**Wills & Trusts**

**Validity of will** – A valid will requires testamentary intent, capacity, and the statutory requirements for wills formalities must be satisfied.

**Attested will** – A valid will requires testamentary intent, capacity, and the statutory requirements for wills formalities must be satisfied. A formal attested will must be (1) in writing, (2) signed by the testator, (3) the testator’s signing or acknowledgment of her signature must occur in the joint presence of at least two witnesses who sign the instrument during the testator’s lifetime, and (4) the witnesses must understand that it is the testator’s will.

**Harmless error doctrine** – If a will is not executed in compliance with the witnessing requirements, it may nevertheless be admitted to probate if the proponent of the will establishes by clear and convincing evidence that at the time the testator signed the document he intended it to constitute will.

**Intent** – The testator must have had the intention to make the particular instrument her will.

**Testamentary Capacity** – At the making of a will the testator must have the capacity to make a will: (1) testator must be at least 18 years of age at time of execution, (2) testator must know the natural objects of her bounty, (3) testator must be able to understand the extent of her property, and (4) testator must know the nature of her act.

**Holographic will or codicil** – A holographic will can be probated in California. A holographic will is a handwritten and unattested will. To be valid, the testator must have testamentary intent, capacity, the testator’s signature, and the material provisions must be in testator’s handwriting.

**Insane delusion** – An insane delusion is a delusion to which the testator adheres when a rational person in her situation could not have drawn the conclusion reached by the testator. A will can be set aside for an insane delusion only if the delusion caused the disposition.

**Fraud** – Misrepresentation of a material fact, known to be false, and induce action/inaction, and in fact induced. Happens in the execution, in the inducement or in preventing the testator from revoking.

**Undue influence – prima facie case** – A will is invalid if it is obtained through undue influence, which is mental or physical coercion that deprives the testator of her free will and substitutes the desires of another for hers. To establish undue influence, the contestants, who have the burden of proof, must establish that (1) influence was exerted on the testator, (2) the effect of the influence was to overpower the mind and free will of the testator, and (3) the product of the influence was a will that would not have been executed but for the influence. Usually, this is shown through circumstantial evidence a number of factors, including the opportunity to exert influence, the susceptibility of the testator to influence due to age or physical condition, whether the beneficiary was active in producing the will, whether the dispositions in the will are at variance with the expressed intentions of the testator, and whether the will provisions seem unnatural.

**Undue influence – case law presumption** – A presumption of undue influence, which shifts the burden of proof to the will proponent, can arise when (1) a confidential relationship exists between the testator and the beneficiary, (2) the beneficiary participate din procuring, drafting, or executing the will, and (3) the will provisions are unnatural and favor the alleged influencer. In addition to the usual common law confidential relationships, California recognizes a confidential relationship whenever one party relies heavily on and places more than a normal amount of trust in another.

**Undue** **influence – statutory presumption** – By statute, California presumes that a provision in favor of one of the following people is the product of fraud or undue influence: (1) the person who drafted the instrument (and his relatives/associates), (2) the person who is in a fiduciary relationship with the testator and transcribed the instrument, and (3) a testator’s care custodian (or his relatives/employees).

**Mistake** – Mistakes of omission cannot be corrected since it would require the court to write the will. A mistake in description can be resolved through parol evidence.

**Revocation by subsequent instrument** – A will may be revoked in whole or in part by the express terms of a later will or codicil or by implication. The revoking instrument must be executed with the formalities required for execution of wills or be revoked by a holographic will. A codicil is one such testamentary instrument intended to modify, amend, or revoke an existing will. It must be executed with the same formalities as a will.

**Revocation by physical act** – A testator can revoke a will by burning, tearing, canceling, destroying or obliterating it, with the concurrent intent to revoke. To revoke by tearing, the will must be torn through some material part.

**Dependent relative revocation** – Where testator revokes will-1 on the mistaken belief that another disposition would be effective, and but for the mistake testator would not have revoked. Cancels the revocation based on the mistaken assumption of law or fact.

**Revival** – Revival of a revoked will concerns a will that was revoked by a subsequent instrument, which itself is revoked by physical act or subsequent instrument. In California, the first will is revived if that is the testator’s intent. A will may also be revived by reexecution or republication. A will may be reexecuted by the testator acknowledging her signature or the will and having witnesses attest to it.

**Integration** – A will can be written on more than one piece of paper. A will consists of all papers that were actually present at the time of execution and that the testator intended to constitute her will. All of the sheets of paper of an integrated will are probated as parts of the testator’s will. Extrinsic evidence is admissible to show the requisite presence and intent.

**Republication by codicil** - A will still in physical existence may be revived through publication of a subsequent codicil, but a will revoked by physical destruction cannot be republished.

**Incorporation by reference** – To incorporate a document by reference: (1) it must be in existence at the time the will was executed, (2) it must be sufficiently described in the will, and (3) there must be proof that the proffered document is the one described in the will. If these requirements are met, courts will infer that the testator intended to incorporate the document.

**Acts of independent significance** – In California, a will may dispose of property by reference to acts and events that have significance apart from their effect on the will.

**Classification of gifts** - A specific gift is a particular item of property distinct from all other objects in the testator’s estate. A general gift is a general economic benefit payable out of the general assets of the estate.

**Abatement** – In the absence of property not passing by will or trust, the omitted child’s share is satisfied by taking pro rata from all of the beneficiaries taking under the decedent’s will and or revocable trust.

**Ademption** – A specific gift is a particular item of property distinct from all other objects in the testator’s estate. A general gift is a general economic benefit payable out of the general assets of the estate. Revocation of a gift by ademption applies only to specific bequests. Usually, a specific bequest is adeemed if the specific property is not party of the testator’s estate death. In California, ademption depends on whether the testator intended to adeem the gift when he disposed of the property.

**Lapse** – At common law, if a devisee predeceased the testator, her gift lapsed.

**Anti-lapse** - In California, the gift does not lapse if the devisee who predeceased the testator was kindred of the testator or kindred of a surviving, deceased, or former spouse or domestic partner of the testator. Kindred means blood relative. The issue of the deceased devisee take in her place. For purposes of succession, an adopted child is deemed a descendant of the person who adopted her. If the statute applies, the issue of the predeceasing beneficiary take the beneficiary’s gift per capita with representation.

**Intestate succession (surviving spouse)** – Any part of a decedent’s estate that is not properly disposed of by will passes to the decedent’s intestate heirs as prescribed by statute. CP is treated differently from SP under the statute.

**Intestate succession (no surviving spouse)** – Under the Californai intestacy statute, if there is no surviving spouse, the entire estate passes to the decedent’s surviving issue. Descendants of a living descendant are excluded. If the eligible surviving issue are all of the same generation, they take equally.

**Per stirpes distribution** – Unlike a per capita with representation, the distribution occurs at the first generation even if everyone is dead so long as they left issue.

**Simultaneous death** – In California, if title to property depends on priority of death and it cannot be established by clear and convincing evidence that one person survived the other, the property of each person is dealt with as if he had survived the other. If the party is intestate, then they must prove by clear and convincing evidence that the heir survived by 120 hours.

**Omitted or pretermitted child** – A child born after the will instrument was executed and not provided for. California has a statute to protect children from being unintentionally omitted from their parent’s will. In California, if a decedent fails to provide for a child born or adopted after the execution of the decedent’s testamentary instruments, the child receives his intestate share of the decedent’s property, unless (1) the omission was intentional as shown in the will, (2) the testator had other children and left the estate to the parent of the omitted child, or (3) the testator provided for the child by transfers outside the will. This rule has been extended to cover a child who was alive when the testamentary instruments were executed but the testator either believed the child was dead or was unaware of his birth.

**Trusts**

**Creation of express private trust** – A trust is a fiduciary relationship with respect to property whereby one person, the trustee, holds legal title for the benefit of another, the beneficiary. Creation of a valid express trust requires (1) property, (2) trustee with duties, (3) definite beneficiary, (4) manifestation of intent to create a trust by a settlor with capacity, and (5) a valid trust purpose.

**Trust Property** – The trust property must be an existing interest in existing property that the settlor has the power to convey.

**Trustee with duties** – Although a trustee is essential to the operation of a trust, a trust generally will not fail for lack of a trustee. The court will appoint a trustee to carry out the settlor’s intent. The complete failure to name a trustee will not defeat a testamentary trust but may cause an inter vivos trust to fail because there can be no delivery of the trust property to the trustee.

**Definite beneficiary** – A definite beneficiary is necessary to the validity of every trust except charitable trusts, which can be enforced by the state attorney general although the beneficiaries are indefinite. If a trust fails for lack of a beneficiary, a resulting trust in favor of the settlor or his successors is presumed.

**Anti-lapse (trust)** – Lapsed gfts may be saved by an anti-lapse statute, which provides that the issue of certain predeceasing beneficiaries may take in their place. California’s anti-lapse statute applies to trusts as well as wills. The statute only applies if the predeceased beneficiary was kindred (blood relative) of either the settlor or the settlor’s surviving spouse or domestic partner.

**Intent to create a trust** – The settlor’s intent to create a trust may be manifested by written or spoken words or by conduct.

**Settlor with capacity** – A person must have sufficient capacity to establish a trust.

**Valid Trust purpose** – A trust may be created for any purpose that is not illegal, does not involve criminal or tortious act, or is not contrary to public policy.

**Charitable trusts** – A trust that benefits the public, not specific individuals.

**Cy pres** – If the specified charitable use is no longer possible or practical, the court will decide whether the settlor intended the trust to fail or would have wished the property devoted to a similar use. If a specific intent for that particular trust is found, the trust will fail and pass by resulting trust to the testator’s estate. If the court finds a general charitable intent, the court will select a purpose as near as possible to the original one.

**Spendthrift trust** – Trust that provides that beneficiary may not voluntarily or involuntarily transfer his interest. Not valid if settlor is also a beneficiary. Dependents, government, and those supplying necessities may be able to reach the protected interest.

**Discretionary trust** – A trust where the trustee has discretion to pay or withhold income or principal. Before trustee makes a payment, creditors cannot reach the interest.

**Support trust** – A trust that cannot be reached by creditors or assigned.

**Termination / revocability of trust by settlor** – In most states a trust is presumed to be irrevocable unless there is an express reservation by the settlor of the right to revoke. However, under the UTC and in California a trust is presumed revocable unless the trust instrument expressly provides that it is irrevocable. That power generally lies with the settlor, although the beneficiaries may consent to terminate a trust if no material purpose will be impaired.

**Termination of trust by beneficiaries** – Most jurisdictions permit the beneficiaries to terminate an irrevocable trust only if (1) all beneficiaries consent and (2) the termination will not impair a material purpose of the trust. Consent of all beneficiaries – existing and potential beneficiaries (including unborn or unascertained beneficiaries) of all present and future interests. In determining the material purpose of the trsut, the whole instrument and the surrounding circumstances will be considered.

**Duties of trustee** – In the case of an irrevocable trust, a trustee of owes her duties exclusively to the beneficiaries.

**Duty to administer trust** – The trustee has a duty to administer the trust in good faith and in a prudent manner, in accordance with the terms and purposes of the trust instrument.

**Duty of care - prudence** – A trustee must exercise that degree of care, skill, and caution that a reasonably prudent person would in managing her own property.

**Duty of loyalty and impartiality** – A trustee has a duty to administer the trust solely in the beneficiaries’ interest, and if there is more than one beneficiary, the trustee must act impartially. A trustee cannot favor one beneficiary over another.

**Duty to Separate and Earmark Trust property** – Trust assets must be kept physically separate from the trustee’s personal assets. In addition, trust property must be titled in the trustee as trust.

**Duty to preserve trust property and make it productive** – There is a basic duty to preserve and protect the trust property. From this duty there is implied the duty to make property productive, which includes the duty to invest. The trustee must invest trust funds within a reasonable time after receiving them and continually review those investments. If the trustee fails to invest, she is chargeable with the amount of income that would normally accure from appropriate investments.

**Duty to invest** – Most states have enacted the Uniform Prudent Investor Act, under which a trustee must invest and manage trust assets as a prudent investor would taking into account the purposes, terms, distribution requirements and other circumstances of the trust. Any type of investment is permitted and prudence is evaluated as to the overall investment strategy rather than as to each investment.

**Trustee’s liability and defenses** – If a trustee commits a breach of trust, the beneficiaries may sue the trustee for the amount necessary to restore the trust property and distribution to what they would have been without the breach. This is called surcharge, and the trustee is personally liable. Equity will not enforce a trust if the beneficiaries expressly or impliedly consented to the breach. Also, the beneficiaries must sue within a reasonable time or they will be barred by laches.

**Pour-over will** – California has adopted the UTATA, under which a testator can make gifts by will to a trust, even a revocable and amendable trust, provided that the trust instrument was executed before or concurrently with the will and is adequately identified in the will.

**Resulting trust** – Results from a purchase money resulting trust, the failure of express trust (resulting trust arises with settlor as beneficiary), or excess corpus (if trust property remains after purpose fulfilled).

**Constructive trust** – An equitable remedy to prevent unjust enrichment, such as where there is theft or conversion, fraud, duress, undue influence, mistake, or breach of fiduciary duty.