Trusts & Wills Outline

Chapter 1: Introduction

* In assessing wills, courts say they primarily look to the testator’s intent – Palmer says this is FALSE
	+ The dominance of testator’s intent is only a community decision to emphasize that intent
	+ Palmer says in assessing wills, you primarily look to death
* The right to inherit is not an inalienable right – it is an expectational right (you cannot waive your parents’ will and take all their property)
* The right to designate heirs is not an inalienable right, the government gives that right
	+ **Hodel** case – a State cannot completely abolish the right to devise by will
* Property & Inheritance:
	+ Property: relationship between a person and a thing created and regulated by the state
	+ Community Property: forced shares for spouses
		- In a CP state, a check with my name is half Jare’s; if I leave all my assets to Zach, this violates CP
	+ Non-community property: no traditionally forced share for spouse
		- Check with my name is all mine
		- Forced share statute: If a non-CP state has a forced share statute, and I leave everything to Zach, then:
			* Jare can waive his rights under my will (which would be nothing because I left everything to Zach) and then get a percentage of my assets
			* The statute establishes the percentage.

The Power to Transmit Property at Death

* Blackstone, Locke, Ascher, Langbein, & Dead Hand
	+ Blackstone – the right of inheritance is a political establishment – a civil right, not a natural right
	+ Locke – by the characteristics of human given by God, children have a right to share in the property of their parents and a right to inherit their possessions
	+ Ascher – believes all property owned at death should be sold and the proceeds paid to the government (with exceptions limited to spouses, children, etc)
	+ Langbein – in the past, transmission of wealth was mostly real property, now it is more investment in skills
	+ Dead Hand – With regard to the amount a decedent can use wealth/will to influence the behavior of others after death, the testator’s intent is given effect to the maximum extent allowed by the law
* Will as Enticement
	+ At most, a will can entice; it cannot compel (the beneficiary can walk away if he so chooses)
	+ You can’t use your will/property to force someone to marry
	+ You can’t use your will/property to place a direct restraint on freedom of religion
	+ There is a dislike of *in terrorem* provisions – gift aimed directly at terrorizing the survivor into compliance. (Courts won’t enforce these)
	+ **Shapiro** case – an incentive trust will allow a kind of in terrorem provision to stand
		- Provision – son gets everything on condition that they marry a Jewish girl within 7 years of father’s death (during which time it will be held in trust), but if he is not, then the son’s share goes to Israel
		- Sending it to Israel – making an identical gift to another party as well – avoided the provision from being in terrorem. This is an “incentive trust” instead
* Will to Destroy – Will a court honor a testator’s instructions to destroy property?
	+ It varies, there is no bright line rule. A house or rare painting – court probably won’t compel testator to destroy. A judge’s papers, court might.

Transfer of Decedent’s Estate

* Nonprobate Property – property that passes outside of probate under an instrument other than a will. Ex)
	+ Joint tenancy – survivor’s right swells to take in decedent’s interest
	+ Life Insurance – determined by designation of beneficiary in policy, which may be united with estate or into trust
	+ Contracts with payable on death provisions
	+ Interests in trust (primary form of nonprobate property) often used just to avoid probate
	+ You don’t automatically put clients through probate, as that would diminish value of the estate and your function is to preserve as much as of the assets as possible
* Probate Property: property that passes through probate under decedent’s will or by intestacy.
	+ Probate Terminology:
		- Probate property – property that passes under the decedent’s will of by intestacy
		- Personal representative – person appointed to oversee decedent’s affairs who then acts as fiduciary
			* Personal representatives are supervised by the court
			* Compensation – personal representatives receive 5% on sums received and paid out, are limited to no more than 5% of estate plus expenses.
		- Executor – person named in a will to administer probate estate 9will-named personal representative
		- Administrator – personal representative when person dies intestate or the named executor is unwilling to serve (usually, administrator does not deal with wills)
		- Devise: to leave real property in a will (left to devisees)
		- Bequeath: to leave personal property in a will (left to legatees)
		- Codicil: an amendment to a will that is executed in the same way wills are executed
		- Revocation Clause: clause in a will that revokes all other wills (only part of a will that does something before your death)
		- Beneficiary or Distributee: takers of an estate
	+ Functions of Probate:
		- Provides evidence of transfer of title
		- Protects creditors by providing a procedure for payment of debts
		- Distributes decedent’s property to those intended after creditors are paid
	+ Probate Procedure:
		- Procedure should happen in jurisdiction where decedent was domiciled at the time of his death
			* First – appoint a personal representative
			* Second – issue letters testamentary to an executor or letters of administration to an administrator, and authorize the person to act on behalf of the estate
		- Formal probate under UPC is a litigated judicial determination after notice to interested parties
		- Informal probate – after appointment, the personal representative administers the estate without going back to court
		- Nonclaim statutes – statute requiring creditors to file claims by a deadline; claims filed afterward are barred
* Professional Responsibility:
	+ Duties to Intended Beneficiaries
		- **Simpson** case – Lawyers have a duty of reasonable care to intended beneficiaries of a will (this is an exception to privity – lawyers have a duty to third party beneficiaries)
			* However, TX and a few other states hold that the lack of privity between drafter and beneficiary prevents a malpractice action by beneficiary (CHECK THAT THIS IS STILL RIGHT!)
		- Lawyers also have a professional obligation to consult or refer if the matter overruns your own competence – you are held to the competence level of a specialist
	+ Conflicts of Interest
		- **A v B** – Can a law firm hired by husband and wife to assist in planning estates disclose the husband’s illegitimate child to the wife?
			* Both husband and wife signed a waiver of conflict of interest form; however, letters of engagement should be used that ALSO surrender confidentiality between the two – if they don’t sign, you want out.
			* Here, the lawyer’s duty to inform his client (the wife) of a material fact (that the non-marital child would inherit on par with the marital children) trumped confidentiality because the lawyer did not learn of the child in a confidential communication from the husband (here it was from the baby-momma)

Chapter 2: Intestacy

* Intestate: when someone dies without a will
* Factors:
	+ Living descendants of deceased spouse
	+ Living descendants of spouse same as descendants of surviving spouse
	+ Survival of deceased spouse’s birth family or their descendants

Separate Property of Deceased

* Basic:
	+ Everything that you acquire before marriage is separate property
	+ After marriage, income from separate property is community property
	+ After marriage, property that you acquire by gift, will, or intestacy is separate property (subject to exception for income from the property)
	+ Everything else is community property
* Factors:
	+ Living descendants of deceased spouse
	+ Living descendants of spouse same as descendants of surviving spouse
	+ Survival of deceased spouse’s birth family or their descendants
* If deceased has living descendants:
	+ Spouse gets 1/3 of personal property + 1/3 of real estate (real estate only as life estate)
	+ Children take the rest
* If deceased has no living descendants:
	+ Spouse gets all personal property and half of land outright
		- Spouse gets all real property if deceased’s birth family has no survivors or descendants
	+ If no member of birth family (decedent’s parents and siblings) or their descendants have survived, surviving spouse takes all

UPC Rights of Surviving Spouse

* If spouse is sole survivor OR there is only joint children then SPOUSE gets all of intestate estate
* If decedent’s parent survives: spouse gets $300k and ¾ of remaining estate, parents get what remains
* If spouse has separate descendants AND joint descendants: spouse gets $225k and ½ of remaining estate, separate descendants get the rest
* If decedent has ONLY separate descendants (no joint children): spouse gets $150k and ½ of remaining estate, separate children get the rest
* Who is a surviving spouse?
	+ If you are legally married at time of decedent’s death
	+ TX recognized common law marriage
	+ You are still a spouse, even if you have filed for divorce, until final divorce decree is signed

Basic Scheme:

* Intestacy under English per stirpes (1/3 of states follow)(not on test but helps to understand how TX version works)
	+ First step: Is there a surviving spouse?
		- If yes, start there.
		- If not, look to descendants first – look for a live stalk
			* As long as there is a living descendant somewhere along a stalk, that stalk retains its share no matter how far down the descendant is
	+ Example: A dies, there is no surviving spouse, A’s 4 children are all dead, but each child has at least one living representative
		- Because 4 stalks, each with a living representative, divide A’s estate into 4 equal parts, 1 per stalk
		- Child 1 (dead) has a surviving child and a surviving grandchild. The child and the grandchild split the ¼ of A’s estate that would come to Child 1, so the child and the grandchild each get 1/8.
		- Child 2 (dead) has one surviving child, that child get’s the ¼ of A’s estate that would have come to Child 2
		- Child 3 (dead) has 3 children, 2 of whom are surviving. The deceased child has two surviving grandchildren
			* Divide the ¼ that Child 3 would have gotten into 3 parts (one for each child) get 1/12
			* The two surviving children get 1/12 of A’s estate
			* The two grandchildren split the 1/12, each gets 1/24 of A’s estate
		- Child 4 (dead) has 2 surviving children, each get 1/8
	+ Once a living representative is satisfied, the distribution of share STOPS at the living representative (so it doesn’t matter if Child 2’s surviving child has children as well, they are not included in the intestate distribution because their parent is alive)
		- Children of living representatives take nothing
		- Children of dead representatives take
* Intestacy under Modern per stirpes (what TX follows) aka “per capita with representation”
	+ Similar to English per stirpes, except where you make the initial divide
	+ Start dividing at the generation where there is the first survivor
		- When you make the initial divide, you divide among total representatives at that level, NOT just living representatives
	+ Count how many live stocks there are at the generational level where you have at least one living representative of at least one stock
		- Live stalk does not necessarily mean a living person, but a stalk where somewhere down that stalk there is a live person
	+ When you find the level where there is at least one living representative of at least one stock, make the divide. Then count all the live stocks at that level, and however many there are, divide the estate.
		- In the example above, you would divide at the second generational level, A’s grandchildren, and there are 8 live stalks, so you would divide A’s estate into 8 equal shares.
		- In the example above, all of A’s grandchildren would get 1/8
		- Child 3’s grandchildren would each get 1/16, because their parent (who would have gotten 1/8) was dead, so they split the share
		- If Child 2’s child was dead, then there would only be 7 live stalks, and everything would be divided up into 1/7 shares
* Intestacy under UPC per stirpes
	+ Very similar to Modern (TX style) per stirpes, except ONE difference
	+ Go down to the first generational level where there is a LIVING representative of a live stalk
	+ DIFFERENCE: once you distribute to the living representatives at the chosen generational level by equal take, COMBINE what is left over and distribute it equally to the descendants of those stalks that DIDN’T have a living representative at that level – so ONLY to those stalks that were NOT satisfied
		- Essentially, what would have been the dead children’s share, put it in a common pot, then divide it equally (NOT by stalk) among the descendants of the dead children)
	+ Important: when dividing up, count the number of stalks not satisfied (NOT the total number of living representatives left
	+ So all grandkids will get the same amount, and all great grandchildren will get the same amount, which will be less than the amount that the grandkids get. Thos equally related to the decedent get equal shares.
		- The remaining amount is placed in a common pot and divided equally at each generational level until the stalks are satisfied
* If there are no surviving spouse or descendants:
	+ TX Probate Code
		- If no living descendants, estate goes up to parents
		- If there are two living parents, they split the estate
		- If there is one living parent, the living parent takes half, and the remaining half goes to the living descendants of the DECEASED parent
			* If there are no living descendants of the deceased parent, the surviving parent takes all
			* The estate DOESN’T go to the deceased parent’s ascendants
		- What if there are no descendants, siblings, descendants of siblings, and no living parent? (All birth family and descendants are dead)
			* Estate gets split into moieties – equal halves
			* One half goes to mother’s side, the other half to father’s side
			* Then we look where to distribute the half
				+ Start with less complicated side – say mother’s. Is there a grandparent? If so, the grandparent gets the half. If not, look to see if grandparent has living descendants. If so, then mother’s half of estate gets divided among the living descendants. If no living descendant of grandparent, then go up higher – to great grandparent, and then living descendant of great grandparent, until you find someone to give the half to
			* You have to exhaust the estate at the closest stalk level (so if grandparents have living descendants, and so do great grandparents, then doesn’t matter because would never get to living descendants of great grandparents)
			* There is no proportional division here – closest living descendant found gets full half
	+ Uniform Probate Code
		- Differs from TX in that:
			* If there’s only one living parent, that parent takes ALL
				+ ONLY if there is no living parents does the estate go down to the descendants
			* If estate does have to be divided into moieties, you stop at the grandparent level if there is no living parent, and then you flip whatever is left to the other side
				+ Why it is important to start on the simpler side!
	+ Intestacy Differences between TPC and UPC
		- UPC – if there is a living parent, that parents takes all over the dead parent’s ascendants
		- TPC – if there is a living parent, does not get 100%
		- UPC – employs common pot doctrine, TX does not
		- UPC – employs “flip” concept for moieties, TX does not
		- TX – has preference for live ascendant, UPC does not
		- UPC – If no living ascendant or descendant, goes to non-blood relatives (stepchildren) before escheat (going to state); under TPC, goes to state
		- TX – half-blood children get only a half share, under UPC, they would share equally with other siblings

Transfers to Children (INTESTATE rules ONLY)

* Posthumous children (children who are **conceived before** decedent’s death, but born after) – treated the same as other children unless the presumption that they are the deceased’s children is rebutted
* Adoption (adoption is a FORMAL PROCEDURE, it cannot be established inferentially)
	+ UPC Rule – Adoptive parents sever the relationship between the child and his genetic parent, except when a step-parent adopts the child
		- Genetic parent not in a parenting role cannot inherit from their genetic child who has been adopted by others
		- Adopted child can inherit from a genetic parent not in a parenting role (CHECK ON THIS! See UPC 2-112)
	+ TPC Rules –
		- Genetic parents in a non-parenting role cannot inherit from or through their children
		- Adopted child can inherit from or through: (adoptive AND genetic parents)
			* Adoptive parents (and adoptive parents can inherit from or through their adopted child)
			* Genetic parents (unless there is a court order for termination)
	+ Other Rules:
		- Public policy – encourage continued relationship by allowing inheritance by genetic parents if they continue to be involved in their child’s life (NOT TX law)
		- COMPLETELY sever (even without court order, which TX requires) adoption as a procedure terminates any relationship with genetic parents (more like UPC Rule) – Ex – Hall case
	+ Minary – Adult adoption (one adult adopting someone else who is already an adult) does NOT work to make someone your heir. How to achieve the same result?
		- Instead of adopting the person, give them a special power of appointment
	+ O’Neal – Equitable Adoption case (equitable adoption will probably not allow child to inherit)
		- For adoption to be such that the adopted child can inherit, there must be:
			* A FORMAL AGREEMENT (not implied or oral)
			* Between parties able to contract
* Non-Marital Children (treated more leniently now than in the past)
	+ All jurisdictions allow inheritance from MOTHERS
	+ To inherit from FATHER, requires proof by (one of): court decree, formal adoption, circumstances of birth, executed statement of paternity, DNA evidence
		- All accepted forms of proof in TX
	+ Posthumously **Conceived** Children (considered non-marital children)
		- Woodward case – issues of posthumously conceived children are most often raised in situations involving intestacy, class gifts, and social security benefits
			* Whether/what the posthumously conceived child gets is determined by 3 considerations –
				+ Best interest of children (weighed highest)
				+ Orderly administration of estates
				+ Deceased’s reproductive rights (did deceased spouse want to have children when/after he died?)
		- In re Martin B – Are posthumously conceived children issue for the purpose of future interests?
			* We need legislation to catch up with technology
			* Here, interest in finality and “orderly administration of estates” is disregarded
			* Court says grantor intended all of his bloodline to be included in the trust, so they include the posthumously conceived child (a lot of deference given to grantor’s desire)
* Transfers to Children by Pre-Mortem Inheritance (Advancements)
	+ Common law used to presume that monetary gifts to children were advancements AGAINST intestate inheritance
		- However, especially in today’s day and age, there are many reasons for gifts other than advancements
			* Although recognition of gifts is better recognized now, gifts may still be advancements – college tuition is not an advancement, but tuition for professional school may be
		- In TX, proof is required for designation as advancement: contemporaneous writing by donor OR donee’s writing at anytime saying that the gift was, in fact, an advancement

Bars to Succession (Only for Intestacy)

* Homicide – Should one profit from one’s own wrongdoing?
	+ Mahoney – wife convicted of manslaughter, husband was intestate
		- VT – passed property to wife in constructive trust for victim’s heirs
	+ TX – prohibits corruption of blood and forfeiture of estate, except when life insurance is involved
		- In TX, you can murder someone and still inherit from them as long as it’s not from life insurance
	+ UPC – in absence of a criminal conviction, the court may still exclude inheritance using preponderance of the evidence standard
	+ CA – has a statute barring certain classes of wrongdoers from inheriting
* Disclaimer – heir disclaims property and this avoids taking it; heir doesn’t want it
	+ Why would an heir want to disclaim? Avoid estate taxes, creditors, etc.
	+ Most states (incl TX) have a disclaimer statute, where if the heir disclaims, the property doesn’t ever get to the disclaimant at all, there is no transfer to the disclaimant or his heirs
	+ These statutes allow post mortem estate planning to avoid gift taxes and creditors of disclaimant, BUT
		- Drye case – court won’t allow unseemly disclaimers for bad faith purposes
	+ TX Disclaimer Example: (CHECK THAT THIS IS RIGHT!)
		- O has two children, A and B
		- A has 4 children, B has 1 child
		- Under intestacy, A’s heirs would each get 1/5, so a total of 4/5 of the estate and B’s heir would get 1/5
		- This is not allowed under disclaimer – if A disclaims, half of O’s estate still goes to B, so A’s four children have to split the ½ of O’s estate among themselves, and B or B’s sole heir gets ½ of the estate

Chapter 3: Wills – Capacity & Contests

Mental Capacity

* A person must have sufficient mental capacity to draft a will in order for that will to be valid
	+ Testamentary capacity tests make sure that a will a person drafts is the will of that person at a point of reasonable competency
	+ Test: Is the person, at the time of drafting, able to know:
		- The nature and extent of his property?
		- The people who are their descendants or ascendants?
		- The dispositions they are making?
		- (Most importantly) How these things relate to form an orderly plan for the disposition of the property)
	+ TO DRAFT A WILL FOR A PERSON INCOMPETENT BY ONE’S OWN JUDGMENT IS A BREACH OF PROFESSIONAL ETHICS
* Instances of Alzheimer’s (These kinds of issues will proliferate)
	+ Washburn – Testator, while in advanced phase of Alzheimer’s, wrote a will that left everything to caretaker, revoking earlier wills – court found testator lacked capacity to execute latest will
		- Earlier will used as way of assessing testator’s capacity at time of execution of latest will (how much they differ)
			* Provisions in will itself can shape legal perception of capacity
		- Burden of proof for testamentary capacity is on PROPONENT (not contestant) of will (in TX too) before will is admitted to probate
	+ Wilson – eccentricity, alcoholism, Alzheimer’s – these things don’t necessarily mean incapacity (have to look to test above) – refines test – look to totality of evidence of incapacity during the relevant time
		- Once will is admitted to probate, burden shifts to contestant to prove lack of testamentary capacity
* Insane Delusion (subset of mental incapacity)
	+ Definition: A false conception of reality, determined by rational person test
	+ Test: Could a rational person in the testator’s situation have drawn that conclusion?
		- A belief not susceptible to corruption by presenting testator with evidence indicating falsity of the belief –
			* SEVERELY ODD in comparison to norm and against evidence AND probability, OR
			* If not normatively odd, persistence in belief against evidence argued to testator
	+ Analysis:
		- Was there an insane delusion?
		- Did or MIGHT the delusion have caused or affected the provisions in the will? (If not, no mental incapacity)
	+ Strittmater – (here, insane delusion found, and person found to lack mental capacity)
		- 1947 case, woman considered feminist to a “neurotic extreme” and hated males – deemed mental incapacity
		- Today, she would have been found to have capacity, because she capably managed her own business affairs until the time of her death
		- Mental incapacity is determined according to social and psychological norms of the times
	+ Breedon – (here, insane delusion was found, but the testator was found to have mental capacity)
		- Here, man consistently did coke and alcohol, and was under insane delusion that FBI was spying on him trying to kill him and his dog
		- However, his actual listing of assets in his holographic will was found to show sufficient mental capacity, and the insane delusion was found to be irrelevant to the will

Undue Influence – was there an element of coercion, or a person who exerted undue influence over the will?

* Standard – Ask:
	+ Is the testator susceptible?
	+ Does the influencer have the disposition to influence?
	+ Is there an opportunity to influence?
	+ Is the provision the result of the influence?
* Cases:
	+ Lakatosh – undue influence was deemed to have been exerted, because drafting lawyer was relative, and provision was in favor of drafting lawyer
		- “Feeble” is not the same as “susceptible” – “weakened intellect” more likely to be susceptible
		- Burden of proof shifts to proponent of will to show independent will and clean hands
	+ Will of Moses
		- When drafting a will, keep in mind claims relatives might assess against a will, as well as presumptions reflective of times, and do damage control
		- Here, undue influence deemed to have been exerted, but probably wouldn’t be today (older woman who’d had mastectomy leaves all to younger male lover)
	+ Kaufmann’s Will (60s gay case)
		- Will left all to testator’s gay boyfriend – they’d been together for 11 years
		- Undue influence was found because testator wrote a letter to his family describing the influence his boyfriend had over him, and the will was drawn up in front of the boyfriend – reflective of prejudice of the time against gays
		- Better way to handle situation where social norms might prompt contest – use a revocable trust instead
			* Shows intent over a long period of time
			* Makes contest less likely – contests usually would happen immediately, but the existence of a revocable trust is not immediately known
* Drafting the Will for Relatives
	+ It is permitted to draft the will for relatives unless you (the drafter) are getting a larger share (if 4 children, I should get ¼, not half)
		- If drafter is going to get more, DO NOT draft the will
		- If drafter is getting less or equal share as other kids, go ahead
	+ **Lipper** – no contest case
		- Son drafted will for his mother, there was no undue influence but son anticipated contest of will, so included a no contest clause in the will, saying he who contests the will gets nothing
		- For these clauses to work, it has to deter people who are still getting something in the will to some extent
		- No contest clauses lead to a lot of out-of-court settling (people make deals so they don’t have to drain the estate)
	+ States will NOT enforce no contest clause agreements if the contest is brought:
		- With probable cause, AND
		- In good faith
	+ DISCOURAGE your client from writing in their will WHY they are excluding a particular person – testator explanations about why people are left out can drive people to litigate or contest when they otherwise wouldn’t, and can be similar to a defamation suit. (Badness).

Chapter 4: Wills – Formalities and Forms

Drafting and Executing the Will

* Ritualistic
	+ Drafting the will is a rigorous ritual – when drafting, you should be superlatively rigorous (use the most rigorous standard you can think of
	+ Also, follow older laws – if you say things the way they’ve always been said, people have a very definite idea of what they mean
	+ Also, ritual persuades testator that what he is doing is important
	+ Method of Execution:
		- Prudent lawyer drafts for ALL STATES – at LEAST according to TX law, plus others
		- Draft in a closed room/controlled environment/careful order/set questions etc. (ritual)
	+ Safeguarding the Will (once drafted)
		- The will must be BOTH safe AND able to be found
			* If a will is not found, it is presumed revoked
		- It’s a good idea for the lawyer to offer to keep the will (TX allows) and then give a copy to the testator with information about location of will
		- If the testator keeps, bad things could happen:
			* Relative who gets there first could destroy
			* Unintended revocation could occur (destruction)
			* Ineffective modifications could happen (testator or others adding on)
* UPC Requirements
	+ A will must be in writing (as a document, not a computer file or audio)
	+ Signed by the testator
		- Or, if the testator can’t sign, will must be signed by someone else at testator’s direction
	+ In the testator’s conscious presence
	+ In the presence of two witnesses either
		- In person, OR
		- At the acknowledgement in the CONSCIOUS PRESENCE of the testator, OR
			* At a reasonable time thereafter
				+ Therefore if testator dies, witness can sign after testator dies
				+ “Reasonable time thereafter” not permitted in TX
		- Acknowledgement: (one of two things)
			* If testator can’t sign, he acknowledges that the other person who signed did so at his discretion, OR
			* If testator DID sign, but witness wasn’t there, testator, when asking witness to sign, acknowledges that he, the testator, did in fact sign it
* Holographic Wills – an entirely handwritten will
	+ Much less formal procedures than a formal will
	+ Holographic will can set aside a formal will, and a formal will can set aside a holographic will (neither trumps the other)
	+ Witnesses are not necessarily required with holographic wills because holographic wills can be self-proving.
* TX Requirements (TPC 59)
	+ Will must be in writing
	+ Signed OR acknowledged by the testator IN PRESENCE of witnesses
	+ Witnesses have to sign or acknowledge AT THE TIME
	+ There must be TWO witnesses who sign or acknowledge IN THE PRESENCE of the testator IF
		- The will is not wholly in the handwriting of the testator
		- The two witnesses do not have to be in each other’s presence as long as they are both in the conscious presence of the testator
* Groffman case – court wouldn’t probate the will because the witnesses were not in each other’s presence when they signed (they were both in testator’s presence, but they were in diff parts of the house frome ach other when they signed) therefore, in the opinion of the court, the required formality of the will was not fulfilled
	+ Shows how strictly court can adhere to formal will drafting requirements
* Purging Statutes – statute that deletes a gift to an interested witness so the will is not denied probate (takes away a witness’s devise so that the witness becomes disinterested)
	+ Morea case – 2 of 3 witnesses were devisees, but neither had to be purged (one was disadvantaged by will, the other was supernumerary because only need 2)
* Self-Proving Will (Avoids need for witness testimony)
	+ For a will to be self-proving, it must have a separate set of witness signatures plus a notarization form
	+ Testator signs twice, witnesses sign twice (both will and affidavit) and then a notary signs (only notarized once)
	+ Possible problems – people have to sign twice so it’s easier for something to go wrong. If someone skips attestation, then their will is not self-proving, and if taken to court and cannot stand up just based on testimony, could be badness
	+ UPC (but NOT TX) now allows a signle set of signatures plus notarization to be a self-proving will

Curative Doctrines

* Pavlinko – court would not allow contentually correct but improperly signed will (husband and wife signed wrong ones) into probate
* Snide – court did allow signed but incorrect will intro probate, just corrected the names
* Substantial Complicane and Dispensing Power
	+ Ranney – substantial compliance case
		- There was no attestation clause (facial self-proving addendum to will), but there was a self-proving affidavit; court allowed the will, saying there was **substantial compliance** with will requirements
			* You must show substantial compliance by clear and convincing evidence
	+ Hall – dispensing power case
		- Draft of joint will was executed without witnesses, but with a lawyer’s notarization, under assurance the draft would be valid until the final will was completed
		- Court used dispensing power – agrees to uphold the will if they are sure that is what the testator wanted to do
	+ TX has certain legislative cures for problems with wills, but does not use substantial compliance of dispensing power
* Holographic Wills
	+ In TX – must be completely in testator’s writing, and signed (date desirable but not necessary
		- Codicil: amendment to a will (has all the same requirements as a will to be valid)
	+ Will of Smith – Orally saying you intend something to be your will is not sufficient if it doesn’t look like a will (here, little card with what looked like instructions on how to write a will)
	+ Kuralt – testator wrote a letter to his mistress describing his intent to make her his devisee, but he never actually did it – court still made it effective (mistress won out, wife got nothing)
		- Shows courts might combine UPC holographic statute with dispensing power
		- TX is not a UPC jurisdiction so this won’t happen here

Revocation of Wills

* Procedure
	+ Revoking a will is as formal as execution
	+ You can revoke a will by writing with testamentary formality (like in the first paragraph of a new will), OR
	+ By a physical (not oral) act – destroying of some kind
	+ Revoking a will revokes any codicils, but revoking a codicil does not revoke the will
	+ Harrison v Bird – testator called lawyer, asked to revoke will.
		- Attorney and secretary destroyed will, notified client, and mailed the pieces to client who threw the pieces away
		- The will was not revoked until the client threw the pieces away – revocation is a formal procedure and must be done in the testator’s presence
		- Destruction only revokes if by testator or in testator’s presence; a lawyer destroying outside the testator’s presence as purported revocation is malpractice
* Lost Wills
	+ If a will is lost, there is a rebuttable presumption that a lost will in the possession of testator was revoked. (If we need to know the provisions for probate purposes, go to drafting lawyer who should have a copy)
	+ Thompson – Judge counseled client NOT to destroy will, just to annotate cover of will in order to revoke
		- The effect of this was that, although intent was shown, there was no revocation because no destruction or physical act on will
		- Lawyer was negligent
		- For revocation, you need:
			* Intent + Physical Act (preferably one that destroys!)
		- How would the court handle the assets in this case? Constructive Trust
			* If the revoked will said the assets go to Fred, then court will create a constructive trust of which Fred is trustee – some interest will go to Fred but not necessarily liquidated interest
* Partial Revocations and Annotations
	+ Partial Revocations – basically, crossing something out of an existing will to revoke that portion of the will
		- This is not allowed in TX
		- It would be difficult to determine whether the cross-out happened at the initial drafting or at a later point, so is not practical
	+ Annotation – basically, handwritten addition to a will
		- If fulfills requirements to be a codicil, then it is acceptable
		- Holographic codicils to formal wills are allowed, but formal codicils are not allowed for holographic wills
* Dependent Relative Revocation (DRR)
	+ Definition: 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
		- Ex) Alternative disposition scheme fails (thought revocation would mean reversion to earlier will)
		- Ex) Testator thought his son was dead, so left son out of the will, and said in will left son nothing because he thought son was dead, but really son was alive
	+ Courts will apply DRR to a will when doing so will further the testator’s intent (try to get as close as the can to what testator wanted)
		- Alburn – Testator wrote will in 1955, new will in 1959, destroyed 1959 will in 1960 on assumption that 1955 will would stand
			* Court probates 1959 will (under WI law, could not use 1955 will) because probating will is better than intestacy
* Revival of Wills
	+ Logical approach – latest surviving will is the will
	+ Majority rule – will 2 revokes will 1 when will 2 is EXECUTED (in the testator’s life)
		- Instance where a will does do something during testator’s life
		- Rule of Intention – If will 2 is revoked, will 1 is revived if the testator so intended
	+ Minority rule – will 2 revokes will 1 when will 2 is executed, but there is no possibility of revival
	+ In TX, revocation of a codicil revives the original provision
* Revocation by Operation of Law
	+ In most states, incl. TX, divorce automatically revokes provisions in favor of former spouse
		- UPC expands this to revoke provisions in favor of spouse’s relatives and descendants as well; TX does not expand it
* Marriage and Revocation
	+ Marriage AFTER execution of a will does not bar the new spouse from an intestate share, UNLESS
		- Spouse is intentionally omitted (in which case spouse will get “forced shares” in non CP states – where spouse waives rights under the will and take the statutory share which would be more if the spouse was omitted from the will)
	+ In TX, marriage after execution of the will does not alter disposition at all, because of community property
		- How does CP handle the situation?
			* In some states – 1/3 of all property
			* TX – just and fair distribution of CP only
				+ In TX, income from separate property is also CP

Components of a Will

* Rules
	+ Integration of Wills – all documents at execution intended to be part of the will are part of the will
	+ Republication by Codicil – a validly executed codicil to a validly executed will re-dates that will (if it is the testator’s intent)
		- Only effective with a probatable will
		- In TX – a holographic will cannot incorporate a typed document by reference (some states do allow)
	+ Incorporation by Reference – even if not present, a writing in existence at time of execution, and clearly designated in a will, is part of the will
		- UPC difference – Writing does not need to be in existence at time of execution – limited to things concerning personal property though
	+ Doctrine of Acts of Independent Significance (aka Doctrine of Nontestamentary Acts)
		- Doctrine that permits extrinsic evidence to identify the will beneficiaries or property passing under the will
		- 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, then under this doctrine the gift will be upheld
		- Ex) You can specify in your will that your gardener gets something at time of your death, but the gardener you have now may not be the one that you have at time of death. However, gardener at time of death will take under this doctrine.

Chapter 5: Construction of Wills (Go THRU CH 5 FROM LR OUTLINE TOO)

Mistaken or Ambiguous Evidence

* Extrinsic Evidence/Plain Meaning Rule (PMR)
	+ Plain Meaning Rule premise – a plain meaning in a will cannot be disturbed by the introduction of extrinsic evidence
		- PMR does not apply to situations of undue influence, compliance with wills act, or ambiguity – courts WILL use extrinsic evidence in these situations
		- Latent ambiguity – manifests itself only when terms of the will are applied to testator’s property or designated beneficiaries
		- Patent ambiguity – error that is open and clear on document’s face (before terms of will are applied)
	+ PMR Examples –
		- Specification in will “to my heirs at law” the heir at law was an aunt; testator had said (but not written) that she wanted her estate distributed among her 25 first cousins. “Heirs” oin plural does not indicate a latent ambiguity when it is really one person
			* Here, they needed a specific inquiry – 25 first cousins by name
			* Effect of PMR – we accord precise meaning to heirs at law, even though we have good evidence that this is not what the client wanted to do, it’s of no help
			* As a lawyer, you could try to argue that the aunt has been unjustly enriched to get the evidence in, and then try to set up a constructive trust
		- “To Perry Manor, Inc” – meant to leave to local nursing home in IL, but name changed and the only Perry Manor, Inc was in NV – but because of the specific name, no extrinsic evidence admitted, everything goes to NV
		- Personal usage exception to PMR – if testator leaves something to a person the testator always called “Mrs. Moseley”, even though that wasn’t the person’s name, and there was another actual Mrs. Moseley who testator didn’t mean to leave anything to, who gets it?
			* Extrinsic evidence will be used to show testator’s personal usage of the phrase “Mrs. Moseley” meant the person that she meant.
	+ Elimination of false designation creates a latent ambiguity, for which extrinsic evidence is possible to access for resolution
		- Arnheiter case – wrong street number included in will. Court said they could not change the street number to the right one, because that would be rewriting the will, but could delete the number, which would make the will ambiguous, and then look to extrinsic evidence to determine the correct street number
		- Gibbs case – will left to certain person at certain address, but middle initial and address were wrong. Court crossed out middle initial and address and used extrinsic evidence to correct it.
* Correcting Mistakes
	+ Erickson – CT will allow extrinsic evidence for purposes of:
		- Identify property named in a will
		- ID named devisee
		- Clarify ambiguous language in a will
		- Prove fraud, incapacity, or undue influence
	+ Fleming – Testator told lawyer will was a sham to convince named devisee to sleep with him
		- Lawyer should have retrieved will – Lawyer was made instrument of fraud
		- What should court do? When court admitted lawyer’s testimony as extrinsic evidence, it made the fraud effective, and the devisee got nothing. Court should not have admitted lawyer’s testimony, and probated the will, then fraud would not have been made effective.

Death of Beneficiary Before Death of Testator

* Antilapse Statutes
	+ In general, these statutes don’t reverse rules about last gifts EXCEPT in regard to specific persons
	+ In TX, these statutes protect devisees who are descendants of the decedent’s parents
		- Other than that, they don’t protect anyone/prevent gifts from lapsing
		- They are blood determined – so protect a very narrow range of people
	+ Other jurisdictions –
		- Many antilapse statutes apply not just to descendants of the parents of the testator and their descendants, but also to the testator’s parents and grandparents and their descendants
		- TX – descendants of the testator’s parents
		- Other jurisdictions – testator’s parents, grandparents, and their descendants
	+ UPC – presumes that words of survivorship (“to my surviving children” etc) can require further evidence (so when drafting, specify what happens if there are no survivors – whether there are alternative takers, or residuary)
	+ Narrowness of antilapse statutes
		- Antilapse statutes do not normally protect spouses
			* Jackson – left to wife and her heirs; wife died; though antilapse statute doesn’t apply to spouse, but only to blood, court construed the “and her heirs” to be “or her heirs” to avoid escheat (atypical)
			* Ex) H mentions children in his will, but devises ¾ to wife and ¼ to charity, and wife predeceases
				+ Although H didn’t want all to go to charity, most courts will give whole estate to charity (assuming rule of “no residue of a residue” has been abolished)
				+ “No residue of a residue” – If residuary takers are A and B, and A dies, then A’s gift lapses.

If there IS a residue of a residue, then A’s share goes back into the residue (common pot)(so probably to B – what will happen where this rule is abolished)

In TX, this rule has been abolished

If there is NOT a residue of a residue, A’s share goes to intestacy

* + Dawson case – if an antilapse statute does not apply, and the estate is left to two non-blood relatives, and one predeceases, what happens to his share? Two possibilities –
		- It can go back to the testator’s residue, and therefore to the testator’s blood heirs (even though this was not the testator’s intent) OR
		- Court can find it was a class gift, and distribute equally among parties of the same designation
			* Class gift: when a gift is named to a specific class (ie “my husband’s nephews”) instead of to individual people
				+ Must be left proportionally to all of the same designation
				+ Cannot be a class gift where people are mentioned specifically or where other people of the same designation are specifically excluded
			* NOTE – courts are increasingly willing to BROADLY apply what a class may be to keep more with the testator’s intent

Changes in Property After Execution of Will

* Ademption – when property changes after the execution of a will (ie legacy fails because subject matter no longer belongs to the testator’s estate at death) “subject to ademption” means there’s a possibility that the named thing will be gone by the time the testator dies. If something is “adeemed” that means that the named thing IS in fact gone by the time the testator dies.
	+ Devises:
		- Specific devises – specifically named property (can be subject to ademption – being taken away later)
			* If a specific devise happens, and the specifically devised item is no longer in the estate when the testator dies, then the devisee gets nothing.
		- General devises – general benefit (such as money)
			* Not subject to ademption – other assets will be sold to satisfy if everything left is general devise
		- Demonstrative devises – general devises payable from a specific source (also not subject to ademption)
	+ Estate of Anton – the holder of durable power of atty liquidated real estate to pay for the testator’s health and care. Subject to ademption?
		- No. Atty can sell, and nothing will be subject to ademption.
		- Had OWNER (testator) sold, ademption would have been clear (the owner selling it is a clear indicator of his intent to sell it, we knew what he intended)
	+ Specific or General Devise?
		- Devise “100 shares of Tigertail stock” v “My 100 shares of Tigertail stock
			* The first is probably a general devise (unless Tigertail is not a widely traded stock, in which case it could be regarded as specific) and so is not subject to ademption
			* The second, with the clarifying “my” is a specific devise, and so is subject to ademption
	+ What happens if the property/assets change form?
		- If Tigertail gets taken over by another company, because this is merely a change in form, not substance, then the change would likely not be significant in regards to ademption (still subject to ademption if a specific devise, and not subject if a general devise.)
		- Courts can also choose to construe at time of death instead of execution
			* “My Lincoln automobile” some courts will pass the Lincoln you owned when you executed the will
			* This is different than just saying “my car” which would be a general devise.
	+ Exceptions to Ademption
		- Conservator’s Action – if the conservator of an incompetent person sells a specific thing, it is not generally adeemed, because it was not devised from the testator’s will
			* It’s gone but not adeemed (there’s probably a remedy of some kind)
	+ Standard Equations (in ademption, these amounts can be incorporated/added into what the overall value of the property was between when the property changed and when the will was executed.)
		- Remaining balance on purchase price of specific property sold
		- Unpaid balance of condemnation award
		- Unpaid fire or casualty insurance proceeds
		- Property owned by testator as a result of mortgage foreclosure on mortgage devised
* Abatement – What happens when there are insufficient assets in residue to pay debts?
	+ First, look to assets, especially anything specifically set aside to pay debts. If there are insufficient assets to pay, then things will be taken:
		- First the residue will be “abated” (taken) – this can be bad because usually the residue goes to the most cherished beneficiary of the estate
		- Then general devises will be abated
		- Then specific devises will be abated
			* Keep these things in mind when drafting – you can specify differently. T can, for example, specify that in the event of debt, someone will take X of residue (and so structure will so most cherished beneficiary doesn’t get hit the hardest)
* Exoneration of Liens
	+ Unpaid mortgage – does the devisee receive the real estate with or free from the mortgage?
		- Old law – if you gave the house to X, it was assumed the house was paid off. (Lien was exonerated)
		- Current TPC – No, not exonerated. The devisee pays mortgage, OR the property is sold and the proceeds will go to pay the mortgage and the remainder to the devisee.
* Does a Post-Execution Transfer/Change in Property Satisfy a Bequest?
	+ For general bequests – a post-execution transfer of SIMILAR BENEFITS can be construed (like an advancement) to satisfy the bequest
	+ Common law says that satisfaction is a rebuttable presumption
	+ UPC and TPC – require written evidence to construe as a satisfaction – presumption is reversed (now it’s a rebuttable presumption that something has NOT been satisfied)

Chapter 6: Nonprobate Transfers and Planning for Incapacity

Will Substitutes

* Examples of will substitutes:
	+ Life insurance
	+ Joint Accounts
	+ Pension Accounts
	+ Revocable inter vivos trusts
* These things are just like a will in substance, BUT:
	+ They do not go through probate
	+ They are not subject to Wills Act
	+ They do not gather up any additional assets
* Will substitutes are revocable in two ways:
	+ Can be revoked by DEED OF TRUST
		- Settlor grants to trustee, who holds legal interest for the beneficiary (who has the equitable interest) (settlor and trustee are not the same person)
		- Settlor retains power to revoke, alter, amend, take trust during life, have testamentary power of appointment
		- The beneficiary can either:
			* Get an equitable interest by deed, or
			* A life estate, with the remainder to go to others.
	+ Can be revoked by DECLARATION OF TRUST (As seen in Farkas case)
		- Settlor is also trustee; these can come into being by a document or by a mere declaration
		- Settlor retains power to revoke, reservation of income, reservation of voting rights of stock, power to sell stock and terminate trust, power to change beneficiary on written notice
			* The beneficiary does have a present interest (though it may be only a theoretical one)
			* These are not testamentary
			* All jurisdictions accept declarations of trust by denying that they are testamentary and affirming that some interest passes (even if, as in Farkas, it is a theoretical unnamable one)
		- Linthicum case – beneficiaries of a revocable trust do not have standing to challenge
			* Court seems to say it’s not just a theoretical small unnamed interest that passes, the interest is in fact not there.
			* This means the probate code is circumvented, but courts are okay with this because they favor trusts.
				+ Law is probably moving more toward this end
	+ Pilafas case – was the trust and/or the will revoked?
		- Testator had both will and trust documents. He had expressed intent to revoke. Neither of the documents was found at death.
		- The trust had specified the method of revocation to be written notice to the trustee (who was also the settlor).
		- There was a presumption that the will was revoked – it was in the testator’s possession and not found at death (even though the unfavored heir was the first into the house after death)
		- Trust – the required written notice was not provided (no, he didn’t write himself a letter) so the trust was not revoked
			* This is an example of a provision of wills law that does not carry over to trusts

Creditors

* State Street v Reiser
	+ Reiser created a revocable inter vivos trust. He (the trustor) then procured an unsecured loan on the basis of properties held by the trust, but the properties were not worth the full amount of the loan. The settlor’s estate was insufficient to pay off the bank.
	+ How are creditors affected?
		- Creditors could have had access to the trust assets to the extent that the settlor could have while alive
		- But after he dies, the interests become vested. What happens then?
		- HELD – Court says that the creditors may access the trust assets after the settlor dies, when the interests become vested
			* This is a change from the law that came before, but will probably become majority rule.
			* This is only permitted if probate assets are insufficient to pay creditors
			* It is unclear whether exemptions for spouse/children of probate assets apply to the trust as well? If we apply wills law to trusts here, and let the creditors access the trust assets, and say 90& of assets were in the trust, the wife and child would be screwed. There is a policy concern here.
* Non-Probate Assets
	+ Revocable Trusts – Reiser says assets in these trusts are accessible to creditors
	+ Life insurance and retirement benefits, when payable to spouse and children, are exempt (not accessible) to creditors
	+ United States savings bonds payable on death – may be exempt from creditors
	+ Joint tenancy in land – exempt from creditors
		- This Is rare in TX
		- Example – To you and me in fee simple with right of survivorship
			* When the first spouse dies, the second spouse’s interest expands to include the first person’s share, and the second person’s heirs inherit what is left
	+ Payable on death bank accounts and joint bank accounts are accessible to creditors, but only after the estate is exhausted
	+ Life insurance
		- Is part of the estate for federal tax purposes, but generally exempt from creditors
		- Can a will change a previously designated life insurance beneficiary?
			* Insurance policies prefer their own policy statements; people generally know to make any changes in the policy itself
			* There is some dissatisfaction in this rule, so it could change in the future.
			* In TX, divorce does void life insurance provisions for spouse
	+ Pension Plans
		- These require a spousal beneficiary
		- They block state law in areas of automatic revocation by divorce or slayer statutes
		- (Another reason to reassess all will and will substitute instruments after a divorce)
	+ Joint Bank Accounts – 3 different types
		- True joint account (with joint access and right of survivorship)
		- A disguised payable on death account (parent doesn’t tell child that they added the child to the parent’s account)
		- An agency/convenience account – such as an account with an elderly person who needs an agent to manage because they have become unable to manage their account
		- It can be difficult to tell which type of account a joint account is – account details are usually on preprinted bank forms and do not indicate the true intent of the depositor.

Revocable Trusts

* Revocable trusts provide an excellent method of estate management and a companion to many wills as well, but they are also becoming a major competitor to wills
* During Life, RTs:
	+ Assist with property management and continuity (it allows you to handle all your assets holistically because they are all handled in the same way)
	+ Sort out property between spouses
		- If there is separate property that one spouse wants to keep separate, a revocable trust allows him to do this
	+ Allow planning for incapacity – if future incapacity is perceived to be an issue when the trust is set up, you can have two trustees – have one be yourself, and if/when you become incompetent, the other can take over
	+ There are NO FEDERAL TAX BENEFITS – revocable trusts do not shield from federal taxation
* After Death, RTS:
	+ Avoid probate (but keep in mind the start-up costs; a revocable trust is more expensive to set up than a will)
	+ RTS have less delay than in probate
	+ RTs don’t have a time limit for creditor’s claims
	+ RT provides more privacy for the trustor
	+ RT avoids any ancillary jurisdiction problem – they can be held in any states
	+ RT avoids the close court supervision that comes with a testamentary trust
	+ RT provides less certainty than with wills (trusts are a changing area of the law)
	+ RTs are harder to challenge than wills
		- Because so much business takes place under a trust, courts are generally unwilling to overturn them because then the court would have to revoke a large number of transactions
	+ RTs in and of themselves provide no tax advantages (though they can be drafted to create some tax advantages)
	+ RTs can ensure a mutual estate plan between spouses, which is made irrevocable on the death of one
		- Husband and wife put their assets into a trust, make the trust revocable by either person at any time, and specify that it will become irrevocable upon the death of one of them
			* This gives either the chance to change the trust provisions, as long as both parties are alive
		- You cannot accomplish this as well with a will.

Pour-Over Wills

* A pour-over will collects assets and pours them over into an inter-vivos trust; this allows for unification of assets
	+ Pour-over wills can gather assets you don’t even know about (whereas revocable trusts generally only include assets you specifically put into the trust)
	+ It is advisable to make a trust and a will – the will gathers the assets, and pours them into the trust, and the beneficiary of those assets can be designated by the trust
		- This allows you to change the revocable trust as much as you want (good flexibility because people are more likely to change trusts than wills
		- Clients can change a trust orally, but as a lawyer you should advise the client to put the change into writing.

Clymer v Mayo (Divorce/Tax case)

* Facts: In 1973, will and life insurance for husband and wife were combined into a trust. In 1978, they divorce, and the husband renounced rights to wife’s life insurance, but not as beneficiary of the trust. The wife dies
* The husband (Mayo) and the wife had their estate set up in two parts. Why? Tax management
	+ Under the marital deduction trust, each person has an exemption
	+ If one spouse left all to the other, they would lose 45% to taxation; so only leave part to the spouse
	+ Giving part to your spouse delays taxes, and then the other part uses the tax exemption
	+ For these reasons, a lot of revocable trusts are broken up into two parts.
* First part: Marital deduction trust – 50% of the estate goes to the husband, with life income and general power of appointment (general power of appointment means husband can use the assets to give to himself or his creditors)
	+ However, the purpose of a marital deduction trust is impossible after divorce
	+ Therefore, because of the divorce, the court does not permit the marital deduction – instead, the court combines ALL assets into the nonmarital trust
		- Courts are extremely willing to modify a will when they see a tax strategy at work
* Second part: Nonmarital trust (where court put all assets)
	+ Once again, gave income to Mayo for life (yet in fact, it was already given to Mayo in the marital deduction part of the trust – hence we see the tax strategy)
	+ Other bequests were made as well
* HELD: The court applies wills law onto the nonmarital trust. They justify their decision by saying here, essentially, there was nothing in the trust – the assets of the trust were probate assets gathered by the will and her life insurance policy – so while wife was alive, there was nothing in the trust.
	+ Generally, with trusts, there is the concept of the “right to receive” – meaning there must be a trust res (something in the trust that can actually be received). Because the trust was created by a will and life insurance, there is nothing in it until the settlor died, so the court in this case (probably to stop Mayo getting away with tax management strategy) says that means the trust had nothing in it at the relevant period of time.

Planning for Incapacity

* Durable Power of Attorney – authorization to act on someone’s behalf in a legal matter (appointing an agent with durable power of attorney does NOT in and of itself create a trust)
	+ Durable power of attorney does not endure after the settlor’s death (it does not avoid probate)
		- Once the settlor dies, all assets under the control of the agent fall into the settlor’s estate
		- If the agent dies before the settlor, the power terminates unless a successor agent is named by the settlor
	+ Durable power of attorney is personal to the person that the settlor appoints – the court will not provide a substitute
		- This differs from trusts, where the court will appoint a trustee because a trust will not fail for lack of a trustee
		- Having a trustee is generally better than having an agent with durable power of attorney – but then again, trusts are more expensive to set up
			* The holder of durable power of attorney is only an agent, not an owner like a trustee, and therefore is less capable of dealing with property in fact.
			* A trustee actually owns legal title, agent does not.
			* The agent may, however, have or be given specific power to make gifts.
	+ Franzen case ruled that the common law did not require absolute specificity to require the agent to revoke the trust (however, the jurisdiction had a subsequent statute so requiring)
* Other Devices
	+ “Living wills”/”Medical directive” – used to terminate medical treatment when a person’s competence is lost
	+ Disposition of your body (making organ gifts) – currently, the settlor has to make clear that he wants to donate his body, but there is lobbying to legislate for presumed consent
	+ Durable power of attorney for health care: decisional power is given to a particular person
		- Usually, to a spouse. The spouse will then be facing a will – they can’t establish a new will, but can set up a trust and specify designation of assets (put the probate assets into the trust) and then do with the trust what they will
		- Law wants to incentivize people to give to spouses
		- There can be tax benefits to giving huge amounts to your spouse (it delays tax) but courts might also view it as attempted avoidance of tax
		- Potential problem: What if the spouse, holding this power, is perceived as undermining the will, which the spouse cannot revoke, but can circumvent using the power to establish a trust?

Chapter 7: Restrictions on the Power of Disposition – Protection of the Spouse and Children

Rights of the Surviving Spouse

* Common Law v Community Property
	+ Couple: Total assets include house and savings = $750k, deriving from income from husband’s employment during marriage
	+ Common law: If wife dies first, she had nothing to devise. If she survives, she received often 1/3 ($250k)only for life: still nothing to devise (spousal support duty)
	+ Community property: Wife has earned half of the assets at acquisition: $375k which she can dispose of during the marriage or by devise. (CP kinder to wife than CL)
* Potential Assets –
	+ Private pension plans (ERISA requires survivorship rights for spouse)
		- ERISA stops controlling after divorce, but spouse should still go in and change! What if divorce happened in the above scenario, and neither spouse went in to change it, and it somehow slipped through the cracks? Possibilities:
		- W dies without changing? H takes (unlike will)
		- W retired taking life annuity? (H does not take.)
			* Once annuitize, effectively cash-out, so H gets nothing
		- W remarries? Does designation of death benefit control? Under ERISA, current spouse would take.
		- If W had changed death beneficiary designation to her sister after the divorce (w/o remarriage)?
			* Sister will take if no remarriage
* Homestead Protection for Spouse and Children
	+ Homestead secures use of family home to surviving spouse and minor children
		- At expense of other heirs and creditors
		- How much do we want to protect people against misfortune?
	+ TX – not a value, but different amounts of land for urban and rural-situated people
		- Urban is 10 acres (since 1999); rural is 200 acres for family
* Elective or Forced Share: CL States ONLY (doesn’t exist in TX, a community property state)
	+ Definition - describes a proportion of an [estate](http://en.wikipedia.org/wiki/Estate_%28law%29) which the surviving spouse of the deceased may claim in place of what they were left in the decedent's [will](http://en.wikipedia.org/wiki/Will_%28law%29).
		- If someone hid these assets in a trust instead, possible the widow won’t be able to get any of these assets (law of wills currently doesn’t really apply to trusts)
	+ Problem: how far are states willing to subscribe to a partnership theory of marriage (ie joint earnings), instead of id-ing earner and asserting duty of spousal support
		- Clearly not too willing, because they have chosen NOT to be CP states
	+ The amount of the elective share is extremely varied among CL states - from outright ownership to life share of 1/3 or 1/2 , even of income from 1/3 for life, and **only if spouse survives**
		- Basically, this is a tool to support a widow/widower
	+ UPC shares: 3% after one year, 3% and then 4% annual increments up to 50%; there is a $75k base. How does this compare with community property?
		- Provides graduated share of a constructed marital property estate
		- Similar to CP - just like community property, it gains in value over the course of the marriage, just as the value of community property would increase over the year
	+ Issues: Medicaid, same sex couples
		- If person surviving is already on Medicaid, Medicaid will stop for the duration of the time the assets the person received from their elective share remain, once they are gone person will go back on Medicaid
		- Pressure on person (from family) not to take elective share – not to use up assets and leave family with nothing
		- Pressure from state to take elective share – don’t make state support person if not needed!
* Estate Tax Marital Deduction (applies to CP states – ¾ population of the country)
	+ What kind of interest do I have to give to my spouse for it to meet the requirements for the estate tax marital deduction?
		- You could transfer all assets to spouse, and instead of getting hit with estate tax, (could be up to 45%!) taxation would be put off until spouse’s death.
			* This is a benefit to provide for your spouse, possibly better than you otherwise would have
		- On the other hand, question – how little do you have to give your spouse to qualify for this benefit? (How much less than “all”?)
			* Enough that it looks like you are trying to provide for your spouse
			* Examples of what is enough:
			* Transfer to spouse outright or in fee simple
			* Trust giving spouse income for life with a testamentary power of appointment to whoever (close to fee simple – though wife can’t give all benefit to herself, can give it to her estate or her estate’s creditor, bc with testamentary power of appointment, even though she can’t access it, she can devise it)
			* QTIP (Qualified terminable interest property trust)– income for life payable **at least annually** and unable to be appointed further during spouse’s life even by spouse. May but need not have a special testamentary power of appointment
				+ \*\*THIS IS ANSWER – the least you can give to your spouse, but still get the tax benefit! (IRS approved)
				+ Since this is terminable, it is really only a life estate
* Prenuptial Agreements
	+ Pre or post marriage, couples may agree and document that separate property becomes community property OR that income from separate property shall remain separate property
	+ Prenups are not merely offensive weapons
		- If someone’s spouse dies, and that person wants to remarry, children of first spouse might be concerned about what happens to assets
		- There is an increasing worry about the way in which prenups are actually drafted
			* People get prenups sprung on them day before the wedding, they sign because they want to get married, aren’t thinking about death/divorce
	+ If you’re the lawyer, insist on independent legal advice and fill disclosure to other party
	+ Inquire about prenups when drafting wills.
* Community Property – Acquests
	+ Community property is a community of acquests – income from separate property is in CP states like TX, community property
	+ Therefore, there are equal shares in each piece of property for husband and wife
	+ Community Property puts restraints on giving an inter vivos gift, and then leaving that person out of the trust (because by its nature, there will be more in the trust as more is acquired over time). Essentially, in a CP state, you can’t do this without the recipient of the inter vivos gift also receiving consideration (in the contracts sense) of great value.
* Community Property: Stepped Up Basis (Income Tax) (Comparing Capital Gains Application)
	+ Capital Gains: if your property increases in value from the time when you acquire it, such increase is referred to as a “capital gain” and you can be taxed on this gain in value. CL (or SP) and CP states tax these capital gains differently.
	+ CL property joint tenancy:
		- Value at acquisition of home: $50k + $50k (one 50k for H one 50k for W) (total of $100k)
		- Value at H’s death of home: $150k + $150k (total of $300k)
		- H devises to W (qualifies for marital deduction – no taxation at this point)
		- You do have considerate capital gains here – W lives there for awhile longer, and the capital gain is even greater
		- Value at sale (when W sells it): $300k + $300k (total of $600k)
		- What is the capital gain for which W will be taxed when she sells the house?
			* Her half from the time of the value at acquisition to the value at sale ($250k), and the husband’s half from the time he died (and she acquired his half) until the time of sale ($150k)
		- Capital gains income tax value: $400k (600k-[50k +50k +100k]) (can tax $400k of the 600k sale; the remaining $200k is exempt from taxation)
			* First $50k – husband’s share at acquisition (not taxed on this)
			* Second $50k – wife’s share at acquisition (never taxed on value of house at acquisition, regardless of whose share)
			* $100k –how much has accumulated on H’s share since of acquisition until the time wife got it (wife is not taxed on this)
	+ CP
		- Value at acquisition of home: $50k + $50k (one 50k for H one 50k for W) (total of $100k)
		- Value at H’s death of home: $150k + $150k (total of $300k)
		- H devises to W (qualifies for marital deduction – no taxation at this point)
		- You do have considerate capital gains here – W lives for awhile longer, and the capital gain is even greater
		- Value at sale (when W sells it): $300k + $300k (total of $600k)
		- What is the capital gain for which W will be taxed when she sells the house?
			* Her half from the time of the value AFTER HUSBAND DIED (not from time of acquisition) ($150k), and the husband’s half from the time he died (and she acquired his half) until the time of sale ($150k)
		- Capital gains income tax value: $300k (600k-[50k +50k +100k +100k]) (can tax 300k of the 600k sale)
			* First $50k – husband’s share at acquisition
			* Second $50k – wife’s share at acquisition (never taxed on value of house at acquisition)
			* $100k –how much has accumulated on H’s share since of acquisition until the time wife got it (wife is not taxed on this)
			* Second $100k – how much has accumulated on W’s (HER) share from acquisition until the time husband died
			* Nothing is going to clear capital gain (can be taxed) on amount increased in value from what you acquired from dead spouse (that will always be taxed)
* BOTTOM LINE – If you choose CP, you get more shelter from capital gains tax.

Conflict of Laws for Migrating Couples

* Law of situs (law of where you are, applies) controls problems relating to land; situs law may implicate marital domicile law
	+ You own property in TX and MO, in a lot of cases, MO will let TX take care of it (will let MO land be handled under TX law)
* Whether you and your spouse are domiciled in a CP or SP state at time of personal property **acquisition** defines property as separate or community.
* Whether you and your spouse are domiciled in a CP or SP state at time of death of one spouse controls the survivor’s marital rights (by CP if domiciled in CP state, by SP if not).
* Moving from Separate to CP State
	+ Couple in non-community property state with husband who is sole wage-earner, assets of $500k. Protected by elective share, wife can get, say $167,000
		- Wife is in no danger - if they stay in a non-CP state, she is protected by forced shares statute; in CP state, she is entitled to half.
	+ Move to CP state (TX), establish residence. Her husband’s separate property = 500k, but husband is retired and has been spending that money. When the husband dies, wife has little money remaining and no forced share statute to protect her
		- Earnings from SP (separate property) become CP (but husband can still spend that money, so this in and of itself does not serve as a protection)
		- How do CP states protect the wife in this sitation? **Quasi community property**
	+ Quasi-community property: treats property that would have been community property if acquired in CP state AS community property, despite fact that it was acquired in SP state
		- Applies in cases of divorce and for death of wage earner, but is not identical to CP because it only applies IF THE NON-ACQUIRING SPOUSE IS THE SURVIVOR, BUT **NOT** IF NON-ACQUIRING SPOUSE PREDECEASES (so not if the supporter/wage-earner lives)
		- CP state policy of support; alternative to forced share statutes
	+ TX (AZ, NM) – partial adoption of quasi-community property, that is, only AT DIVORCE, but NOT at death. LEAVES NON-EARNING SPOUSE WITHOUT SUPPORT AT DEATH OF EARNING SPOUSE, if husband devises to someone else.
		- Why at divorce but not death? Because protecting the non-earning spouse in the case divorce won’t negatively affect the state - doesn’t create sufficient incentive for people to move to TX just to get divorced
		- So why not at death?
			* TX doesn’t want people moving here just to die
			* Nowadays, more frequently both spouses have worked, so this isn’t as big an issue as it would have been 50 years ago – however, still keep this in mind.
			* You can deal with this apparent problem with CP states by weighing the possibility of harm against the known benefit of capital gains tax law in CP states (substantial benefit for other property owner – won’t necessarily leave them high and dry)
				+ If husband DOES leave wife assets in CP state, then so much more is protected (wife can hang on to a lot more) than those assets would be in a SP state
		- This could turn into a real problem in years ahead because so many people are moving to TX
* Moving from CP to SP state
	+ Couples migrating out of CP state CAN retain property as community property
		- Advise your clients to do this, even if another lawyer advises them not to
	+ EXPLAIN CAPITAL GAINS INCOME TAX CONSEQUENCES
		- H&W in NY, H has assets of $3mil, tax basis of $75k. W has assets of $200k. Knowing that W will die first, should they move to CA, establish resident and convert to CP??
		- YES – otherwise, H has taxable capital gains of $2925000 (because on wife’s death, husband would be taxed on everything he ever acquired in that SP state). By converting to CP, all of that is untaxable under capital gains.
	+ Alaska Community Property Trust
		- AK has made it possible for people to come and register/acquire property as CP if you want – but this hasn’t been tried in courts much yet.
		- Just moving and establishing residency is enough to convert your property to CP, and it is safer than this AK plan because it has stood the test of time, we know it to be reliable.

Rights of Those Omitted from Will

Spouse Omitted from Premarital Will (doesn’t apply to TX)

* Distinguish –
	+ **Common law** state where there is a forced share statute (often specifically against intention of testator)
		- Forced share takes care of omitted spouse in a will (doesn’t care about presumed intent)
		- CL states also have pretermitted spouse statutes
	+ **CP** states where provision is made for spouses UNINTENTIONALLY omitted from premarital will (to implement presumptive intent of testator)
* This does not currently apply in TX (but might eventually, accord with general and TX policy)

Rights of Children Omitted from Will

Intentionally Disinherited Children

* Disinheriting children is both LEGAL and POSSIBLE, but dangerous because it invites a contest
* In all states except LA, a child or other descendant has no statutory protection against intentional disinheritance by a parent – testators are not req’d to leave any property to a child.
* Prospect of sympathetic jury – testator will not be there, children will be, often dictates out-of-court settlement
* Complete disinheritance is unwise, though legal - a will disinheriting a child invites a will contest – usually on grounds of testamentary capacity, undue influence, or fraud.

Unintentionally Omitted Children

* Pretermission statutes are statutes that allow an unintentionally omitted child to take what his or her intestate share would have been
	+ These statutes apply only to testamentary assets
* Non-marital children have rights also, but clients (particularly with couples) might not mention them

Protection from Unintentional Omission

* Gray v Gray (528)(AL, 2006)
	+ The statute said that an omitted child was not entitled to the normal share he would have gotten under intestacy if when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child.
	+ Son who was omitted (father drafted will before his birth and left everything to son’s mother) argued that the statute does not take into account the fact that divorce might happen, as it did here, and that under AL law, though the will left everything to his mother, neither he nor his mother actually get anything.
	+ Court construes statute strictly, son gets nothing
* IF Gray v Gray was under UPC – here much like TPC 69
	+ Only applies to children born or adopted after execution of will
	+ If no children at execution, then already-existing pretermitted children take intestate share (**unless** mother is substantially sole beneficiary of will)
	+ If there were some children alive and included in the will when the will was executed, then the pretermitted children take an equal share from resources allocated to the children, reducing their share pro rata.
		- UNLESS will indicates the omission was intentional OR the testator provided otherwise in lieu thereof, with proof.
* UPC Dealing with Omitted Children – generally protects them – awards them share they would have received if testator had died intestate
* Kidwell v Rhew (536) – Do heir statutes protect a child omitted from a non-probate mode of transfer such as a revocable trust?
	+ Appellant argued that pretermitted heir statute should apply to trusts as well as wills, though on its face the statute only deals with wills
	+ Pretermitted heir statute purpose – to avoid inadvertent omission of children or issue of deceased children unless an intent to disinherit is expressed in the will.
	+ Will – disposition of property to take effect upon death of the maker of the instrument
	+ Trust – fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another
	+ Court says no – pretermitted heir statute does not apply to trusts, only to wills.
	+ Therefore, EASIER to disinherit a child with a trust than with a will

Chapter 8: Trusts – Creation & Characteristics

Basic Definitions

* Trust: arrangement where trustee manages property as a fiduciary for one or more beneficiaries
* Trustee hold legal title to trust property (can sell it, etc.)
* Beneficiaries hold equitable title and are entitled to payments from trust income
* Legal title – you actually possess the title; Equitable title – you have an equitable interest, and at some point you have the right to acquire actual legal title

Types of Trusts

* Private Trust: trust that is created gratuitously for the benefit of individual beneficiaries. Five common uses:
	+ Revocable trusts – O declares herself trustee of property for benefit of O for life, then on O’s death to pay the principal to O’s descendants (avoidance of probate)
	+ Testamentary marital trusts – federal estate tax law permits a deduction for property given to the surviving spouse (to trustees to pay income to spouse for life, then to pay principal to settlor’s children)
	+ Trusts for incompetent persons – O’s son is mentally impaired and unable to manage his property; O transfers property to X in trust to support son for life, remainder to O’s descendants
	+ Trusts for minors – federal gift tax law allows a tax-free gift of $13000 a year per donee – outright gift to minor creates problems because minor cannot manage the estate, so give in trust
	+ Dynasty trust – successive life estates
	+ Discretionary trusts – trustee has absolute discretion to pay out an amount of income to someone else. (to avoid having settlor’s assets drained by beneficiary’s creditors)

Parties to a Trust

* Settlor/trustor/grantor can create
	+ Inter vivos trust (during settlor’s life)
		- Can be created by declaration of trust (settlor declares he holds certain property in trust) or
		- Can be created by deed of trust, where settlor transfers property to another person as trustee
	+ Testamentary trust (created by will)
* Trustee
	+ There can be one or many trustees; can be individual or corporation; can be third party, settlor, or a beneficiary
	+ A trust will not fail for lack of a trustee – if settlor fails to name one, or if named trustee refuses to consent to being trustee, the court will appoint a trustee
	+ Central feature of a trust – bifurcation – trustee holds legal title to property, but beneficiaries have equitable, or beneficial interests
	+ Issues arising from bifurcation
		- Effect on rights of third parties with respect to the trust property
			* Although trustee has legal title to the trust property, a personal creditor of the trustee has no recourse against the trust property
		- Rights of beneficiary with respect to the trust property and against the trustee
			* To safeguard the beneficiary against mismanagement or misappropriation by the trustee, the trustee is held to a fiduciary standard of conduct
				+ Duty of loyalty – trustee must administer the trust solely in the interest of the beneficiaries
				+ Duty of prudence – trustee held to an objective standard of care in managing the property
				+ No commingling of resources is permitted.
* Beneficiaries
	+ Beneficiaries to a trust hold equitable interests
	+ Beneficiaries, therefore, have a claim against the trustee **personally** for br/trust, and additional remedies in equity relating to the trust property itself
	+ But can also reach trust property put out of trust (but didn’t sell), recovering against all but bona fide purchaser

Creating a Trust

* Requires Intent: there are no magic words that create a trust; the grantor must manifest an intention to create a trust relationship.
* Jimenez v Lee (Did settlor intend for this to be a trust?)
	+ Establishes test for whether one is a custodian (who has more leeway) or a trustee – Was the transfer (or investment) made with the intent of beneficial interest, not in the trustee/custodian figure, but in a third party? If so, he is a trustee, as here, and thus subject to standards governing trustee conduct.
		- Even when trustee is father of beneficiary, he is held to fiduciary standard of conduct, he cannot commingle resources, he has to administer the trust solely in the interest of the beneficiary. Father failed to do that here, and was found personally liable.
* Legal v Equitable Life Estate
	+ When there’s a life estate in property, then the remainder (once life tenant dies) has to go to a remainderman
		- If you want to sell property:
			* In equity, the trustee has it, and there are mechanisms to ensure that the trustee handles the property in a way fair to everyone
			* With a legal life estate, it’s very difficult to establish real value, because we don’t know when current life tenant will die, or if the property will appreciate or depreciate in value; also, because it is the trustee who has the legal life estate, and wants to pass it on, the potential remainderpersons or reversioners all have to be involved and approve any deals involving the property
				+ Only use legal life estates for heirlooms
	+ Trust is better than legal life estate
* Precatory Language –
	+ Language that expresses a wish “with the hope that” etc. Don’t use this kind of language.
		- Not enforceable as a trust, could be seen as just a gift instead of a trust
	+ Use precise language – “I wish but do legally require”
* Resulting Trusts
	+ O 🡪 A for life, then after 3 days, to B (the three days create a resulting trust in fee) (B has a springing executory interest)
		- During those three days there is a REVERSION in O.
		- If it was a longer period of time, there could be a large reversionary interest there for O to incur taxation
		- Executory interest (after three days) cuts short the reversionary interest O has in fee simple, and interest springs to B.
		- This is one kind of resulting trust – for those three days held the interest, didn’t dispose of it, therefore we get a resulting trust
	+ A resulting trust is not expressly created, but **naturally results from the grant**, not created by the court
		- Example: Money goes from purchaser🡪owner🡪 the owner gives title to stranger
		- Why is this a trust?
			* Purchaser didn’t want title to be in his hands because didn’t want wife be able to access it, so stranger holds it in trust – stranger’s position as, essentially, trustee is one that naturally results from the grant.
* Constructive Trust – construed by the court, not a natural result of the law of future interests
	+ Testator 🡪Devisee (court decides that the devisee will actually hold the interest for beneficiary)
		- Common in situations involving confidential or fiduciary relationship; express or implied promise; transfer of property in reliance on the promise; **unjust enrichment of transferee (usual the reason courts will construe/construct a trust)**
		- Increasingly frequent options courts use to serve justice where will is contested.

Requirements of Trusts

* Necessity of Trust Property
	+ “Trust res” – refers to property in the trust; to create a trust, you have to put something IN that trust
	+ Unthank case (TX case)
		- Facts: Decedent wrote plaintiff a letter that he would send her $200 every month for five years. Initially, he wrote “provided I live that long” in the letter, but scribbled that out. Plaintiff wanted to probate the letter as a holographic codicil to the defendant’s will, and argued that the scribbled out part created a trust subject to enforcement.
			* Court says no – a promise CANNOT be tortured into a trust
			* There is no trust res or reference to testator’s holdings – this is not a trust.
		- Another court may have decided this case differently (look to Kuralt’s case with letter to mistress) but this court follows the Clymer approach and finds lack of trust res
	+ Brainard case
		- Facts: There was an oral declaration (which is fine) of trust made, but the trust res did not yet exist. All that existed was the intention to deal in stock and eventually generate a trust res.
		- Court said this is no trust, for lack of trust res, until he enters his profits into his accounting log, and can be taxed on them, which is a sufficient declaration that the trust res does actually exist.
			* A trust with no trust res doesn’t lose all chance at ever existing; it can come into formal existence once a trust res exists
	+ Internal Revenue Code 671-677: Grantor trusts trust income still attributable to settlor.
		- If you set up a trust with your own assets, do you have to pay income tax on that income? Probably. See below for ineffective ways to set up a trust to try and avoid income tax
			* Spousal Attribution: Making your spouse your beneficiary won’t shield you from having to pay income tax.
			* Retaining possibility of reversion (for yourself) of 5% in corpus or interest
				+ You can get some tax shelter if you do this, only if your beneficiary is one of your children who has not yet reached the age of 21
				+ You want to get some of the income tax that you’ve paid back if the minor dies before age 21
			* The trustee (whether settlor, or non-adverse party) doesn’t get taxed income tax based on the income of the trust (or, in the case of the settlor, if the settlor is the trustee, the settlor doesn’t get taxed twice)
				+ Non-adverse party: lacks substantial beneficial interest that would be adversely affected by exercise or non-exercise of power
			* An independent trustee won’t get taxed on the income of the trust (independent meaning “not related, subordinated, nor subservient”
				+ There is the possibility for the exercise of the administrative powers of, say, the independent trustee, for the benefit of the settlor – could distribute trust income right back to settlor or spouse
		- This tax provision does not apply to:
			* A settlor’s or trustee’s power to distribute corpus by reasonably definite standard (“reasonably definite” = health, education, safety, maintenance, and support), OR
			* The power given to a trustee other than the settlor or his/her spouse, to distribute income by the same reasonably definite standards
* Trusts Needs Beneficiaries
	+ Clark case
		- Testator left personal property to trustees to either give to the testator’s “friends” as gifts, or sell.
		- The bequest for the benefit of the testator’s unspecified “my friends” fails for want of the certainty of the beneficiaries. Friends get nothing.
		- The testator’s indefinite language make it clear testator’s intent was to substitute, for his will, the decisions of his trustees (prohibited by statute) – trust fails.
			* How to fix? If this discretionary power were given as a power of appointment to either a beneficiary or a non-beneficiary, then the trustees could have given stuff to the friends, as the testator wanted
	+ Searight’s Estate (Replaced by TX Prop. Code 112.037)
		- In TX now – one can create a trust for an animal that is alive in the lifetime of the settlor (NOT for descendants of the animal born after settlor dies though)
		- Only a “reasonable amount” can be left as an endowment for pet – the excess will go to will beneficiaries or intestate heirs.
* Strongly Advised Written Instrument
	+ Fournier case – oral trusts are permitted in many cases, but not encouraged. TX, for example, permits oral trusts, but not when they involve land.
	+ Oral Trust for Disposition at Death
		- Oliffe case – Law is headed toward treating semi-secret and secret trusts the same (though TX currently treats them differently)
			* This case revolves around a testamentary trust that was considered semi-secret.
				+ Secret trust – One that can be known only from extrinsic evidence. Courts will often respond to secret trusts by creating a constructive trust for the intended beneficiaries to avoid unjust enrichment (court has to construe it because otherwise no one would know the trust exists)
				+ Semi-secret trust – We know a trust exists, but we don’t know the provisions. Courts ensure that beneficial interests equal legal interests. If anything remains after trust assets are distributed, what’s left is retained by the settlor.
		- Hieble case (oral inter vivos trust)
			* Mother and son have interests with survivorship
				+ Mother conveyed because she was sick, if she got well, son was to convey his interest back to her
				+ Survivorship: when one party dies, survivor’s interest expands to include the interest of that who died
			* He didn’t convey back to her. Was he unjustly enriched? Court says YES – a confidential or “trustee” relationship arose from their mother-son relationship, the fact the mother was sick, the fact that the mother had clean hands in this transaction, and the fact that the son kept telling his mother he would convey back to her.
				+ Once trustee relationship has been established, burden switches to the “trustee” to prove that a trust didn’t exist. Here, Court found that it did, that he had been unjustly enriched, and they created a constructive trust.

Chapter 9: Rights to Distributions from the Trust Fund

Rights of the Beneficiaries to Distributions, and Rights of the Beneficiary’s Creditors

* Mandatory v Discretionary Trusts
	+ Mandatory Trust: the trustee must pay out each designated pay period, he has no discretion
	+ Discretionary Trust: the trustee has discretion to distribute the assets of the trust
	+ Marsman case – is the trust mandatory or discretionary?
		- The trust essentially said (in attempt to balance the interests of benefiting the next generation while also taking care of the spouse) that spouse gets the income that the trust earns, and if things get hard for him, then the trustee can give him money from the principal as well – this decision was left in the hands of the trustee (hence, discretionary trust)
		- Trustee here (lawyer) would probably be liable for malpractice, because he did not ever investigate whether the spouse had other available sources of support or might need some of the trust principal
		- Essentially, trustee of discretionary trust has more power than that of a mandatory trust, but also can be found liable in more ways than the trustee of a mandatory trust.
	+ Can creditors access discretionary trusts?
		- Discretionary trust (without standards – meaning trustee has full discretion and is not bound to do or not do anything with the trust) – the beneficiary of such a trust has no right to force payment, therefore the creditor has no right to compel a distribution, either.
			* Creditors can, however, intercept if the trustee distributes
		- Discretionary trust (with standards: support trust “For A’s support” – trustee still has discretion, but there are limits to the liberties he can take)
			* Creditors who supply needs for support can access, but not general creditors
			* Perhaps alimony and child support
* Spendthrift Trusts
	+ A trust that provides continuing support for the possibly irresponsible, in which beneficiaries cannot voluntarily alienate their interests, so neither can creditors reach the interest
		- From standpoint of settlor, want to protect the stupid kid who can’t look out for themselves (Palmer thinks this is unfair)
		- Settlor has the option of paying the beneficiary’s external creditors but if the settlor chooses not to, the creditors cannot get at the trust assets of a spendthrift trust
	+ Scheffel case – Courts are reluctant to modify a spendthrift trust in a way that will alter the intent of the settlor
		- Krueger was beneficiary of a spendthrift trust, he had creditors, he is in prison for sexually assaulting a minor and broadcasting it online
		- The court upheld the trust, despite arguments that it should modify the trust by introducing a “contrary to state policy” exception, or because the original purpose is no longer practicable (beneficiary in jail)
	+ Shelley case – Beneficiary was “(settlor’s son), or children of settlor’s son”
		- Son disappeared, leaving behind two wives, and children with each – he was delinquent in spousal and child support.
		- The trust said that the interest was not to go to fulfill the son’s financial obligations. The bank determined that paying his ex wives and supporting his children are not within the terms of the trust, though the children are mentioned in the trust. Is the bank right? Probably
			* As to accumulated interest of a spendthrift trust:
				+ For children, the state has a clear interest in giving them access to the trust
				+ For wives, the state’s interest is less clear, but most courts allow
			* As to the principal of a spendthrift trust
				+ For wives, at trustee’s discretion (usually can’t get it)
				+ For children, here they are mentioned as beneficiaries, so the trustee may (but not must) exercise his discretion for their needs, if the interest is insufficient (usually can get it)
* Exceptions to Spendthrift Protection:
	+ Self-settled trust (to protect own wealth): creditors can access to same extent settlor can (spendthrift trusts established in Alaska and Delaware “if not intended to avoid creditors”)
	+ Child support and alimony: Shelley is majority but not uniform rule (TX allows court orders for child and spouse support
	+ Necessary support: suppliers of necessary support can access spendthrift’s interest
	+ Federal and state taxes (in state, only as allowed by state law that varies)
	+ Excess over amount needed: for creditors (pretty useless, because of station in life standard for need (only in some states)
	+ Garnishment of small amount of income (few states)(not in TX)
	+ Tort creditors? (possibly)
	+ Bankruptcy creditors cannot access interest
* Trusts for the State Supported: Medicaid (example of asset protection trust)
	+ If self-settled (meaning trust created by the individual for his own benefit), state can reach your money in the trust to the extent the beneficiary can
		- Revocable trusts: all assets (can’t shield from creditors)
		- Irrevocable trust: maximum possible under any circumstances
		- Discretionary: maximum discretion assuming full exercise
	+ Exceptions for using your own money – ways you can protect your money from being used for Medicaid
		- First way: A spouse can by will leave money in a discretionary trust for a surviving spouse: the trust will not be deemed available to the surviving spouse for Medicaid purposes
		- Second way: (more common) A person’s own assets can be put into a trust (thus SELF-SETTLED and would ordinarily be deemed available) to provide supplementary needs in additional to Medicaid AS LONG AS the trust provides that state will be repaid if there is anything in trust at death.
			* “Supplementary needs” – must specify to be used for things other than Medicaid/ordinary medical expenses and that the remaining amount will be used to repay the state
		- Third way (but NOT self-settled): if established by third party, state can reach to the extent that the beneficiary has an interest that will compel trustee
			* With a mandatory or support trust: state can access
			* With a discretionary trust: state cannot access
				+ UNLESS intended to be used for support (ie giving beneficiary right to compel)
			* Anyone (including parents) can set up a discretionary trust whose purpose is such support, BUT THEY CANNOT SAY THAT IS THE PURPOSE – the trust must appear completely discretionary for it to work

Modification and Termination of Trusts

* Claflin Doctrin: 1889
	+ Should a trust be reformed when established to pay beneficiary annually and then to distribute when beneficiary reaches age 30 if the beneficiary is the sole beneficiary and petitions for this?
		- Basic Doctrine – you can’t modify a trust if to do so would violate a material purpose of the settlor
		- Similarly with support trusts, discretionary trusts, spendthrift trusts
* Modification under the Restatement
	+ In re Trust of Stuchell (OR 1990) (Modification)
		- Can J.H.’s remainder assets be restructured into a supplemental needs trust?
			* Restatement: can deviate from trust if a) circumstances unknown to settlor b) would defeat or substantially impair the accomplishment of trust purposes, BUT not merely to make it better for beneficiaries
			* The proposed modification would only make the distribution to JH more profitable, therefore no modification allowed
		- This situation was possible, so possibility of JH developing special needs was not beyond the knowledge of the settlor, so for JH to do this, settlor would have had to provide for it
	+ Similarly, no modification is allowed when people are provided with inadequate support in a trust (as in a set amount annuity)
	+ How to handle Stuchell situation? Two possible ways
		- Add a special power of appointment, OR
		- Have a “trust protector” – relatively new development. Instead of a PoA, give petitioner the power to modify the trust provisions to further the intent of the settlor
* TX Property Code 112.054
	+ Court may order that trustee be changed, terms of trust be modified, that trustee be directed or permitted to do things not forbidden by trust, prohibited from…..IF
		- Purposes of trust have been fulfilled or have become illegal or impossible to fulfill; or
		- b/c circumstances not known to or anticipated by settlor, compliance with terms of trust would defeat or substantially impair the accomplishment of the purposes of the trust
		- Basically, can go to a court to change some investment if too risky, so on
	+ Court shall exercise discretion…..to conform with intention of the settlor…court is not precluded from exercising discretion solely b/c trust is spendthrift.
		- Basically Claflin doctrine.
	+ Note: presumption that trust is revocable (if no provision to the contrary)

Chapter 10: Trust Administration: The Fiduciary Obligation

The Fiduciary Obligation: the trustee must administer the trust solely in the interest of the beneficiary

* Hartman case – self-dealing by the trustee, even for his/her spouse and through a third party, means no further inquiry is necessary – the trustee is essentially strictly liable. We don’t inquire into good faith.
* Gleeson’s Will case – Gleeson figured he should just rent the property, of which he was trustee, himself, at no discount. The court, however, took a strict view and said you cannot be both a trustee and a tenant – have to choose one
* Rothko case
	+ Three trustees named. One was a struggling artist, who benefitted from trustee position by gaining exposure. Two was an officer in a corporation that purchased paintings (some of One’s). Three noted the conflict of interest and argued with One about it.
	+ Rothko’s daughter sues and all three are held liable. One and Two were self-dealing. Three is held liable because merely objecting to what the other two were doing is not enough, he had a duty to stop it.
	+ Note: this behavior was still held to be self-dealing even though none of the executors got any direct financial gain.

Co-Trustees

* Private non-charitable trusts: trustees must act with unanimity. One cannot delegate discretionary powers to another regarding purchase/sale of assets/investment decisions, allocation of assets/disbursement between principal and income/discretionary payments to beneficiaries
* Movement toward (TX rule) allowing trustees to act by majority, shielding provable dissenters
* Trustee can even be held liable for not checking up on what was done in his absence.
* Charitable trusts: trustees may act by majority rule

Prudence

* Uniform Prudent Investor Act of 1994
	+ Duty requires diversification unless you can reasonably believe the purposes of the trust would require otherwise
	+ Diversification eliminates uncompensated risk (risk with no pay back)
	+ Even ERISA allows investment in mutual funds
	+ However, diversification does not include “speculation” such as investing in a small start up with no track record at all
* Third Restatement of Trusts – Investment of Trust Funds
	+ Essentially, same as UPIA – says you do have to get advice from an authority on how to invest
* What belongs to current beneficiary as against remainderpersons?
	+ Rent
	+ Interest on loans and bonds
	+ Cash dividends on stock
	+ Net profits from a business/farm
	+ Royalties from natural resources (less 27.5% to principal)
	+ Royalties from patents and copyrights (but not in excess of 5% of inventory value
	+ Proceeds from sale of property
	+ Proceeds of insurance on property
	+ Stock splits and dividends
	+ Corporate distribution from mergers and acquisitions
* Total Return Trusts under Modern Portfolio Theory
	+ If the allocations above prevail, what kinds of investments must trustees make to be impartial? It makes more sense to allow trustees to invest well, and then figure out how to be impartial
		- Basically, we want trustee to have freedom to invest WELL
	+ The trust may specify:
		- Income beneficiary gets all of traditional income, with power in trustee to allocate traditional principal if needed
			* All income may go to current beneficiary, and if not enough, can dig into the corpus
		- Income beneficiary may get both traditional income and traditional principal (as would be fair)
		- Income beneficiary may get a set percentage of total value of trust
			* 5% that way if it grows a lot, B will get more accordingly
		- Value of trust can be recalculated annually, or on a running average of value, and with or without a lag. The latter two even out distribution
			* Value of trust can be important because income beneficiary only gets set percentage of the trust’s total value
	+ In re estate of Janes (Duty of Diversification case)
		- Trustee invested everything in Kodak, and didn’t sell even after Kodak stock dropped A LOT
		- Authorized retention of undiversified assets – NO LONGER a protection for trustees

Impartiality

* Impartiality: equally fair to current and future beneficiaries, given the nature of their interest
* A surviving spouse life beneficiary will often have a trustee empowered to invade the corpus for HEMS: health, education, maintenance, and support: impartiality may mean consuming the whole corpus . In this siutation, trustee cannot simply give out excessively: she must consider equally the two interests as set up by the settlor: (that of beneficiary and that of remainderman)
	+ Remainderpersons get less, is that equal, yes because the settlor named the interest for life tenant subject to HEMS
	+ Remainderpersons get what’s left, nothing unfair about that. Must take the actual interest into account

Other Duties of Trustee

* Duty to collect and protect trust property
	+ For testamentary trust, trustee must examine actions of executor, including possible overpayment of gift and estate tax (federal tax on testator’s estate) or inheritance tax (state tax on what a beneficiary receives) that would diminish assets of the trust
* Duty to earmark trust property
	+ Trustee is liable for losses actually occasioned y the failure to earmark
* Duty not to mingle his personal assets with the assets of the trust
* Duty to inform and account
	+ Increasing ability even of non-beneficiaries who would have been intestate heirs to get information (in case of a will substitute like a trust)
	+ Always preserve the core of the fiduciary obligation, despite provisions for secrecy and diminishing of accounting obligation

Chapter 11: Charitable Trusts

* Shenandoah Valley Bank - Charitable trusts are exempt from RAP and thus may exist forever. This privilege is only accorded for social benefit
	+ Charitable purposes: relief of poverty, advancement of education, advancement of religion, promotion of health, government or municipal purposes, other matters beneficial to community
	+ NOT simply a benevolence
* TX Charitable Trusts (Prop Code 123.001)
	+ TX Prop Code 123.001 – for scientific, educational, philanthropic, environmental, social welfare, arts and humanities, other civic or public purposes
		- Be sure of exact name of charity and whether it is in fact tax deductible
		- Philanthropy – large gift, given to better the human condition
		- A simple benevolence is not sufficient for a charitable trust
* Cy Pres
	+ Charitable trusts can be modified (origins of cy pres) when purpose has become illegal, impossible, or permanently impractical – BUT NOT to remedy inefficiency or for perceived better use
	+ In re Neher (1939 NY)
		- Bequeathed his home to village to be used as a hospital named after him
		- Village used his home as a municipal building, because of insufficient funds for hospital and medical needs provided by nearby town
		- The analysis is in favor of a generalized charitable intent (ie no particular medical specialization; note also no alternative gift) – Court said this was fine.
	+ The Barnes Foundation
		- If there isn’t enough money in the trust to do what the settlor wanted, the court must decide what the settlor would prefer. Here, they decided to modify the trust, and that was allowed.
* Supervision of Charitable Trusts
	+ Herzog case – the University changed the purpose for which the charitable trust funds were used (though it was still for a charitable purpose) This was fine because only the AG or the beneficiary of the trust are the ones with standing to sue
	+ Smithers case – the court has discretion to give standing to sue to the donor’s family if they think the abuse of the trust is bad enough

Chapter 12: Powers of Appointment

Terminology

* Definition: the ability of the [testator](http://en.wikipedia.org/wiki/Testator) (the person writing the will) to select a person who will be given the authority to dispose of certain property under the will.
* Donor: he/she who giveth the power
	+ Can designate “takers by default”
	+ Can designate “objects” of the appointment
		- My kindred
	+ Knows generally where he wants property to go, but not specifically.
* Donee: person to whom power of appt is given – power to designate the taker
	+ Decides which objects **specifically** will take
* Objects: once power is exercised, objects become “appointees”
	+ General PoA – you can give to yourself, your creditors, your estate and your estate’s creditors, or anyone else – broader power than special PoA – closer to but not actual ownership
		- All that’s standing in between done and money is saying “I take”
	+ Special PoA – you can’t give anything to yourself, your creditors, or your estate’s creditors
		- You cannot benefit financially from having a special PoA

Special v General Power of Appointment

* Irwin Union Bank case
	+ Power of appointment was given but phrased as “have the right to withdraw from principal once a year up to 4% of market value of entire principal, which right shall not be cumulative”
	+ This is a general power of appointment – he can take the percentage to do whatever
	+ This percentage is not considered his property for ordinary creditors or forced shares, but it is his property for estate/gift tax, and RAP purposes (where fed gov’t has an interest)

Tax Law and Power of Appointment

* For IRS – done of a general power of appointment is the owner – so if exercised during donee’s life, it will be subject to a gift tax
* If it is NOT exercised, then it is taxable under estate tax
* What you can do in tax law:
	+ To A in trust for A for life
	+ With A to receive income
	+ With SPECIAL power of appointment by deed or will
	+ With power to consume trust property for HEMS (or for maintenance of standard of living to which accustomed)
	+ With power to withdraw $5k or 5% of corpus, whichever is greater, each year
	+ ALMOST OWNERSHIP, BUT, FOR TAXES, NOT OWNERSHIP OF CORPUS OR AMOUNTSS NOT TAKEN IN PRIOR YEARS

Exercising a Power of Appointment

* Beals case – what if you don’t exercise your power of appointment during your lifetime?
	+ You can pass your PoA on in a will, BUT a vague residuary clause is no longer good enough to exercise/pass PoA. The trend is STRONGLY toward requiring explicit mention (including in TX)
* Lapse and Powers of Appointment
	+ Suppose appointee dies before donee?
	+ Does the antilapse statute (statute that saves a bequest if it has been made to parties identified by the state – usually direct blood relatives) apply? Generally not
	+ For general powers – they are close enough that courts will usually extend antilapse protection (but this conceptualization would limit)
		- Or will fudge using the testator/donee’s intent(this conceptualization focuses on intent and thus would not necessarily end at antilapse statute bloodline)
	+ For special powers – if the special power is limited to the necessary bloodline ambit, courts often give to heir of predeceased appointee
* PoAs and Creation of Trusts
	+ General Power – theoretically, donee would have to appoint to self FIRST before creating a trust. Now courts generally overlook that technicality
	+ Special Power – increasingly but not always, donees of special powers may appoint in trust, but NOT to frustrate limitations of PoA
	+ Appointing to create a NEW power of appointment (previously, this was very controversial) – donee of a special PoA may appoint an interest with a new general power (usually for taxation purposes), but not to violate the original limitations
* Special Powers –Can Be Exclusive or Non-Exclusive
	+ Exclusive – may exclude some of the objects
	+ Nonexclusive – must give some to each object
	+ Presumption generally in favor of exclusive special powers – more flexible
	+ Problems of language (BE AWARE!)
		- “Among the children of A”
		- “Among such of the children of A”
		- Which of these is clearly exclusive? (Second)
* Fraud on a Special Power
	+ Elsa had special testamentary power of appointment; objects were “her kindres”
	+ She agreed with Paul (E’s cousin) that she would devise him $250k if he would grant $100k to Foster (E’s husband)
		- Cousin is a kindred
	+ Foster is not her kindred
	+ This is fraud on a special power, because, although it purports to abide by the limitations on the power, it arranges to divert the assets to one who is not an object
	+ Neither Foster nor Paul got anything – this was a scam
* Capture
	+ For general powers only, for either ineffective or incomplete exercises
		- General ®: property passes in default of appointment or returns to donor’s estate – this doctrine may prevent the return
		- When donee of general PoA manifests an intent to assume control of the appointive property for all purposes and not merely for the limited purpose of giving effect to the expressed appointment THEN the trust property is captured for the estate of the donee

Chapter 13: Construction of Trusts: Future Interests

Future Interest in Transferor

* Transferor 🡪 “TO B for life” 🡪 B (life estate)
	+ Transferor has reversion in fee simple (reversion: go back)
* “Rule of reversions”: O will not have a reversion in fee simply if O transfers a possessory fee simple or a vested remainder in fee simple
	+ In all other cases where O transfers a present possessory interest, O will have a reversion in fee simple
* The sense of this “rule” is that if you give everything away, you don’t have anything left
* But when you have given everything away: what is a remainder as distinct from an executor interest? What is a vested remainder?
	+ We do not treat possibilities of reverter and rights of

Future Interests in Transferees

* Remainders never cut short a preceding interest, but take effect immediately after the natural expiration of the preceding estate
* Remainders:
	+ Vested
		- “To B for life, then to C”
	+ Contingent – “TO B for life, then, if C reaches 21, to C”
		- Here, C doesn’t actually have the interest until he reaches 21; not executor because C cannot cut off B’s interest
	+ Vested subject to complete or partial divestment – “To B for life, then to C’s Children” – C has one child AND C is still alive
* Keep in mind:
	+ If there is a vested interest left to a class, and one member of the class dies, but there is no survivorship requirement, then that person’s share goes to that person’s estate (instead of being distributed equally among the surviving class members)
	+ “Heir” is not the same as “devisee”. You can devise to anyone, but an heir will be a family member. Also, heirs are determined at death – you don’t have an heir until you die.
	+ Contingent Remainder v Vested Remainder Subject to Divestment
		- Contingent Remainder: with a contingent remainder (see above example) C doesn’t actually have anything before the condition precedent occurs, he never has the interest, so there is no divestment
		- Vested – “For A for life, then to B, but if B does not survive A, to C.”
			* Here, B does actually have the interest, it is just not possessory yet
			* It is subject to divestment because B could lose that interest if he does not survive C
			* If you never had the interest, (like with contingent remainder) it cannot be divested.
				+ If not first vested, cannot divest
	+ Executory Interests divest – they do not take effect at the natural determination of the preceding estate
		- They take away what would have otherwise been someone else’s interest
		- “But” or “Unless” indicates a possibly XI.
* Interests and the Exercise of a Power of Appointment
	+ Exercising a PoA operates as a divesting on the takers by default (if donee doesn’t exercise power of appointment, things will pass to the default takers)
		- If things are set up so that the takers by default have a vested remainder, exercise of the power will take that away from them.

Construction of Trust Instruments

* Disclaimers and the GST
	+ Estate Tax
		- 41% – 55%
		- Graduated
	+ Generation Skipping Transfer Tax – alternative to estate tax (either or)
		- 55% of amount left
		- Taxed once each generation
			* Once down to kids, get taxed.
	+ Example:
		- Settlor 🡪 A (Disclaimant) 🡪 B
		- Settlor – Pays 41% to 55% in Estate Tax
		- Disclaimant – 55% GST (Generation Skipping Transfer) of amount left
		- B – joyously receives something like 25% of settlor’s estate
		- Beware of consequences of a disclaimer: beneficiaries may lose immediately about 3.4 of estate – no delay at all of taxation (Lose HUGE amounts to taxation)

Transferability and Taxation

* Estate tax applies to any transfer of a property interest (except to spouse)
* A future interest contingent upon surviving to the time of possession is not transferable at death (if the contingency does not occur)
	+ Why? If you have to survive to get it and you don’t survive, it’s not in your estate because you didn’t satisfy the condition so there was no transfer there
* Problem on Transmissible Interests
	+ T devises in trust “For A for life, then to B, and if B does not survive A, to C”
		- B dies during A’s lifetime. What are the interests and is B’s interest taxable in his estate?
		- A has a life estate. B has a vested remainder in fee simple subject to divestment. C has an executory interest in fee simple
		- B’s remainder is not in his estate. He cannot transmit it: it was divested immediately at his death because he did not survive A
			* B’s interest is NOT taxable in his estate
		- Is C’s interest taxable in his estate if C dies before A and B? YES. C’s interest is not conditioned on his survival. His heirs will still receive a possessory interest if B dies before A. His interest is not only transmissible but transmitted and thus taxable.
* Avoiding Transmissible Interests but Transmitting Anyway
	+ Devise in trust “for A for life, then to A’s child B if B survives A, and if B does not survive A, then to B’s spouse or such one or more as B’s issue as B appoints by will”
		- Take care of spouse first
		- B given power of appointment
	+ Estate tax delayed for duration of A’s life, but then levied at A’s death
	+ B subject to GST tax when going from B to next generation UNLESS B utilizes the special power to elect to pay the estate tax
	+ If B survives A, then the interest becomes possessory.
	+ What happens if B does not survive A (The power if appointment is only important in that scenario)
	+ If B decides to exercise his special power of appointment to grant to C (next generation) a life estate with a general power of appointment, B’s interests never go into B’s estate, they fall into C’s estate and is taxed under the estate tax instead of under the GST tax
		- Special power in trust instrument = flexibility AND taxation

Clobberie’s Case – case distinguishing types of interests vested with payments postponed

* When a sum of money is given to A with a future date specification, and A does not live to that date: Results are different if the words used are:
	+ To A at age 21, payable with interest - (money goes to executors when A would have been 21)
		- What does “payable” mean? Court thinks it’s a firm gift, but we are delaying payment until a later date when A is more mature. If A dies before this date, money goes to executors
		- Why don’t we just give it to executors immediately, before waiting to see if A makes it to 21? Maybe someone would be hurt or deprived by this action
			* Also, this way it doesn’t get transferred to A’s estate so the estate can’t be taxed on it
	+ To A at age 21 – money is not given
		- Courts interpret this to mean that if A doesn’t make it to age 21, then neither A nor his estate is going to get it, so he doesn’t get taxed on it
	+ To A TO BE PAID at age 21 – money goes to executors immediately if it deprives no one else, otherwise when A would have been 21
		- No mention of interest here
		- Someone else is taking the interest (so more of a chance someone might get hurt than number 1?)

Gifts of Income

* Dewires case – “To pay income to each of my three children in equal amounts during their lives, and upon the death of the last survivor, to distribute the principal to their issue then living. “
	+ Are grandchildren left without income until last of settlor’s original children dies? Generally, yes. (Court took care of grandchild here)
	+ Generally, in the absence of a contrary intent expressed in the will, or a contrary statute, members of a class are joint tenants with rights of survivorship
* At what time do you determine who a person’s heirs are?
	+ Generally, when the testator dies
	+ However, CA and UPC prefer, for tax reasons, to determine heir at time interest will become possessory and thus not transmissible.

Class-Closing Rule (aka “Rule of Convenience”)

* A class may close physiologically to A for life, then to A’s children. All of A’s children will be ascertained at A’s death 🡪 so the class of “A’s children” closes at A’s death
* By the class closing rule – a class will close whenever any member of the class is ENTITLED TO POSSESSION AND ENJOYMENT of his or her share
* **No person born thereafter** can share in the property; people already born can drop out
* Ex - $10,000 to children of B
	+ When B has children already, class closes immediately even though more children of B are possible
* Ex - $10,000 to the children of B, to be paid to them in equal shares as the respectively reach 21
	+ Vested with payment postponed
	+ Class closes when 1 reaches 21 or, if he dies early, when he would have reached 21

Postponed Gifts

* If the class is postponed in possession until a life tenant dies, the class will not close until the time for taking possession
* Ex) T bequeaths $10k “to A for life, then to the children of my daughter B”
	+ Rule of convenience will close class NO SOONER than death of A: no one is ENTITLED TO POSSESSION until then
	+ The class WILL CLOSE at A’s death if:
		- A child of B is then alive
		- A child of B predeceased T and the jurisdiction’s antilapse statute saves the gift, so that a grandchild is entitled to possession
		- A child of B was alive at T’s death or was born after T’s death and such child predeceased A
* Ex) To A for life, then distribute to children of B who reach 21, with income payable to eligible parties in the meantime
	+ Distribute = principal (in this case)
	+ Income payable = interest. Separate from principal; class closes for income every year
	+ After A’s death, who is entitled to income? C gets income; when D is born, C & D divide income.
	+ When is the first distribution of principal made? When C reaches 21How is principal
* Problem – T bequeaths a fund in trust “to divide the fund among the children of B, payable to each at age 21, and in the meantime they are to receive the income”
	+ Think of word payable as something already yours that you can’t get your hands on yet
	+ First: Classify the gift:
		- Under Clobberie, this is vested with payment postponed
	+ Second: When does the class close? (When someone is entitled to possession) Is C’s administrator entitled to possession? NO – only when C would have reached 21 (even if C actually dies before then, class still closes when C WOULD HAVE reached 21)
		- Classes can’t close early

RULE AGAINST PERPETUITIES

* No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest
	+ TX is a classic RAP state – but if you notice a provision violates RAP, you can reform it by cy pres
* “Vesting” means vesting either in possession or in interest (vesting in interest is the hard part)
* Only the portion of the grant that violates is void
* Look to Create, Kill, Count

Examples

* Admissions to the bar
	+ In trust for A for life, then to the first child of A to be admitted to the bar
	+ Void:
		- Create (a new post-born – ie not measuring life but **potential taker** – child of A
		- Kill – (assume) A and all other children of A are dead (**all measuring lives**)
		- Count – will the new child of A necessarily be admitted to the bar within 21 years? NO
		- Interest violates RAP, RAP cuts it off
* Ex) To A for life, then to B if B goes to the planet Saturn
	+ This interest is VALID – B will necessarily go to Saturn within her own life if she does it at all
* E) To A for life, then to B if ANY person goes to planet Saturn
	+ This interest is VOID – B’s interest is not a life estate nor does it require survival to possession, so it could vest 300 years in the future
* Ex) To A for life, then to B for life if any person goes to the planet Saturn
	+ This interest is VALID – B’s life estate must necessarily vest or fail during B’s own life, and she was a known person in existence at creation of interest
* MEASURING LIFE (hypothetical person you create)
	+ Measuring life is a life in being at the creation of the interest
	+ The relevant lives in being are those who can affect the vesting of the interest
		- Preceding life tenant, beneficiary, ancestor of beneficiary (who could still have children), any person who can affect a condition precedent attached to the gift or the size of a class member’s share (in a gift)
	+ Determining the measuring lives: when does it begin?
		- As long as someone can revoke the trust or revoke the will, the property is not tied up and the perpetuities period does not begin
		- In a will: the measuring life must be in existence at the time of the testator’s death (not when will is written)
		- In a deed or irrevocable trust: when the deed or trust takes effect (probably during lifetime of settlor)
		- In a trust revocable by settlor alone: when the trust becomes irrevocable (settlor’s death usually, or when the settlor makes trust irrevocable)
* Rule Against Perpetuities – CLASSES
	+ A class gift cannot be partially good – all or nothing
		- Interests have to be vested, and no one in the class can drop out; portions determined
	+ Testamentary trust “for A for life, then to distribute the property to such of A’s children as attain the age of 25
		- Trust created in will (interest only become tied up after testator’s death)
		- Stipulated at T’s death, A has four children, ages ranging from 26 to 3 (only the 26 year old over 25)
		- Is it true that at A’s death the oldest will be able to close the class – he will be entitled to immediate possession? YES (if A died before any other children reached 25)
			* But at this point A is still alive (so oldest child can’t take yet)
			* Create: a fifth child who will not be a measuring life
			* Kill A and the four children
			* Count – it would be 25 years until it would be known whether the fifth child would qualify and thus what share the estates of the four children will have
			* 25 years > 21 years, so interest is void
			* All of these people are measuring lives
	+ Devise “to such of the grandchildren of A as shall attain the age of 25” T dies, no one having reached 25 yet
		- Analysis – unknown takers, condition precedent, rule of convenience, RAP
		- If A is dead – VOID – children of A are still alive and may have children, all others dying, who may be the first to reach 25
	+ Devise “to such of the grandchildren of A as shall attain the age of 25” T dies, no one having reached 25.
		- Analysis – unknown takers, condition precedent, rule of convenience, RAP
		- Suppose A and all of A’s children are dead at T’s death
		- VALID – there can be no more grandchildren of A; current grandchildren are measuring lives
		- No creating here because A and all of A’s children are dead (no way to create another offspring)
			* If there was or could be another grandchild, then this would be void – but since there’s no way there can be, it’s valid
	+ Devise “to such of the grandchildren of A as shall attain the age of 25.” T dies, a grandchild has reached 25.
		- So A is alive, and one grandchild of A is already 25.
			* BUT – A could have another child, but that person won’t be a measuring life because was not alive at creation of the interest
				+ SO since wasn’t alive, will not violate RAP – class closed because child is already 25 (new child couldn’t be in the class because it is already closed)
		- Valid – class is closed by rule of convenience, since there is someone to claim possession. Validating lives are the one grandchild, and any other grandchildren who are alive, and their interest will vest within their own lives
	+ Devise “to such of the grandchildren of A as shall attain the age of 25.” T dies, a grandchild has reached 25, but THIS TIME A is dead.
		- Interest is valid
		- Class is closed by rule of convenience, since there is someone to claim possession. Validating lives are the one grandchild and any other grandchildren who are alive, and their interest will vest within their own lives
		- In this case, A’s death doesn’t change anything (it does take out possibility for creation of more grandchildren, but that’s irrelevant here because class is already closed)
	+ Devise “to such of the grandchildren of A as shall attain the age of 25.” T dies, A is dead, and one grandchild is 4
		- VOID
		- Create – one of A’s other children has a child (grandchild of A), call it Q
		- Kill – A’s three children and grandchild
		- Count – Q will NOT reach 25 years within 21 years, the 4 year old grandchild did NOT meet the condition of reaching 25 (we killed him off) and so cannot close the class, HENCE – interest VOID
	+ Devise in trust to “pay the income to A for life, and then in further trust for the grandchildren of B, their share to be payable at their respective ages of 25.” A and B survive.
		- Eldest grandchild of B (X) is 25 at T’s death
		- “To be payable” – (Clobberie’s!) - Grandchildren’s interest are vested subject to postponed enjoyment
		- **No condition precedent: no survival requirement, so X’s (grandchild’s) executors can take as well as X.** (can go to estate!!!)
		- Class will close immediately at A’s death (no one can close the class while A is enjoyed)
		- Create – Add’l grandchild of B, call her Q.
		- Kill off everyone else
			* Is Q in the class? Class closes when A dies. Let’s say A dies right after Q was born – Q would be IN the class, because class can’t close before A dies and as long as it isn’t closed, other people can enter into the class.
				+ Is Q a problem in this situation? No, not for RAP purposes – relevant fact here is that X grandchild is already 25
			* If A is already dead when Q is born, Q cannot be in the class.
		- Interest is VALID
	+ Devise in trust to “pay the income to A for life, and then in further trust for the grandchildren of B, their share to be payable at their respective ages of 25.” A and B survive.
		- X (oldest grandchild) is 10 at T’s death
		- Grandchildren’s interest is vested subject to postponed enjoyment under Clobberie’s (no condition precedent)
		- Class will close EITHER on A’s death (if one of the grandchildren has or would have reached 25) when all shares will be certain OR on the day X reaches or would have reached 25 (ie no later than 15 years after A’s death)
			* Why is it has or “would have”?
			* Even if they’re not alive, estates will get the benefit
		- Interest is VALID
		- If A lives for another 60 years, class might not close for 60 years, A is a measuring life (alive at creation of the interest) and interest would still be valid
	+ Devise in trust to “pay the income to A for life, and then in further trust for the grandchildren of B, their share to be payable at their respective ages of 25.” A and B survive.
		- X (oldest grandchild) is 2 at T’s death
		- Vested subject to postponed enjoyment under Clobberie; no condition precedent
		- Class will close on later of:
			* A’s death
			* Passage of 23 years (time until the oldest grandchild alive at creation of trust will be 25)
		- Consider – T dies in 1990. In 1991 B has a fourth child. Kill off everyone but 4.
			* No convenience to closing until the passage of time for x’s estate to claim
			* 4 has a child (grandchild for purposes of the trust) in 2012, 22 years after death of last measuring life and one year before class closes, THEREFORE
			* Interest is VOID
		- What if B’s third child has a child Q (a grandchild of B) and we kill off everyone else. Is Q in the class?
			* Class won’t close for a minimum of 23 years (when oldest grandchild would reach 25), so new people can enter the class, so Q is in the class
			* Is Q being in the class a problem? That child’s interest is vested subject to postponed enjoyment (because of Clobberie). Not a “problem” – person entered class on time and interest is vested
			* Creating a child Q of B’s third child is not a good answer to show why this interest is void under RAP because that wouldn’t violate RAP. (Have to create a fourth child for B, instead of an extra grandchild for B)
	+ Devise in trust to “pay the income to A for life, and then in further trust for the grandchildren of B, their share to be payable at their respective ages of 25.” A is dead; B survives
		- Oldest grandchild is 2
		- Same as previous example, except A is killed off
		- Class will close after passage of 23 years, when X will be or would have been 25. T dies in 1990.
		- Again: B could have another child in 1991, a fourth child, who would not be a measuring life. Class will not close until 2013. Kill everyone else in 1991 except fourth child. Count, and find that 4 herself could have a child in 2012, who would thus be included in the class more than 21 years after last measuring. VOID.
	+ Devise in trust to “pay the income to A for life, and then in further trust for the grandchildren of B, their share to be payable at their respective ages of 25.” A survives T; B predeceases T.
		- Since B is dead at T’s death, the children of B will validate all their children, whose interests will thus vest within period.
			* Interest is VALID
			* Note: the payable language does not affect vesting, only affects the closing of the class. Class will close in 23 years if anyone is left living; will close earlier if all of B’s children die and then all the grandchildren die.
		- Since B is dead, you cannot create another child of B to function as a measuring life. You can only create a child of one of B’s children (which wouldn’t violate the rule at all)
	+ Devise in trust to “pay the income to A for life, and then in further trust for the grandchildren of B, their share to be payable at their respective ages of 25.”
* Perpetuities Reform – Savings Clauses
	+ Lawyers avoid RAP problems by putting in a savings clause, written according to a standard form, which will save you from RAP violation every time
		- It says at the point when this interest WOULD violate RAP, the interest will VEST, and distribute to those who currently hold the interests.

Chapter 15: Wealth Transfer Taxation

Wealth Transfer Taxation

* Federal
	+ Gift Tax: levied on donor
	+ Estate Tax: levied on decedent’s estate, not recipient of the assets
	+ Generation Skipping Transfer Tax: levied on generations that do not pay estate tax on certain assets
* State
	+ Inheritance tax: levied on recipient
* Incentive for lifetime giving:
	+ Gift tax is levied only on the gift itself (the money paid in tax is not itself subject to the gift tax)
	+ Estate tax is levied before devises, so that devises are made from post-estate tax value (so that the money that is paid in estate tax has already been hit by the estate tax and thus reduced)
	+ Example (stipulate 55% tax)
		- In an inter vivos gift: the amount given is taxed after the gift is removed from the estate
			* “Tax exclusive”
		- Whereas in a devise (if you wait to give until after you die, the WHOLE ESTATE is taxed – unlike in a gift. So EVERYTHING in the estate is taxed by 55%, INCLUDING the million dollar gift being made – so the estate is taxed 55%, and THEN the million dollar gift is taxed (again!) 55%)
			* Basically, because the gift is taxed out of the estate and then again by itself, it costs far more to leave someone a gift by devise than as an inter vivos gift – inter vivos gift is a way to escape some taxation.
			* “Tax inclusive” – tax before devise
* Exemptions 2011 if nothing else happens
	+ Gift Tax: $13000 to any number of individuals per year
	+ Gift Tax: Money paid directly for tuition or medical providers
	+ Marital Deduction – allows one spouse to delay the estate taxation until the spouse’s death
	+ Gift/Estate Tax: $1mil unified exemption with estate tax (ie if used as gift tax exemption, not available as estate tax exemption)
		- Estate tax is the default; only when estate tax is not possible from one generation to the next that you go to GST (Generation Skipping Transfer Tax)
	+ GST exemption: $1mil
		- If life estate and special power of appt and he does nothing, then no estate tax possible, so GST. If uses to give to next generation, IRS says same thing as throwing assets into estate.
			* When you see special power of appt, see a flexible instrument (if car accident, can give more to one child) and a taxation device (allows you to pass assets through generations)
* Estate Tax and Generation Skipping Transfer Tax
	+ If a grandfather attempts to give, not to daughter but to granddaughter, while daughter is still alive, estate tax and GST will both be levied (taken from the estate)
* Estate Tax
	+ If you delay taxation by using marital deduction and leaving to your spouse, wealth will be taxed at that spouse’s death; always use BOTH spouse’s deductions
	+ Estate tax will include unexpected things:
		- Life insurance unless totally outside decedent’s dominion
		- Gifts made within three years of death
* GST Exempt Trust (million dollar exemption)
	+ If you have already used your gift/estate tax exemption
		- You can then establish a GST exempt trust
			* You must then pay your own estate tax on the money (since you have used your estate tax exemption)(could be the better choice because often estate tax is lesser percentage than GST)
			* Can be $1mil from you and $1mil from your spouse total of $2mil
			* Trust will then, as successive life estates, be exempt from GST and estate tax for duration of perpetuities period
		- To do this at no taxation cost, must use up estate tax exemption (assuming you do this at death) because shielded only from GST. If used up gift and estate tax exemption, will have to pay taxes on the million put into the trust
		- This is NOT an exemption from the estate tax, is just a succession of life estates
	+ Pre 1986 – Trusts: do not touch
		- Don’t ever touch pre 1986 trusts – these predate the GST and are not subject to the GST, and if you change them, they WILL become subject to the GST (and the 55% tax)
			* Otherwise, you will probably be subject to a malpractice suit