**Wills Outline**

1. **Intent**
   1. **Capacity**: at time of *execution*, testator must (1) be at least 18, (2) be able to understand the extent of her property, (3) know the natural objects of her bounty, and (4) know the nature of her act.
      1. Natural Objects of Bounty: spouse/domestic partner, issue, parents, and those whose interests affected by the will.
      2. Nature of Her Act: that she is executing a will. Need not know all legal technicalities of the will.
      3. Mere appointment of conservator or diagnosis of mental illness is not sufficient to undermine capacity—must still go through analysis.
      4. **Consequences of No Capacity**: entire will is invalid and property passes by intestate succession. However, if testator had valid prior will purportedly revoked by second will, first will is probated.
   2. **Insane Delusion**: will can be attacked if at time of *execution*, testator was suffering from insane delusion. Exists if (1) testator had false belief; (2) that was the product of a sick mind; (3) no evidence to support that belief; and (4) delusion affected the will.
      1. **Consequences of Insane Delusion**: only that part of the will affected by delusion is invalid. That part goes to residuary devisee or, if none or residue itself was infected by delusion, by intestate succession. [Residuary gift is part of estate not expressly disposed of in will.]
      2. Distinguish Capacity: delusion is narrow problem, and testator is otherwise normal. E.g., believing spouse is unfaithful.
   3. **Fraud**: a representation of material fact known to be false by wrongdoer, made for the purpose of and in fact inducing action or inaction.
      1. **Fraud In the Execution**
         1. Definition: someone forge’s T’s signature to a will or T is given document to sign that purportedly is non-testamentary but in fact it is testamentary.
         2. Consequence: entire will is invalid. Property passes by intestate succession unless there is prior will validly executed.
      2. **Fraud In the Inducement**
         1. Definition: wrongdoer’s misrepresentation affects the contents of T’s will.
         2. Consequence: only that part of the will affected by fraud is invalid. Court can (1) give property to residuary devisee, or, if none, (2) to the heirs at law by intestate succession, or (3) impose constructive trust remedy. Constructive trust remedy is especially useful where wrongdoer would recover under other options, and will require trustee to transfer to intended beneficiary.
      3. **Fraud In Preventing Testator from Revoking**
         1. Definition: based on fraud, testator does not revoke will. E.g., son lies about charity being bad, dad does not revoke will leaving to son in favor of charity, though he would otherwise have.
         2. Consequence: court will not probate the will and thus property will go to heirs. Simultaneously, heir is decreed constructive trustee with duty to transfer to intended beneficiary.
   4. **Undue Influence**: testator’s free agency is subjugated. Established by any of Prima Facie Case, Case Law Presumption, or Statutory Presumption. Discuss all 3. Unlike fraud (lie), undue influence is honest, but wrong.
      1. **Prima Facie Case**
         1. Susceptibility: any weakness that can subjugate free will
         2. Opportunity: wrongdoer had access to T
         3. Active Participation: wrongful act
         4. Unnatural Result: provision is unnatural/unexpected.
      2. **Case Law Presumption**: undue influence presumed if (1) beneficiary was in a confidential relationship with T, (2) beneficiary participated in execution of will, and (3) provisions appear unnatural. Note: no presumption from gift to spouse or domestic partner.
         1. **Consequence of Prima Facie or Case Law Presumption**: only that part of will affected by undue influence is invalid. Instead, give property to residuary devisee, or, if none, to the heirs at law by intestate succession, or impose constructive trust remedy. Court uses remedy that gets best result.
      3. **Statutory Presumption**:
         1. **Presumption**: a donative transfer is presumed product of undue influence if to (1) drafter, (2) fiduciary who transcribed instrument, (3) “care custodian” of “dependent adult” if instrument executed during care or +/- 90 days, or (4) a spouse, DP, cohabitant, employee or relative within 3rd degree of any of foregoing. Presumption conclusive for drafter and associates, rebuttable for others.
         2. **Exceptions**: presumption inapplicable to (1) spouse, DP, or cohabitant of transferor (even if person was the drafter), or (2) any transfer if reviewed by independent attorney.
         3. **Consequence**: transferee does not take gift. Instead, goes to residuary devisee or, if none, to heirs at law by intestate succession, or constructive trust.
2. **Mistake**
   1. **In Content**: wrong beneficiary is named or wrong gift is made.
      1. Omission: words mistakenly omitted: no remedy. But see below for possible relief under DRR.
      2. Addition: words mistakenly added: court may strike addition.
   2. **In Execution**: T signs the wrong document
      1. T signs will, mistaking it for non-testamentary instrument: will is not probated, as T did not intend document to be a will.
      2. Two Ts (e.g., H & W) have reciprocal wills (each leaving all to the other) and each mistakenly signs wrong one: court may reform the will and substitute correct names.
   3. **In Inducement**: gift is made/not made on basis of mistaken belief: no relief. Narrow exception where both the mistake and what T would have done but for mistake appear on the will (rare).
   4. **In Description** (ambiguity): court will admit parol evidence of T’s intent.
   5. **\*In Validity of Subsequent Testamentary Instrument (DRR)**
      1. Rule: if T revokes her valid will, or portion thereof, in mistaken belief that a substantially identical will or codicil effectuates her intent, then, by operation of law, the revocation of the first is deemed conditional, dependent, and relative to the second effectuating T’s intent (and being valid). If second doesn’t, first deemed never revoked.
      2. Revocation by Physical Act: even if lost/destroyed, first will can be probated if at least one witness (e.g., attorney) testifies as to contents. Need not have been one of the attesting witnesses.
   6. **Involving Living Children**: mistaken omission of child from will
      1. **Rule**: a child is pretermitted if born or adopted after all testamentary instruments are executed and not provided for therein. Pretermitted child receives intestate share.
      2. **Corollary**: if child is born/adopted before execution of all testamentary instruments, and those later instruments omit mention of him, child takes nothing unless reason for omission was T’s mistaken belief that child was dead or non-existent.
3. **Components of Will**
   1. **\*Integration**: paper constitutes a will or part of a will if *both*:
      1. Intent: T intended the papers to be part of the will
      2. Presence: paper was actually/physically present at time of execution
   2. **\*Incorporation by Reference**: allows a non-integrated writing to become part of the will if (1) writing was in existence when the will was executed, (2) writing was clearly identified in the will, and (3) T intended to incorporate the document into the will. The writing does not have to be independently valid.
      1. **Writing Disposing of Tangible Personal Property**: decedent may dispose of items of tangible personal property (excluding cash or business property) in a writing even if it could not be incorporated by reference if the writing (1) is referenced in an unrevoked will, (2) is dated and either signed by T or in his handwriting, and (3) describes the items and recipients with reasonable certainty. The writing may be prepared before *or after* execution of the will. $5000 limiter per item, $25,000 limit total.
   3. **\*Facts of Independent Significance**: blanks in a will can be filled by reference to facts of significance independent of the will, using trustworthy parol evidence.
   4. **Pour-Over Wills**: where part or all of T’s estate is devised to an inter-vivos trust, the trust instrument may be admitted into probate and the pour-over effectuated via (1) Incorporation by Reference; (2) Facts of Independent Significance; or (3) the Uniform Testamentary Additions to Trusts Act, if there is a valid trust executed before or with the will, *even if the trust is later modified*.
4. **Formalities of Execution for Attested Wills**
   1. **\*Elements of an Attested Will**: a valid will must be:
      1. In writing.
      2. Signed by T or appointee (if incapacitated) or conservator.
      3. Signed in presence of 2 witnesses both present at same time (or T acknowledges his signature to both at same time and presence)
      4. Witnesses must sign will during T’s lifetime
      5. Witnesses must understand that they are signing T’s will

Note: will not complying with iii-iv (witnessing) can be probated if proponent

establishes by CCE that at time T signed, intended to be will.

* 1. **\*Interested Witness Problem**: witness is beneficiary: will is *valid*, but presumed that gift procured by wrongdoing unless there are 2 other disinterested witnesses. If witness-beneficiary rebuts the presumption, she takes per the will, but if not, she takes amount not exceeding intestate share.
  2. **Conditional Wills**: if terms of will itself make will conditional, only probated if condition is satisfied.

1. **Formalities of Execution for Holographs** (handwritten wills)
   1. **\*Elements**: must be (1) signed by T and (2) *material provisions* (gift and beneficiary) must be in T’s own handwriting. Interlineations are valid, even if no new signature.
   2. **Testamentary Intent**: statement of testamentary intent (“this is my will”) need not be in will, and extrinsic evidence is admissible to determine intent. Even a series of letters can, under integration, constitute a holograph.
   3. **Dates**: not required, but absence can create problems
      1. An undated holograph is invalid *to the extent* of inconsistency with another will unless the undated holograph’s time of execution is established to be later. If two undated holographs and cannot establish which is later, neither is probated to the extent of inconsistency.
      2. An undated holograph is invalid if T lacked capacity at any time it might have been executed, unless established that executed during time of capacity.
2. **Choice of Law**: a will can be admitted to probate in CA if it complies with the formalities of execution of either (1) CA, (2) place where executed, or (3) place of domicile at time of death.
3. **Codicils**: a testamentary instrument modifying, amending, or revoking a will. Must meet same formalities as either attested or holographic will.
   1. **Republication**: a codicil “republishes” a will, so that the will is deemed re-executed at time of codicil. May have affect on pretermission and incorporation by reference. But note that codicil itself is valid testamentary instrument, and by itself can negate pretermission problems.
   2. **Revocation**: If T executes will, then executes codicil, and subsequently revokes codicil, rebuttable presumption that T intended only to revoke codicil. But, if T executes a will, then executes codicil, then subsequently revokes the will, rebuttable presumption that T intended to revoke both.
4. **Revocation**
   1. **\*By Physical Act**
      1. **Elements**: (1) will must be burned, torn, cancelled, destroyed, or erased, (2) T must have *simultaneous* intent to revoke, (3) physical act must be done by T or someone’s in T’s presence at his directions.
      2. **Cancellations & Interlineations** (either crossing out lines or writing between the lines): generally revokes the changed provision yet does not add the new material (unless all material terms are in T’s handwriting, and thus a holographic codicil). However, old provision may be saved by DRR only if interlineation is *more than* cancelled provision (T rather beneficiary get less than get nothing, but not rather that get more than nothing).
         1. While cancellation alone can decrease beneficiary’s take, it cannot be used to increase another beneficiary’s take. Instead, cancelled material goes to residuary or, if none, intestacy.
      3. **Duplicate Wills**: if there are duplicate, fully executed originals of a will, and T, or someone in T’s presence and at his direction, revokes by physical act one of the originals, the other is revoked as a matter of law.
      4. **Mutilated Wills**: if will is found in mutilated condition at T’s death, and when last seen was in T’s possession, rebuttable presumption that T mutilated with intent to revoke.
   2. **\*By Subsequent Written Instrument**
      1. Manner: subsequent instrument can revoke will expressly (statement in later will) or implicitly (second will totally disposes of T’s estate). A later holograph *can* revoke an attested will.
      2. **Revival**: if later, revoking written instrument is itself revoked, the prior will not be revived unless T manifests intent to revive the prior will. Extrinsic evidence of intent may be offered.
   3. **By Operation of Law**
      1. **\*Omitted/Pretermitted Child**: a will executed prior to birth/adoption of child and which omits that child is revoked as to that child, who receives intestate share + assets in inter vivos trust, and other gifts are abated or reduced to effectuate. **Exceptions**: child does not take intestate share, even if pretermitted, if either (1) failure to provide for child was intentional, and intent apparent from face of instrument, (2) T evidenced plan that child’s other parent would take care of child, or (3) T provided for child outside testamentary instrument intending transfer in lieu of testamentary provision.
      2. **Omitted Spouse/DP**: a surviving spouse who marries the decedent after the execution of all testamentary instruments and who is not provided therein. Spouse receives statutory share of assets owned at death + assets in inter vivos trust. Statutory share: D’s ½ CP & intestate share of SP (not to exceed ½ SP estate). Other gifts abated or reduced to effectuate. **Exceptions**: spouse does not take if either (1) failure to provide for spouse was intentional, and intent apparent from face of instrument, (2) T provided for spouse in other transfer with intent to be in lieu, or (3) spouse signed valid, written waiver. Waiver requires full disclosure of finances and independent counsel, but still valid even if not satisfied so long as spouse should have known or waiver is in fact fair.
      3. **Final Dissolution of Marriage/DP**: disposition of property to spouse is revoked upon annulment or final dissolution of marriage (but not on legal separation alone). Reinstated if will unchanged and later re-marriage. These are default rules if will does not otherwise provide.
   4. **By Change in Property Holdings (Ademption)**
      1. Classification of Devises
         1. Specific: a particular item. E.g., real property, *my* Xerox stock
         2. General: satisfied by generic item or its FMV. E.g., Xerox stock.
         3. Demonstrative: Hybrid. E.g., “To J I leave $1000 in BofA acct.”, only $900 in acct., J gets $900 in acct. and $100 from general estate.
         4. Residuary
      2. **Ademption by Extinction**: *specific* devise, if not owned by T at death, is revoked and beneficiary takes nothing unless evidence that T intended a substitute gift. Stock splits not ademption. Where T no longer has property but is receiving eminent domain, insurance, or installment proceeds, beneficiary can get those paid after death, and can get those paid before if he can trace assets, which shows T’s intent not to extinguish.
      3. **Ademption by Satisfaction**: a gift is satisfied pre-death to the extent T transfers property to the beneficiary and (1) a contemporaneous writing signed by either T or beneficiary states satisfaction, or (2) specific gift is given (this is both extinction and satisfaction).
      4. **Ademption by Advancement**: intestate share is satisfied pre-death to the extent D transfers property to heir apparent and a contemporaneous writing signed by either D or heir apparent states advancement.
5. **Contracts Regarding Wills**: T can contract to make, not make, revoke, or not revoke a testamentary instrument, and testamentary formalities are not required, as contract law controls.
   1. Consequence: if contract is broken, will is probated, but promisee can sue estate for breach and seek damages, specific performance, or constructive trust. Can sue only at death, unless T engaging in conduct which would cause irreparable harm.
   2. How Established: either (1) inclusion of terms in testamentary instrument; (2) reference in testamentary instrument + extrinsic evidence (even oral), (3) writing signed by T, or (4) clear and convincing evidence of agreement enforceable in equity (estoppel).
   3. Contract Requirements: must be in writing unless basis for estoppel.
   4. Joint &/or Mutual Wills: execution *does not* create a presumption of a contract to not revoke or make will, but it may be evidence of such a contract in conjunction with other factors. (Joint: will of 2 or more people on one document; Mutual: separate wills of 2 or more people which are reciprocal/similar.)
6. **Restrictions on Testamentary Dispositions**
   1. Definition: Quasi-CP: all personal property wherever situated, and all real property situated in CA, acquired by decedent while domiciled elsewhere that would have been CP if acquired while domiciled in CA. Note: different than CP definition.
   2. **Spousal/DP Protection**
      1. CP: T can only dispose of ½ CP in a testamentary instrument
      2. Quasi-CP: acquiring T can only dispose of ½ QCP in a testamentary instrument

Note: non-acquiring spouse has no testamentary power to dispose of acquiring

spouse’s CP/Quasi-CP while acquiring spouse still alive.

* + 1. Widow’s Election: where T attempts to dispose more than ½ share, widow must either take under the will or demand ½ share but must relinquish all testamentary gifts in her favor.
    2. Illusory Transfers of Quasi-CP: an inter vivos transfer by acquiring decedent of Quasi-CP to a third person without consideration is allowed. Spouse has only mere expectancy for Quasi-CP. However, transfer is invalid where decedent retained some interest in the property, in which case surviving spouse may elect to require transferee to restore ½ of the Quasi-CP.
  1. Unworthy Heirs or Beneficiaries: Killers: those who feloniously and intentionally kill the decedent cannot take under will or intestacy. Killer is deemed to pre-decease T/D and anti-lapse inapplicable: neither killer, nor his issue, take.

1. **Intestate Succession**
   1. **\*D Leaves Surviving Spouse/DP**
      1. CP: gets all CP (e.g., D’s ½ and her own)
      2. Quasi-CP: gets all CP (e.g., D’s ½ and her own)
      3. SP
         1. If D leaves no issue, parents, brother or sister, or issue of brother or sister > all to spouse.
         2. If D survived by one child, or issue of a predeceased child > ½ to spouse, ½ to child or child’s issue.
         3. If D survived by 2 or more children, or issue of predeceased children > 1/3 to spouse, 2/3 to children or their issue.
         4. Id D survived by no issue, but leaves parents or siblings > ½ to parents or siblings, ½ to spouse.
   2. **\*D Leaves No Surviving Spouse/DP**: to (1) issue; (2) parents; (3) siblings; (4) grandparents; [(5) aunts/uncles; (6) step-children—issue of predeceased spouse; (7) next of kin; (8) in-laws; (9) siblings-in-law; (10) escheats to state.]
   3. **\*Per Capita / Representation**: whenever issue take by intestacy, or if testamentary instrument does not specify how taken, issue take as follows:
      1. Issue of Same Degree take per capita—equally and own right.
      2. Issue of More Remote Degree take “per capita with representation.”
         1. Make the initial division of shares of the estate—one share for each line of issue—at the first generational level at which there are survivors.
         2. All persons living at that first generational level take one share each.
         3. The shares of the deceased persons at the first generational level are combined and then divided equally among the takers at the next generational level in the same way.
      3. Per Stirpes: *only* if specified “per stirpes” or “by representation”, distribute at first line of descent even if no one alive. Issue step into shoes of predecessor. Thus, issue in same generational line could take different shares.
   4. **Adopted Children**: adopted child treated as a natural child of adopting parent. Severs relationship with natural parent unless adoption is either (1) by spouse/DP of natural parent or (2) after death of either natural parent.
   5. **Step** **& Foster Children**: treated as adopted if relationship established in minority, lasts through lifetime, and parent would have adopted but for legal barrier.
   6. **Non-Marital Children**: inherits if there was a parent-child relationship. Marital status irrelevant.
   7. **Half-Bloods**: relatives with only one common parent: relatives of a half-blood inherit as a whole blood (e.g., half-blood sibling inherits as sibling).
2. **Distribution of the Estate**
   1. **Who Takes?**
      1. **Posthumous Children**: child conceived during lifetime but born after death: deemed heir of an intestate and beneficiary of a testator’s will.
      2. **\*Lapse & Anti-Lapse**
         1. **Rule of Lapse**: if beneficiary predeceases T, gift lapses (fails) unless contrary intent expressed in will. Lapsed gift goes to residuary or, if no will, intestacy.
         2. **CA Anti-Lapse:** if predeceasing beneficiary was *kindred* (blood relative) of T (or T’s spouse/DP) and leaves issue, issue step into shoes and take gift. This is a default rule absent contrary intent in will. Devisee cannot be spouse/DP. Applies to class gifts as well.
      3. **Simultaneous Death**: where two people die and it cannot be determined by clear and convincing evidence who dies first, property of each treated as if each predeceased the other. For joint tenants, sever the estate and give half to each tenant’s estate. For spouses/DPs, split CP and QCP and give half to each estate.
         1. Intestate & Heir Rule: for heir to take, must survive D by 120 hours.
   2. **What is Taken?**
      1. **After-Acquired Property**: will passes all property, including after-acquire property—property acquired after will *executed*.
      2. **Increase During Testator’s Lifetime**: stock dividends or splits paid during T’s lifetime and after T executed will devising stocks go to beneficiary if stock owned by T at T’s death. Doesn’t matter if devise general or specific.
      3. **Increase After Testator’s Death During Probate**
         1. Specific Devise: all increases go to beneficiary.
         2. General Devise: do not receive increase, but may get interest on dollar gifts not distributed within one year after T’s death.
      4. **Abatement**: process by which certain gifts are decreased
         1. **Order of Abatement for Omitted Spouse/DP/Child**: First, abate property not passing by will or revocable trust. Second, abate from all beneficiaries of will/revocable inter vivos trust pro rata to the value of gift. No distinction is made between specific and general gifts, but court can exempt specific gift if abatement would defeat obvious intent of T.
         2. **Order to Pay General Debts of Decedent**: (1) intestate property; (2) residuary gifts; (3) general gifts to non-relatives; (4) general gifts to relatives; (5) specific gifts to non-relatives; (6) specific gifts to relatives. To the extent can be satisfied from designated fund, demonstrative gifts are treated as specific gifts.
      5. **Exoneration**: no automatic exoneration (paying off) of encumbered gifts. Devisee takes gifts subject to encumbrance unless will specifically says otherwise with respect to that gift (general statement as to all gifts insufficient).
3. **Will Substitutes**
   1. **Gift Causa Mortis**: gift or *personal property* made in contemplation of imminent death, perfected by delivery (actual, symbolic—something representative is given, or constructive—donor has done everything possible to effectuate delivery). If donor survives peril, gift revoked by operation of law.
   2. **Totten Trust**