-6-101: Right to Make and Dispose; Exception:** any person of legal age and *sound mind* may make a will and dispose of all his property by will except what is sufficient to pay his debts, and subject to the rights of the surviving spouse and children.

A(1). **G/R: Standard of Review:** appellate courts in making a decision on mental capacity will review the evidence to determine whether there is **sufficient evidence** to determine that the will was the product of an insane delusion or lack of general capacity [*In Re Stattmater; In Re Honigman*].

A(2). **G/R: Burden of Proof:** the burden of proving testamentary *incapacity* is on the objectors (plaintiffs challenging the will) and is a difficult one to carry.

1. However, once an objector has gone forward with evidence reflecting the operation of the testator's mind, it is the proponent's duty to provide a basis for the alleged delusion.

*[*In Re Honingham*].

B. **G/R: Mental Capacity Generally:** in almost all states, to make a will a person must be age 18 or over, and also of sound mind.

1. The requirement that the testator have mental capacity is an ancient one.

2. There are three traditional explanations, and four other explanations, given for the requirement, all owing something to how persons and property have been viewed in history:

a. The traditional explanations are:

i. a will should be given effect only if it represents the testator's true desires;

(A) The theory is that the court wants to give *effect to the true testamentary intent of the decedent*;

ii. a mentally competent man or woman is not defined as a person; and

iii. the law requires mental capacity to protect the decedent's family.

b. The other four explanations are:

i. to a large extent public acceptance of law rests upon a belief that legal institutions, including inheritance, are legitimate, and legitimacy cannot exist unless decisions are reasoned.

(A) Hence, it is important that the succession to property be perceived as a responsible reasoned act, according the survivors their just deserts.

ii. mental capacity assures a sane person that the disposition the person desires will be carried out even though the person becomes insane and makes another will.

(A) This gives a person of sound mind the advantage of being able, while in a rational mind, to choose what will happen to his property in the future and to have confidence his choice will be carried out.

iii. the requirement of mental capacity may protect society at large from irrational acts.

iv. requiring mental capacity may protect a senile or incompetent testator from exploitation by cunning persons.

(A) Keep in mind, however, that what may look like exploitation to some may give the testator much pleasure;

(B) Also, exploitation may be adequately remedied by setting aside transfers on the ground of undue influence.

3. *Principle of Reciprocity*: close family members—ordinarily those described as heirs in intestacy statutes—usually render services and give love and comfort to the aging relatives.

a. An inheritance is a delayed payment in reciprocity.

b. By giving an economic incentive to heirs apparent, whose expectations cannot be defeated by the testator's insanity, society furthers its objective of caring for the aged in a humane manner.

c. The principle of reciprocity is recognized when the court considers, sometimes *sub silentio*, the fairness of a disposition as a factor in mental capacity cases.

C. **G/R: Test for Mental Capacity**: there are four minimal requirements for mental capacity. The testator only has to have the ability to know:

1. the nature and extent of the testator's property;

2. the persons who are the natural objects of the testator's bounty;

3. the disposition of the testator is making; and

4. how these elements relate so as to form an orderly plan for the disposition of the testator's property.

**The testator does not have to have average intelligence as this would incapacitate almost half the people making wills, but the testator must have mind and memory relevant to the four matters mentioned.

**The testator must understand the significance of the act.

D. **G/R: Testamentary Capacity**: testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal *unless* they directly bare upon and have influenced the testamentary act.

1. However, testamentary capacity is destroyed upon a showing of paranoid conditions, especially insane delusions about a particular person or class of persons leading the testator to dispose of her will in an untraditional way.

a. In *In Re Strittmater*, the court held that the testator's paranoid condition about her family (which led her to kill her cat) and insane delusions about the male sex led her to leave her estate to a feminist organization and set probate aside for lack of testamentary capacity.

b. In will capacity cases, the court is often concerned with "traditional values" and may find incapacity in some cases where it does not exist but the person nonetheless distributed her property in an untraditional method.

i. In other words, a particular judge may be biased and decide the case based on his ideological preferences and decide that the testator was incompetent as a way of correcting an unorthodox distribution of property.

*[*In Re Strittmater*].

E. **G/R: Declaration of Incompetency:** the fact that a person has been declared incompetent and put under a conservator does not necessarily mean the person has no capacity to execute a will thereafter.

1. *Varying Degrees of Competency:* capacity to make a will is governed by a different legal test and requires less competency than the power to make a contract or a gift.

a. In a gift or contract situation, the law has the objective of protecting the incompetent contractor or donor from suffering economic loss during lifetime, which might result in impoverishment.

b. Protecting a dead person from economic loss is of course not a consideration.

c. Legal capacity to make a will, however, requires greater mental capacity than is required for marriage.

*[*Lee v. Lee*].

2. One whose property is under conservatorship may write a valid will if the trial court finds that the will was written during a lucid interval.

F. **G/R:** to draft a will for an incompetent person is a breach of professional ethics. The lawyer, however, may rely on his own judgment regarding the client's capacity; he does not have to make an investigation of it.

G. **G/R: Insane Delusion:** a person may have sufficient mental capacity to execute a will but may be suffering from an insane delusion so as to cause a particular provision in a will—or perhaps the entire will—to fail for lack of testamentary capacity.

1. Only the part of the will caused by the insane delusion fails; if the entire will was caused by the insane delusion, **the entire will fails**.

2. An insane delusion is a legal, not psychiatric, concept.

a. A delusion is a false conception of reality.

i. An insane delusions relates to a thought or belief that is unsupported by all accounts of reality.

ii. An insane delusion occurs if a person persistently believes supposed facts, which have no real existence except in his perverted imagination.

b. An insane delusion—which impairs testamentary capacity—is one to which the testator adheres against all evidence and reason to the contrary.

i. *Minority view:* some courts hold that if there is any factual basis at all for the testator's delusion, it is not deemed insane.

(A) Wyoming follows this view.

ii. *Majority view:* a delusion is insane even if there is some factual basis for it if a rational person in the testator's situation could not have drawn the conclusion reached by the testator.

3. Insane delusion cases usually involve some false belief about a member of the testator's family.

G(1). **G/R: Insane Delusion Test:** if a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence of probability, and conducts

himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion, and delusion in that sense means insanity.

1. Such a person is essentially mad or insane on those subjects, though on other subjects he may reason, act, and speak in a sensible manner.
2. A will is bad when its dispositive provisions **were or might have been** caused or affected by the delusion.

a. In *In Re Honingman*, the court held that the testator (a husband) was having insane delusions about his wife cheating on him which caused to act irrational with respect to her and that he was suffering from an insane delusion about the purported adultery which caused him to leave his property to his brother thereby cutting out his wife.

i. The court hinted around at the moral obligation a man owes his wife, and that the wife had earned a lot of the money and was rightfully entitled to it (these are the kind of policy decisions which affect the court in deciding to go one way or the other, and should be used on the exam).

ii. In other words, there is a clear indication of fairness in an insane delusion case and if the court thinks that finding an insane delusion will result in a fair distribution of the property, then the court may be more willing to find an insane delusion.

*[*In Re Honigman*].

H. **G/R: Lucid Interval Doctrine**: a person's capacity to make a will is determined at the time the will was executed; not when the person dies.

1. Even if the person is incompetent the court may find that during certain periods of his life he had "lucid intervals" of competency and if the will was drafted in lucid interval, then the will can be given effect.

I. **G/R: Mistake**: the law draws a line between insane delusions and mistake.

1. An insane delusion is a belief not susceptible to correction by presenting the testator with evidence indicating the falsity of the belief, thus the court will invalidate a will resulting from an insane delusion.

2. A mistake is susceptible to correction if the testator is told the truth, as a general rule, courts do not reform or invalidate wills because of mistake.

a. EX: Testator falsely believes that her son has died and therefore executes a will leaving all her property to her daughter; in fact, her son had not been killed. The testator is mistaken, not under an insane delusion, and the will *is entitled to probate*.

b. caveat: UPC §2-302(c), gives a child an intestate share where the testator mistakenly believes the child is dead.

§3.2: UNDUE INFLUENCE

I. UNDUE INFLUENCE

A. **G/R: Definition**: the Wyoming Supreme Court has defined undue influence as an influence that substitutes a person's will/intent for that of the testator's and if that part of the will is the product of undue influence it may be invalidated, ***without invalidating the entire will***.

B. **G/R: Burden of Proof**: a person of sound mind has the legal right to dispose of his property as he wishes, with the burden on those attacking the disposition to prove that it was the product of undue influence [*Lipper v. Weslow*].

C. **G/R: Test for Undue Influence**: the test for undue influence is whether such control was exercised over the mind of the testator as to overcome her free agency and will and to substitute the will of another so as to cause the testator to do what she would not otherwise have done *but for* such control [*Lipper v. Weslow*].

C(1). **G/R: Alternative Test for Undue Influence**: the general test, and rule, applied in undue influence cases and the burden of proof that often applies, is:

1. where a person in a confidential relationship;
2. receives the bulk of the testator's property;
3. from a testator of weakened intellect, the **burden shifts to the person occupying the confidential relation to prove affirmatively the absence of undue influence.**
4. In several jurisdictions, however, there must be additional evidence that the beneficiary was active in procuring the execution of the will.
*[*In Re Will of Moses*].

D. **G/R: Proving Undue Influence**: the will contestant (plaintiff challenging the validity of the will) must show that an improper influence resulted in control of the testator's mind with respect to testamentary intent (in other words, the will was not the product of the testator's own intent). The contestant must show:

1. That the testator was susceptible to undue influence:
 - a. Facts that indicate that the testator was susceptible to undue influence:
 - i. age;
(A) generally, the older the testator the more likely the court is to find an unorthodox disposition the product of undue influence.
 - ii. judges' bias (e.g. like a judge being against homosexuality);
 - iii. relationship with the testator, not only blood relationship, but how much time/contact was spent with the beneficiary;
(A) does the person have keys to the house, visit a lot, do various tasks for the testator, etc...
 - iv. sophistication of the testator and sophistication of the alleged influencer;
 - v. state of mind of the testator;
 - vi. health, drug use, the evidence of good health and strong will;
 - vii. existence of a confidential relationship.
2. The alleged influencer had the disposition and opportunity to exercise the undue influence;
AND;
 - a. Facts that indicate the testator had the disposition and opportunity to unduly influence:
 - i. opportunity: living next door, being a lover, testator in a relationship with a sophisticated person (such as an attorney);
 - ii. disposition: animosity or hatred in the family, persons in the family providing "special services," age, and weird relationships (such as an age differential of 15-20 years);
 - iii. the amount of money in the estate;
 - iv. attitude toward other natural objects of bounty; and
 - v. access to the testator.
3. The disposition was the result of undue influence:
 - a. The primary evidence that the disposition was the result of undue influence is the existence of an uneven relationship or disposition and a link to the testator.

- i. EX: one family member getting a grotesquely unequal, and hence unfair, share or the leaving of loved ones or other important people (such as spouse, kids, etc...) out of the will.

E. **G/R: Effect of Undue Influence on Will:** if part of the will is the product of undue influence, those portions of the will that are the product of undue influence will be stricken from the will and the remainder *will be allowed to stand* if the invalid portions of the will can be separated without defeating the testator's intent or destroying the testamentary scheme.

G/R: Existence of a Confidential Relationship: in most, if not all courts, there is a presumption of undue influence if the alleged influencer is in a confidential relationship with the testator; hence, the burden shifts to the alleged undue influencer (the proponent of the will) to prove the absence of undue influence.

1. There are several kinds of confidential relationships:

- a. lawyer/client;
- b. doctor/patient;
- c. financial planner/client;
- d. priest/pennant;
- e. trustee/beneficiary.

There is **no confidential relationship between: husband/wife; parent/child; and a family relationship is not presumed to be confidential.

2. Courts shift the burden when a confidential relationship is involved because the relationship gives rise to duties, which relate to the service provided, between the provider and the client; hence, a fiduciary duty to act in the best interest of the client arises which justifies shifting the burden.

3. *Bequeaths to Attorneys:* many courts are concerned with the appearance of impropriety and have ruled that a presumption of undue influence arises when an attorney-drafter receives a legacy, except when the attorney is related to the testator.

a. The presumption can be rebutted by only *clear and convincing evidence* provided by the attorney, this usually has to be in the form of demonstrating that the testator sought and received independent legal advice.

b. If the attorney is going to receive an unnatural disposition from the will, he should **never be the drafter.**

c. **MRPC 1.8(c):** provides that it is a conflict of interest if lawyer drafts the will and is a beneficiary. It states that "a lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift form a client, including testamentary gift, except where the client is related to the donee."

*[*In Re Will of Moses*].

G. **G/R: No-Contest Clauses:** a no contest clause provides that a beneficiary who contests the will shall take nothing, or a token amount, instead of the provisions made for the beneficiary in the will. A no contest clause is designed to discourage will contests.

1. In dealing with these clauses, courts have been pulled in several directions by conflicting policies:

- a. On the one hand, enforcement of a no-contest clause discourages unmeritorious claims and litigation, family quarrels, and defaming the reputation of the testator.

- b. On the other hand, enforcement of a no-contest clause could inhibit lawsuits proving forgery, fraud, or undue influence and nullify the safeguards built around the testamentary disposition of property.
- 2. The courts are split on how they deal with no-contest clauses:
 - a. *Majority Rule*: [UPC §2-517]: the majority of courts enforce the no-contest clause *unless* there is **probable cause for contest**.
 - b. *Minority Rule*: in a minority of jurisdictions, courts enforce no-contest clauses *unless* the contestant alleges forgery or subsequent revocation by later will or codicil, or the beneficiary is contesting a provision benefiting the drafter of the will or any witness thereto.
 - i. These jurisdictions believe a probable cause rule encourages litigation and shifts the balance unduly in favor of contestants.

H. G/R: Statements of Reason for Disinheritance in Will: a will is a public document, hence, if a statement of reasons is placed directly in the will, it will be open to the public. This may cause or provoke a will contest (because it is viewed as an un-gratuitous last parting shot).

- 1. Generally, a statement of reasons should not be put in the will, however, if that is the testator's desire, the lawyer must make sure all assertions are factually correct.

I. G/R: Planning for a Will Contest: there are several things a lawyer should look for in anticipating a will contest, the lawyer should:

- 1. keep firmly in mind the methods by which a person can attack a will (i.e. make sure the will is executed in compliance with the law);
 - 2. clearly investigate the intent of the testator, if the disposition of the estate is unnatural, and the estate is large, or if the testator has health problems or problems with capacity that make him susceptible to influence;
 - a. If the estate is very large, the lawyer should automatically begin planning for a will contest.
 - 3. determine if the testator wants disinherit kids, wife, or some other significant person, and the reasons therefore, in order to avoid the appearance of undue influence;
 - 4. *not* become friends with the testator and dominate the decision making process.
 - a. If the lawyer is involved more than average, he should start taking precautionary measures.
 - 5. *not* create a lot of haste, and a flurry of new wills or codicils because it looks bad and may be evidence of undue influence or lack of capacity.
- *[*Seward Case Study*]

J. G/R: Precautions for a Possible Will Contest: the lawyer can do several things to lower the chances of a possible will contest:

- 1. Add a no-contest clause, however, this still may not be sufficient to stop a contest;
- 2. the testator can give the property out-right, instead of through a will, such as in an inter vivos trust;
- 3. Could adopt someone which could remove standing;
- 4. Precautions with respect to execution:
 - a. the prospective beneficiaries should not be present when the attorney is conferencing with the testator;
 - b. the statement of reasons for the will should be in a separate document; and
 - c. can obtain a court reporter, videotape the signing of the will, audiotape it.

*[*Seward Case Study*].

III. FRAUD

A. **G/R:** Test for Fraud: fraud occurs where the testator is deceived by a misrepresentation and does that which the testator would not have done had the misrepresentation not been made.

1. *Elements:* the misrepresentation must be made with both:
 - a. the *intent* to deceive the testator; and
 - b. the *purpose* of influencing the testamentary disposition.
2. The provision in a will procured by fraud is invalid. The **remaining portion of will stands** unless the fraud goes to the entire will or the portions invalidated by fraud are inseparable from the rest of the will.

B. **G/R:** Fraud in the Inducement: occurs when a person misrepresents facts, thereby causing the testator to execute a will, to include particular provisions in the wrongdoer's favor, to refrain from revoking a will, or not to execute a will.

C. **G/R:** a fraudulently procured inheritance or bequest is invalid only if the testator would not have left the inheritance or made the bequest had the testator known the true facts.

1. Thus, the issue often becomes, what would the testator have done if the true facts had been known.

D. **G/R:** Fraud in the Execution: occurs when a person misrepresents the character or contents of the instrument signed by the testator, which does not in fact carry out the testator's intent.

E. **G/R:** Constructive Trusts: a constructive trust can be imposed upon the defendants to rectify alleged fraud or undue influence of the testator.

1. A constructive trust is sometimes said to be a fraud-rectifying trust; but a constructive trust may be imposed where no fraud is involved but the court thinks that unjust enrichment would result if the person retained the property.

E(1). **G/R:** Preventing Revocation and Codicils: where a devisee or legatee under a will already executed prevents the testator by fraud, duress, or undue influence from making a codicil, so that the testator dies leaving the original will in force, the devisee or legatee holds the property thus acquired in a constructive trust for the intended devisee or legatee [*Latham v. Father Divine*].

E(2). **G/R:** Interfering with Testator's Intent: when an heir under a will prevents the testator from providing for one whom the testator would have provided, *but for*, the interference of the heir, such heir will be deemed trustee of the property received by him, to the amount or extent that the defrauded party would have received had not the intention of the deceased been interfered with.

- a. This rule applies also when an heir prevents the making of a will or deed in favor of another, and thereby inherits the property that would otherwise been given to such a person.

*[*Latham v. Father Divine*].

F. **G/R:** Tortious Interference with Expectancy: [Rst. (2) Torts §774B]: intentional interference with an expected inheritance is a valid cause of action.

1. This theory extends to expected inheritances the protection courts have accorded commercial expectancies, such as the prospect of obtaining employment or customers.
2. Under this theory, the plaintiff must prove that the interference involved conduct tortious in itself, such as fraud, duress, or undue influence.

3. The theory cannot be used when the challenge is based on testator's mental incapacity.
4. A tort action for tortious interference with an expectancy is not a will contest. It does not challenge the probate or the validity of a will but rather seeks to recover tort damages from a third party for tortious interference.
5. The action is not subject to the typically short state statute of limitations on will contests, but the tort statute of limitations starts running on the action at the time plaintiff discovered or should have discovered the fraud or undue influence.

§4: WILLS: FORMALITIES AND FORMS

§4.1: EXECUTION OF WILLS

I. ATTESTED WILLS

A. **Generally:** a validly executed will must be signed and witnessed, among other things. An attested will is one that has been executed according to the formalities of law. There are several reasons and functions for the formalities required in executing a will:

1. Ritual Functions: the court needs to be convinced that the statements of the transferor were deliberately intended to effectuate a transfer because people are often careless in conversation and informal writings.
 - a. In other words, dispositive effect should not be given to statements, which were not intended to have that effect.
 - b. The formalities of transfer therefore generally require the performance of some ceremonial for the purpose of impressing the transferor with the significance of his statements and thus justifying the court in reaching the conclusion, if the ceremonial is performed, that they were deliberately intended to be operative.
2. Evidentiary Function: the requirements of transfer may increase the reliability of the proof presented to the court. To the extent to which the quantity and effect of available evidence should be restricted by qualitative standards, is controversial.
 - a. Several difficulties arise with gratuitous transfers and these difficulties are entitled to especially serious consideration in prescribing requirements for the gratuitous transfers, because the issue of the validity of the transfer is almost always raised after the alleged transferor is dead; and therefore, the main actor is usually unavailable to testify, or to clarify or contradict other evidence concerning his all important intention.
 - b. At any rate, whatever the ideal solution may be, it seems quite clear that the existing requirements of transfer emphasize the purpose of supplying satisfactory evidence to the court.
3. Protective Function: some of the requirements of the statutes of wills have the stated prophylactic purpose of safeguarding the testator, at the time of the execution of the will, against undue influence or other forms of imposition.

A(1). **G/R:** Common Law Requirements: in most states, these minimum requirements, which were established at common law, are still required. The will must be:

1. in writing, whether it is attested or holographic;
 - a. *caveat:* some states allow non-curative wills (oral) in limited situations.
2. signed—all wills *have* to be signed by the testator; and
3. attested—witnessed in some shape or form.
 - a. *Subscribing witnesses:* Wyoming, and the UPC, require that the witnesses sign the will, as most do most jurisdictions;

- b. The various between State statutes normally comes in the form of who must sign, when, where and what to be a competent witness.

A(2). **Statute of Wills §9: The Wills Act**: the statute of wills (an English statute which a lot of American statutes followed) provides that no will shall be valid *unless*:

1. it is in writing; and
2. executed in the following manner:
 - a. signed at the end by the testator (or by some other person in his presence at his direction);
 - b. witnessed by two persons *present at the same time*; and
 - i. The requirement that the witnesses be present at the same time to determine if the testator is of sound mind—to back up the idea of capacity.
 - c. the witnesses shall attest and sign in the present of the testator; *but*
 - d. no form of attestation of shall be necessary.

*[*In re Goffman*][In *Goffman*, the witnesses did not sign at the same time and the court invalidated the will]

**3/4 of the states do not require dual witnesses to be present at the same time, Wyoming's statute [§2-6-112, see below] does not specifically require two witnesses to sign at the same time.

B. **W.S. §2-6-104: Law Governing Meaning and Effect**: the meaning and legal effect of a disposition in a will is determined by the **law of the state in which the will was executed**, unless the will otherwise provides...

C. **W.S. §2-6-112: Wyoming Will Requirements**: except as provided in [the holographic will statute], all wills to be valid *shall* be:

1. in writing;
2. witnessed by two competent witnesses; and
 - a. any personally generally competent to be a witness may act as a witness to a will [W.S. §2-6-115].
3. and signed by the testator

D. **W.S. §2-6-116: Validity of Execution**: a written will is valid if executed in compliance with:

1. §2-6-112 (will requirements) or §2-6-113 (holographic will requirements); or
2. meets the requirements of the state in which it was executed; or
3. meets the requirements of the place where the person was domiciled.

E. **UPC §2-502: Execution; Witnessed Wills; Holographic Wills**

(a) Except as provided in subsection (b) ... a will must be:

- (1) in **writing**;
- (2) **signed** by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
- (3) signed by at least **two** individuals, each of whom signed within a reasonable time after he **witnessed** either the signing of the will as described in paragraph (2) or the testator's acknowledgement of that signature or acknowledgement of the will.

(b) A will that does not comply with subsection (a) is valid as a **holographic will**, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

(c) Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.

D. **G/R: Presence Requirements**: there are two tests the courts use to satisfy the "presence" requirement for witness:

1. *Line of Sight Test*: in England, and some American states, the requirement that the witness sign in the *presence* of the testator is satisfied only if the testator is capable of seeing the witness in the act of signing.

a. Under this test, the testator does not have to actually see the witness sign but must be able to see them were the testator to look.

i. exception: an exception is made for blind persons.

2. *Conscious Presence Test*: in other states, under this test the witness is in the presence of the testator if the testator, through, sight, hearing, or general consciousness of events comprehends that the witness is in the act of signing.

a. This test would have changed the result in the *Groffman* case.

3. **UPC §2-502(a)**: dispenses altogether with the requirement that the witnesses sign in the testator's presence.

a. This had lead to some cases where the witnesses has tried to sign after the testator's death, however, the statute can probably not be read to go so far.

D(1). **G/R: Sufficient Acknowledgement**: [*Classical England Rule*] authorities establish that the signature of the testator must be on the document at the time of the acknowledgement; and that the witness had the opportunity or saw the signature at the time of acknowledgement.

1. There is no sufficient acknowledgement unless the witness either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will.

*[*In Re Groffman*].

E. **G/R: Order of Signing**: the testator must sign or attest the will before either of the witnesses attest; in other words, the attestation requirement necessitates that the testator sign first [*Wheat v. Wheat*].

1. *Caveat*: other courts have held that as long as the testator signs while all other witnesses are in the room, the order of signing is immaterial [*Waldrep v. Goodwin*].

G. **G/R: Signature**: normally, the testators name must be signed by his own hand if that is possible.

1. Most statutes, like W.S. §2-6-112, allow the will to be signed on behalf of the testator by some person in his presence and by his *express direction*.

2. If a person is too ill to sign his name (because his hands shake or can't move them) then the testator can sign by a mark, such as an X, if his intent to sign can be gleaned from the mark.

a. An X, in most jurisdictions, would be held to be valid if the testator is too weak to sign his own name or cannot sign his own name.

b. If the testator merely signs his first (or last) name, and it is intended to be his full signature, then most jurisdictions would uphold it.

i. However, if it is not intended to be his full signature, and some intervening factor stopped him from completing the signature, most jurisdictions will not uphold it.

c. If a person helps the testator sign by moving his arm, the testator *must ask for assistance*, in order for the signature to be valid.

3. The mere illegibility of the signature does not render it invalid.

H. **G/R: Where Testator Must Sign**: most states have adopted the provision of the wills act that the testator must sign at the foot of the will or the end thereof. Thus, most states require that the signature be at the end of the body of the will and before the signatures of the witness.

1. If something is added after all the signatures, like an additional codicil, the codicil is invalid.

I(A). Interested Witnesses

A. **G/R: Rules of Construction**: courts are required to construe statutes so as to effectuate the purpose of the law.

1. When a court seeks to interpret legislation, the various parts of the statutory enactment must be harmonized by considering the particular clause or section in context of the statutory framework as a whole.

*[*Estate of Parsons*].

B. **G/R: INTERESTED WITNESSES DO NOT INVALIDATE THE WILL!**

B(1). **G/R: Interested Witnesses**: an interested witness is a witness who signs the will and also receives something from the will. An interested witness:

1. does NOT invalidate the will;
2. may cause his gift to be purged (Wyoming and 1/3 of the states);
3. may not have any effect on the gift (UPC and 1/3 of the states);
4. may cause the entire gift to be purged (Massachusetts); or
5. may not cause the entire gift to be purged for *some* individuals (all others).

C. **W.S. §2-6-112: ...Subscribing Witness not to Benefit; Exception: ...**No subscribing witness to any will can derive any benefit therefrom unless there are two disinterested and competent witnesses to the same, but if without a will the witness would be entitled to any portion of the testator's estate, the witness may still receive the portion to the extent and value of the amount devised.

1. This statute allows some of the gift to be saved for *some* interested witnesses.
2. *Calculating the Amount the Interested Witness Receives*: in Wyoming, if the person witnesses the will and is an heir, he may still receive the money.
 - a. Take what the testator's estate would be, to the *extent and value of the amount* devised, which means the interested witnesses that is an heir gets their intestate share or the amount of the devise.
 - b. Thus, the **interested witness that is an heir gets whichever is less: the amount devised or what their intestate share would be.**
 - a. In other words, the interested witness can never receive **more** than his intestate share.
 - b. This only applies to interested witnesses who are heirs (i.e. an interested witness who is not an heir, such as the testator's best friend would take nothing).
 - c. *Policy*: the interested witness gets the less of the two amounts because the interested witness should not be able to benefit from her status as interested witness.

D. **UPC §2-505: Interested Witnesses**:

- (a) Any person generally competent to be a witness may act as a witness to a will.
- (b) A **will or any provision thereof** is not invalid because the will is signed by an interested witness.

E. **G/R: Proving a Will is Genuine:** in order to establish that a will is genuine, it is not always necessary that each and every one of the subscribing witnesses testify in court.

1. A will under some statutory schemes might be proven on the sole testimony of the subscribing witness, who is named in the will as a beneficiary; and
2. if the will has attested by two other disinterested subscribing witnesses (Wyoming also has a similar provision), the interested witness, whose sole testimony established the will, would also be permitted to take his gift as provided in the instrument.

*[*Estate of Parsons*].

F. **G/R: Subscribing Witness:** the quintessential function of the subscribing witness is performed when the will is executed.

1. Thus, the statute (similar to Wyoming's) operates to ensure that there are at least two disinterested witnesses, for proof of:

- a. credibility; and
- b. absence of selfish-motives.

*[*Estate of Parsons*].

G. **G/R: Effect of Disclaimer:** if an interested witness attempts to disclaim his share of the will, in order to take his intestate share, which is more, the court will not allow such a disclaimer.

1. A subscribing witness to a will who is also named in the will as a beneficiary does not become a "disinterested" subscribing witness by filing a disclaimer of his interest after the testator's death.

- a. Most statutes regarding subscribing witnesses look solely to the time of execution and attestation of the will; hence, it follows that a subsequent disclaimer will be ineffective to transform an interested witness into a "disinterested" one.
- b. If such a transformation were possible, the purpose of the subscribing witness statute would be undermined, i.e., to protect the testator from fraud and undue influence at the time he executes his will.

*[*Estate of Parsons*].

I(B). Proving Due Execution of a Will

A. **G/R: Proving Due Execution of a Will:** there are three ways of proving due execution of a will:

1. The proponents (persons saying the will is good) must prove:
 - a. *The Will was Signed:* this can be done through:
 - i. oral or written testimony of the witnesses;
 - ii. two witnesses who can testify that all the signatures on the will are really the witnesses signatures; or
 - ii. admit other evidence tending to show that the witnesses signed the will.
 - b. *Attestation Clause:* states that everyone signing the will is of sound mind and signed the will;
 - i. This creates a presumption of due execution.
 - c. *Self-Proving Affidavit:* creates a *conclusive presumption* of due execution;
 - i. Wyoming's self proving affidavits are in **W.S. §2-6-114**.

B. **G/R: Common Law Rule:** at common law, if the formalities of the will were not strictly complied with, the will was declared invalid.

C. **UPC §2-503: Harmless Error:** Although a document or writing added upon a document was *not executed* in compliance with §2-502 [will formalities], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by **clear and convincing evidence** that the decedent intended the document or writing to constitute:

- (i) the decedent's will;
- (ii) a partial or complete revocation of a will;
- (iii) an addition to or an alteration of the will; or
- (iv) a partial or complete revival of his formerly revoked will.

*This is referred to as the dispensing power, and is a curative doctrine which will allow a will to be probated if the testator's intent is proven; notwithstanding the fact the testator did not comply with the formal requirements imposed by statute.

In other words, the dispensing power allows the court to probate a will if there is clear and convincing evidence that the testator intended the document to be his will; in that case, the court can dispense with the formalities of the will (except signature and writing**) if the court finds the document to be the clear intent of the testator.

***This gives the court a lot more power but is used in fewer jurisdictions than the substantial compliance doctrine.

D. **G/R: Substantial Compliance Doctrine:** in limited circumstances, a will may be probated if it substantially complies with the statutory requirements.

1. The ALI institute encourages courts to permit probate of wills that substantially comply with will formalities [Rst. (2) Property, §33.1 cmt. g].

2. In the absence of legislative action courts should apply a rule of excused non-compliance, under which a will is found validly executed if the proponent establishes by clear and convincing evidence that the decedent intended the document to constitute his will.

3. **G/R:** the substantial compliance doctrine holds that if there is clear and convincing evidence that there was a substantial compliance with the formalities, but there was a small mistake, and there is no problem with the intent of the testator, then the court will probate the will.

a. This is a curative doctrine, which requires the testator to have nearly complied with all the formalities, in effect, a *near miss*. This is a fairly narrow doctrine.

4. **Policy:** Substantial compliance is a functional rule designed to cure the inequity caused by the harsh and unrelentless formalism of the law of wills.

a. The underlying rationale is that the finding of a formal defect should not lead to automatic invalidity but rather to further inquiry:

i. does the document express the decedent's testamentary intent?

ii. does its form sufficiently comply with the wills act formality to enable the court to conclude that it serves the purpose of the Act?

*[*In Re Will of Ranny*].

E. **Rst (3) Property §3.3:** provides that a harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his will.

F. **G/R: Self-Proving Affidavits:** a self proving affidavit and an attestation clause are sufficiently similar to justify the conclusion that signatures on a self proving affidavit, like signatures on the attestation clause, satisfy the requirement that the signatures be on the will.

1. Self-proving affidavits and attestations clauses, although substantially similar in content serve different functions:

- a. *Attestation Clause*: facilitates probate by providing prima facie evidence that the testator voluntarily signed the will in the presence of the witnesses.
 - i. An attestation clause also permits probate of a will when a witness forgets the circumstances of the will's execution or dies before the testator.
- b. *Self Proving Affidavits*: are sworn statements by eyewitnesses that the will has been duly executed.
 - i. The affidavit performs virtually all the functions of the attestation clause and has the further effect of permitting probate without the appearance of either witness.
 - ii. Wills may be self-proving simultaneously, with or after execution.

*[*In Re Will of Ranny*].

G. G/R: where witnesses, with the intent to attest a will, sign a self proving affidavit but do not sign the will or an attestation clause, clear and convincing evidence of their intent should be produced to establish substantial compliance with the statutory requirements [*In Re Will of Ranny*].

II. HOLOGRAPHIC WILLS

A. Generally: holographic wills are allowed in about half of the states, including Wyoming. The main difference between a holograph and an attested will is that the former does not require witnesses.

1. There are two general requirements for a holographic will:
 - a. written in the testator's handwriting; and
 - b. signed.
2. Some states have imposed additional requirements such as:
 - a. requiring an holographic will to have a date on it (because a later will may revoke it);
 - b. some states require the entire document to be in the testator's handwriting, while others only require material portions to be in the testator's handwriting.

B. G/R: Holographic Wills: in about half the states, primarily in the South and West, holographic wills are permitted.

1. *Definition*: a holographic will is a will written by the testator's hand and signed by the testator; attesting witnesses are not required.
2. The requirements for holographic wills vary; most states allowing holographic wills have provisions similar to UPC §2-502(b). However, some states also require:
 - a. *Several states require*: that the holographic will be *entirely* handwritten by the testator;
 - i. Wyoming's statute has this requirement and has held that if the document is not entirely in the testator's handwriting the will cannot be probated [*In re Estate of Dobson*];
 - ii. this requirement causes problems when wills are typed or pre-printed and signed by the testator.
 - b. *a few states require*: that a holographic will be dated, which means full date of day, month, and year;
 - i. A date is useful in determining which of two inconsistent testamentary instruments was written later; the last written instrument prevails;
 - ii. Of course, the requirement of a date causes an undated instrument to fail even if there is no other inconsistent testamentary instrument.
 - c. *almost all states require*: that a holographic will be signed, however, the document may be signed at the end, at the beginning, or anywhere on the will, but if not signed at

the end there may be doubt about whether decedent intended his name to be his signature.

3. If the testator writes a holographic will in a state recognizing such a will, and then moves to a state that does not recognize holographic wills and dies there, the courts are split:
 - a. with some permitting probate of a holographic will if valid were executed;
 - b. other states deny probate.

C. **UPC § 2-502: Holographic Wills:**

(a) Except as provided in subsection (b) [holographic wills] and in §2-503 [Harmless Error], ...

(b) A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

(c) Intent that the document constitute the testator's will can be established by extrinsic evidence, including for holographic wills, portions of the document that are not in the testator's handwriting.

--the official comment to this section says that holographs may be written on a printed will form if the material portions of the document are handwritten.

D. **W.S. §2-6-113: Holographic Will:** a will which does not comply with W.S. 2-6-112 [formality requirements] is valid as a holographic will, whether or not witnessed, if it is **entirely in the handwriting of the testator** AND **signed** by the hand of the testator himself.

E. **W.S. §2-6-206: Proof; Holographic Wills:** a holographic will may be proved the same as any other private writing.

F. **G/R: Animus Testandi:** [does not apply to states which require the entire holographic will to be in the testator's handwriting]: the statutory requirement that the material provisions be drawn in the testator's own handwriting requires that the handwritten portion clearly express a *testamentary intent* [animus testandi].

1. By requiring that only the *material provisions* to be in the testator's handwriting (rather than entirely as some states require) a holograph may be valid even though immaterial parts such as the date or introductory wording be printed or stamped.

- a. *Form Wills:* a valid holograph might even be executed on some printed forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will.

- i. *Policy:* for persons unable to obtain/afford legal assistance, the holographic will may be adequate.

2. In a holographic will, the **important thing is that the testamentary part** of the will be written by the testator and signed by him.

- a. It is thus clear under the terminology of the statute, an instrument may not probated as a holographic will where it contains words not in the handwriting of the testator if such words are essential to testamentary disposition.

- i. *Doctrine of Surplusage:* the mere fact that the testator used a blank form, whether of a will or some other document, does not invalidate the will if the printed words **may be rejected as surplusage**.

3. **Special Glasses Rule:** the material portion of the holograph must show testamentary intent in order to probate the will.

- a. Under the special glasses rule, the judges will only see the handwritten portion of the will to glean testamentary intent; thus the testator must make clear how he wants to distribute his property in the handwritten portions.
- b. In states like Wyoming which require the entire will to be handwritten, do not use special glasses, if they see on spec of handwriting on the will—its shit-canned.
- c. Under the UPC, special glasses are not needed because subsection (c) says that if the intent of the testator is clear, the will should be probated.

4. **Note:** in *In Re Estate of Johson*, the court held that the written word “estate” was too ambiguous to indicate animus testandi, because the word estate has several meanings, so if you see something like that on the exam, don’t be tricked.

*[*In Re Estate of Johnson*].

F(1). **G/R: Doctrine of Suplusage:** if the proponent of the will can demonstrate that the printed matter on a document was not intended to be part of the will itself the court even in jurisdictions which hold that the entire document must be in the testator’s handwriting will probate the will.

1. EX: Megan writes a holographic will while she is high on dope in a motel room on the Holiday’s stationary, leaving everything to her lover LaMar. If LaMar can show that the printed material (the holiday inn letters head) was not intended to be part of the will, it can be probated.

2. This comes into play when persons leave holographic wills on physical objects.

G. **G/R: Form Wills:** a printed form filled out by the hand of the testator constitutes a holographic will only if the printed portion could be eliminated and the handwritten portion would still evidence the testator’s intent [*In Re Estate of Johnson*].

1. This is the special glasses rule.

H. **G/R: Extrinsic Evidence:** a holographic will is generally probated without witnesses, hence, courts will sometimes look to outside evidence to glean the testators intent. Jurisdictions around the country treat extrinsic evidence differently; and sometimes courts within the same jurisdiction treat it differently depending on the policy the courts wants to enforce and if the disposition is unorthodox [*In Re Will of Smith*].

1. If the court is looking at extrinsic evidence to glean testamentary intent, then it is acceptable if there is some testamentary intent in the will, but the testator has to intend that the document be his will.

- a. Courts can usually determine what a person wants to do with their property; the question then becomes whether the document was sufficient to constitute a will.

I. **G/R: Conditional Wills:** an informal document evidencing a conditional gift and an intent to execute may serve as a testamentary document.

1. Deeds, mortgages, letters, powers of attorney, agreements, checks, notes, and the like have all been held to be in legal effect a will; hence an assignment.

2. Where the words on an informal document condition the gift, they strongly support the idea of testamentary intent; indeed, they may exactly state what is expressed in or must be implied from every will.

- i. *Caveat:* if the particular contingency stated in the informal document, as the condition upon which it shall become effective, has never in fact occurred, it will not be admitted to probate.

*[*Kimmel’s Estate*].

3. Conditional wills are holographic wills which the testator writes on the eve of a surgery or trip. The question that arises is whether this will is *only valid upon that condition*. Courts generally presume that the stated condition is not determinative and routinely probate the wills.

a. This is only a presumption and it can be rebutted upon clear and convincing evidence that the condition was meant to be determinative.

*[*Eaton v. Brown*].

J. **G/R: Signature Element:** all holographic wills require a signature by the testator, however, jurisdictions differ on how they treat signatures. Generally if the court finds that the testator had the testamentary intent to create a holographic will the court will find anything within reason suffices as a signature.

1. In *Kimmel's Estate* the court held that the holograph signed "father" satisfied the Wills Act because that his how he signed every document; hence, if a person signs a document in a certain as habit, the court will probably hold that it satisfies the requirement, or at least argue that.

*[*Kimmel's Estate*].

§4.2: REVOCATION OF WILLS

I. REVOCATION BY WRITING OR PHYSICAL ACT

A. **Generally:** wills are ambulatory documents, which means that they can be revoked and subject to revision or modification until death.

1. All states permit revocation of wills in one of two ways:

a. *Writing:* by subsequent *writing* executed with all the formalities required for a will;

or

b. *Destruction:* by destroying the will (burn, tear, shred, etc...) *with the intent to revoke*.

2. Oral revocation is not allowed in any state.

3. Even if the will has been destroyed, in some instances, it can still be probated.

4. In addition, subsequent wills can revoke provisions (or the entire) previous will be *inconsistency*, if it can be shown that the will was intended to **replace and not just supplement** the previous will.

B. **G/R:** a revocation of an underlying will, revokes all codicils; whereas, a revocation of a codicil does not revoke the underlying will.

1. EX: In 1995 testator executes a will. A year later he adds a codicil. In 1999 he revokes the codicil with the intention of revoking it. T dies in 2000. The 1995 will is offered for probate, and it will be admitted because the codicil is stricken but that does not affect the underlying will.

*[*In re Estate of Hering*].

C. **G/R: Revocation:** a will is an ambulatory document, which means that it is subject to modification or revocation by the testator during his lifetime. All states permit revocation of will in one of two ways:

1. by a subsequent *writing* executed with testamentary formalities [see UPC §1-201(56)]; or

2. by a *physical act* such as destroying, obliterating, or burning the will.

D. **G/R: Oral Revocation:** on the assumption that oral revocations would open the door wide for fraud, an oral declaration that a will is revoked, without more, is inoperative in all states.

E. **G/R:** if a duly executed will is not revoked in a manner permitted by statute, the will is admitted to probate.

D. **UPC §1-201(56):** defines a *will* to include a codicil and any testamentary instrument that merely appoints an executor or revokes or revises another will.

1. In state recognizing holographic wills, a holograph can revoke a typewritten, attested will.

F. **UPC §2-507: Revocation by Writing or By Act:**

(a) A will or any part thereof is revoked:

(1) by executing a subsequent will that revokes the previous will or part expressly or inconsistency;

(2) by performing a revocatory act on the will, if the testator

--performed the act with the intent *and*

--for the purpose of revoking the will or part *or*

--if another individual performed the act in the testator's *conscious presence* and by the *testator's direction*.

For purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing, or canceling is a "revocatory act on the will," whether or not the burn, tear, or cancellation touched any of the words on the will.

G. **W.S. §2-6-117: Revocation by Writing or Act:**

(a) A will or any part thereof is revoked:

(i) By a subsequent will which revokes the prior will or part expressly or *by inconsistency*; or

(ii) By being burned, torn, cancelled, obliterated, or destroyed with the **intent** and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

G(1). **G/R: Revocation at Testator's Instruction:** both Wyoming's statute, and the UPC, require that if a will is destroyed by a person other than the testator, it must be done **in her presence and by her direction**.

1. Hence, if a will is destroyed at the direction of the testator, but not in her presence, the will can be offered for probate [*Harrison v. Bird*].

H. **G/R: Revocation by Inconsistency:** a subsequent will wholly revokes the previous will by inconsistency if the testator intends the subsequent will to replace rather than supplement the previous will.

1. A subsequent will that does not expressly revoke a prior will but makes a complete disposition of the testator's estate is presumed to replace the prior will and revoke it by inconsistency.

2. If the subsequent will does not make a complete disposition of the testator's estate, it is not presumed to revoke the prior will but is viewed as a codicil.

a. A codicil supplements a will rather than replacing it [UPC §2-507(b)-(d)].

I. **G/R: Probate of Lost Wills:** in the absence of statute, a will that is lost, or is destroyed without the consent of the testator, or is destroyed with the consent of the testator but not in compliance with the revocation statute can be admitted into probate if its contents are proved.

1. A lost will can be proved by a copy in the lawyer-drafter's office or by a secretary who typed the will or by other clear and convincing evidence.
2. **G/R:** in a few states, statutes prohibit the probate of a lost or destroyed will unless the will was *in existence* at the testator's death (and destroyed thereafter) or was fraudulently destroyed during the testator's life.
 1. This is Wyoming's approach in **W.S. § 2-6-207(b)**.
3. Courts have chosen to give effect to the will revocation states and have gutted proof statutes by holding *either*:
 - a. that a will is not lawfully revoked continues in "legal existence" until the testator's death (and the word "existence" in the statute means legal existence); *or*
 - b. that a will destroyed by a method not permitted by the will revocation statute has been "fraudulently destroyed."

I(1). Probate of Lost Wills and Presumptions at Law: at the testator's death, if the will is not found, there is a **presumption** that the testator destroyed the will. Then a **separate presumption** arises that the "destroyed" lost will was destroyed with the *intent to revoke* all wills.

1. These are separate, but related presumptions.
2. The opportunity of disinherited heir to destroy will does *not* rebut the presumption revocation [*Estate of Travers*].
 - a. EX: Testator's lawyer sends the testator home with the only executed copy of her will. The will leaves all her property to A. After the testator's death, her heir goes in her house looking for her will and reports that she could not find it. Although she had the opportunity to destroy the will the presumption is still not revoked.
 - b. **Caveat:** in some circumstances, however, it will be enough to rebut the presumption such as where the husband lived in the house with wife and the couple had been fighting before her death [*Loneragan v. Estate of Budahazi*].
3. Duplicate Originals with One Original Missing: if a person has drafted duplicate wills, and keeps one at home and one in a safety deposit box, the fact that the one that was kept at home is missing when the testator dies does not give rise to a presumption that the testator destroyed the will, or with the intent to revoke; hence, the intestate heirs would have the burden of proving that testator revoked the will.

I(2). **G/R:** Lost Wills: if the decedent has possession of her will before death, but the will is not found among her personal effects after death, a **presumption arises** that the decedent destroyed the will.

1. Further, if the decedent destroys a copy of the will in her possession, a **presumption arises** that she has revoked her will *and* all duplicates, even though a duplicate exists that is not in her possession.
 - a. *Duplicate Originals*: are two copies of the same will executed in the same manner, each complying with the requirements of will formalities (i.e. each signed, witnessed and in writing). Duplicate originals can be admitted to probate.
 - b. *Copies*: a copy of a will, such as a photocopy, cannot be admitted to probate; however, it can be used to indicate testamentary intent in the case that a will is lost or missing upon death of the testator.
2. *Rebuttable Presumption*: this presumption of revocation is rebuttable and the burden of rebutting the presumption of revocation is on the proponent of the will.
 - a. Therefore, the proponent of the will has the burden to present sufficient evidence to convince the trier of fact that the absence of the will from the decedent's personal effects after death was not due to the decedent destroying the will.

*[*Harrison v. Baird*].

J. **G/R: Destroyed Will with Absence of Proof of Intent to Destroy:** if there is proof that the will has been destroyed, but there is no evidence that the person revoked, then the will can still be probated if there is *clear and convincing evidence of the intent of the contents of the will*.

1. This can be proven by photocopied wills, having the attorney or paralegal testify, etc...

K. **G/R: Elements of Revocation:** to effect a revocation of a duly executed will, in any of the methods prescribed by statute, two things are necessary:

1. The doing of the acts specified; and
 2. accompanied by the intent to revoke—the *animus revocandi*.
- *Proof of either, without the other, is insufficient (both elements are required).
**[*Thompson v. Royall*].

L. **G/R: Revocation by Cancellation:** [*Majority Rule*]: revocation of a will by cancellation within the meaning of the statute contemplates marks or lines across the written parts of the instrument or a physical defacement, or some mutilation of the writing itself, with the intent to revoke.

1. If written words are used, for the purpose, they must be so placed as to physically affect the written portion of the will, not merely on blank parts of the paper on which the will is written.
2. If the writing is intended to be the act canceling *does not* mutilate, erase, or deface, or otherwise physically come in contact with any part of the written words of the will, it cannot be given any greater weight than a similar writing on a separate sheet of paper, which identifies the will referred to, just as definitely as it does the writing on the back.

a. *NOTE:* if the writing on the will does not deface the words of the will, but is executed as a subsequent will (with all the formalities met), then it can be a revocation by subsequent writing. Similarly, if the writing does not deface the words on the will but is in the testator's handwriting and signed (and possibly dated) it may be a valid holograph which revokes by a subsequent writing.

- i. In *Thompson*, however, none of these theories worked because the attorney wrote cancelled (not in the testator's handwriting and hence not a valid holograph) and there were not witnesses (not a validly executed will).

*[*Thompson v. Royall*].

3. *Minority Rule:* [UPC §2-507(a)(2)] would change this result because it provides “a burning, tearing, or canceling is a revocatory act on the will, whether or not the burn, tear, or cancellation touched any of the words on the will.

M. **G/R: Partial Revocation by Physical Act:** Although UPC §2-507 and the statutes of many states authorize partial revocation by physical act, in several states a will cannot be revoked in part by an *act of revocation*; it can be revoked in part **only by a subsequent instrument**.

1. The reasons for prohibiting partial revocation by physical act are:
 - a. canceling a gift to one person necessarily results in someone else taking the gift, and this “new gift”—like all bequests—can be made only by an attested writing; and
 - b. permitting partial revocation by physical act offers opportunity for fraud.
2. In other words, a person can partially revoke expressly through a codicil or indirectly through an inconsistency; however, that is by subsequent writing and not physical act.
3. *Minority View:* In Wyoming, [under **W.S. §2-6-117**], partial revocation by physical act (cutting out a bequest to someone and then taping the document back together and putting it in a safety deposit box) is sufficient and permissible, if there is *testamentary intent to revoke*.
 - a. This is similar to other states which follow the minority view.

N. **G/R: Partial Revocation by Obliteration**: this situation arises when the testator has a list of devisees, and then crosses out one of the names on the list. The **presumption** when there is an obliteration in the will that was in the testator's possession is that the testator obliterated that section of the will with the intent to revoke.

1. Thus, the burden shifts to the proponent of the will to prove that they did not intend to revoke. If the proponent cannot rebut the presumption, then he takes nothing and the others will receive his share equally.

a. The counterargument to this approach is that it allows the testator to re-execute the will by, in effect, distributing more property to others in the will who take if one person is excluded without compliance with the formalities of the will.

2. *Holographic Wills*: if the document which has changes to it is a holographic will, then if the testator makes handwritten changes (such as scratching out a devise) to the will he **is not** revoking by partial physical act; but rather, revising the holographic will because he has executed a new holograph.

a. This may cause problems with things such as the time the document was executed.

II. DEPENDENT RELATIVE REVOCATION AND REVIVAL (DRR)

A. **Generally**: if the testator revokes a will or part thereof based on a mistaken belief of law or fact, the revocation is ineffective. The Elements of DRR are:

1. Valid revocation;
2. based upon a mistaken belief of law or fact;
3. creates a presumption that the testator would not have revoked *but for* the mistake (and this presumption can be rebutted).

A. **G/R: Elements of DRR**: the elements of DRR are:

1. valid revocation of will #1 (remember the thing to focus on for a valid revocation is **intent to revoke** if that is lacking, there is no intent to revoke, and hence, this element is not met).

+

2. based on a mistake of law or fact (and the execution of a new will which is invalid for some reason is typically the mistake of law);

=

3. Presumption that testator would not have revoked *but for the mistake*.

a. This is a rebuttal presumption.

***Note**: if the revocatory act is not a physical act, but is an express clause of revocation in the second will, DRR *does not* apply because the second will was never valid; thus, the first will was never revoked.

***The Invalidly Executed Second Will is NEVER Given Effect!** [In other words, it is not really what the testator wants, which would be giving effect to the second will, but it is the next best thing).

B. **G/R: Doctrine of Dependent Relative Revocation**: if the testator purports to revoke his will upon a mistaken assumption of law or fact, the revocation is ineffective if the testator would not have revoked his will had he known the truth.

1. Ex: the usual case involves a situation where the testator destroys his will under a belief that a new will is valid but for some reason the new will is invalid.

2. If the court finds that the testator would not have destroyed his will had he known the new will was ineffective, the court, applying the doctrine of DRR, will cancel the revocation and probate the destroyed will.

3. The doctrine is applied to carry out the testator's presumed intent.
4. *Limitations*: the Courts have set limits on the DRR doctrine. With rare exceptions, courts have held that DRR applies only:
 - a. where there is an alternative plan of disposition that fails; *or*
 - b. where the mistake is recited in the terms of the revoking instrument, or possibly, is established by clear and convincing evidence.
 - c. The alternative plan of disposition is usually in the form of another will, either duly or defectively executed.
 - i. By so limiting the doctrine, the kind of extrinsic evidence that can be looked at is narrowed.

C. **G/R: Classic Example:** the classic example of DRR is:

1. T revokes will #1, thinking that will #2 was validly executed, when in fact, will #2 was not properly executed. This messes up T's estate plan because now there is no valid will in existence; hence, the intestate heirs would take. After T's death, the heirs apparent would try to revive will #1 through DRR:
 - a. Will #1 was revoked by destruction, based upon a mistake of law or fact, so a **presumption** arises that will #1 was valid.
 - i. The testator will **NEVER** get his way through will #2 because it was invalid from the beginning.
 - ii. DRR will **NEVER** validate an improperly executed will, so the best T can ever receive is will #1 rather than intestacy.
 - b. The court will look at the wording of the wills to try and glean the testator's intent. If the testator's intent is clear from will #1 and will #2 (such as in both wills none of the intestate heirs would have taken), *then*;
 - c. Another **presumption** arises that the testator intended to devise the property to the persons in will #1. In that case, the intestate heirs will have to rebut the presumption that the testamentary intent of T was not to give it to the persons in will #1.
 - i. This can be demonstrated in instances when the intestate heirs are named in will #2; that is, the intestate heir can show and rebut the presumption that T wanted to leave the property to the persons in will #1.
2. DRR all boils down to a contest between the beneficiaries in Will #1 and the intestate heirs.
3. *Another Example*: T duly executes a will devising his property to Peggy Martin. Thereafter T learns that the legal name of the intended devisee is "Margaret Martin" not "Peggy Martin" and T decides that this misdescription should be corrected. T therefore cancels his old will by writing "VOID" across it and executes a new will devising his property to "Margaret Martin." Unfortunately, Margaret is one of the two witnesses to the new will and under the interested witness statute the devise to her is ineffective. Since it is clear that T wants Martin to take his property, DRR is applied.
 - a. The revocation of the first will is not given effect; the first will is probated and Margaret Martin (i.e. Peggy Martin) takes T's property under that will.

**This is good case for DRR because the testator's intent is clear—give the property to Martin.

D. **G/R: Burden of Proof:** the burden is on a person attacking a paper offered for probate as a will to sustain the grounds of his attack.

1. Usually, by statute [as in this case], where a will has been cancelled or obliterated in a material part, a presumption of revocation arises, and the burden is on the proponent of the will to show that *no* revocation was intended.

2. Where the paper is found among the testator's effects, there is also a presumption that he made the cancellations or obliterations.

*[*Carter v. First Methodist Church*].

E. **G/R:** Intent to Revoke: the intention to revoke will be presumed from the obliteration or canceling of a material portion of the will. *[*Carter v. First Methodist Church*].

F. **G/R:** Doctrine of Dependent Relative Revocation (conditional revocation): is a doctrine of presumed intention, and attempts to give effect to the real intention of the testator.

1. DRR states that: the mere fact that the testator intended to make a new will, or made one which failed of effect, will not alone, in every case, prevent a cancellation or obliteration of a will from operating as a revocation.

a. If it is clear that the cancellation and the making of the new will were parts of one scheme, and the revocation of the old will was so related to the making of a the new as to be dependent upon it, then if the new will be not made, or if made is invalid, the old will, though cancelled, should be given effect, if its contents can be ascertained in any legal way.

b. But if the old will is once revoked, if the act of revocation is completed, as if the will be totally destroyed by burning and the like, or if any other act is done which evidences an unmistakable intention to revoke, though the will not be totally destroyed, the fact that the testator intended to make a new will, or made one which can not take effect, counts for nothing.

c. In other words, evidence that the testator intended to make or did actually make a new will, which was inoperative, may throw light on the question of intention to revoke the old one, but it can never revive a will once completely revoked.

2. DRR has been recognized and applied by the highest courts of many states.

3. DRR is correctly perceived to be a rule of presumed intention rather than a rule of substantive law.

a. The court will refuse to set aside the revocation until evidence bearing on the testator's intent, including his oral declarations, was examined in an effort to discern what he would have desired if he had been aware of the true facts.

4. Most courts have taken the position that dependent relative revocation is judged by a stricter standard in a situation involving revocation by subsequent instrument as opposed to physical act.

5. If the purpose of the doctrine is to effect testator's intent, there is no point in distinguishing between revocation by physical act and by subsequent instrument.

*[*Carter v. First Methodist Church*].

G. **G/R:** More DRR: the usual situation for the application of DRR arises where a testator executes one will and thereafter attempts to revoke it by making a later testamentary disposition which for some reason proves ineffective.

1. The doctrine has also been applied to situations in which a testator revokes a later will under the mistaken belief that by so doing he is reinstating a prior will. In this usual situation, DRR is invoked to render the revocation ineffective.

2. DRR is based upon the testator's inferred intention.

a. It is held as a matter of law the destruction of the later document is intended to be conditional where it is accompanied by the expressed intent of reinstating a former will and where there is not explanatory evidence.

b. Of course, if there is evidence that the testator intended destruction to be absolute, there is no room for the application of the doctrine.

*[*Estate of Auburn*].

H. Rst Conflicts of Laws §307: whether an act claimed to be a revocation of a will is effective to revoke it as will of movables is determined by the law of the state in which the deceased was domiciled at the time of his death.

II(A). Revival of a Will

A. **Generally:** the questions of revival typically arise under the following facts:

1. Testator executes will #1;
 2. Subsequently testator executes will #2, which revokes will #1 by an express clause or by inconsistency;
 3. Later, testator revokes will #2;
- Is will #1 revived?

B. **G/R: Revival:** the states generally fall within one of three groups with respect to revival of wills:

1. **American View:** a large majority of jurisdictions assume that will #2 legally revokes will #1 at the time will #2 was executed. But the courts then divide into two groups:

a. *Majority view:* the majority of states hold that upon revocation of will #2, will #1 is revived if the testator so intends.

i. The testator's intent may be shown from circumstances surrounding the revocation of will #2 or from the testator's contemporaneous or subsequent oral declarations that will #1 is to take effect.

b. *Minority view:* a minority of states hold that a revoked will cannot be revived unless re-executed with testamentary formalities or republished by being referred to in a later duly executed testamentary writing.

2. Wyoming does not have a will revival statute, but has recognized judicial revival if the facts and circumstances demonstrate a testator's intent to revive [*May v. Estate of McCormick*].

C. **UPC §2-509: Revival of Revoked Will:**

(a) If a subsequent will that **wholly revoked** a previous will is thereafter revoked by a revocatory act under §2-507(a)(2), the previous will remains revoked unless revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

--This subsection deals with will #2 **wholly** revoking will #1, in such a case, the presumption is that will #1 remains revoked *unless* the facts demonstrate the testator's intent to revive will #1; thus the burden is on the person to who wants to show revival.

(b) If a subsequent will that **partially revoked** a previous will is thereafter revoked by a revocatory act under §2-507(a)(2), a revoked part of the previous will is revived unless it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did *not* intend the revoked part to take effect as executed.

--This subsection deals with situations where will #1 is partial revoked by a codicil. Under this subsection, there is a presumption *for revival* if the codicil is revoked, and the burden is on the person who wants to prove that there should be no revival.

(c) If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later, will, the previous will remains revoked in whole or in part, *unless* it or its revoked is revived. The previous will or its revoked part is revived to the extent it appears *from the terms of the later will* that the testator intended the previous will to take effect.

--This subsection deals with three wills [Will #1, then executes Will #2 which revokes will #1; then executes Will #3 revoking will #2] The revocation of will #3 will not serve to revive will #1. A writing has to specifically revive will #1.

D. **G/R: Presumptions:** under §2-509(a), if a subsequent will that *wholly* revoked the previous will is itself revoked by physical act, the presumption is that the previous will remains revoked.

1. On the other hand, under subsection (b), if a subsequent will that *partly* revoked the previous will is itself revoked, the presumptions is that the previous will is revived.

III. REVOCATION BY OPERATION OF LAW: CHANGE IN FAMILY CIRCUMSTANCES

A. **G/R: Revocation by Divorce:**

1. *majority of states:* statutes provide that a divorce revokes any provision in the decedent's will for the divorced spouse.

1. *minority of states:* in the remaining states, revocation occurs only if divorce is accompanied by a property settlement. These revocation statutes ordinarily apply to wills, not to life insurance policies, pension plans, or other non-probate transfers.

B. **UPC §1-201(19): Governing Instrument:** [in §2-804] means a deed, will, trust, insurance or annuity policy, account with P.O.D. designation, pension plan, or similar non-probate donative transfer.

C. **UPC §2-804: Revocation of Probate and Non-Probate Transfers by Divorce:**

(b) Revocation Upon Divorce: except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after marriage, divorce, or annulment, the divorce or annulment of marriage:

(1) *revokes any revocable:*

(i) ****disposition or appointment of property made by a divorced individual to his former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse;**

(ii) **provision in a governing instrument conferring a general or non-general power of appointment on the divorced individual's former spouses or on a relative of the divorced individuals former spouse; and**

(iii) **nomination in governing instrument, nominating a divorced individual or a relative of the divorced individual's former spouse to serve in any *fiduciary or representative capacity*, including a personal representative, executor, trustee, conservator, agent, or guardian, AND**

(2) **severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming the interests of the former spouses into equal tenancies in common....**

(d) Effect of Revocation: provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse *disclaimed* all provisions revoked by this section or, in the cases of a revoked nomination in a fiduciary or representative capacity as if the former spouse and relative s of the former spouse died immediately before the divorce or annulment...

(f) No Revocation for Other Change of Circumstances: no change of circumstances other than as described in this section and in §2-803 [dealing with homicide] effects a revocation.

D. **G/R:** Life Insurance: if the state revocation by divorce statute does not apply to life insurance proceeds, the life insurance proceeds will, according to most cases, pass to the divorced spouse unless the divorce property settlement expressly provides that the spouse surrenders all rights to collect in insurance proceeds.

E. **G/R:** Marriage: if the testator executes his will and subsequently marries, a large majority of states have statutes giving the spouse here intestate share [omitted spouse statutes], unless it appears from the will that **the omission was intentional** or the spouse is provided for in the will or by a will substitute with the intent that the transfer be in lieu of a testamentary provision [UPC §2-301].

F. **G/R:** Birth of Children: a small minority of states, either by statute or judicial decision, follow the common law rule that marriage followed by birth of issue revokes a will executed before marriage, but this rule is not in the UPC and is rapidly disappearing.

1. However, almost all states have pretermitted child statutes, giving a child born after execution of the parent's will and not provided for in the will, a share in the parent's estate.

§4.3: COMPONENTS OF A WILL

I. OVERVIEW

A. **Generally**: if a State's Wills Act is not complied with in all its particulars, a testamentary instrument may not be admitted to probate, no matter how clearly it reflects the testator's intention.

1. *Caveat*: despite these formal requirements of transfer, it is possible for documents and acts not executed with testamentary formalities to have the effect of determining *who* takes *what* property belonging to the testator.

2. The primary doctrines which allow this are:

- a. Incorporation by reference;
- b. acts of independent significance;
- c. integration of wills; and
- d. republication by codicil.

II. INTEGRATION OF WILLS

A. **G/R:** Integration of Wills: wills are often written on more than one sheet of paper. Under the doctrine of integration, all papers present at the time of execution, intended to be part of the will, are integrated into the will.

1. The attorney can prevent any problem from arising under the integration doctrine by seeing to it that the will is fastened together before the testator signs and by having the testator sign or initial each numbered page of the will for identification.

B. **G/R:** Proving Integration: wills are often written on more than one sheet of paper, and if they are all found together (tied together is good, stapled even better) and there is **testamentary intent that that documents all be part of one will**, the court will give effect to all the documents—codicils and the originals.

1. Factors evidencing testamentary intent:
 - a. physical connection of the pages;

- a. stapled together;
 - b. tied together;
 - c. attached by a huge fucking paperclip; or
 - d. any other method of physically attaching the pages together.
- b. have a document paginated and initialed; or
 - c. have sentences carry over from one page to the next.

III. REPUBLICATION BY CODICIL

A. **G/R: Republication by Codicil:** under the doctrine of republication by codicil, a will is treated as re-executed (republished) as of the date of the codicil.

1. Updating the will in this manner can have important consequences.
 - a. *EX: squeezing out:* suppose a testator revokes a first will by a second will and then executes a codicil to the first will. The first will is republished, and thus the second will is revoked by implication, i.e., squeezed out.
2. The doctrine of republication by codicil is not applied automatically, but only where updating the will carries out the testator's intent.
3. The fundamental difference between republication by codicil and the doctrine of incorporation by reference is that **republication applies ONLY TO:**
 - a. a prior validly executed will;
 - b. whereas, incorporation by reference applies to incorporate into a will instruments that have never been validly executed.

B. **G/R: Republication by Codicil:** the execution of a codicil *republishes the will* which **stronger** than validating the will and operates to give the will a new date; namely, the day it was executed. The codicil that is being republished **HAS TO BE A PROPERLY EXECUTED WILL.**

1. Effects of republication by codicil:
 - a. *Squeezing Out:* a codicil to a first, after the execution of a second will, republishes the first will and the codicil thereby squeezing out the second will.
 - b. *Capacity:* if the testator had capacity problems in executing the first will, republication by a codicil when capacity is regained can give effect to the first will.
 - c. *Validating an Invalid Will:* if the first will was not properly executed because of fraud or undue influence (and some courts hold for any reason); and hence, invalid, a properly executed codicil (signed, witnessed, and in writing) can validate the will.
 - d. *Interested Witness Status Eliminated:* if a witness to the first will was also a beneficiary under the will, and would be precluded from taking under the interested witness statutes, and then the testator executes a valid codicil with different disinterested witnesses; thereby republishing the first will, the disinterested witness beneficiary in the first will can take again.

****WATCH OUT FOR THIS ON THE EXAM!**

C. **G/R: Valid Will Requirement:** a validly executed will, and only a validly executed will, can be admitted to probate based on a codicil that republishes it.

1. *Exception:* there is a limited exception that if the first will is not validly executed because of fraud or undue influence, then the invalid will can be republished by subsequent codicil.
 - a. Wyoming has recognized this exception [*In Re Nelsons Estate*].

IV. INCORPORATION BY REFERENCE

A. **UPC §2-510: Incorporation by Reference**: any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

A(1). **G/R: Elements of Incorporation by Reference**: there are three elements for this doctrine to apply:

1. the document must be **in existence** at the time the will is executed;
2. the will identifies the document; and
3. the will manifests the intent of the testator to incorporate the document.

B. **G/R: Incorporation by Reference**: a properly executed will may incorporate by reference into its provisions any document or paper not so executed and witnessed, whether the paper referred to be in the form of a mere list or memorandum, if:

1. it was in existence at the time of the execution of the will; and
 2. is identified by clear and satisfactory proof as the paper referred to therein.
- *[*Clark v. Greenhalge*]

C. **G/R: Interpretation of Wills**: the cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided it is consistent with the rules of the law.

1. The intent of the testator is ascertained through consideration of the language which the testator has used to express her testamentary designs, as well as the circumstances existing at the time of the execution of the will.
 2. The circumstances existing at the time of the execution of a codicil to a will are equally relevant, because the codicil serves to ratify the language in the will which has not been altered or affected by the terms of the codicil.
- *[*Clark v. Greenhalge*].

D. **G/R**: if a writing is found which is dated prior to the date of the codicil to a will, which serves to republish the will, it will comply with the requirement that an incorporated document be in existence on the date of the republished will [*Simon v. Grayson*].

E. **G/R: Codicils and Incorporation by Reference**: by definition, a codicil is a supplement to, an addition to, or a qualification of, an existing will, made by the testator to alter, enlarge, or restrict the provisions of the will, to explain or republish it, or to revoke it, and it must be testamentary in character.

1. A codicil need not be called a codicil.
 2. The intention to add a codicil is controlling.
 3. A codicil is valid if: it is written, dated, and signed by the testator it meets all of the requirements of a valid holographic codicil [or if it meets all the formal requirements of a will].
 4. **g/r**: the general principle of law that a codicil validly executed operates as a republication of the will no matter what defects may have existed in the execution of the earlier document, that the instruments are incorporated as one, and that a proper execution of the codicil extends also to the will.
- *[*Johnson v. Johnson*][The *Johnson* case was decided wrongly because in order to probate a holographic will it is necessary to eliminate typed matter on the face of the holographic will on the ground that it is either immaterial or that there is no intent to incorporate the typed matter].

F. **G/R**: A valid holographic codicil may incorporate and republish a prior will which would have been ineffective because of its failure to comply with the formal requisites [*Johnson v. Johnson*].

G. **G/R: Tangible Personal Property Statutes:** allow a person to distribute tangible personal property without re-executing the will; these statutes are a very limited exception to the incorporation by reference doctrine. The list of goods to be distributed can be created after the execution of the will.

1. **W.S. §2-6-124:** is Wyoming's tangible property statute.

G(1). **UPC §2-513: Separate Writing Identifying Bequest of Tangible Property:** whether or not the provisions relating to a holographic will apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, *other than money*.

--To be admissible under this section as evidence of the intended disposition, the writing must:

--be *signed* by the testator; AND

--must describe the items and devisees with reasonable certainty.

--The writing may be referred to as one to be:

--in existence at the time of the testator's death;

--it may be prepared before or after the execution of the will;

--it may be altered by the testator after its preparation; and

--it may be a writing that has no significance apart from its effect on the dispositions made by the will.

IV. ACTS OF INDEPENDENT SIGNIFICANCE

A. **UPC § 2-512: Events of Independent Significance:** A will may dispose of property by reference to acts and events that have significance *apart from their effect upon the dispositions made by the will, whether they occur before or after the execution* of the will or before or after the testator's death. The execution or revocation of another individual's will is such an event.

B. **G/R: Acts of Independent Significance:** this doctrine permits extrinsic evidence to identify the will beneficiaries or property passing under a will.

1. If the beneficiary or property designations are identified by acts or events that have a lifetime motive and significance apart from their effect on the will, the gift will be upheld under the doctrine of acts of independent significance.

a. This is true even though the phrasing of the will leaves it in the testator's power to alter the beneficiaries or the property by a non-testamentary act.

2. In other words, one must determine the testator's intent at the time he changed his estate plan.

C. **G/R: Examples of Acts of Independent Significance:** property designations (like fire or theft insurance) can be incorporated into a will if their significance is apart from the dispositions made in the will. The list can be made after the will is executed (even though this has the effect of allowing the testator to change the will after execution).

1. EX: if T said A gets the picture above my fireplace; and at the time of execution a farm picture was above the fireplace, but at the time of T's death a famous Monet was hanging above the fireplace:

a. If the pictures were moved only because T was redecorating then A does not get the Monet because that is not an act of independent significance.

b. If the Monet was moved after A told T that was the one she wanted, then she would not get it either because the painting was moved for a testamentary effect, and not as of act of independent significance.

2. EX: if T stated in her will that she wanted A she wanted her to have everything is a specific closet:
 - a. If T then placed a bunch of valuables and wad of money in the closet, A would not get the valuables or the money because the items were moved there to give effect to a testamentary intent.
3. EX: if T said that she wanted A to have everything in her safe deposit box:
 - a. A would get the items in the box because courts invariable hold that safe deposit boxes are for “safekeeping purposes”—an act of independent significance.
4. EX: if T said that she wanted A to have everything in her desk drawer:
 - a. This could go either way—if the purpose is non-testamentary then A would get it.
5. EX: a fire insurance list is created, and T says “I want these pictures on this list to be given to A.”
 - a. The court would enforce this because it was not based on testamentary intent; that is, the list was compiled for fire insurance purposes and not testamentary disposition—an act of independent legal significance.

D. **G/R:** under the doctrine of acts of independent significance, the purpose of the transfer or list CANNOT HAVE TESTAMENTARY INTENT.

V. REVIEW

A. **Distinguish:** on the exam DO NOT confuse the elements of these doctrines:

1. Doctrine of Integration: the elements are:
 - a. all papers must be present at execution; and
 - b. intended to be a part of the will.
2. Incorporation by Reference: the elements are:
 - a. the documents must be in existence at the execution of the will;
 - b. the documents must be sufficiently identified in the will; and
 - c. the testator must manifest an intent in the will to incorporate the documents into the will.
3. Republication by Codicil: a validly executed will is treated as re-executed as of the date of the codicil.
4. Acts of Independent Significance: a will may dispose of property by reference to acts or events that have significance **apart from their effect on the disposition of the will.**
 - a. These can be made before or after the will is executed.

§4.4: CONTRACTS RELATING TO WILLS

I. OVERVIEW

A. **Generally:** this situation arises in older person’s wills, or when there is a marriage and consideration for making a will. Generally the contract:

1. must be in writing;
2. may be enforceable by the promisee through specific enforcement;
 - a. However, courts generally give the promisee the quasi-remedy of unjust enrichment and place the damage valuation on the services rendered.
 - b. Some courts hold that there is no consideration for the promise and hence it is unenforceable because the spouse already has a legal duty to care for the other spouse [*Borelli v. Bursseau*].

i. However, there is no legal duty between same sex couples and the promise can be enforceable [*Bryne v. Laura*].

3. EX: T makes a contract with A to leave everything to A at death if A will take care of T for life. T executes a will leaving her estate to A. Subsequently, A changes her mind and decides not care for T. T rescinds the contract. Upon T's death is A entitled to take under T's will because **breach of contract does not revoke a will**; however, T or T's estate may be able to sue under a contract theory, which almost always is the case in these type of situations.

B. **G/R**: a person can enter into a contract to *make a will* or contract *not to make a will*.

1. A contract beneficiary must sue under the law of contracts and prove a valid contract.
2. If, after a contract becomes binding, a party dies leaving a will not complying with the contract, the will is probated but the contract beneficiary is entitled to enforce the contract by having a constructive trust impressed for his benefit upon the estate or devisees of the defaulting party.

II. CONTRACTS TO MAKE A WILL

A. **G/R**: Contracts to Make a Will: a person may enter into a contract to make a will.

1. In many states, a contract to make a will must be in writing to be able to sue for specific performance.
 - a. In these states, if the promisee is not entitled to sue for specific performance because contract to make a will is by oral agreement, the promisee is entitled to receive the value to the decedent of services rendered (quantum meruit).
 - i. The value the decedent put on the services in the oral agreement (e.g. I promise to leave you half of my estate if you care for me) is evidence of the reasonable value of those services.
2. In other states, an oral contract to make a will is specifically enforceable provided:
 - a. the terms are proved by clear and convincing evidence;
 - b. the rendition of the services is wholly referable to the contract; and
 - c. the services are of such peculiar value to the promisor as not to be estimated or compensable by any pecuniary standard.
3. A few states hold that an oral contract for a will in consideration for services rendered by a spouse fails for want of consideration because a spouse is already under a legal duty to care for the dying spouse [*Borelli v. Brusseau*].

B. **G/R**: with contracts to make a will, in order to be enforceable they will have to be very clearly proven.

1. The UPC requires that contract, in effect, be in the will.
2. If the contract is enforceable, it is enforced through contract law, and **not through probate law**.
3. If the contract not enforced in the service type of situation, many times if the court finds the services were rendered, the court will conclude that unjust enrichment has occurred and the service provider (generally a spouse) may get the reasonable value of her services.
 - a. *Caveat*: if the services are provided the spouse some courts will hold that there is a preexisting duty and therefore the provider cannot recovery for unjust enrichment.

C. **UPC §2-514: Contracts Concerning Succession**: a contract to make a will or devise, or not to revoke a will or devise, or to die intestate, . . . , may be established **ONLY BY**:

- (i) provisions of a will stating material provisions of the contract;

(ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; OR

(iii) a writing signed by the decedent evidencing the contract.

The mutual execution of a joint will or mutual wills does *not* create a presumption of a contract not to revoke the will or wills.

II. CONTRACTS NOT TO REVOKE A WILL

A. Contracts Not to Revoke a Will: a person can enter into a contract not to revoke a will. Questions often arise respecting contracts not to revoke will where the husband and wife have executed joint or mutual wills.

1. *Joint Will*: a joint will is one instrument executed by two or more persons as the will of both.
 - a. When the testator dies, the instrument is probated as the testator's will; when the other testator dies, the instrument is probated as the other testator's will.
2. *Mutual Wills*: are the separate wills of two or more persons that contain similar or reciprocal provisions.
3. A *joint and mutual will* is a term commonly used by courts to describe a joint will that devises the property in accordance with a contract.
 - a. In this context, mutuality refers to the contract and not to reciprocal provisions of separate wills.
4. There are no legal consequences peculiar to joint or mutual wills unless they are executed pursuant to a contract between the testators not to revoke their wills.
 - a. The initial problem is proof of the contract.
 - b. Most courts hold that a contract not to revoke a will is not enforceable unless it is proved by clear and convincing evidence and that the mere execution of a joint will or of mutual wills does not give rise to a presumption of contract.
 - i. The difficulty, however, is that the existence of a common scheme and in the case of a joint will, the expression of the scheme in a jointly executed document, strongly suggests an understanding or underlying agreement and thus invites a claim of contract, the terms of which can be inferred from the will or wills.
5. The danger of a lawsuit can be reduced by inserting in every joint or mutual will a provision declaring that the will was or was not executed pursuant to contract.
6. The lawyer should not execute joint wills.

B. **G/R**: Third Party Beneficiaries and Mutual Wills: [*majority rule*]: a surviving spouse's statutory share of an estate can be subordinated to claims of third party beneficiaries of previously executed mutual wills.

1. It makes no difference whether the surviving spouse was married to the decedent for one year or 25-years, the surviving spouse would be entitled to no interest in the deceased's spouse's probatable estate if the third-party beneficiaries' claim consumed the estate.
 - a. In other words, this gives the children (the third part beneficiaries) creditor's status to the contract and that means before the estate is divided all the creditors take what is coming to them, and they get to take before the division of the estate.
2. Elective Share Rule: *Minority view*: [adopted by the court]: a contract that gives rise to the claim of the third-party beneficiary is limits the rights of the third party beneficiary: the third party beneficiary's right under the contract is limited by the possibility that the survivor might remarry and that the subsequent spouse might elect against the will.

a. The justification for the elective share and pretermitted spouse statutes is to protect the surviving spouse of the marriage in existence at the time of death of his or her spouse. This based on the fact that courts value highly the institution of marriage.

*[*Via v. Putnam*].

**These situations arise in cases with fact scenarios similar to the one in *Putman*:

- a. A marries B and they execute mutual wills leaving the residuary after last spouse dies to the kids. B dies, then A remarries C. A then dies. The kids bring a claim to collect the residue, but C probably under a pretermitted spouse statute claims some A's estate.
- i. Under the majority rule the kids win as third party beneficiaries.
 - ii. Under the minority rule, C gets the statutory amount (same as intestacy in most states).

C. **G/R: Consumption Doctrine**: parties should not enter into contracts not to revoke a will because it limits the person's rights to deal with the property—the property is transferred, in effect, into a life estate with the power to consume reasonably. Thus, the surviving spouse cannot consume the entire estate, based on a good faith test.

1. This even covers property that the surviving spouse acquires after the dead spouse died.
2. The “consumption doctrine” basically says that the surviving spouse has to, in good faith, consume the property; that is, not waste it.

§5: **TRUSTS: CREATION, TYPES, AND CHARACTERISTICS**

§5.1: INTRODUCTION

I. OVERVIEW

A. **Generally**: a trust is a device whereby a trustee manages property for one or more beneficiaries.

1. A trust is a flexible tool that can be used for purposes as unlimited as the imagination of lawyers.
 - a. These diverse purposes range from simple estate plans to provide for the surviving spouse and children in accordance with the respective needs, to the running of vast business empires.
 - b. The trust is a useful device for managing wealth held for charitable purposes or for pensions. It is also used for managing against investment funds or holding security for a loan.
2. The gift giver (in life or death) wants to give property to a beneficiary but they want someone else to manage the property, i.e., the trustee.
 - a. EX: Settlor gives in trust to pay the income to B for life, and upon B's death, pay the principle to C.
3. Trusts are temporal divisions of property; that is, a life estate with a vested remainder. Trusts are a series of possessory estates and future interests.
 - a. The trust can create all kinds of interests and divestments.
4. *Rule Against Perpetuities*: because trusts are made up of future interests, they are subject to the rules against perpetuities, meaning that they could fail if they do not satisfy the life in being and 21-years rule.
 - a. exception: charitable trusts are not subject to the Rule against perpetuities.

B. **G/R: Private Express Trust**: are trust created gratuitously for the benefit of individual beneficiaries. Thus, a private express trust is a gift from one person to another, in life or after death.

1. There are several kinds of private express trusts:
 - a. Revocable trust;
 - b. marital trust;
 - c. trust for incompetent person;
 - d. trust for minor;
 - e. dynasty trust; and
 - f. discretionary trust.
2. *Distinguish*: private express trusts from trusts that arise by operation of the law, such as constructive trusts and resulting trusts.
 - a. *Constructive Trusts*: the duty of the trustee under a constructive trust is to give the property to the beneficiary—just turn the property over to the person who is to receive it (the beneficiary). Constructive trusts are implied by the operation to prevent fraud, and other inequitable taking of property (such as when the someone kills to take under a will) and the trustee’s only duty is to turn the property over.
 - b. *Resulting Trusts*: are another type of trust which arises by operation of law. These trusts are implied when the settlor tries to make a trust, but fails, then the trustee’s only duty is to give the property back to the settlor.

II. PARTIES TO A TRUST

A. **G/R: Creating a Trust**: to create a trust, a property owner transfers assets to a trustee, with the trust instrument or will setting forth the terms of the trust.

1. A properly drafted trust will set forth both the dispositive provisions fixing the beneficiaries’ interests and the administrative provisions specifying the powers and duties of the trustee in managing the trust estate.
2. A trust ordinarily involves at least three parties:
 - a. the settlor;
 - b. the trustee; and
 - c. one or more beneficiaries.

*Three persons are not necessary for a trust, one person can wear two or even all three hats.
3. **Elements of a Trust**: there are three elements that are needed to create any type of trust:
 - a. Intent;
 - b. property; and
 - c. beneficiaries.

II(A). Settlor

A. **G/R: Parties to a Trust**: there must be three parties to every trust:

1. *Settlor*: the person creating the trust through a trust instrument;
 - a. the trust created can be either:
 - i. inter vivos; or
 - ii. testamentary.
 - b. there are two types of provisions in a trust:
 - i. *dispositive provisions*: the provisions distributing the property and stating to whom the property is to go; and
 - ii. *administrative provisions*: provisions describing how the property is to be given away.
2. *Trustee*: the person who manages and administers the trust property; and

3. *Beneficiary*: the person who receives the property.

B. **G/R: Inter Vivos Trust**: [distinguish from inter vivos gifts]: an inter vivos trust is a trust created during the settlor's life.

1. An inter vivos trust can be created either by:

a. *Declaration of Trust*: a declaration of trust (in which the settlor declares that he holds certain property in trust); or

i. under the declaration of trust, the settlor is the trustee;

ii. to make an outright gift of property, the donor must either deliver the property or execute a deed of gift;

iii. however, a declaration of trust of personal property requires neither delivery nor a deed of gift; all that is necessary is that the donor manifests an intention to hold the property in trust;

iv. If the trust is real property, the Statute of Frauds requires a written instrument for a declaration of trust.

v. EX: A declaration of trust arises when a person states that "I declare I hold this property in trust for "X" Under this common scenario, "T" is the settlor and trustee, and "X" is the beneficiary.

b. *Deed of Trust*: a deed of trust in which the settlor transfers property to another person as trustee.

2. **G/R**: the only prohibition on an inter vivos trust is that the trustee cannot be the sole beneficiary.

a. Think of this requirement as there must **always be someone to march into court and enforce the trustee's managerial duties**.

3. **G/R: *Delivery***: delivery is required if the settlor is not going to be the trustee.

C. **G/R: Testamentary Trust**: is a trust created by will, if the trust is created by will, the settlor, cannot be the trustee (of course because he's dead). Thus, the trustee will necessarily be someone else.

1. A testamentary trust is still a private express trust.

D. **G/R: Trust Property**: is the property placed in trust, whether it is real estate or money.

1. The trustee holds legal title to the trust property.

2. The beneficiaries have equitable interests in the trust property.

E. **G/R: Statute of Frauds**: if the trust property is real property, the Statute of Frauds requires a written instrument for a declaration of trust.

II(B). Trustees

A. **G/R: Trustees**: a trustee is the person who administers and manages the trust property.

1. There may be one trustee or several trustees; the trustee can be an individual or a corporation.

2. The trustee may be the settlor or a third party, or the trustee may be a beneficiary.

3. The trustee is held to very high standards in managing the trust, he is a fiduciary and must manage the trust in the sole benefit for the beneficiary.

a. The trustee must make the trust profitable and productive; and

b. he has to have some duties to perform **or the trust will fail**.

B. A Trust Will Not Fail for Want of Trustee: if the settlor intends to create a trust but fails to name a trustee, a court will appoint a trustee to carry out of the trust.

1. *Successor Trustees*: if the testator's will names someone as trustee but the named person refuses appointment or dies while serving as trustee, and the will does not make provision of a successor trustee, the court will appoint a successor trustee.
 - a. Exception: this rule does not apply if the court finds (or the trust instrument specifies) that the trust powers were *personal to the named trustee*. If it is determined that the settlor intended the trust to continue only so long as the person designated as trustee continues to serve in that capacity, the trust terminates when the named person ceases to serve as trustee [however, this exception is rarely invoked].

C. **G/R**: Trustee's Fiduciary Duties: In managing the trust property, the trustee is held to a very high standard of conduct.

1. The trustee is under a duty to administer the trust solely in the interest of the beneficiaries;
 - a. *Self-Dealing*: wherein the trustee acts in the same transaction both in its fiduciary capacity and in an individual capacity are severely limited, and for some transactions is prohibited all together.
2. The trustee must preserve the property, make it productive, and where required by the trust instrument, pay the income to the beneficiary.
3. In investment decisions, the trustee owes a duty of fairness to both classes of beneficiaries:
 - a. *Income Beneficiaries*: the income beneficiaries (who are interested in income and high yields) and
 - b. *Remaindermen*: the remaindermen (who are concerned about preservation of principle and appreciation in values).
4. Other important duties of a trustee include the duty to:
 - a. keep the trust property separate from the trustee's own property;
 - b. to keep accurate accounts;
 - c. to invest prudently; and
 - d. not to delegate trust powers.

D. **G/R**: Passive Trusts: in order to have a trust, it is necessary for **the trustee to have duties to perform**. If the trustee has no duties at all, there is no reason to recognize, or have, a trust and it will fail.

1. The trust is said to be dry or passive;
2. When a trust fails because the trustee has no active duties, the beneficiaries acquire legal title to the trust property.

E. **G/R**: Consent: because a trustee has onerous duties and liabilities, the law does not impose upon a person the office of trustee unless the person accepts. Once a person accepts the office of trustee, the person can be released from liability only with consent of the beneficiaries, or by a court order.

II(C). Beneficiaries

A. **G/R**: Beneficiaries: the beneficiaries hold equitable interests, generally speaking, this means that the beneficiaries have interests that are different from the legal interests.

1. Of special importance are the remedies available to beneficiaries for breach of trust. The beneficiaries have a personal claim against the trustee for breach of trust.
 - a. However, this personal claim has no higher priority than the claim of other creditors of the trustee and thus might not protect the beneficiaries if it were their only remedy.

- b. Equity gives the beneficiaries additional remedies relating to the trust property itself.
- c. Personal creditors of the trustee, other than the trust beneficiaries, cannot reach the trust property.
- d. If the trustee wrongfully disposes of the trust property, the beneficiaries can recover the trust property unless it has come into the hands of a bona fide purchaser for value.
- e. If the trustee disposes of trust property and acquires other property with the proceeds of the sale, the beneficiaries can enforce the trust on the newly acquired property.
 - i. Largely because of these rights to reach the trust property, the beneficiaries have equitable title to the trust property.

B. G/R: Rights of Beneficiaries: beneficiaries are the person who will get the benefits of the trust. They usually get the property interest (i.e. money or property) through a series of future interests.

1. *Creditors:* the creditors of the settlor cannot reach the property of the trust; but the creditors of the beneficiaries can reach the trust property.
2. *Bona Fide Purchaser Rule:* if the beneficiary sells the trust property to a bona fide purchaser for value, then his creditors cannot reach the property anymore.
3. *Discretion of Trustee:* the discretion of the trustee is usually described in the trust instrument, however, the courts usually give the trustees as much discretion as can be given under a “reasonable trustee standard.”
 - a. If the trustee is too conservative or unreasonable in investments, he can be held liable for breach of a fiduciary duty to the beneficiary.
 - b. The settlor can put provisions in the trust instrument which limit the liability of the trustee, absent a limit of liability for willful misconduct.
4. *Revocability:* most trusts today are revocable, and the settlor can revoke the duties of the trustee, but problems arise when the settlor dies because the **general rule** is that the beneficiaries cannot remove the trustee.
 - a. However, the court, under exceptional circumstances, can remove the trustee but it is very hard to do and is not done often.

C. G/R: Successive Beneficial Interests: private trusts almost always create successive beneficial interests.

1. Typically, trust income is payable to the beneficiary (or class of beneficiaries) for life, perhaps to be followed by life interests in another class of beneficiaries, with the trustee to distribute the trust corpus to yet another class of beneficiaries upon termination of the trust.
2. Thus, the creation of a trust involves the creation of one or more equitable future interests as well as a present interest in the income.
 - a. Today, most life estates and future interests are equitable rather than legal interests; they are created in trusts.
 - b. Legal life estates and future interests in tangible or intangible property are rare and almost always *inadvisable*.
 - c. A trust with an equitable interest is a much more flexible and useful means of giving property than a disposition that creates legal interests.

§5.2: CREATION OF A TRUST

I. OVERVIEW

A. G/R: Elements of a Trust: there are three main elements to a trust:

1. *Creation:*

- a. intent;
- b. property;
- c. beneficiary.

2. *Parties:*

- a. settlor;
- b. trustee;
- c. beneficiary.

****REMEMBER:** the *sole trustee cannot be the sole beneficiary* because then there is not enforcement power on the part of the trustee (unless he sues himself).

3. *Types:*

- a. inter vivos trust:
 - i. declaration of trust;
 - ii. deed of trust (must have delivery).
- b. testamentary trust: trust set up in the will.
- c. inter vivos trust with pour over will:
 - i. combines the inter vivos trust and the testamentary trust;
 - ii. this type of trust comes into being by setting up a trust inter vivos, then when the settlor dies, the property from the will pours into the assets of the trust.
 - thus, the testator is the settlor.

****These are all private express trusts as opposed to constructive or resulting trusts.**

II. INTENT TO CREATE A TRUST

A. **Generally:** the settlor has to have intent to create a trust relationship, he does not have to say trust, or even know what it means, he must however transfer the property to someone else with the intent that the person manage his property.

A(1). **G/R: Intent to Create a Trust:** no particular words are necessary to create a trust. The words trust and trustee need not be used.

1. **TEST:** the sole question is whether the grantor manifested an intention to create a trust relationship.
 - a. Where the grantor conveys property to a grantee to hold for the “use and benefit” of another, this is a sufficient manifestation of an intention to create a trust.

A(2). **G/R: Creation of a Trust:** there are three elements necessary to create a trust:

1. *Settlor’s Intent:* the settlor must manifest an intention to allow another person to manage property for the benefit of a third person, the beneficiary [distinguish from precatory language]; the settlor does not need to use the word trust, or even know what it means.
2. *Property:* there has to be something to place in the **trust box** (i.e. tangible property, however, intangible property can also go into the box).
 - a. Any recognizable transferable property is sufficient.
 - b. The trust property **has to be in existence to go into the box:**
 - i. EX: the settlor cannot say I will give in trust the money I get from a garage sale I will have next year (because you don’t really know if the settlor have a garage sale, or if he does, that he will sell anything).
 - ii. EX: the settlor can say I will hold in trust the money I get from a store which sells his junk for him wherein they give him a ticket and when the item is sold give him a percentage of the money [this is allowable because there is an interest

in the ticket—if the store never sells it he can go get his property back, if he does, he can have the money].

3. *Beneficiary*: there must be a person who will receive the property.

A(3). **Distinguish**: these elements from the elements of a gift. The elements of a gift are:

1. donative intent;

2. delivery; and

a. Delivery must be as *perfect as the circumstances allow*. There are three types of delivery:

a. actual delivery: passing title directly;

b. constructive delivery:

c. symbolic delivery:

3. acceptance.

B. **G/R: Intent**: if the respective donors of a trust did not expressly direct a beneficiary to hold the subject matter of the gift “in trust” it is not dispositive because that is not essential to create a trust relationship.

1. It is enough if the transfer of property is made with the intent to vest the beneficial ownership in a third person.

*[*Jimenez v. Lee*].

C. **G/R: Partial Merger**: a trust may be created in which the trustees are A and B and the sole beneficiary is A.

1. In such a case it might be argued that there is automatically a partial extinguishment of the trust, and that A holds an undivided half interest as joint tenant free of trust, although B holds a similar interest in trust for A.

2. The better view, however, that there is no such partial merger, and A and B will hold the property as joint tenants in trust for A.

*[*Jimenez v. Lee*].

D. **G/R: Trustee’s Duties**: the trustee owes a duty to the beneficiary to administer the trust solely in the interest of the beneficiary [Rst. (2) Trusts §170].

1. The trustee also has the duty to maintain and render accurate accounts of the trust property, and this duty is a strict one.

*[*Jimenez v. Lee*].

E. **G/R: Accounting Duty**: it is the duty of the trustees to keep full, accurate, and orderly records of the statutes of the trust administration and all acts thereunder.

1. The general rule of law applicable to a trustee burdens him with the duty of showing that the account which he renders and the expenditures which he claims to have been made were correct, just, and necessary.

2. He is bound to keep clear and accurate accounts, and if he does not, the presumptions are all against him, obscurities and doubts be resolved adversely to him.

3. He has the burden of showing on the accounting how much principal and income he has received and from whom, how much disbursed and to whom, and what is on hand at the time.

4. The trustee is entitled to be credited on the accounting with all sums paid or property transferred by him from trust funds, and with sums advanced by him from his own funds, when such payments or transfers were in the exercise of powers expressly or impliedly granted to

him by the trust instrument, or powers given him by statute or court order, or reasonably identical to the exercise of such powers.

*[*Jimenez v. Lee*].

F. **G/R: Precatory Language:** in a surprisingly large number of cases, the testator expresses a wish that the property devised should be disposed of by the devisee in some particular manner, but the language does not clearly indicate whether the testator intends to create a trust (with a legal duty so to dispose of the property) or merely a moral obligation unenforceable at law.

1. If the language indicates only a moral obligation, it is called *precatory* language, and sometimes courts speak of precatory trusts meaning unenforceable dispositions of this sort.

a. EX: a bequest to “A with the hope (wish, desire, etc...) A will care for B.

G. **G/R: Equitable Charge:** there is a distinction between a trust and an equitable charge. If a testator devises property to a person, subject to the payment of a certain sum of *money* to another person, the testator creates an equitable charge, not a trust.

1. An equitable charge creates a security interest in the transferred property, and there is no fiduciary relationship.

H. **G/R: Gifts:** a gift which is imperfect for lack of delivery will not be turned into a declaration of trust for no better reason than that it is imperfect for lack of delivery. Courts do not supply conveyances where there is none [*Hebrew Univ. Ass’n v. Nye*].

I. **G/R: Oral Trusts:** one can orally constitute himself as trustee of personal property for the benefit of another and thereby create a trust enforceable in equity, even though without consideration and without delivery.

1. But he must in effect constitute himself as trustee. There must be an express trust, even though oral.

III. NECESSITY OF TRUST PROPERTY

A. **Generally:** the usual definition of a trust includes the element of *trust property*.

1. Since a trust is a method of disposing of, or managing, property, it is said that a trust cannot exist without trust property.

2. The trust property may be one dollar or one cent or it may be *any interest in property* that can be transferred.

a. Contingent remainders, leasehold interests, choses in action, royalties, life insurance policies—may be put in trust.

B. **G/R: Trust Res:** the requirement of an identifiable trust res distinguishes a trust from a debt.

1. A trust involves a duty to deal with some specific property, kept separate from the trustee’s own funds.

2. A debt involves an obligation to pay a sum of money to another.

3. **Test:** the crucial factor in distinguishing between a trust relationship and an ordinary debt is whether the recipient of the funds is entitled to use them as his own and co-mingle them with his own monies.

C. **G/R: Resulting Trusts:** if the private express trust fails for any reason, such as lack of trust property, it can be argued that a resulting trust should be implied at law.

1. A resulting trust is a trust that arises by operation of the law in one of two situations:

- a. where an express trust fails or mistakes an incomplete disposition; or
 - b. where one person pays the purchaser price for property and causes title to the property to be taken in the name of another person who is not a natural object of bounty of the purchaser.
 - i. This is a purchase money resulting trust.
2. While some of the rules applicable to the express trusts are applicable to resulting trusts, the statute of frauds *is not*.
3. A resulting trust does not contemplate an ongoing fiduciary relationship wherein the trustee holds and manages the property for the beneficiary. Once a resulting trust is found, the trustee must re-convey the property to the beneficial owner upon demand.

D. **G/R: Constructive Trusts**: a constructive trust arises by operation of law and not by the express terms of an instrument. Basically, the term constructive trust is the name given a flexible remedy imposed in a wide variety of situations to prevent unjust enrichment.

- 1. A constructive trustee is under a duty to convey the property to another on the ground that retention of the property would be wrongful.
- 2. The usual **elements of a constructive trust are**:
 - a. a confidential or fiduciary relationship;
 - b. a promise, express or implied, by the transferee;
 - c. a transfer of property in reliance on the promise; and
 - d. unjust enrichment of the transferee.
- 3. **G/R: Change in Position**: [how to use on the exam] generally an ineffective gift will not be upheld as an express trust. However, if the donee, in reliance upon the gift, so changes his position that it would be inequitable to preclude him from obtaining the property, a court of equity will compel the donor to complete the gift by making an effective conveyance.
 - a. In such a case, the donor holds the property upon a constructive trust for the donee until he make an effective conveyance of it to the donee.
 - b. Equity is not converting an imperfect gift into a declaration of trust, but is merely imposing a duty on the donor in order to prevent unjust enrichment.

*[*Scott, Trusts*].
- 4. **G/R: Effect of Death of Donor**: where the owner of property makes an ineffective conveyance of an intended gift, he will not ordinarily be compelled to complete the gift; but if he dies believing that he as made an effective gift, and if the donee was natural object of his bounty, such as a wife or child, it has been held that the donee can obtain the aid of a court of equity to complete the gift against the heirs or next of kin of the donor.
 - a. In such a case, the donor is not an express trustee of the property, nor are his heirs or next of kin, but equity imposes a constructive trust upon the property.

E. **G/R: Expectancy Interests**: an interest which has not yet come into existence or which has ceased to exist cannot be held in trust; courts have uniformly held that an expectancy cannot be the subject matter of a trust and that an attempted creation, being merely a promise to transfer property in the future, is invalid unless supported by consideration.

- 1. *Caveat*: a person can make a contract binding himself to create a trust of an interest he may acquire in the future; but such an agreement is not binding as a contract unless the requirements of the laws of contracts are complied with.
 - a. In such a case, there is at most a gratuitous promise to create a trust in the future and such an undertaking is not binding as a contract for lack of consideration.

- b. If a person purports to declare himself trustee of an interest not in existence, or if purports to transfer such an interest to another in trust, he is liable as upon a contract to create a trust if, *but only if*, the requirements of the law of contracts are complied with.

*[*Brainard v. Comm'nr*].

F. **G/R:** Oral Declarations of Trust: declarations of trust do not have to be in writing, that is, they can be made orally.

- a. *Caveat:* if it is a trust to create interest an real estate then the statute of frauds has to be complied with.

*[*Brainard v. Comm'nr*].

G. **G/R:** Future Profits Coupled with a Property Interest: there are many instances of courts enforcing assignments of rights to sums which were expected thereafter to become due to the assignor.

1. However, such an assignment must be coupled with a property interest, such as a license; in other words, because a license is an assigned property right, a person can place a percentage of that right in the "trust box" off which future earnings will accrue.

2. **Note:** be careful to distinguish between a gift and declaration of a trust in such cases. In *Speelman* the transfer was actually gift; whereas in *Brainard*, the court did not allow the transfer because it was a trust.

3. **Examples:**

- a. B declares to A: "I will give you 5% of the profits of a musical play based upon a written score if a produce it and if there are any profits.

- i. This is not an effective transfer because there is no "delivery."

- b. B orally declares himself trustee fro one year of all stocks he owns, with any profits of the stocks he owns to go to A.

- i. This is an effective transfer because stocks, and the profits therefrom, can go in the box.

- c. In a notarized writing B declares himself trustee for the benefit of A of any profits B makes from stock trading in the next year.

- i. This is just like the *Brainard* case, (except in writing) but there is still not any property in the box because he does not "own" the stocks; hence, the trust fails for want of a corpus.

*[*Speelman v. Pascal*].

F. **Bottom Line:** there must be property to put in the box, it can be based on future profits, in situations were there is a license, or it can be based on stock if it is owned. However, if it is just a promise for future profits, it is a gift to give future profits, which is unenforceable for want of consideration, but if there is a contract and consideration it enforceable under contract law.

IV. NECESSITY OF TRUST BENEFICIARIES

A. **G/R:** Beneficiary Requirement: a trust must have one or more beneficiaries; there must be someone to whom the trustee owes fiduciary duties, some on can call the trustee to account (march into court an enforce the rights).

1. The beneficiaries have to be identifiable because he has to be able to go into court and enforce the duties of the trustee.

- a. **G/R:** the trustee CANNOT be the sole beneficiary because unless he sues himself there are no enforceable duties.

2. *Caveat:* there does not have to be an ascertainable beneficiary.

- a. EX: The beneficiaries may be unborn or unascertained when the trust is created.
 - i. Thus, a trust created by A, who is childless for the benefit of her future kids would be a valid trust.

3. Want of Indefiniteness: if there are no identifiable characteristics to the beneficiary, however, the trust will fail for want of indefiniteness.

- a. Exception: charitable trust do not need to have ascertainable beneficiaries, or beneficiaries with identifiable characteristics.

B. **G/R: Power of Appointment**: the settlor can give someone else the power to decide who is to receive his property.

- 1. The power of appointment, unlike a trust, is not imperative and leaves the act to be done at the will of the donee of the power.
- 2. Where there is an transfer in trust for members of an indefinite class of persons, no enforceable trust is created but the transferee has a discretionary power to convey the property to such members of the class as he may select; in other words, he has the power of appointment [*Scott, Trusts*—this can be used as a counterargument to the rule set forth in *Clark* see below].
- 3. **TEST**: a valid power of appointment may have definite class of beneficiaries (e.g. my issue) or it may not (e.g. anyone except the donee or her creditors or her estate). The test of validity is:

- a. if the class of beneficiaries is so described that some person might reasonably be said to answer the description, the power is valid.
 - i. An appointment is not invalid, however, if it cannot be determined whether the appointee answers the description.

4. **Rst. (2) Donative Transfers, §12.1 cmt. e**: a provision in a will in relation to specified property may authorize the executors to make decisions as to the person who will receive the property.

- a. Rather than failing altogether, the provision should be construed to give the executors a power of appointment exercisable with a reasonable period of time after the appointment of executors, with specified property passing in default of appointment power is not exercised.

*[*Clark v. Campbell*].

C. **G/R: Want of Indefiniteness**: by the common law, there cannot be a valid bequest to an indefinite person. There must be a beneficiary or class of beneficiaries indicated in the will capable of coming into court and claiming the benefit of the bequest.

- 1. This principle applies to private, but not to public trusts and charities.
- 2. The basis for this distinction is the difference in the enforceability of the two classes of trusts:
 - a. *Private Trusts*: in private trusts, there being no definite person with a beneficial interest in the estate to assert his right, there is no one who can compel performance, with the consequent unjust enrichment of the trustee;
 - b. *Public Trusts*: in the case of public or charitable trusts, performance is considered to be sufficiently secured by the authority of the attorney-general to invoke the power of the courts.

*[*Clark v. Campbell*].

D. **G/R: Class Beneficiaries**: the beneficiaries under a trust may be designated by class (like the direct legatees in a will); but in such a case the class must be capable of delimitation, such as “brothers and sisters,” children, issue, nephews and nieces.

1 A bequest giving the executor authority to distribute his property among “his relatives” can be sustained because there are statutes defining such a class (the intestacy and distribution statutes). Thus, if the class can be ascertainable through statutory definition, such as relatives or next of kin, the trust can be enforced.

2. In *Clark*, the decedent attempted to make a bequest to his “friends” because that class is indefinite and cannot be defined through statute or otherwise, the devise fails for want of indefiniteness.

*[*Clark v. Campbell*].

E. **G/R: Honorary Trusts:** the elements of an honorary trust are:

1. *Acceptance:* the trustee must be willing and accept the position, and the trustee is on her honor to provide for the settlor’s intent; and

2. *Must Not Violate RAP:* the trust must not violate the rule against perpetuities (most honorary trusts fail because they do not satisfy this element.

a. The rule against perpetuities has to be satisfied when the trust is created.

*[*In Re Searight’s Estate*].

E(1). **G/R: Bequests to Animals:** a bequest to care for a *specific animal* is usually designated as an honorary trust; that is, one binding the conscience of the trustee, since there is no beneficiary capable of enforcing the trust.

1. Generally, the absence of a beneficiary having a legal standing in court and capable of demanding an accounting of the trustee is fatal and the trust fails, however, the courts have generally relaxed this rule by enforcing honorary trusts.

2. **Rst. (2) §379:** a limitation of property on an intended trust **is invalid** when, under the language and circumstances of the limitation:

a. the conveyee is to administer the property from the accomplishment of a specific non-charitable purpose and there is no definite or definitely ascertainable beneficiary designated; and

b. such administration can continue for longer than the maximum period allowed by the rule against perpetuities.

3. **Note:** if the gift would have been made to the humane society, or some other charitable organization, the gift could have been enforced as a charitable trust, and hence, there is no requirement for a identifiable beneficiary.

*[*In Re Searight’s Estate*].

V. NECESSITY OF A WRITTEN INSTRUMENT

V(A). Oral Inter Vivos Trusts of Land

A. **Generally:** an inter vivos oral declaration of trust of personal property is enforceable; however, the Statute of Frauds requires an inter vivos gift of land to be in writing (and the Statute of Wills requires that a testamentary trust be created by a will).

1. Thus, a **written instrument is required:**

a. when there is an inter vivos gift of land, which has to satisfy the Statute of Frauds; or
b. a testamentary trust created by will because wills are required to be in writing.

B. **G/R: Oral Inter Vivos Trusts of Land:** in a transfer of land by inter vivos trust based through a deed upon an oral trust to pay the income for life and then transfer at death, the courts are split:

1. *Majority Rule*: requires that for the statute of frauds to be complied with, thus, the transfer of any interest must be in writing [*Heible v. Heible*];

2. *Minority Rule*: [a small exception to the majority rule that everything must be in writing] hold that there is a constructive trust and that the original transferee has to give the land back in order to avoid unjust enrichment.

a. Courts, under this theory, will enforce a constructive trust when there is a confidential relationship and no unclean hands. The confidential relationship arises when someone is really sick and *not* just in a familial relationship.

C. **G/R**: under the Statute of Frauds, oral agreements concerning interests in land are unenforceable.

1. *Caveat*: the Statute of Frauds does not apply to trusts arising by operation of law.

a. Where a confidential relationship has been established there is substantial authority that the **burden of proof rests on the party denying the existence of the trust**—and then, by *clear and convincing evidence*, to negate such a trust.

b. It is unnecessary to find fraudulent intent for the imposition of a constructive trust. Whether there be fraud at the inception or a repudiation afterward, the whole significance of such cases lies in the unjust enrichment of the grantee through his unconscionable retention of the trust res.

i. The bond between a parent and child is not a per se fiduciary one; it does generate, however, a natural inclination to repose great confidence and trust.

2. Exception: thus, there is an exception to the statute of frauds requirement where:

a. the owner of an interest in land transfers it inter vivos to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, as required by the statute of frauds, and the transferee refuses to perform the trust, the transferee holds the interest upon a *constructive trust* for the transferor if the transferee at the time the transfer was in a confidential relation to the transferor [**Rst (2) §44(b)**].

*[*Hieble v. Hieble*].

D. **G/R**: Doctrine of Unclean Hands: a court in equity will not enforce a constructive trust when the transferor perpetrates a fraud on the court thereby giving him “unclean hands.”

1. An attempt to avoid probate is not unclean hands.

*[*Pappas v. Pappas*].

V(B). Oral Trusts for Disposition at Death

A. **G/R**: if a person procures an absolute devise or bequest to himself by orally promising the testator that he will convey the property to or hold it for the benefit of third persons, and afterwards refused to perform his promise, a trust arises out of the confidence reposed in him by the testator and of his own fraud, which a court of equity, upon clear and convincing evidence, will enforce against him at the suit of such third persons.

1. If the testator devises or bequeaths property to his executors upon trusts not defined in the will, but which, as he states in the will, he has communicated to them before its execution, such trusts, if for lawful purposes, may be proved by the admission of the executors, or by oral evidence, and enforced against them.

2. Such trusts may be enforced against the heirs or next of kin of the testator, as well as against the devisee.

*[*Olliffe v. Wells*].

C. **G/R: Secret Trusts**: if the testator leaves a legacy to a devisee absolute on its face, without anything in the will indicating an intent to create a trust, a promise by the devisee to the testator to use the legacy for some state purposes (such as charity) is enforceable by a constructive trust imposed on the devisee.

1. This is called a secret trust because the will indicates no trust and it looks like an absolute gift.
2. Courts admit evidence of the promise for the purpose of preventing the devisee from unjustly enriching himself by pocketing the legacy.
3. Having admitted proof of the promise the courts proceed to enforce the promise by imposing a constructive trust on the devisee for the benefit of the stated purpose (charity).

D. **G/R: Semi-Secret Trusts**: if the will indicates that the devisee is to hold the legacy in trust but does not identify the beneficiary; a semi-secret trust is created. Since the will shows on its face an intent not to benefit the devisee personally, it is not necessary to admit evidence of the devisee's promise in order to prevent unjust enrichment.

1. Such evidence is excluded and the legacy of the devisee fails for want of an identifiable beneficiary.

E. **G/R: Semi Secret and Secret Trusts Distinguished**:

	<u>SECRET</u>	<u>SEMI-SECRET</u>
Will provision:	absolute gift to trustee	gift in trust but terms omitted
Oral Promise:	Will hold in trust for Bs	Key Terms (Bs)
Result if left as is:	trustee takes (unjust enrichment)	trust fails
Usual Remedy:	constructive trust	resulting trust
Who Takes:	intended Bs	heirs/residuary

Key: Bs = beneficiaries.

E(1). **G/R: Secret Trust analysis**:

1. With secret trusts the devise looks like an absolute gift.
2. There must be some oral promise by the devisee to hold the property in trust for some stated purpose.
3. If the court does not look at extrinsic evidence surrounding the oral promise, it is considered an outright gift and the intended trustee gets to keep the property, even if he is unjustly enriched.
4. However, to prevent the devisee from being unjustly enriched the court can enforce a constructive trust.
5. Thus, if the court hears extrinsic evidence on the oral promise, it will enforce it and the intended beneficiaries will take.

E(2). **G/R: Semi-Secret Trust analysis**:

1. On the face of the will, it will look like the testator intended to create a trust, but if the key terms are admitted into evidence, usually the beneficiaries will take.
2. The oral promise is the “key term” of the trust that is missing.
3. If the court does not allow evidence of the oral promise to be admitted, then the trustee will not take any money because the trust fails, and hence the court will not enforce any provision because the devisee is not the beneficiary.
4. The court will enforce a resulting trust, and the purported trustee will have the duty to turn the property over to the heirs and residuary devisees.

**The key is if the intended trustee gets the gift outright, the court will enforce it.

§5.3: DISCRETIONARY TRUSTS

A. **G/R: Mandatory Trusts:** trusts can be divided into mandatory trusts and discretionary trusts. In a *mandatory trust*, the trustee must distribute all of the income.

1. EX: To trustee to pay the income to A quarter for life, then distribute the principle to B.

B. **G/R: Discretionary Trusts:** in a *discretionary trust*, the trustee has discretion over payment of either the income or the principal, or both. Discretionary powers of a trustee can be drafted in limitless ways.

1. With respect to the principle of the trust, the trust instrument may specify that the trustee has discretionary power to distribute principal to the income beneficiary. Such a power may be limited by standard (such as “such amounts as are necessary to support my wife in the style of living which she has become accustomed.”); or the trustee may be given wide discretion (such as “to give to B whenever he thinks necessary.”).
2. **Duty:** the trustee still has a duty in discretionary trusts, namely, to act in good faith and be reasonable—this is his minimum standard of conduct.
3. EX: O transfers property in trust to X to distribute all the income to one or more members of a group consisting of A, A’s spouses, and A’s children in such amounts as the trustee determines is necessary. (In this example the trustee has discretionary power over the income but not the principle).

C. **G/R: Other Types of Trusts:** there are several other types of trusts, some with discretionary clauses, and mandatory clauses, or only discretionary but with a standard, here are the most common:

1. **Spray Trusts:** are mandatory and discretionary w/ the power to distribute specifically to certain persons.
 - a. EX: To trustee to pay the income of A, B, *or* C quarterly for 10-years, then pay the principle to X. Trustee may invade the principle during the course of the trust as necessary to support the medical needs of A, B, or C.
 - i. In the first clause, it is mandatory that the trustee has to give money, but it is discretionary in who he gives the money to.
 - ii. The second clause is mandatory because he has to give the principle to X.
 - iii. The third clause is discretionary, but it comes with a duty, namely, to keep appraised of A, B, and C’s medical needs and if the principal invades the principal to pay for their medical needs, he must do so in good faith (investigating, accounting, etc...).
2. **Spend Thrift Trusts:** the beneficiary cannot voluntarily alienate their interests, nor can their creditors reach their interests; it is created by imposing a disabling restraint upon the beneficiaries and their creditors:

- a. To trustee to pay the income to A quarterly for life, then pay the principle to A's children. A may not alienate her income interest nor may it be reached by her creditors.
 - i. These trusts are common when the parents know their kids are fucksticks and will be likely to waste all the money and/or run up huge debts; the parents want to keep the idiots alive, but don't want them wasting all the money.
 - ii. Courts will enforce the creditor's clause;
 - iii. Spendthrift trusts are the best of both worlds because they beneficiary gets a steady stream of income, there is no discretion in the trustee, and the creditors cannot attach to the stream of money.
- b. *Disabling Restraint*: A may not transfer her estate, nor may her creditor reach it (*note* this goes against the idea the property should be entirely alienable).
 - i. Exceptions: as required by federal law, child support may be taken out, alimony in some cases, and the federal government and tax commissions can reach the property. Some states allow a person who has provided support to reach the trust.
- c. **g/r**: a spendthrift trust cannot be set up for one's personal benefit.
- d. The only difference between a mandatory trust, and a spendthrift trust, is the addition of the disabling restraint.

3. **Support Trusts**: A support trust is a trust that requires the trustee to make payments of income (or if so specified, of the principle too) to the beneficiary in an amount necessary for the education or support of the beneficiary in accordance with an ascertainable standard. A support trust is a gift of support to the beneficiary—whatever is required to support the beneficiary, no more or less. Nor can creditors of the beneficiary reach the beneficiaries interest, except suppliers of necessities may recovery through the beneficiaries right.

- a. **EX**: To trustee to pay the income to A as needed for medical expenses for life, then distribute the principle to B.

D. **G/R**: Duty of Trustee in Support Trusts: if the trustor leaves to the trustee “such amounts as they shall deem advisable for his comfort, support, and maintenance” the trustee does not have sole discretion. The clause has been interpreted to set an ascertainable standard; namely, to maintain the life of the beneficiary in accordance with the *standard of living which was normal for him before he became beneficiary to the trust*.

- 1. Even where the only discretion to the trustee is that he shall “in his discretion” pay such portion of the principal as he shall “deem advisable” the discretion is not absolute.
 - a. Prudence and reasonableness, not caprice or careless good nature, much less a desire on the part of the trustee to be relieved of trouble furnish the standard of conduct.
 - b. **Standard of Conduct**: prudence and reasonableness.
 - c. **Duty**: in a support trust, there is a *duty of inquiry and investigation* into the needs of the beneficiary which follows from the requirement that that the trustee's power must be exercised with that soundness of judgment which follows from a due appreciation of true responsibility.

*[*Marsman v. Nasca*].

E. **G/R**: Arbitrary Action of the Trustee: action of the trustee is arbitrary where is he is authorized to make payments to a beneficiary if in his judgment he deems it wise and refuses to inquire into the circumstances of the beneficiary.

- 1. **Note**: trustees often seem to favor remaindermen over the actual beneficiary, this is usually the case for a couple of reasons:

- a. The trustee has to pay both the beneficiary and the remaindermen. If the trustee dips into the principle he is hurting the remainderman. If the trustee is conservative in paying out support to the beneficiary on the front end, the remaindermen will be happy at the back end when they receive the entire principle. However, if there is none left after the beneficiary dies, and the remaindermen sues to recover the principle, the trustee will be personally liable if he wasted the money; hence, the trustee's favor the remainder to cover their own ass.
- b. Another reason the trustee may be conservative is that they are waiting for a catastrophic illness and want to ensure that they have enough money in the principle to cover such a situation if it should arise.
- c. The trustee may also be doing it out of self-serving motives because the larger the corpus the more money the trustee is entitled to receive.

*[*Marsman v. Nasca*].

F. **G/R: Constructive Trusts:** when the trustee impermissibly withholds the principal, and a beneficiary later sues, they will often argue for the imposition of a constructive trust.

- 1. However, a constructive trust cannot be established without:
 - a. Notice of the breach of trust; and
 - b. the existence of a fiduciary relationship.
- 2. If a constructive trust can be imposed, and even in cases where beneficiaries have already been paid funds by mistake, the amounts may be collected from them *unless* they were bona fide purchasers or unless they, without notice of the improper payments had so changed their position that it would be inequitable to make them repay.

*[*Marsman v. Nasca*].

G. **G/R: Exculpatory Clauses:** exculpatory clauses are not looked upon with favor and are strictly construed; however, such provisions inserted in the trust instrument without any overreaching or abuse by the trustee of any fiduciary or confidential relationship to the settlor are generally held effective.

- 1. **except:** as to breaches of trust committed in bad faith, or intentionally, or with reckless indifference to the interest of the beneficiary.
- 2. **Rst. (2) Trusts §222 cmt. d:** lists six factors that may be considered in determining whether a provision relieving the trustee from liability (exculpatory clause) is ineffective on the ground that it was inserted in the trust instrument as a result of an abuse of a fiduciary relationship at the time of the trust's creation:
 - a. whether the trustee prior to the creation of the trust had been in a fiduciary relationship to the settlor, as where the trustee has been guardian of the settlor;
 - b. whether the trust instrument was drawn by the trustee or by person acting wholly or partially on his behalf;
 - c. whether the settlor has taken independent advice as to the provisions of the trust instrument;
 - d. whether the settlor is a person of experience and judgment or is a person who is unfamiliar with business affairs or is not a person of much judgment or understanding;
 - e. whether the insertion of the provision was due to undue influence, or other improper conduct on the part of the trustee; and
 - f. the extent and reasonableness of the provision.
- 3. The fact that the trustee drew the instrument and suggested the insertion of the exculpatory clause does not, however, necessarily make the provision ineffective.
 - a. No rule of law requires that an exculpatory clause drawn by a prospective trustee be held ineffective unless the client of advised of it independently.

*[*Marsman v. Nasca*].

H. **G/R:** Trustee's Judgment and Review by Court: if the trustee has simple discretion unqualified by the adjective "sole" or the like, the courts will not substitute their judgment for that of the trustee as long as the trustee acts *not only in good faith, but also within the bounds of a reasonable judgment*.

1. When an instrument purports to free the trustee from some or all of these limitations, problems in construction arise:

- i. at one extreme are instruments that purport to give unlimited discretionary power to the trustee; *but*
- ii. a discretionary power to be exercised in the "trustee's absolute and uncontrolled discretion" is **NOT absolute**.

2. NO language, however strong, will entirely remove any power held in trust from the reach of a court of equity. After allowance has been made for every possible factor which could rationally enter into the trustee's decision, if it appears that he has utterly disregarded the the interest of the beneficiary, the court will intervene.

*[*Stix v. Commissioner*].

I. **G/R:** Difference between Simple Discretion and Absolute Discretion: the difference between simple and absolute discretion is one of degree and the trustee's action must not only be in good faith, but also to some extent reasonable, with more elasticity in the concept of reasonableness the greater the discretion give [Rst. (3) Trusts §50].

J. **G/R:** Trustee Considering other Resources of the Beneficiary: an issue that often arises in litigation is whether a trustee, in exercising a discretionary power to spend income or principle for the beneficiaries support may consider the other resources of the beneficiary.

1. Absent being dealt with in the trust instrument, the issue is up to the court and a matter of interpretation of the instrument.
2. However the **presumption** is that the settlor intended the beneficiary to receive his support from the trust estate regardless of the beneficiary's other financial support.
 - a. This presumption can be rebutted by the special circumstances of the case.

K. **G/R:** Creditor's Rights: the creditor's rights are different with the varying types of trusts—mandatory or discretionary. The **general rule** is that the creditor's ability to reach the trust mirrors the trustee's ability to pay income (i.e. the beneficiaries rights).

1. *Mandatory Trusts*: if a person can freely alienate an interest in a mandatory trust, then the creditors can freely attach it.

2. *Discretionary Trusts*: if a person can freely alienate an interest, as in a discretionary trust, then the creditor cannot attach because the creditor will not know if the trustee is going to distribute it to (A, B, or C).

- a. If there is a lot of discretion in the trustee, it is much harder for the beneficiary or the creditor's to reach the trust corpus.

3. If there is an absence of an absolute right to income by the beneficiary, then the creditor's cannot attach.

- a. Exception: if it is a support trust, and the *support trust* is for a specific purpose (like education, or medical expenses) then the creditor may attach if it is for those specific purposes, i.e., in a support trust for medical care, a hospital with unpaid bills could reach the trust money.

4. *Spendthrift Trusts*: a person can make it so the creditor can NEVER reach the corpus through a disabling restraint with the only limitation being that a person cannot set up a spendthrift trust to benefit himself.

§5.4 CHARITABLE TRUSTS

I. THE NATURE OF CHARITABLE PURPOSES

A. **G/R: Differences between a Private Express Trust and a Charitable Trust**: there are three main differences between a charitable trust and a private express trust:

1. *Private Express Trust*:

- a. Rule Against Perpetuities (RAP) applies;
- b. Definite beneficiaries; and
- c. Modification and Termination is almost impossible in the terms of a private express trust because the terms of the trust are being altered against the settlor's wishes.

2. *Charitable Trust*:

- a. RAP does not apply;
- b. Beneficiaries cannot be too definite and must benefit the public; and
- c. Modification and termination can be done more easily through the doctrine of cy pres.

B. **G/R: Testator's Intent**: if the testator's dominant intent, as expressed in the trust, was charitable, the trust should be accorded efficacy and sustained.

1. *Caveat*: if the testator's intent as expressed is merely benevolent, though the disposition of his property be meritorious and evince traits of generosity, the trust must nevertheless be declared invalid because it violates the RAP.

*[*Valley Nat'l Bank v. Taylor*].

C. **G/R: Charitable Purpose**: for a trust to be valid as a charitable trust, it must have a charitable purpose. Charitable purposes include:

1. the relief of poverty;
2. the advancement of education;
3. the advancement of religion;
4. the promotion of health;
5. governmental or municipal purposes; and
6. other purposes for the accomplishment of which is beneficial to the community.
 - i. This is the *catchall* and the scope of this category will depend upon how courts define beneficial to the community.

*[*Valley Nat'l Bank v. Taylor*; Rst. (Trusts) §368].

C(1). **G/R: Charitable Purpose**: to be classified as charitable, a trust that is for the benefit of a class of person and not for the benefit of the community at large, must be for the relief of poverty or for the advancement of education, religion, health, or other charitable purpose.

1. A trust is not charitable merely because it is for the benefit of a class of persons.
 - a. EX: a trust for the benefit of the needy or sick employees is charitable; whereas, a trust for the general benefit of employees is not charitable. Or a trust to pay the salary of law professors is charitable because it promotes education, but a trust for the general benefit of lawyers is not.

2. A trust may be a valid charitable trust although the persons who directly benefit are limited in number.

a. EX: A trust awarding a scholarship or prizes for educational achievement is charitable; whereas, a trust to educate a particular person or named persons is not charitable (such as a trust to educate the descendants of the settlor is not charitable).

3. **Trusts to Benefit a Political Party:** it is against public policy to endow perpetually a political party, especially republicans. Hence, a trust to promote the success of a political party is not charitable.

a. soft money exception: a trust can be created to promote the particular platform of a political party.

D. **G/R: Definition of Charity:** “a charity” in a legal sense, may be described as a gift to be applied consistently w/ existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

1. It is immaterial whether the purpose is called charitable in the gift itself; if it is so described as to show that it is charitable.

2. Generally, any gift not inconsistent with existing laws which is promotive of science or tends to the education, enlightening, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge, or is for the public convenience, it is a charity.

3. *Indefiniteness:* it is **essential** that a charity be for the benefit of an indefinite number of people; for if all beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity.

E. **G/R: Benevolent Gifts:** in the law of trusts, there is a real and fundamental difference between a charitable trust, and one that is devoted to mere *benevolence*.

1. A charitable trust is public in nature and valid;

a. To constitute a charity, the use must be public in nature.

2. A benevolent gift is private, and if it offends the RAP, it is void.

a. It is clear that trusts which are devoted to mere benevolence or liberality, or generosity, **cannot be upheld as charities.**

b. Benevolent objects include acts:

i. dictated by mere kindness, goodwill, or a disposition to do good.

E(1). **G/R: Gifts:** gifts which are mere exhibitions of liberality and generosity, without regard to their effect upon the donees, are not charitable. There must be an amelioration of the condition of the donees as a result of the gift, and this improvement must be of a mental, physical, or spiritual nature and not merely financial.

1. Thus, trusts to provide gifts to children, regardless of their need, or the make Christmas gifts to members of a certain class, without consideration of need or effect, are not charitable.

2. Gifts which are made out of mere sentiment and will have no practical result except the satisfying of a whim of the donor, are obviously lacking in the widespread social effect necessary to a charity.

F. **G/R: Judicial Interpretation of Charitable Trusts:** charitable trusts are favored creatures of the law, enjoying the especial solitude of courts of equity and liberal interpretation is employed to uphold them.

G. **G/R: RAP:** charitable trusts are **exempt** from the RAP and may endure forever. This exemption is not given to a trust for a noncharitable purpose.

1. **UPC §2-907(a):** provides that a trust for a lawful noncharitable purpose may be performed by the trustee for 21-years, but no longer.
2. If a trust is created to last “in perpetuity” that is a huge red flag, that the trust will not survive the RAP and if not a charitable trust, will be unenforceable.

H. **G/R: Drafting Advice:** the lawyer drawing a will making a gift to charity should make sure:

1. the exact legal name of the charity;
 2. if the client wants an estate tax charitable deduction, which is usual; and
 3. should NEVER use the words, “benevolent” or “philanthropic.”
- *It should also state and describe a method for enforcing the trust properly.

I. **G/R: Charitable Trust Beneficiaries:** charitable trust beneficiaries should not be *too* definite; even though the trust sometimes appears to be helping only a definite ascertainable person.

1. Generally, if the class is large, and although possibly ascertainable, and is for a public purpose it will generally be upheld.
 - a. EX: helping persons who harmed in the Okalahoma city bombing would be permissible as a charitable trust.
2. If the trust is set up to benefit a broad group of persons, but at any given time only helps a specifically identifiable beneficiary, it will be upheld.
 - a. EX: scholarships to help retards like myself make it through law school. Although I am an ascertainable beneficiary, after I quituate from law school, some other retard will get the scholarship.
3. If the purpose of the trust is for a charitable purpose, and the class is established overtime, then it will also be enforceable.
 - a. EX: Like to augment a law school’s Dean’s salary from time to time.
 - i. **Exception:** if it is “Associate Dean” Bradley P. Saxton, it cannot be enforceable because he hinders the learning process of law students more then benefits it; hence, no charitable purpose.
4. Thus, the two most important things to look at is (a) how the beneficiaries are classed; and (b) their need.

J. **G/R: Trustee Discretion:** if the trustee has no duties/powers to enforce the trust (such as paying money to the beneficiaries or to make sure money is being used for educational purposes) then most of the time the trust cannot be enforced.

1. *Remember:* with discretion comes duty, and that duty is enforceable. If there is not duty on behalf of the trustee then the trust fails.

K. G/R: IF THE TRUST FAILS AS A CHARITABLE TRUST, THE ANALYSIS IS NOT OVER; IT STILL MAY BE VAILD AS A PRIVATE EXPRESS TRUST! DO NOT FORGET THAT ON THE EXAM, DUMBASS.

II. MODIFICATION AND TERMINATION OF CHARITABLE TRUSTS

A. **Generally:** unlike a private express trust, a charitable trust can be modified or terminated after the settlors death, in certain situations, under the doctrine of cy pres, to either continue carrying out the settlor’s intent, or to cease from using the trust as a purpose he would not have wanted.

B. G/R: Termination of a Private Express Trust: termination of a private express is difficult. The settlor can retain the right to terminate; however, if the settlor dies, the right is lost. Then the only way to terminate a trust absent a provision in the trust is that all the beneficiaries and the settlor to the trust have to agree to termination. This is usually impossible because:

1. the settlor may be dead;
2. beneficiaries may not be born; and
3. certain beneficiaries may not want to terminate because they receive a lot of money under the trust.

*For the same reasons, a private express trust cannot be modified.

C. G/R: Cy Pres [modification of a charitable trust]: Cy pres is the equitable power of the court to alter the terms of the trust so it does not fail. There are two elements:

1. The **purpose of the trust has become impracticable or impossible;**

- a. Courts use a high standard of review on this element and require to be proven clearly because they don't want persons freely manipulating a charitable trust; and
 - a. EX: A executes a trust to the University's Medical School; but the trustees determine that it would be better spent on the law school, they cannot channel the money to the law school because both the medical school and law school exist.
 - i. However, if the medical school closed down, then they could go to element #2.

2. Behind the stated purposes of the trust, **the settlor had a more general purpose or charitable intent.**

- a. The court will have to determine this element through the use of extrinsic evidence;
- b. Courts however are very deferential with respect to this element because they want to enforce a charitable trust, some courts have even moved toward a presumption of general intent to create a charitable purpose.
- c. **G/R:** if the paramount intention was to give the property in the first instance for a general charitable purpose, rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the gift is to be carried into effect.
 - i. Such a grafted direction may be ignored when compliance is altogether impracticable and the gift may be executed cy pres through a scheme to be framed by the court for carrying out the general charitable purpose [*In Re Neher*].

**The parties in these types of cases will be the person who take if the trust fails (i.e. heirs or residuary devisees) and the charitable institution.

D. Rst. (2) Trusts §399: Cy Pres: the doctrine of cy pres can be described as:

1. If property is given in trust to be applied to a particular charitable purpose and it *is* or becomes *impossible or impracticable* or *illegal* to carry out the particular purpose, and if the settlor manifests a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purposes which falls within the general charitable intention of the settlor.

§6: INTERPRETATION OF WILLS AND TRUSTS

§6.1: ADMISSION OF EXTRINSIC EVIDENCE

I. INTERPRETATION OF WILLS

A. **Rules of Construction Generally:** the construction phase of the will proceeding is where the will is being *interpreted* this must be distinguished for the admission phase where the court determines capacity and testamentary intent. *DO NOT FORGET THAT.*

1. Also remember the rules of construction are not consistent, they are all in conflict with the general plain meaning rule which states that extrinsic evidence cannot be used. Look at the plain meaning rule as the big tool rule and the others as tools to get extrinsic evidence admitted.

B. **G/R: Plain Meaning Rule:** (the big tool rule—all other rules are exceptions to it). Under this rule, the court will interpret the will from the four corners of the document, and **will not allow extrinsic evidence to be admitted**, even if there is a witness saying that the will is wrong.

1. A plain meaning in a will cannot be disturbed the introduction of extrinsic evidence that another meaning was intended.

a. Thus, if the plain meaning of the will is clear, the court will not look at another piece of evidence, the **construction phase is over.**

2. *Policy:* the written word dominates, encourages good writing and drafting of wills, so the court is not going to interpret the will to add or subtract anything from it; in other words, the courts will be hesitant to try and fix a mistake.

3. *Identification Phase:* the plain meaning rule is rather illusory because the court can never admit, interpret, and implement a will without lifting their eyes from the four corners of the document because:

a. there are names, and faces have to be put with those names;

b. there is property, and it may be ambiguous as to which property is identified; and

c. then the property has to be give to those faces.

d. This is all determined in the identification phase.

i. EX: T leaves her car to her cousin Jenny Jones. When the court goes to find put the names with the faces, it finds out that there are two cousins named Jenny Jones and T only had a truck—this creates a latent ambiguity.

B(1). **G/R: Plain Meaning Rule:** a will duly executed and allowed by the court must under the statute of wills, be accepted as the final expression of the intent of the person executing it.

1. The fact that it was not in conformity to the instructions given to the draftsmen who prepared it, that he made a mistake does not authorize a court to reform or alter it or remold it by amendments.

2. The will must be taken construed as it came from the hands of the testator.

*[*Mahoney v. Grainger*].

B(2). **G/R: Mistakes under the Plain Meaning Rule:** mistakes in the drafting of the will may be of significance in some circumstances in trial, such as to the due execution and allowance of an alleged testamentary instrument.

1. Proof that the legatee actually designated was not the particular person intended by the one executing the will **cannot be received** to aid in the interpretation of a will.

2. When the instrument has been proved and allowed as a will, oral testimony as to the meaning and purpose of a testator in using language must be *rigidly excluded*.

a. Where no doubt exists as to the property bequeathed or the identity of the beneficiary there is no room for extrinsic evidence; the will must stand as written.

b. *exception*: (see below) it is only where the testamentary language is not clear in its application to facts that evidence may be introduced as to the circumstances under which the testator used that language in order to throw light upon its meaning.

*[*Mahoney v. Grainger*].

C. **G/R: Latent Ambiguity Exception (Rule/Tool)**: under the plain meaning rule, if the outside world creates an ambiguity, then the court will try and figure it out through extrinsic evidence the testator's intent.

1. In other words, if the language of a will is ambiguous or uncertain resort to extrinsic evidence is permissible in order to ascertain the intention of the testator—extrinsic evidence is admissible to explain any ambiguity arising on the face of the will, or to resolve a latent ambiguity which does **not appear on the face of the will**.

2. A **latent ambiguity is one which does not appear on the face of the will** but is disclosed by some fact collateral to it.

a. Extrinsic evidence may always be introduced initially in order to show that under the circumstances of a particular case the seemingly clear language of a will describing either the subject of or the object of a gift actually embodies a latent ambiguity for it is only by the introduction of extrinsic evidence that the existence of such an ambiguity can be shown.

b. Once shown, such an ambiguity can be resolved by extrinsic evidence.

3. A latent ambiguity is an ambiguity that does not appear on the face of the will but appears when the terms of the will are applied to the testator's property or designated beneficiaries.

*[*Estate of Russel*].

C(1). **G/R: Equivocation**: admission of evidence to clarify a latent ambiguity first began in cases of equivocation, where a description fits two or more external objects equally well.

1. EX: a devise to "My girlfriend Megan" when in fact I have two girlfriends named Megan! Yahoo for me.

2. Where there is an equivocation, direct expressions of the testator's intent are admissible in evidence. Oral declarations of intent to the *scrivener* are admitted in most jurisdictions in the case of a latent ambiguity.

D. **G/R: Personal Usage Exception**: if the extrinsic evidence shows that the testator always referred to a person in an idiosyncratic manner, the evidence is admissible to show that the testator meant someone other than the person with the legal name of the legatee.

1. Use this as a counterargument to the plain meaning rule.

2. EX: T bequeaths \$20K to Mrs. Johnson, a lady named Mrs. Johnson whom the testator had never met challenges the will to collect, but T really intended the gift to go to Mrs. Smith, who she called Mrs. Johnson because her husband died and she was planning on marrying the Mr. Johnson, but never got around to it.

E. **G/R: Will Speaks as of the Testator's Death**: one doctrine/rule holds that a will speaks as of the time of the testator's death; hence, if there are changes in circumstances during the testator's life, those changes are not reflected in the will.

1. EX: T devised home to Mr. and Mrs. W presently residing at No. 17 Sex Circle. Mr. and Mrs. W get divorced and someone else moves into No. 17 Sex Circle and marries Mr. W, making her Mrs. W(2). Under this rule, Mrs. W(2) would get the house because she fits the description at the time of the testator's death.

a. Most courts don't follow this anymore, and hold there is a latent ambiguity and allow extrinsic evidence to be admitted.

*[*Ihl v. Oetting*].

F. **G/R: Patent Ambiguity Exception**: a patent ambiguity is an uncertainty which **appears on the face of the will**. When an uncertainty arises upon the face of the will as to the meaning of any of its provisions, the testator's intent is to be ascertained from the words of the will, but the circumstances of the execution of the will may be taken into consideration, excluding the oral declarations of the testator as to his intentions [*Estate of Russel*].

1. For whatever reason the patent ambiguity arose (mistake of attorney, testator, etc...) the ambiguity must exist on the face of the document before the court will attempt to "fix" it.

a. Some courts will not "fix" a patent ambiguity by using extrinsic evidence and will declare the will void. However, more courts will fix the patent ambiguity by using *inferences* of the testator's intent.

2. A patent ambiguity is an ambiguity that appears on the face of the will.

a. In some states, evidence is not admissible to clarify the ambiguity, and the will fails, but courts often have disposed of the problem by simply construing the language of the will **without the aid of extrinsic evidence**.

3. EX: T purporting to devise her entire estate to 3-charities gave 25% to each charity. The court construed the clause to give 33.3% or 1/3 shares to each charity on the theory that the testator intended to devise her entire estate—that's "fixing" the ambiguity without extrinsic evidence.

G. **G/R: Taking the Will out of the Construction Phase**: another tool/exception use to get extrinsic evidence admitted is to take the will out of the "construction phase" where there are all these prohibitions on extrinsic evidence and declare that the testator's intent is being ascertained in the "admission phase" where extrinsic evidence is more readily used.

H. **G/R: Correcting a Sham Will**: it is competent to contradict by parol evidence (i.e. bringing someone into court to testify orally as to the contents) the solemn statements contained in an instrument that is a will, that it has been signed as such by the person named as the testator, and attested an subscribed by persons signing as witnesses.

1. In *Fleming*, the testator got the will properly executed; however, after he died the attorney came forward and stated that the testator only executed the will in order for the legatee (right word?) to sleep with him. The court held that the evidence could be admissible because absent any intent to properly execute the will, it was invalid.

*[*Fleming v. Morrison*].

I. **G/R: Modern Trend in Interpretation of Wills**: the modern trend is to do away with the plain meaning rule because it is self-evident that in the interpretation of a will, a court cannot determine whether the terms of the will are clear and definite in the first place until it considers the circumstances under which the will was made so that the judge may be placed in the position of the testator whose language he is interpreting.

1. Thus, extrinsic evidence of the circumstances under which a will is made (except as expressly excluded by statute) may be considered by the court in ascertaining what the testator means by the words used in the will.

2. If in light of the extrinsic evidence, the provisions of the will are reasonably susceptible of two or more meanings claimed to have been intended by the testator, an uncertainty arises, and extrinsic evidence is admissible to prove any of the meanings.

3. If on the other hand, in the light of the extrinsic evidence, the provisions of the will are not reasonably susceptible of two or more meanings, there is no uncertainty arising upon the fact of the will and any proffered evidence attempting to show an *intention different* from that expressed by the written words in the will, is inadmissible.

4. In other words, the court throws out everything—plain meaning rule, latent/patent ambiguity exceptions, and admits extrinsic evidence in the construction phase.

*[*Estate of Russel*; the plain meaning rule is also rejected by **Rst. (3) Property Donative Transfers §12.1**].

**The “modern trend” is just another tool to use, because even the court in that case reverted to the plain meaning rule in ultimately holding that the testator intended to give a gift to her heir at law who was not even mentioned.

**So those are the tools, use the motherfuckers, Ryan likes counterarguments.

II. CORRECTING MISTAKES

A. **G/R: Misdescription of Property or Person**: a well established rule is that the mere false description does not make the instrument inoperative. A false description of property of the intended recipient may be stricken.

B. **G/R: Scrivener’s Error Mistake**: if a scrivener’s error has misled the testator into executing a will on the belief that it will be valid notwithstanding the mistake (or there is simply a mistake such as a misdescription) extrinsic evidence of that error is admissible to establish the intent of the testator that his will be valid notwithstanding the mistake.

1. Extrinsic evidence of a scrivener’s mistake is admissible to:

- a. identify a named devisee or legatee;
- b. to identify property described in the will;
- c. to clarify an ambiguous clause in the will; or
- d. to prove fraud, incapacity or undue influence.

*[*Erickson v. Erickson*].

C. **Rst. (3) Property, Donative Transfers §12.1: Reforming Donative Documents to Correct Mistakes**: a donative document, though unambiguous, may be reformed to conform the test to the donor’s intention if the following are established by *clear and convincing evidence*:

- (1) that a mistake of law or fact, whether in expression or inducement, affected specific terms of the document; and
- (2) what the donor’s intention was.

Direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered in determining whether elements (1) and (2) have been established by clear and convincing evidence.

§6.2: DEATH OF THE BENEFICIARY BEFORE DEATH OF THE TESTATOR

A. **G/R: Lapsing Devise**: if a devise does not survive the testator, the devise lapses (i.e. it fails). All gifts made by will are subject to the requirement that the devisee survive the testator, unless the testator specifies otherwise.

1. There are common law default rules for lapsing devises; but
2. most every state has enacted an antilapse statute which under certain specified circumstances, substitute another beneficiary for the predeceased devise.

B. G/R: Common law Default Rules:

1. If the devise fails then:
 - a. general or specific devise; *lapse to*
 - b. residuary devisee; if none, *lapse to*
 - c. intestacy.
- *exception: class gifts.

C. G/R: Statutory Changes: statutory changes in the common law default rules have been adopted by nearly every state providing the following lapsing order:

1. general or specific devise; *lapse to*
 2. residuary devisee; *lapse to*
 3. gift is shared.
- *exceptions: antilapse statutes and class gifts.

D. G/R: Antilapse Statute: are an exception for limited circumstances when the lapsing statutes will not apply:

1. **IF:**
 - a. Dead devisee is of a specified relationship to the Testator [this is defined by statute, it may be narrow, but the most common is]:
 - i. descendants: kids, grandkids, down the tree;
 - ii. grandparent or lineal descendant thereof—kids, parents, aunts, uncles; etc...
--Wyoming has this one
 - iii. kindred: quite broad.
 - b. Did dead devisee leave an **issue** (kids, etc...) who survive T; **THEN**
 - c. Give dead devise to that kid.
2. In other words, the typical antilapse statute provides that if a devisee is of a specified relationship to the testator and is survived by issue, who survive the testator, the issue are substituted for the predeceased devisee.
3. These are default rules for will the will does not specify an alternative taker (i.e. T devises house to wife, in not her, to Bill—that is an alternative taker in the will).

E. G/R: where the devise contains an express requirement of survivorship, the antilapse statute will NOT APPLY, no matter what the circumstances. If the devise says “*if*” he survives me...the antilapse statute does not apply.

1. In other words, an express requirement of survivorship, according to the majority of states, states an intent that the antilapse statute does not apply.
 2. **UPC §2-605:** reverses this common law rule and states that words of survivorship, absence other evidence, are not sufficient to preclude use of the antilapse statute.
- *[*Allen v. Talley*].

F. G/R: Words of Limitation and Alternative Takers: generally, the word “and” is construed as a word of limitation; and the word “or” is construed was a word indicating alternative takers [*Jackson v. Shultz*].

G. G/R: Class Gifts: [an exception to the antilapse statute]: under the common law of lapse, a class gift is treated differently from a gift to individuals. If a class member predeceases the testator, the surviving members of the class divided the total gift, including the deceased member’s share.

1. **Test for Class Gifts:** whether the testator is “group minded”

- a. The testator is thought to be group minded if he uses a class label in describing the beneficiaries, such as “To A’s children” or “to my nephews and nieces”
 - a. *caveat*: a class label is not necessary for a class gift. Beneficiaries described by their individual names, but forming a natural class, may be deemed a class gift if the court decides, after admitting extrinsic evidence, that the testator would want the survivors to divide the property.
 - i. EX: if all the beneficiaries described in the will are aunts of T, then that could be an example of a “natural class.”
 - b. Courts will usually consider extrinsic evidence in looking at whether the testator created a class gift.

2. **Definition of Class:** A gift to a class is defined as a gift of an aggregate sum to a body of person uncertain in number at the time of the gift, to be ascertained at the future time, and whose are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons.

*[*Dawson v. Yucus*].

D. **G/R:** Application of Antilapse Statutes to Class Gifts: almost all states apply their antilapse statutes to class gifts. Many statutes expressly so provide.

§6.3: CHANGES IN PROPERTY AFTER EXECUTION OF A WILL: SPECIFIC AND GENERAL DEVICES COMPARED

A.

