**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** – 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 are 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** –

**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.

**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.

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

**Revocation by operation of law** –

**Dependent relative revocation** –

**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.

**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

Classification of gifts

Abatement

Ademption by extinction

Ademption by satisfaction

**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. 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.

**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** –

**Simultaneous death** –

**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.

Homicide bar to succession

Elder abuse bar to succession

Express private trust

Trust formalities

Charitable trusts

Honorary trusts

Spendthrift trusts

Discretionary trusts

Support trust

Modification and termination of trust by settlor

**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.

**Modification and termination of trust by court** -

Powers of trustee -

**Duties of trustee** – A trustee of an irrevocable trust 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.

**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.

Life insurance trusts

Totten trust bank accounts

Resulting trusts

Constructive trusts