

Wills Outline

I Approach: Consider

- A) is there a valid Will (Capacity, Intent, Formation)
- B) What documents constitute the will (Integration, incorporation by reference, codicil, acts of independent significance)
- C) Defenses to the Will?
- D) Has W been revoked, republished, revived? IF so, does DRR Apply?
- E) Misc: K to Make a W, Joint Will, Gift Causa Mortis etc?
- F) Restrictions on T Dispositions: Kids, Widow's Election, Lapse?
- G) If no Valid W → Intestate succession

IS THERE A VALID WILL?

II Capacity: At time the W was executed

- A) Capacity. (E.g., Sharada when she was sick)
 - 1) Requirements: AT THE TIME OF EXECUTION. **Mnemonic "T must be 18 to DINE Here"**
 - (a) T must be at least 18 yrs of age
 - (b) The nature of her DISPOSITION: that she's executing a W
 - (c) Not suffering from INSANE Delusion: At time of execution. 4 reqs
 - (i) False/irrational belief + which is the product of a sick mind + unsupported by any E + that affected T's W (E.g., Sharada: ghosts after us)
 - (ii) Consequences: Affects only that portion of the W affected by delusion. Passes to residuary devise or intestacy
 - (d) T must know the NATURAL objects of her bounty + those whose interests are affected by her W
 - (e) T must understand the EXTENT of her property
 - 2) Consequences of lack of capacity: ENTIRE W invalid. Property passes by intestacy UNLESS prior valid W which controls bc T's 2nd W invalid w/o capacity
 - 3) **Tip:** Bar fact situations that T may not lack capacity: conservator, mental illness

III Present T Intent: Question of fact. Will may be conditional (E.g., I leave W that says, "W to be probated only if I die in Israel").

IV FORMATION/FORMALITIES: Attested/Formal/Witnessed Wills or Hologs

- A) Formalities for Execution for Attested Wills. **Tip: Heavily Tested:**
 - 1) Requirements (4). Trigger: "Mac the Rich Oil Well Owner w/stroke" comes in my office
 - (a) Writing (In CA v other jx)
 - (b) Signature
 - (i) by 1 of the 3 following: 1) The T OR 2) If T incapacitated: 3rd person in T's presence & at T's direction or 3) conservator pursuant to ct order
 - (ii) What qualifies as a "signature" – Nicknames, "X," (illiterate). May appear anywhere on W
 - (c) 2+ Ws must be PRESENT AT THE SAME TIME:(Rationale: concerns @ undue influence etc).
 - (i) Presence:
 - (1) What qualifies: "sight" or "conscious"(T signs/acknowledges w/in Ws' hearing + W knows)
 - (2) T need not sign in W's presence SO LONG AS:T acknowledges his signature OR the W (e.g., "this is my W"). Note: no publication req: T does not have to declare "this is my W"
 - (3) Ws do not have to sign in presence of ea other – but must be present at same time.

- (4) When Ws sign: can't sign T's W after T dies. Should sign after T but if sign before T, W not invalid if SUBSTANTIAL COMPLIANCE (infra)
- (ii) Who can Be an attesting W:
 - (1) If W is an interested W (a B under the W), presumption that W-B secured gift by wrongdoing. W-B may rebut presumption if 2+ disinterested Ws. Effect: take gift. If can't rebut: take intestate sh.
 - (2) NA: if W-B takes only in fiduciary capacity (i.e., as a trustee).
- 2) If W fails to satisfy formalities of execution, may still be probated under Doctrine of Substantial compliance: If no fraud/mistake, W deemed validly executed if substantial compliance w/formalities.
- B) Formalities of Execution for Holo Wills ("Indiana Jones" W)
 - 1) Requirements (3): 1) Writing 2) signed by T 3) Material provisions are in T's handwriting.
 - (a) What constitutes "material" – gifts made, beneficiaries named. Not introductory cls, appt of executor (bc ct can appoint).
 - (b) No req testamentary intent appear on the face of the W:
 - (i) Testamentary intent may be part of commercially printed form (E.g., "home-made W kits)
 - (ii) E.g., parol E admissible to determine if a writing is just a list of ppl & assets or if T intended it to be a disposition; parol E admissible to determine if T intended series of letters to constitute 1 will under integration
 - (c) No req the writing be dated to be valid holo W. But 2 potential probs:
 - (i) Inconsistent Ws: if an undated holo is inconsistent w/provisions of a dated W/codicil etc, undated holo invalid to extent of inconsistency UNLESS can establish that undated holo was executed after dated W was executed
 - (ii) Lack of capacity: If established that T lacked testamentary capacity at any time during which W might have been executed, holo invalid: UNLESS established that T had testamentary capacity when executed it

V Determining If Will Can be Admitted into Probate in a Choice of Law Situation: (Typical situation: T domiciled in NJ when executed W in NY, became domiciliary of CA & died there). "CED"

- A) W can be admitted into probate in CA if: 1) complies w/CA formalities for execution (supra) 2) complies w/formalities of execution where W executed OR if neither 3) complies w/formalities of the place of T's domicile at the time T executed the W

SECTION TWO: COMPONENTS OF A WILL

I Components of a Will: Integration, Incorporation by Reference, Facts of Independent Significance, Writing disposing of limited tangible personal property and Pour-Over Wills

A) Integration:

- 1) Rule: All papers actually present at the execution are integrated into the W IF the T intended the papers to be a single W. E of intent: physical connection (e.g., stapled) or logical connection (don't end w/completed sentence)
- B) Incorporation by Reference: a non-integrated writing may be given T effect & become part of the W & therefore admitted into probate if it is incorporated by reference into original W. (**Capt Jack Sparrow's holo mentions 100 barrels of rum at the island for Elizabeth**).
- 1) Reqs (4): 1) a doc/writing 2) in existence when W was executed 3) clearly identified in the W & 4) T intended to incorporate the doc into the W (presumed if above 3 satisfied). Irrelevant if the doc is invalid, e.g., invalid K, deed, will of 3rd person/T.
- C) Facts of Independent Significance: Rule: Facts of independent significance fill in 'blanks' (e.g., who B is, what property devised). Parol E admissible to prove fact of indep significance.

- 1) Definition: A fact of independent significance is one which has meaning independent/unrelated to the W. (E.g., I leave \$1000 to UC Davis. My graduation from there is fact of ind significance & parol E admissible to show). Ask: whether even w/o the W, it would still have existed.
 - (a) Fact/act can be a future or a past fact/act (E.g., leave to the people I went to law school with; or to ppl who will be in firm). But "I leave all my property to ppl I'll name on note tomorrow" NA
- D) Writing disposing of limited tangible personal property: Effective for decedents dying after Jan 1, 2007 Even if a writing can't be incorporated by reference/isn't a fact of independent significance, may be admitted into probate & given T effect if: Reqs met ("**Scrooge**")
 - 1) Writing is referred to in W, dated & signed/handwritten by T
 - 2) writing describes items/recipients w/reasons/bale certainty
 - 3) Writing executed before OR after the W – not during AND
 - 4) Writing directs disposition of tangible personal property –not \$/property – valued at time of T's death at < \$5,000 per item or \$25,000 or less in aggregate (if item exceeds: passes to residuary or intestacy)
 - (a) If T makes subsequent handwritten/signed changes & inconsistent disposition, last writing controls
- E) Pour-Over Wills: When T's will says that all/part of T's estate is devised to the trustee of the inter-vivos trust to be administered pursuant to the terms of the trust. (**Hakuna Matata – Timon leaves trust for Pumba: UTATA**)
 - 1) Trust admitted into probate by 3 ways:
 - (a) incorporation by reference
 - (b) independent significance (even w/o will, have) or
 - (c) Uniform Testamentary Additions to Trusts Act (UTATA: Require 1) valid trust and 2) exists before will executed/at time of execution
- F) Codicil:
 - 1) Definition: T instrument executed after a W w/applicable T formalities AND w/intent to modify, alter or amend the W. May be executed in holo maner.
 - 2) Effect: W "speaks as of the date of the codicil" – codicil "republishes" prior W; if makes reference to prior invalid W, may give effect to that document. In CA: valid holo codicil may validate a prior invalid formal W

SECTION THREE: DEFENSES TO A WILL: Fraud, Mistake, Undue Influence

II Fraud: Lack of T intent

- A) General P/f case for all: 1) there must be a representation 2) of material fact 3) known to be false by the wrongdoer 4) for the purpose of inducing action/inaction 4) which actually induces action/inaction desired
- B) Then Consider if either of 3 types fraud:
 - 1) Fraud in the execution: misrepresentation as to nature/contents of instrument (e.g., giving doc purportedly non-T + T signs). Consequence: ENTIRE W void & property passes by intestacy unless prior valid W. Contrast w/fraud in the inducement: T does not intend it to be W.
 - 2) Fraud in the inducement: misrepresentation of facts influence contents of T's W. Consequences: Only the infected portion void. Give property to residuary devisees, if none – to heirs at law by intestacy or constructive trust remedy (deny probate, allow property to go to residuary/heirs but impose constructive trust – duty is to transfer property to rightful takers).
 - (a) Fraud in preventing T from Revoking W: type of fraud in the inducement. E.g., T wants to revoke to leave all to charity & Son maligns charity. She does not revoke.

III Undue Influence: Lack of T intent. Definition – mental/physical coercion that deprives T of free agency + causing T to substitute another person's desire for her own. Demonstrate by 3 ways

- A) P/F: Reqs "**SODU**" 1) T is susceptible to influence (\$, psych, physical) 2) The other person had the opportunity to influence T (usually not disputed) 3) the other person is disposed to influence – commits a wrongful act to get

the gift & 4) provisions of W are unnatural (devise to one who would not be expected to take, exclude those who would). **Proff seduces student into having 1 night stand – she says “so du” me.**

- B) Presumption of undue influence:** if 1) B was in confidential relationship w/ 2) B participation in execution of W & 3) provisions appear unnatural. Places burden of proof on B.
- 1) Confidential relationships recognized: same as CL (5): L-cl, Doc-patient, Gaurian-ward, clergy-penitent, & trustee-beneficiary. CA ALSO recognizes: whenever one person reposes trust in another (e.g., 2 pals)
- C) Consequences of finding undue influence p/f or by presumption:** only portion affected invalid, portion affected goes to residuary devisees, if none → heirs by intestacy, or constructive trust remedy
- D) Statutory Undue Influence (CA):** Donative transfer by W or trust from testator or settler invalid if to:
- 1) The person who drafted the instrument
 - 2) A person related to, married, cohabiting, domestic partner, EE
 - 3) A person in fiduciary relationship AND who transcribes instrument/causes it to be transcribed OR
 - 4) A “care custodian” of a “dependent adult” (Dependent adult: older than 64 yrs OR at least 18 w/physical or mental disability)
 - 5) EXCEPTIONS: 1) Transferor related to/married/domestic partner/cohabits w/drafter OR 2) instrument reviewed by independent counsel OR 3) ct determines by clear & convincing E that transfer NOT product of wrongdoing.
 - 6) Consequences statutory undue influence: Transferee is limited to taking only what she would have by intestacy, rest goes to residuary devisee or if none, to heirs by intestacy or constructive trust

IV Mistake – 6 forms – lack of T intent

- A) Mistake in the content:** when the wrong B is named/wrong gift is made. Consider the type of mistake.
- 1) Mistake in omission (words accidentally left out): No remedy bc ct doesn't rewrite wills
 - 2) Mistake in addition: words accidentally added. Remedy: ct may strike out offending part
- B) Mistake in the execution:** T executes the wrong document. Executed doc not admitted to probate bc no intent. 2 situations: 1) T mistakenly signs W believing it is non-T instrument. W not probated 2) Reciprocal/Mutual Ws: 2 Testators each w/own W & each leaves everything to other (E.g., H & W). Ct reform bc equitable
- C) Mistake in inducement:** No relief if a particular gift is made/not made on the basis of mistaken belief UNLESS both the mistake AND the disposition T would have made but for mistake appear on face of W. EXCEPTION: Pretermitted heir: If W doesn't provide for living ch solely bc T believes ch doesn't exist, ch gets intestate sh.
Tip: heavily tested
- D) Mistake in description (ambiguity):** No one/nothing fits the description or 2+ persons/things fit the description. Traditional v CA modern view
- 1) Traditional view:
 - (a) Latent ambiguity: no ambiguity on face of W. Parol E admissible to 1) establish ambiguity & then 2) to determine T's intent. (E.g., which cousin John?).
 - (b) Patent ambiguity: ambiguity apparent on the face of the W. No extrinsic E admissible.
 - 2) CA statute (Modern): Parol E admissible for *any* type of ambiguity to determine T's intent
- E) Mistake in validity of a subsequent testamentary instrument (dependent relative revocation):**
- 1) Rule: When the T effectively revokes his W + upon the mistaken belief that another disposition of his property validly effectuates her intent + and the revocation was solely dependent and conditional on the validity of the alternative disposition, the revocation is set aside. Consequently, the original W remains in force.
 - 2) Note: When interlineation is LESS Than canceled provision, DRR not used & devisee gets nothing. E.g., Scrooge leaves \$1500 for Cratchit & then interlineates \$500. DRR not used. Cratch gets \$0
 - 3) Rationale for rule: Equity. Not enforcing it: T's property would pass in intestacy.

- 4) Ways T can revoke W: Revocation by physical act (burning, tearing, destroying, canceling, crossing out w/pen/pencil) or Subsequent instrument (then extrinsic E not admissible to show mistake – E.g., W2 expressly revokes W 1).
- 5) Misc:
 - (a) W 1 & W2/codicil/trust must be substantially the same (but for the mistake)
 - (b) Consider CA's lost provisions stdn: If T revoked W1 by physical revocation: W 1 can still be probated if lost/accidentally destroyed W + at least 1 W (whether or not attesting) remembers the terms of the W (e.g., L).
- F) Mistake involving living kids (pretermisssion):
 - 1) Rule: A child is pretermitted if she is born/adopted AFTER all testamentary instruments are executed & not provided for in ANY Testamentary instrument (includes W, codicil & revocable inter-vivos trust). Gets intestate sh
 - 2) Corollary: A child born/adopted BEFORE testamentary instruments executed not pretermitted and gets NOTHING.
 - (a) EXCEPTION: A child born/adopted before testamentary instruments executed still receives protection of pretermisssion if: child not provided for in testamentary instrument SOLELY bc testator thought child was dead/didn't exist- mistake.

SECTION FOUR: The "4 R's"- Revocation, Republished, Revived, or DRR

V Codicils: REVIEW

- A) Definition: A T instrument executed in compliance w/California Probate Code requirements. It modifies, amends or revokes a W.
- B) Functions of a Codicil:
 - 1) Codicil May Republish a W: Effect: Causes the W "to speak from the date that the codicil was executed." 2 common situations:
 - (a) Pour over wills and incorporation by reference: E.g., Problem.
 - (i) 1/1 T executes inter-vivos trust. 1/2 T executes W w/pour-over provision (supra). 1/3 T amends trust. Trust can't be probated by incorporation by reference bc it was modified & therefore wasn't in existence at time of execution.
 - (ii) BUT codicil is solution. If on 1/4 T executes a codicil which republishes W, codicil causes W to speak from 1/4. Incorporation by reference of trust bc trust as modified existed at time W executed
 - (b) Pretermisssion problems: The Problem: E.g., Yr 1 W executed leaving all to charity. Yr 2 Child born! Yr 3 codicil executed (republishes W). Child gets no pretermitted protection. **IMPORTANT TIP:** discuss why child gets no pretermisssion protection under BOTH theories 1) codicil republication – causes will to speak from Yr 3 & 2) codicil is T instrument & ch born before
- C) Revoking the Codicil: 2 fact patterns
 - 1) If T executes a W, then executes a codicil & then revokes codicil: Rebuttable presumption T intended only to revoke codicil
 - 2) If T executes a W, executes a codicil & then revokes W: rebuttable presumption T intended to revoke both W & codicil (Makes sense bc codicil meant to amend, modify W)

REVOCATION OF THE WILL: 1) by physical act 2) by subsequent

VI Revocation of the Will by Physical Act: Cancellation

- A) Requirements: (3)

- 1) W/must be burned, torn, cancelled, destroyed or obliterated. (Cancellation: lined out. Pen/pencil – contrast w/interlineations – writing bw lines; Obliterated: erased)
 - 2) T must have simultaneous intent to revoke (E.g., think concurrence bw AR & Mens Rea). Consider lost wills provision (E.g, if T accidentally destroys W)
 - 3) The act must be done either by T OR someone in T's presence + at T's direction (E.g., No revocation by arson).
- B) ESSENTIAL TIP: ALWAYS CONSIDER THE POSSIBILITY OF DRR W/REVOICATION.** Note: When interlineation is LESS Than canceled provision, DRR not used & devisee gets nothing.
- 1) E.g., W reads "I leave \$100,000 to Mother Theresa." I cross out \$100K & write in \$99K.
 - (a) 99K does not result in valid holo bc material provisions not in my handwriting. But apply DRR. My revocation of 100K is conditional & dependent on my belief that 99K devise was effective. Bc 99K devise was not valid, under DRR my 100K devise would not be deemed revoked.
 - (b) E.g., I leave \$100K to Red Cross." I find out Red Cross is shady. I write in "leave 50K to red cross." Interlineation. Not a valid holo codicil. Ct won't apply DRR bc less than. So Red Cross gets 0. Effect: 50K goes 1) to residuary devisees or 2) intestacy heirs
- C) Cancellation to increase a gift is prohibited.** E.g., Dad leaves \$100 to Rajan and Meera. Dad crosses out Meera when Meera supports the jury system. Rajan gets ½ of \$100 & the other ½ goes to residuary devisees & if none, to intestate heirs (Mom).
- D) Writing "Null & Void" across the face of a will isn't a valid holo codicil UNLESS signature to the change but constitutes a cancellation**
- E) Duplicate Wills:** Duplicate originals. Revocation by physical act of one works a revocation on the other
- F) Mutilated Ws:** If W found in mutilated condition at T's death + last seen in T's possession: Rebuttable presumption T meant to revoke it. Consider: 1) was T the only one who had access

VII REVOCATION BY SUBSEQUENT WRITTEN INSTRUMENT: Consider: manner of revocation and revival

- A) Manner of Revocation: Express or Implied**
- 1) Express Revocation: W #1 revoked by W #2 if W 2 says "I revoke all previous Ws"
 - 2) Implied Revocation: W #1 revoked by W #2 if W 2 disposes of ALL of T's estate (W #1 no function). "**Hugh Hefner**"
- B) Revival: Limited. 2 common situations**
- 1) Revocation by physical act: T executes W # 1, executes W #2, Revokes W #2. Whether or not W # 1 revived: Not automatically revived. Revival only if T manifests intent to revive W 1. Consider extrinsic E – e.g., oral statements of T made during W 2's revocation (e.g., "w 1 in operation" admissible to show T's intent but not "now everything back the way it should be bc not clear)
 - 2) Revocation by subsequent instrument: T executes W #1, then W #2 which revokes W # 1 (expressly or impliedly). Then T executes subsequent codicil to revoke W #2. Same rule – need E of T's intent to revive W.

VIII REVOCATION BY OPERATION OF LAW: Consider 1) omitted child 2) omitted spouse 3) omitted domestic partner 4) final dissolution of marriage/termination of domestic partnership

A) Omitted Child: Definition + Exception

- 1) Definition: A child born/adopted after all T instruments are executed and not provided for in any T instrument (T instrument broad: includes W, codicil, or revocable inter vivo trusts created during D's lifetime)
- 2) Consequence: omitted child gets intestate sh of D's assets owned at death + assets held inter vivos trust. For omitted child to get statutory share other gifts will be abated: thus, revocation by law
- 3) Exception where ch won't take statutory sh (3):
 - (a) D provides for transfer outside T instrument w/intention transfer be in lieu of (e.g., annuity)
 - (b) D' failure to provide for ch was intentional AND intention appears from T instrument

- (c) D has 1+ children & transferred by W/revocable inter vivos trust substantially all of estate to parent of omitted child. Rationale: parent will financially provide. (E.g., T & X have a kid together unmarried. Then T executes W & doesn't name Ch 1. Ch 1 not pretermitted. Gets 0. After W executed, T & X have Ch 2. On T's death, T gave all estate to X. Ch 2 doesn't get intestacy sh)
- 4) Order of Abatement for OMITTED CHILD, SPOUSES, and DPS (NOT the same as abatement for general debts):
 - (a) First: abate property not passing by D's W/revocable inter-vivos trust; 2nd abate from all B's of T's W/revocable inter-vivos trust pro rate - in proportion to gift received – make no distinction bw specific, general & residuary gifts. (Exception for specific gifts: if it would defeat T's obvious intent)
- B) Omitted Spouse: Definition + Exception
 - (a) Definition: a suing spouse who married the decedent AFTER execution of all T instruments AND is not provided for in any T instruments.
 - (b) Consequence: gets intestacy sh of D's assets owned at death + assets held in inter vivos trust so: 1) ½ CP so Spouse left w/100% CP or in revocable inter vivos trust 2) ½ QCP 3) intestacy sh of SP – BUT won't exceed ½ value of sep property. Bc other gifts will have to be abated for omitted spouse to get protection, revocation by law.
 - (c) Exceptions: (3): 1st 2 same as above. But ALSO Spouse may sign a WAIVER: voluntary relinquishment of a KNOWN right BEFORE/DURING marriage.
 - (i) What can be waived: Any probate rights: homestead, family allowance, intestate sh & right to take as omitted spouse
 - (ii) 4 Reqs for valid waiver:
 - (1) Writing + signed by Waiving spouse before/during marriage
 - (2) Fair & full disclosure (EXCEPTION: waiving spouse had/should have had knowledge of T's finances OR waiver in fact fair – e.g., waived \$100K worth of rights but got \$100 worth)
 - (3) Independent counsel by waiving spouse
 - (4) Waiver not unconscionable
- C) Omitted Domestic Partner: Definition: 1) same sex OR opposite sex + 62 yrs AND 2) decl domestic partnership w/Sec of State; same rules apply.
- D) Final Dissolution of Marriage/Termination of Domestic Partnership: revokes devise if annulment, dissolution or termination BUT devise reinstated if W changed & remarries/re-establishes DP

IX Revocation by Change in Property Holdings:

- A) Revocation Depends on the Classification of the Gift: Step 1 Classify the gift (4 types)
 - 1) Specific Devise: gift of a particular item that T objectively appears to have intended B to take. E.g., shares of a corp closely held/not publicly traded, "my" 100 shs of Google, real estate, antiques. Consider: ademption by extinction but generally not ademption by satisfaction
 - 2) General Devise: gift payable out of the general assets of D's estate. E.g., 100 shs Google, \$10. Consider: ademption by satisfaction
 - 3) Demonstrative Devise: a gift from a particular fund which, if the fund is insufficient, allows the executor to satisfy the gift through D's general property. Hybrid of specific & general. E.g., I leave \$100K from my WAMU account to Mother Theresa. Only \$99K in WAMU. Mother Theresa can recover \$1K from my general assets
 - 4) Residuary devise: All other property not expressly disposed. "Residue to X," "Balance of estate to X"
- B) Abatement of Gifts: if D's estate not sufficient to satisfy gifts.
 - 1) Order: 1) intestate property 2) residuary 3) general gifts to non-relatives/rel 4) specific gifts (same)
 - 2) Gifts to Bs abated to achieve statutory sh for omitted child, spouse or Domestic partner (all)
- C) Ademption by Extinction: devise is adeemed when it objectively appears D did not intend it to pass + it is not part of D's estate at death/has been a material change to it.
 - 1) Common Fact Situations:

- (a) Securities changing form (mergers, stock splits, dividends reorganization etc. ABC → XYZ. Devise 100 sh ABC → 100 sh XYZ to B. No ademption)
- (b) Conservator selling off assets. No ademption & B takes net sales price. E.g., Devise of Spring Valley Lake. Conservator sells. No ademption & B gets net sales price)
- (c) **Eminent domain awards, casualty awards or installment sale of property where T holds deed of trust as security for sale:** No ademption if paid AFTER T's death; if paid before D's death & proceeds easily traceable, B can argue T did not intend gift to be adeemed. No ademption
- (d) D provides for transfer outside T instrument

D) Ademption by Satisfaction: Applies only where D dies TESTATE

- 1) Definition: T gives B an inter-vivos 'down-payment' on a devise.
- 2) 4 ways to establish: 1) The writing itself provides for a deduction of the inter vivos gift OR 2) T declares in contemporaneous writing that gift is satisfaction OR 3) B acknowledges in writing at any time the satisfaction OR 4) property given in satisfaction is same as subject of specific gift – ademption by extinction (e.g., piano)
- 3) Where satisfaction not given in cash, determining the value of the property: 1) either the value of the satisfaction expressed in contemporaneous writing OR if none 2) the fair market value measured in time transferee came into possession
- 4) If B receives satisfaction but pre-deceases T: anti-lapse statutes may apply

E) Advancements: Similar to ademption by satisfaction BUT applies only when D dies INTESTATE

- 1) 2 ways to establish: 1) Intestate declares in contemporaneous writing gift is advancement or 2) heir acknowledges in writing the same
- 2) Distinction from ademption: If heir receives advancement but predeceases – NOT tx as having receiving an advancement
- 3) Where advancement not given in cash: value it same as w/ademption by satisfaction

F) Exoneration: No exoneration. Devise is subject to any lien, even if directive in instrument to pay debt. Must expressly have estate pay out federal taxes.

X Revival: CA law: Revocation does not automatically revive (see above)

XI Republication: See above

SECTION FIVE: Misc

XII Contracts to Make OR not make a Will/Devise

A) Exception to General Rule: K may make a Will/Devise Irrevocable

- 1) General Rule: Will are ambulatory: freely revocable. E.g., I can devise residuary to Red Cross & then to Mother Theresa
- 2) EXCEPTION: If K bw T and a 3rd person providing that T will not revoke W/devise.
- 3) Consequences for breach: T is deemed "in breach" of K and at T's DEATH, c/a accrues bc possible T will comply. EXCEPT: c/a may accrue during T's lifetime if engaging in conduct that would be a FRAUD on promise (i.e., irreparable harm. 3rd party may get injunction)
- 4) 5 Alternative Ways to Make a K not to revoke/to make a W:
 - (a) The W/other instrument (e.g., trust) states the material provisions on the K w/express reference
 - (i) Parol E – including oral T – admissible to establish material terms of K (consideration, parties etc) & SOF not issue even though K for real property
 - (b) There is a writing signed by D evidencing a K
 - (c) There is clear & convincing E of agreement bw D & promisee. Enforceable in equity/estoppel
 - (d) There is clear & convincing E of agreement bw D & 3rd person for benefit of claimant. Enforceable in equity/estoppels

XIII Joint and Mutual Wills

- A) Joint Will: the will of 2+ persons executed w/intent to serve as the will of each AND on 1 doc.
 - 1) No req provisions be reciprocal.
 - 2) Probated as many times as there are number of ppl (e.g., when person A dies, then when B dies)
- B) Mutual (a/k/a "Reciprocal" Ws): the SEPARATE Ws of 2+ ppl containing reciprocal provisions (H & W)
- C) Joint & Mutual Wills DO NOT CREATE a presumption of a K to not revoke OR to make a W, but may be E of a K
- D) Remedies Against Promisee: 1) P can sue D's estate for damages 2) specific performance from executor & 3) constructive trust of disputed property

XIV Substitute for Will: Gift Causa Mortis

- A) Definition: Gifts of personal property perfected by delivery & made in contemplation of imminent death. Delivery may be 1) Actual: corpus itself transferred 2) Symblic: e.g., writing E ownership, quarterly statement or 3) constructive: when donor did everything possible to effectuate delivery & no fraud/mistake (equity)
- B) If Donor survives – gift revoked by operation of law

SECTION 6: Restrictions on T Dispositions

I Community Property, Separate Property & Quasi Community Property

- A) Community Property State (CA): Consider the nature of the property and who survives D
 - 1) Community Property: All property acquired during marriage/DP + while domiciled in CA + that is not SP.
 - 2) QCP: All personal property wherever situated + all real property in CA + acquired by D while domiciled elsewhere + that would have been CP if D had been domiciled in CA when he acquired it
 - 3) Separate property: All property acquired before marriage/DP AND during marriage/DP from gift, bequest or devise + any resulting rents/profits
- B) Restrictions on T's disposition:
 - 1) T can dispose only ½ of CP or ½ of QCP bc spouse has a ½ interest. If T tries to dispose of more: WIDOWER'S ELECTION: Survivor may take "under the W" (may accept the gift in Ts W in lieu of statutory right) or "against the W" (may renounce benefits in W in lieu of statutory right)
 - 2) inter-vivos transfer by D to 3rd person w/o consideration allowed (bc of ownership interest) BUT not where SS/DP invokes widow's election
- C) Killers Can't Keep
 - 1) A person found to have feloniously & intentionally killed D MAY NOT inherit D's property by W or intestacy. Established by criminal conviction/guilty plea (conclusive) OR probate ct may find by preponderance of E
 - 2) Consequence: Estate pass as if killer predeceased D but anti-lapse statute not applied so K's issue will not take (a) Note: If killing by a Joint Tenant, Killer loses right of survivorship but not ½ interest.
- D) Adopted Kids: treated as the natural child of adoptive parents & can inherit through them; ties w/natural parents are severed & do not inherit unless natural parents expressly provide in T instrument
- E) Non-Marital Kids: CA Rule – May inherit from Mo by virtue of Mo giving birth but may inherit from Fa only if Fa acknowledges child, is married to Mo during time of birth, or ct decree of paternity. If DP, a parent child relationship established by presumption if: 1) ch born during DP 2) DP formed/attempted in lawful manner after ch's birth + non-birthing parent named on birth certificate or 3) non-birthing DP makes voluntary promise to pay child support/ordered by ct
- F) Half bloods: relatives w/only 1 common parent (e.g., step sibs). Inherit the same as whole bloods. E.g., may inherit from both.
- G) Posthumous Kids: kids who are conceived during T's lifetime but born after T dies. Deemed heirs & B

- H) Stepkids/Foster Kids: Tx as being adopted if 3 elements 1) relationship began during kids' minority 2) continued through parties' lifetimes & 3) clear & convincing E they would have been adopted but for a legal barrier (e.g., natural parents' consent)
- 1) Equitable adoption: adoption by estoppels When parties hold themselves out as parents to kid
- I) Lapse & Anti-Lapse Statutes:
- 1) Common Law: B must survive T or gift lapses & passes to residuary devisees. If none → intestacy
 - (a) BUT: If Devise is to a class: E.g., "To the children of X" – divided among X's surviving kids so doesn't lapse
 - 2) CA: Anti-lapse statute: Issue of deceased legatee take by right of representation if issue is a blood relative of T OR T's surviving, former or deceased spouse – UNLESS W expressly provides otherwise.
- J) Simultaneous Death:
- 1) Traditional Rule: When 2 ppl die at the same time & it can't be established who predeceased whom, the property of each D is tx as though he predeceased the other.
 - (a) JT: ½ property goes to estate of ea JT; Insured & B: tx as though insured outlived B; H & W: ea get ½ CP & QCP bc tx as surviving ea other
 - 2) Modern rule: prb w/litigation: One who does not survive T by 120 hrs is tx as if predeceased T. Clear & convincing E

SECTION 7: INTESTACY

II Intestacy (SP: Remember – CP & QCP go to the surviving spouse).

- A) If Spouse Survives:
- 1) spouse takes 1/3 if D survived by 1 child AND the issue of deceased child OR issue of 2+ deceased children. 2/3 go to 2 kids
 - 2) spouse takes ½ if D survived by only 1 child/issue of a deceased child OR no issue but parent or issue of parent. If 1 kid, it's split.
 - 3) Spouse takes all if D leaves no issue, parent, siblings or issue of deceased siblings.
- B) If Spouse does not survive:
- 1) To issue → to D's parent(s) → issue of parents/D's siblings → to grandparents → issue of predeceased spouse → Next of Kin (infra) → the parents of predeceased spouse/their issue → escheat
- C) General Principles of Intestate Succession:
- 1) If surviving issue are all the same degree, they take equally or "per capita"
 - 2) If issue are of unequal degree, issue of more remote degree take w/right of representation.
 - 3) Next of Kin: Look to degree of kinship. If relatives are of the same degree but have different ancestors, those who claim through ancestor nearest to D take to exclusion of others.
 - 4) 2 different methods:
 - (a) CA: D's estate divided into equal shares in generation closest to T where there is a survivor & more remote generations receive a sh of right of representation
 - (b) Pure Per Stirpes: D's estate is divided into equal shares in generation closest to T, regardless of whether they are living or dead