

WILLS AND TRUSTS OUTLINE

I. Intestate Succession.

- A. **Introduction.** Every state has an intestacy statute that governs the process of disbursing the decedent's assets upon death without an estate plan. These statutes are intended to codify a disbursement plan that an average or normal person would desire. Intestate statutes tend to benefit spouses and children of the decedent. The process of distributing assets intestate takes place in probate court.
- B. **Terminology.**
- i. **Descent.** Descent refers to the succession of real property. The law of the state where property is located is the law that governs (this is called ancillary probate).
 - ii. **Distribution.** Distribution refers to the succession of personal property. The law in the state where the decedent lived is the law that governs (called domiciliary probate).
 - iii. **Intestate.** The decedent dies intestate if he dies without any form of estate plan.
 - iv. **Heir.** An heir is a person entitled to take from decedent's assets under intestate succession laws.
 - v. **Heir Apparent.** An heir apparent is a person who will become an heir of the decedent upon the death of said decedent.
 - vi. **Descendant.** A descendant is a person related to the decedent in a descending lineal line. Descendant usually refers to a blood relative in the direct line of descent.
- C. **Spouse.** Under most intestacy statutes, the surviving spouse is given at least half of the decedent's estate after probate. In community property states, the surviving spouse gets half of the community property with the added benefit of avoiding probate; however, all of the decedent's individual property goes through probate.
- i. **Same Sex Marriage.** In CA, domestic partners can register with the Secretary of State, giving the surviving partner the rights of a spouse in the case of intestacy.
- D. **Descendants.** After the spouse has received her share of the intestate estate, the remaining assets are probated and distributed to those determined to be descendants of the decedent.
- i. **Share of the Descendants.** If all of the children of an intestate decedent are alive, each child receives an equal share under the doctrine of per capita distribution. If at least one of the children predeceases the decedent, there are two possible disbursement doctrines: strict per stirpes and modern per stirpes.
 - a. **Strict Per Stirpes.** Under this doctrine, the estate to be distributed to the descendants is divided at the first generation into as many lines as have living descendants.
 - b. **Modern Per Stirpes.** Under this doctrine, the estate to be distributed to the descendants is divided at the first generation that has any living descendants, and is divided into as many lines as have living descendants.
 - c. **Example: Difference between Strict and Modern.** Assume D has three children: 1, 2, and 3. Assume that 1 and 2 have one child each (a and b respectively), and 3 has two children (c and d). Now assume that 1, 2 and 3 all predeceased D. Under strict

per stirpes, a would receive 1's 1/3, b would receive 2's 1/3, and c and d would split 3's 1/3, giving them each 1/6. Under modern per stirpes, a, b, c, and d would all receive 1/4.

- ii. **Adoption.** An adopted child will be determined to be a descendant of the decedent if there has been either a legal adoption or an equitable adoption. Once a person is adopted, he is considered to be a natural child of the adoptive parent(s) and no longer a child of the natural/actual parents.
 - a. **Legal Adoption.** A person can be adopted when there is consent of, or notice to, the natural parents and the court orders the adoption.
 - b. **Equitable Adoption.** A court may allow for an equitable adoption in the absence of a legal adoption when there is clear and convincing evidence that the "parents" intended for there to be an adoption.
 - c. **Step Children.** When a step parent adopts a step child, the child will inherit from the adoptive step parent and both of the child's natural parents. However, the "replaced" natural parent cannot inherit from the child.
 - d. **Adult Adoption.** As it concerns intestate succession, there is no difference between the adoption of an adult and the adoption of a child. However, see the exception below.
 - e. **Exception: Contrary Intent.** When there is a testamentary device, a court may refrain from allowing an adopted person to take when allowing so would be contrary to the intent of the testator. See Minary v. Citizens Fidelity Bank & Trust, where the court did not allow the adopted wife of a child of the testator to take under the will because the testator would not have so intended; see also Doris Duke, where the court held that an adopted child of the settler's daughter could not claim an interest to the trust because the settler would not have so intended.
 - iii. **Posthumous Children.** A child conceived before father's death and born after father's death inherits so long as the child does not die within 120 hours of the father.
 - a. **In Vitro Fertilization.** A child of the decedent conceived after the death of the decedent shall be deemed to have been born in the lifetime of the decedent if (a) the decedent consented in a signed and dated writing, (b) within four months of the decedent's death, and notice of the possibility of posthumous conception is served upon a person who has the power to control the distribution of the decedent's property; and (c) the child was in utero within two years of the decedent's death so long as the child is not a clone of the decedent.
 - iv. **Surrogate Mothers and Sperm Donors.** There is usually a contract for surrogacy and sperm donors that says who the legal mother and father will be. The contract controls, and the child will take from the contractual mother and father in the case of intestacy.
 - v. **Advancements.** A gift made to an heir apparent during life will be an advancement on the heir's intestacy share (deducting the gift from the intestate share) if there is a declaration by the decedent in writing or an acknowledgment from the heir in writing that the gift is to be treated as an advancement.
- E. **Simultaneous Death.** In the situation where two people die very closely in time and location, it becomes very difficult to prove who died first. In CA, two people are considered to have died simultaneously if it can't be shown that one survived the other by 120 hours (5 days).
- F. **Bars to Intestate Succession.** There are situations where an heir would not take in intestacy.

- i. **Slayer Statute.** An heir who intentionally and feloniously kills the decedent is treated as predeceasing the decedent, and thus does not take. Self defense and insanity are valid defenses, and if proved will allow the heir to take. An heir criminally convicted of an intentional and felonious killing will automatically not take. An heir not criminally convicted may not take if intentional and felonious killing is shown by preponderance of the evidence in probate court.
 - ii. **Elder Abuse.** If there is clear and convincing evidence that an heir physically or financially abused an elder or dependent adult, the heir will be treated as predeceasing the elder and will not take.
 - iii. **Disclaimer.** A disclaimer is a voluntary act by an heir whereby the heir gives up his share of an inheritance. For a disclaimer to be valid, there must be a signed writing refusing all rights/benefits in the property that is irrevocable and unconditional that is delivered to the personal representative to the estate within 9 months of the decedent's death, and there must be no acceptance or benefits of, or dominion over, the property. The heir's share will pass to his heirs.
 - G. **Partial Intestacy.** When a will fails to mention some assets of the decedent, the non-identified property will pass under intestate succession.
- II. **Wills.** There are two types of wills: attested and holographic. The requirements for a valid attested will are: the testator is at least 18 years old, the testator has testamentary intent and testamentary capacity, and the will is executed pursuant to the due formalities. The requirements for a valid holographic will are the same, except the will does not have to be executed pursuant to the due formalities, but the material or dispositive provisions must be written in the testator's own hand and then signed by the testator.
 - A. **Testamentary Capacity.** The testator must be capable of knowing and understanding in a general way (1) the nature and extent of his property, (2) the natural objects of his bounty, (3) the disposition that he is making of that property, and (4) of relating these elements to one another and forming an orderly desire regarding the disposition of the property. The testator is presumed to have testamentary capacity; the burden of showing a lack of testamentary capacity is on the challenging party.
 - i. **Lack of Capacity.** If one or more of the 4 elements of testamentary capacity is missing then there is a lack of testamentary capacity, which invalidates the wills.
 - ii. **Planning for Incapacity.**
 - a. **Power of Attorney.** A power of attorney creates an agency relationship whereby the agent ("attorney in fact") is given a written authorization to act on behalf of the principal, subject to traditional rule of agency law. On either's incapacity, the agent's authority terminates. However, a durable power of attorney continues throughout the incapacity of the principal until the principal's death. The attorney in fact acts in the best interest of the principal, his powers are governed by the contract establishing the relationship, but an attorney in fact may never create a will (but can create a trust) and does not allow for health decisions (see below).
 - b. **Health Care Directive.** A health care directive is an affirmative direction that expressly states what the person wants to have happen when they become incapacitated, including when to terminate medical treatment and appointing an agent to make such a decision. If an agent is appointed, he will be held to the substituted judgment standard, which requires that the agent do what the principal would have wanted.
 - B. **Testamentary Intent.** The testator must intend for the document to pass his property at death

- C. **Attested Wills.** An attested will is a will that has been signed by witnesses.
- i. **Purpose of the Formalities.** There are four policy considerations underlying the due formalities requirement: (1) the ritual or cautionary function, which makes sure that the testator intended to make a distribution of property; (2) the evidentiary function, which makes sure there is reliable evidence of the testator’s intent; (3) the protective function, which makes it harder for people to exert undue influence over the testator; and (4) the channeling function, which increases the confidence of the testator that his desires will be carried out and makes it easier for the courts to cope with wills.
 - ii. **Due Formalities.** To satisfy the due formalities requirement, there must be a writing signed by the testator or by proxy, there must be two witnesses of the testator’s signature or acknowledgment, and the witnesses must sign the writing.
 - a. **Signature.** Any mark, cross, abbreviation, or nickname of the testator is sufficient. If a proxy signs for the testator, it must be done in the testator’s presence and at the testator’s direction.
 - b. **Witnesses.** The witnesses must both see the testator sign. The witnesses must sign before the testator’s death; however the harmless error rule may be invoked if this requirement is not met (see below). If there is a bequest to a witness under the will, a rebuttable presumption of undue influence, duress, and menace arises (see below).
 - c. **Writing.** A “writing” is anything that is an intentional reduction to a tangible form. The form must be a reasonably permanent record of the will.
 - iii. **Attestation Clauses.** An attestation clause recites that the will was duly executed and then signed by witnesses. Such a clause gives rise to a presumption of due execution.
 - iv. **Self-proving Affidavit.** A self-proving affidavit is added to the end of a will and signed by the testator and the witnesses before a notary public that swears that the will was duly executed. The notary public signs and attaches the required seal.
 - v. **Curing Defects.** Mistakes in execution may be overlooked by the court.
 - a. **Substantial Compliance.** A will should be admitted to probate if there is clear and convincing evidence that the purposes of the formalities were served despite a defective execution (it’s a “near miss” standard).
 - b. **Harmless Error.** Courts may excuse noncompliance with the formalities if there is clear and convincing evidence that the decedent intended the document to be his will. In CA, this rule is limited to attestation errors (such as witnesses signing after testator’s death).
- D. **Holographic Wills.** A holographic will is a will written by the testator’s own hand and signed by the testator; attesting witnesses are not required. The dispositive portions of the will must be written by the testator’s hand in order for a holographic will to be valid.
- i. **Conditional Wills.** A conditional will is a will that takes effect upon the happening of some condition. In most cases, courts allow such a will to be probated upon death from any cause, not just the cause stated in the condition.
 - ii. **Signature.** The signature may be anywhere on the document, but if it is not at the end there may be doubt about whether the decedent intended his name to be a signature.

- E. **Components of a Will.** The following doctrines are used to determine what documents make and terms make up a will.
- i. **Integration of Wills.** Under this doctrine, extrinsic evidence will be allowed to show that all papers present at the time of execution that are intended to be part of the will are integrated into the will.
 - ii. **Republication by Codicil.** A codicil is a testamentary instrument that supplements an earlier valid will. A will is treated as re-executed as of the date of the codicil. If a will has been revoked, it may be republished by codicil and make the revoked will valid.
 - iii. **Incorporation by Reference.** A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests an intent to incorporate and the writing is sufficiently identified by the will. In CA, no single item passed by separate writing can have a value in excess of \$5000 and the total passed in this way cannot exceed \$25,000
 - iv. **Acts of Independent Significance.** If the beneficiary or property designations are identified by acts or events that have a lifetime motive and significance apart from their effect on the will, the gift will upheld under this doctrine. Extrinsic evidence is permitted to identify the beneficiaries or property passing under the will in this way.
- F. **Construction of Wills.** The goal in construing wills is to give effect to the testator's intent. Extrinsic evidence may be considered by the court in ascertaining what the testator meant by the words used in the will.
- i. **Reformation.** If there is clear and convincing evidence of a scrivener's error, the court may reform/correct the error.
 - ii. **Construction.** If there is an ambiguity in a will, the court may construe the will consistent with the testator's probable intent.
 - iii. **Death of Beneficiary before Testator.** If a devisee does not survive the testator, the devise lapses (fails). However, all states have anti-lapse statutes that are default rules in such a case. In CA, if a transferee predeceases the testator/settlor, the transferee's issue take the transferee's share. Under the CA statute, "transferee" means blood relative, so only the heirs predeceasing blood relatives may take from decedent.
 - iv. **Ademption.** Ademption refers to a situation wherein property gifted to a beneficiary no longer exists at the death of the decedent.
 - a. **Ademption by Extinction.** Ademption by extinction applies to specific devises of property. Thus, if a specific and identified item is gifted to a beneficiary, but then that item no longer exists at decedent's death, the devise fails.
 - b. **Ademption by Satisfaction.** Ademption by satisfaction is similar to advancement (above), and it applies when the testator makes a transfer to a devisee after executing the will. In such a case, if the testator is the parent of the beneficiary, a rebuttable presumption arises that the gift is in satisfaction of the devise made by will. This doctrine applies to general pecuniary bequests, but not to specific bequests.
 - v. **Abatement.** Abatement occurs when the estate has insufficient assets to pay debts as well as all the devises. In such a case, some devises must be abated or reduced. Reduction occurs in the following order: first from residuary devises, then from general devises, and finally specific and demonstrative devises (reduced pro rata).

- vi. **Pretermisison Protection.** If a decedent fails to provide for his surviving spouse, who married decedent after execution of all of the decedent's testamentary instruments, she shall receive her intestate share. The same holds true for children born after the execution of all of the decedent's testamentary instruments.
 - a. **Exceptions.** The surviving spouse or after-born child will not take their intestate share if (1) the decedent's failure to provide for the spouse or child was intentional and that intention appears on the face of the instrument; or (2) the decedent provided for the spouse or child outside of the testamentary instruments and that intent is shown by any extrinsic evidence.

G. **Revocation of a Will.** To revoke a will, the testator must be 18, and he must have testamentary capacity and an intent to revoke. A will can be revoked in any of the following ways: an express written revocation by testator or proxy, revocation by physical act by testator or proxy, revocation by law by testator or proxy, revoked by inconsistency, or revoked by operation of law. Revocation of a will also revokes all underlying codicils and all copies of the will.

- i. **Express Written Revocation.** A will can be revoked by a subsequent attested or holographic will that expressly revokes the prior will. This must be done by the testator or by proxy.

- ii. **Revocation by Physical Act.** A will can be revoked by a physical act such as destroying, obliterating, or burning the will. A revocation by physical act only revokes the part of the will that is actually destroyed; the remaining portion may still be a valid will. In CA, striking out portions of the will (called cancellation) is a valid partial revocation by physical act. This must be done by the testator or by proxy.

- a. **Lost Wills.** There is a presumption that a will was revoked by physical act if there is evidence that the will was in physical possession of testator and the will cannot be found at testator's death. However, a will that is lost, destroyed without the consent of the testator, or not destroyed in accordance with the revocation statute, the will can be probated if its contents are proven.

- iii. **Revocation by Inconsistency.** A subsequent will that does not expressly revoke the prior will, but makes a complete disposition of the testator's estate, presumptively replaces the prior will and revokes it by inconsistency. If the subsequent will does not make a complete disposition of the testator's estate, it does not revoke the prior will and the property not disposed of under the codicil is disposed of in accordance with the prior will.

- iv. **Revocation by Operation of Law.** In most states, divorce revokes any provision in the decedent's will for the divorced spouse. In other states, revocation occurs only if the divorce is accompanied by a property settlement.

- v. **Dependent Relative Revocation.** This is also called implied conditional revocation. If the testator purports to revoke his will upon a mistaken assumption of law or fact, the revocation is ineffective if the testator would not have revoked his will had he known the truth. Usually, a testator implicitly conditions revocation on the happening of some event (e.g., subsequently executed will as being valid), and if the implied condition does not occur, then neither does the revocation.

- vi. **Revival.** A testator can reinstate (revive) a will that has been revoked by re-executing the revoked will or by including an express statement of revival in a subsequent will or codicil.

Challenging the Validity of a Will.

- i. **Insane Delusion.** An insane delusion means that the testator was laboring under a false belief that was maintained despite all evidence to the contrary and that the false belief directly affected a particular provision of the will. A mistake is not an insane delusion.
 - a. **Result.** If an insane delusion is shown, but the delusion did not affect the dispositions, then the will stands. If it did affect the dispositions, then the will fails for lack of testamentary capacity.
- ii. **Undue Influence.** Undue influence exists if the testator was coerced into making a bequest that he would not have made absent the undue influence and that the testator did not desire to make. If there isn't direct evidence of undue influence, then proving the following three elements will raise a rebuttable presumption of undue influence: (1) there was a confidential relationship between the testator and the alleged influencer (usually a dominant-subservient relationship); (2) the influencer was active in the procurement of the will; and (3) there was an unnatural disposition (esp. a non-blood bequest).
 - a. **Result.** If part of a will is the product of undue influence, those portions of the will that are the product of such influence may be stricken and the remainder of the will allowed to stand, if the invalid portions of the will can be separated without defeating the testator's intent or destroying the testamentary scheme.
 - b. **Attorneys and Non-blood Caretakers.** A presumption of undue influence arises when a non-blood attorney writes himself into the will or a non-blood caretaker takes under the will. The presumption can be rebutted by a certificate of independent review attached to the will.
 - c. **Duress.** When undue influence becomes overtly coercive it is called duress. A donative transfer procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.
- iii. **Fraud.** Fraud occurs where the testator is deceived by a deliberate misrepresentation and does that which he would not have done had the misrepresentation not been made. The misrepresentation must be made with both the intent to deceive the testator and the purpose of influencing the testamentary disposition. There must be (1) an intentional misrepresentation, (2) made for the purpose of inducing reliance thereon, (3) with actual reliance, and (4) damages.
 - a. **Result.** A provision in a will procured by fraud is invalid, and the remaining portion stands unless the fraud permeates the entire will or the portions invalidated by the fraud are inseparable from the rest of the will.
- iv. **No Contest Clauses.** A no contest clause provides that a beneficiary who contests the will shall take nothing, or a token amount, in lieu of the provisions made for the beneficiary in the will.

Contracts Relating to Wills. A person may enter into a contract to make a will or a contract not to revoke a will. Contract law applies. Upon breach, the contract beneficiary is entitled to a contract remedy. Generally, these contracts must be in writing, but equitable estoppel has been used in CA to get around the statute of frauds.

Pour-over Wills. A pour over will is a will that has an express clause to distribute some or all of decedent's probated property to an inter vivos trust. The property will then be distributed under the terms of the trust. The trust can be funded or unfunded, and it can be created and/or amended after the will is executed. The trust is incorporated by reference.

- II. **Trusts.** A trust is an arrangement whereby a trustee manages property as a fiduciary for one or more beneficiaries. The legal and equitable title is split so that the burdens of ownership (legal title) go to the trustee and the benefits of ownership (equitable title) go to the beneficiaries.
- A. **Creation of a Trust.** The requirements for the creation of a trust are: (1) intent to create a trust, that is, to hold property for the benefit of another; (2) mental capacity; (3) split of legal and equitable title; (4) res, that is the thing or property over which title is split; and (5) a signed writing by the settlor of the property held and split is real estate.
- i. **Intent.** The settlor must have the intent to create a trust. In so doing, the focus is on function rather than form. That is, no particular form of words or conduct is necessary for the manifestation of intention to create a trust; all that is required is a command from the settlor that a trust shall be created. To decide the settlor's intent, the court will look to the language of the governing document in light of all the circumstances.
 - ii. **Res.** A trust cannot be created if there isn't any property. Similarly, a trust terminates when no property remains. The trust res has to be in existence at the time the trust is created.
 - iii. **Inter-vivos or Testamentary Trust.** A trust can be created during the lifetime of the settlor (inter-vivos) or by will upon the settlor's death (testamentary). A testamentary trust must be writing, but an inter-vivos trust does not (unless the res is real property).
 - iv. **Declaration or Deed of Trust.** A declaration of trust is a situation where the settlor declares himself to be the trustee and thus retains the legal interest over the trust res; the settlor only needs to manifest the intention to hold the property in trust for the benefit of another. A deed of trust is a situation where the settlor transfers legal title of the res to a third party to act as trustee. Here, a deed of trust or actual delivery of the trust property is necessary.
- B. **Parties to a Trust.** Ordinarily, a trust involves three parties: the settlor, the trustee, and one or more beneficiaries. However, one person can be more than one party to the trust, and sometimes can even be all three.
- i. **Settlor.** The settlor is the person who creates a trust by splitting his title in property. The settlor can also be a trustee and a beneficiary so long as there is more than one trustee or beneficiary.
 - a. **Creditors.** A revocable trust is subject to the claims of the settlor's creditors while the settlor is living and upon the settlor's death. An irrevocable trust is subject to the claims of the settlor's creditors while the settlor is living only if the settlor is also a beneficiary.
 - ii. **Trustee.** The trustee holds legal title to the res and owes a fiduciary duty to beneficiaries (see below). A trustee can also be the settlor or a beneficiary. There can be multiple trustees to a single trust. A trust will not fail for want of a trustee: the court will appoint a trustee if the settlor fails to appoint one, the trustee refuses the appointment, or the trustee dies.
 - a. **Creditors.** A personal creditor of the trustee has no recourse against the trust property, and a creditor of the trustee as a trustee has no recourse against the personal property of the trustee.
 - iii. **Beneficiary.** The beneficiary holds equitable title to the res and is owed a fiduciary duty by the trustee. A beneficiary can be a human or legal entity so long as they are

ascertainable during the life of the trust (exception: charitable or honorary trusts see below).

b. **Creditors.** A creditor cannot attach trust assets if the trust is a discretionary trust, but can if the trust is a mandatory trust, unless the creditor is a preferred creditor (i.e., debt for alimony and child support, tort victims, or IRS). A discretionary trust is one in which the trustee has discretion in the distribution, whereas a mandatory trust is one in which the trustee must make specified distributions to an identified beneficiary. A non-preferred creditor may not attach trust assets of a mandatory trust if there is a spendthrift clause (the beneficiary is prohibited from transferring his interest in the trust).

C. **Modification and Termination of a Trust.** A trust may be modified or terminated if the settlor and all beneficiaries consent (if inter-vivos irrevocable), after the settlor's death if all beneficiaries agree and the court orders the modification or termination, or on court order in changed circumstances not anticipated by the settlor that will defeat or substantially impair a material purpose of the trust absent modification or termination.

i. **California Statute.** In CA, a court may modify the administrative or dispositive provisions of a trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. In other words, modification or termination is appropriate if the reason for the modification or termination outweighs any conflicting material purpose of the settlor.

a. **Intent.** Modifications and terminations are usually ordered in order to carry out the intent of the settlor. This must always be taken into account in a modification or termination analysis.

D. **Fiduciary Duty.** All trustees are fiduciaries, and all fiduciaries owe a duty of loyalty and a duty of prudence to beneficiaries. A trustee may be liable to the beneficiaries when there is a breach a fiduciary duty that causes damages.

i. **Duty of Loyalty.** The duty of loyalty means that the trustee will administer the estate solely in the interest of the beneficiaries. The duty of loyalty is referred to as the duty against misappropriation. Under this duty, the trustee is prohibited from self dealing.

a. **No Further Inquiry Rule.** If the trustee engages in a transaction that involves self-dealing or a conflict between the trustee's fiduciary capacity and personal interests, good faith and fairness to the beneficiaries are not enough to save the trustee from liability. In such a case, no further inquiry is made; the trustee's good faith and the reasonableness of the transaction are irrelevant.

(i) **Exceptions.** Self-dealing is allowed, and the no further inquiry rule abrogated, if: (1) the trust authorizes self dealing; (2) all beneficiaries consent to the transaction; (3) the trustee gets a court order authorizing the transaction; or (4) the trustee is a corporation or bank and the trust assets were deposited with its own banking department in order to invest the trust assets in a common trust fund or in a mutual fund that it operates.

b. **Bona Fide Purchaser.** A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

ii. **Duty of Prudence.** The duty of prudence is the duty to administer the trust as a reasonably prudent person would. The duty of prudence is the duty to avoid

mismanagement. The trustee has the affirmative duty to actively advance the interest of the beneficiaries. There are 8 duties: (1) duty to collect and protect assets; (2) duty to administer the trust; (3) duty to make proper investment selection; (4) duty to diversity; (5) duty of impartiality; (6) duty of proper delegation; (7) duty to inform and account; and (8) duty to earmark.

a. **Prudent Investor Rule.** A trustee shall invest and manage trust assets as a prudent investor would. The trustee shall exercise reasonable care, skill, and caution in so doing. A trustee's investment and management decisions must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

b. **Duty to Diversify.** A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying. Diversification reduces the risk of the overall portfolio. Failing to diversify is an uncompensated risk, meaning that there is a higher risk without the higher possibility of reward.

c. **Duty of Proper Delegation.** Prudent people seek help when dealing with matters beyond their ken. Delegation is permitted subject to a duty of care, skill, and caution in selecting, instructing, and monitoring the agent. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

d. **Duty of Impartiality.** This duty is implicated when a trust has two or more beneficiaries. The duty of impartiality mandates that the trustee strike a balance between the beneficiaries when investing, managing, and distributing the trust property. Generally, the interests of income beneficiaries are at odds with the interests of remainder beneficiaries. The trustee may not favor one class of beneficiaries over the other.

e. **Duty to Inform and Account.** The trustee has a duty to inform the beneficiaries of the existence of the trust and significant developments pertaining to the administration of the trust, and to respond promptly to a request by a beneficiary for information reasonably related to the beneficiary's interests in the trust. The beneficiaries must be given enough information for them to be able to decide to enforce, modify, or terminate the trust. The trustee must account once per year, and the law protects a trustee from liability to the beneficiary for breach of trust if the facts underlying the beneficiary's claim are fairly disclosed in an accounting filed with the court, notice of the accounting is properly served on the beneficiary, and the beneficiary does not timely object to the accounting.

(i) **California Statute.** A CA statute provides that when a revocable trust becomes irrevocable because of the death of the settlor, the trustee shall provide a complete copy of the terms of the trust to any beneficiary or heir of the settlor who requests it.

f. **Duty to Earmark.** To earmark property is to designate it as trust property rather than the trustee's own. Commingled trust funds become difficult to trace and hence subject to the risk that personal creditors of the trustee can reach them. Thus, there is a prohibition against commingling, and all trust property must be earmarked.

g. **Duty to Collect and Protect the Trust Property.** A trustee has the duty to collect and protect trust property without unnecessary delay. "Unnecessary delay" depends on the circumstances.

- iii. **Calculating Damages.** The core principle in trust remedy law is to put the beneficiary in at least the position that she would have been in had the breach not occurred. This make-whole standard is implemented by holding the trustee liable for any losses incurred and gains forgone as a result of the breach. In addition, the trustee is liable for any profit made by the trustee through the breach of trust.

E. **Charitable and Honorary Trusts.**

- i. **Charitable Trusts.** A charitable trust need not have an ascertainable beneficiary. A charitable trust is any trust that is for a charitable purpose. The state attorney general has the power and standing to enforce and bring suit against the trustee of a charitable trust.

- a. **Charitable Purpose.** A trust is for a charitable purpose, and is thus a charitable trust, if it is for: (1) relief of poverty; (2) advancement of education; (3) advancement of religion; (4) promotion of health; or (5) government or municipal services such as parks or museums (or any other purpose that is sufficiently beneficial to the community to justify the preferential treatment afforded to a charitable trust

- b. **Cy Pres Doctrine.** Under this doctrine, if the settlor's exact charitable purpose becomes illegal, impossible, or impracticable, the court may direct the application of the trust property to another charitable purpose that approximates the settlor's intention. The doctrine, which means "as nearly as possible," addresses the risk that because a charitable trust may have a perpetual existence, changed circumstances will render the trust's original purpose obsolete. A court is required to award the funds to a charity that most resembles the one that was to be the recipient of the trust.

- ii. **Honorary Trusts.** Honorary trusts have been accepted in CA even though there is no human being with equitable title. An honorary trust is where the trustee has the power, but not a duty, to apply the trust property to the settlor's stated purpose. If the trustee does not do so, then the property reverts on resulting trust to the settlor or the settlor's heirs or devisees.

- a. **Examples.** In CA, a trust for the benefit of a pet or an animal is valid for the lifetime of the animal. Similarly, a trust can be for the keeping property in good condition, erection of monuments, saying of mass for the decedent, etc.

- iii. **Discriminatory Trusts.** If the trustee of a racially restrictive trust is a governmental body, courts have held that the administration of the trust in a racially discriminatory manner is discriminatory state action forbidden by the Constitution, making the racial restriction unenforceable. In such cases, most courts have held that the settlor would prefer the charitable trust to continue without the racial restriction. Such restrictions on a private trustee do not violate the Constitution, but may be violative of federal laws. Other types of discriminatory trusts include gender based discrimination and religious based discrimination. In each case, distribution in accordance with the terms of the trust may violate federal law.

III. **RAP.** No interest in property is good unless it must vest or fail within any life in being plus 21 years. If a conveyance fails under that test, it may still be valid if it actually either vests or fails within 90 years of the conveyance. If the conveyance still fails, then the court will reform the document.

A. **Application.** RAP only applies to contingent interests. An interest is contingent if there is a condition precedent to the beneficiary being able to take, or if the beneficiary is not yet born.

B. **Tolling.** The tolling of the two time periods begins when the conveyance becomes irrevocable.

- C. **Life in Being.** A life in being can be any beneficiary alive when the tolling period begins. The object is to find a life in being that will show that the interest will vest or fail within the 21 year period. If such a life in being can be found, that person is called the validating life.

- D. **Savings Clause.** A savings clause stipulates that the trust must terminate and all interests distributed within 21 years of the death of the measuring life individual. The sole purpose of such a clause is to ensure that RAP is not violated.