

WILLS & TRUSTS
4&5 February 1998

WILLS

I. INTESTATE SUCCESSION

- Probate: the court proceeding in which it is judicially determined that a decedent left a validly executed will (or that decedent died intestate) and also a *personal representative* (executor of will or court appointed administrator for intestate) is appointed to administer the decedent's estate
- Intestate Rules apply either (1) when decedent left NO WILL (or the will was not validly executed, (2) will does not COMPLETELY dispose of the estate (resulting in *partial intestacy* or (3) an heir successfully contests the will and the will is DENIED in probate or (4) the testator MARRIES after the will's execution in which case the will is REVOKED by Law. Intestacy rules are also invoked for issues concerning the OMITTED child statute

A. Intestate Decedent Survived by Spouse

- When an Intestate decedent is survived by a **SPOUSE + ISSUE**, whether the issue are from this marriage or an earlier marriage, the SURVIVING SPOUSE **takes ½ of the Estate**, and the Issue split the remainder of the estate per capita by representation
- When an Intestate Decedent is Survived by a **SPOUSE + Other KINDRED** but no issue, the SURVIVING SPOUSE takes the **1st \$200,000 of the Estate + ½ Balance** (with the other half of the balance going to the other Kindred)
- When an Intestate Decedent is Survived by a SPOUSE but neither Issue nor Kindred, the SURVIVING SPOUSE Inherits the ENTIRE ESTATE (rare to have NO kindred, since MA has no limit on the degree of kinship)

Intestate Decedent Survived by: who gets what?

Surviving Spouse + Issue	Surviving Spouse ½, Issue ½ per Capita by representation
Surviving Spouse + Other Kindred (no Issue)	Surviving Spouse \$200,000 + ½ Balance, Other Kindred ½ Balance
Surviving Spouse (no issue no kindred)	100% Surviving Spouse

- The \$200,000 for the Surviving Spouse comes exclusively from the Decedent's personal property. However, if the Personal Property is insufficient, only then may the Administrator sell or mortgage any real property

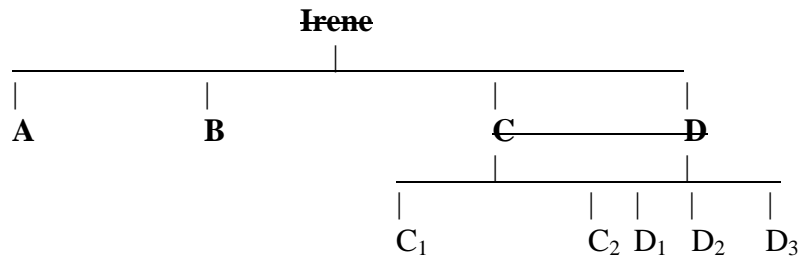
B. Other Statutory Rights of Surviving Spouse

- Whether by Will or Intestate, should discuss the following rights in any answer dealing with surviving spouses. These Statutory Rights Take Precedence over any Creditor's Claims.
- **Right to Occupy Residency for 6 Months** – Spouses may remain in the house of a deceased spouse for 6 months WITHOUT CHARGE for Rent (only relevant if property in name of deceased spouse and NOT Joint Tenancy or Tenancy by the Entirety)
- **Spouse's Allowance** – Upon PETITION, the Probate Court may grant the Surviving Spouse an Allowance to provide for the NECESSITIES for a short time

until the spouse has an opportunity to adjust herself to the new situation. The Amount of the allowance is within the court's discretion.

C. Inheritance by ISSUE: Per CAPITA with Representation

- For Inheritance, it is PER Capita with Representation at the next level. If no living people at a level, go down to the next level of generation by representation.
For Example Irene, a widow, dies intestate survived as follows.
 Distribution?



$A = \frac{1}{4}$ $B = \frac{1}{4}$ ($C = \frac{1}{4}$ & $D = \frac{1}{4}$) ergo, C_1 & $C_2 = \frac{1}{8}$, $D_1, D_2, D_3 = \frac{1}{12}$

For Example: If however, A & B also pre-decease Irene, then since $C_1, C_2, D_1, D_2, \& D_3$ are each at the same generational level, then they would each be entitled to $\frac{1}{5}$.

For Example: If same thing, except B also had a will wherein he left everything to his wife Mrs. B. Mrs. B would Not be entitled to anything from Irene since SPOUSES of Children are NOT Descendants and CANNOT take by representation. Plus, B's share is a mere expectancy before Irene dies and is not really a property interest.

D. Intestate Decedent NOT survived by Spouse or Issue

- For an intestate decedent who is survived neither by spouse nor issue, then:
 - All to **parents** ($\frac{1}{2}$) each OR surviving parent (all)
 - If no surviving parents, to **issue of parents** who take **PER CAPITA by Representation** (brothers, sisters, issue of deceased siblings)
 - If no surviving parents, siblings, or descendants of siblings, then to NEXT of KIN in nearest degree of kinship (no limit on degree of kinship to qualify as an heir). Only if no living kin does the property *excheat* to the State
- Massachusetts has ABOLISHED the Distinction between Collateral Kindred of the $\frac{1}{2}$ blood and whole blood. Now $\frac{1}{2}$ brothers = whole brothers for purposes of inheritance (\neq common law where collateral kindred of the $\frac{1}{2}$ blood would take only $\frac{1}{2}$ as much as the whole bloods)

E. Adopted Children, Children Born out of Wedlock

- **Adopted** Children and their Issue have FULL inheritance rights from the Adoptive Family (& vice-versa)
- As soon as a Child has been adopted by a NEW Family, the Child has NO INHERITANCE rights from the Natural Parents or their Kin EXCEPT where the child is adopted by Spouse of a Natural Parent After another natural parent has died
- For an *out-of-wedlock* Issue to inherit from a NATURAL father require EITHER:
 1. ***Mother & Father MARRY Post-birth and father acknowledges the child as his own***
 2. ***Paternity is Established in a Paternity suit***
 3. ***Paternity is Established in PROBATE proceedings in an action commenced within 1 YEAR of decedent's death***Otherwise, the out-of-wedlock Child CANNOT inherit from a father
Out-of Wedlock Child can ALWAYS inherit from an intestate mother
Note: The *unadopted step-child* has NO LEGAL relation to his father and may not inherit from his unadoptive step-father UNLESS **adoption by estoppel** (an unperformed agreement to adopt...i.e., the step-father dies before the adoption process is completed)

F. Deaths in Quick Succession

- Under the MA **Uniform Simultaneous Death Act**, when title to property depends on the order of death and there is NO *sufficient evidence* that the persons have died otherwise than simultaneously, then the **property of each passes as though he or she survived**
 - Intestacy***: as though the intestate survived & heir pre-deceased
 - Wills***: As though testator survived and beneficiary pre-deceased
 - Insurance***: as though insured survived and beneficiary pre-deceasedIf Joint Tenants or Tenancy by the Entirety, ½ as though A Survived & ½ as though B survived. Defeat Right of Survivorship & create more or less a Tenancy in Common
Note; MA did not adopt the **120 hour rule** under which a person must survive for 120 hours in order to take. Thus in MA, if survive by 1 second, will take.

G. Lifetime Gifts to Heir or Will Beneficiary

- A LIFETIME Gift to an Heir is NOT an advancement of a bequeath/intestacy share **Unless**
 1. **It was DECLARED as such in a CONTEMPORANEOUS WRITING by the Donor OR**
 2. **ACKNOWLEDGED as such in a WRITING by the Donee**
- A pre-payment in Satisfaction of a Legacy is NOT a Satisfaction of that legacy UNLESS
 1. **It was DECLARED as such in a CONTEMPORANEOUS Writing by the Donor OR**
 2. **ACKNOWLEDGED as such in a WRITING by the Donee OR**
 3. **The Will provides for Reduction of Legacies by any lifetime gifts**

H. Disclaimer by Heir or Beneficiary

- Nobody can be compelled to be a beneficiary or heir against her will
- An intestate heir, will beneficiary, beneficiary of a life insurance policy, or employee benefit plan, or any other interest in property can **DISCLAIM**, in whole or in part.
- A Disclaimer, ONCE MADE, is **Irrevocable**
- **To be a Valid Disclaimer, Require:**
 1. *In Writing & Signed* (Real property requires Notary Public to witness and an attested copy to be recorded in county where land located)
 2. *Filed in the Probate Court within 9 months after decedent's death*
 3. *All interests can be disclaimed. HOWEVER, Joint Tenants or Tenants by the Entirety can Disclaim ONLY to the Extent the deceased party FURNISHED consideration for the property's acquisition.*
 4. *Disclaimer may be Partial*
 5. *Personal Representatives may Disclaim on behalf of a deceased beneficiary or heir (tax), and a guardian or conservator may disclaim on behalf of an Incapacitated Beneficiary or Heir BUT ONLY if the probate court finds such disclaimer to be in the Best INTEREST of the ESTATE of such beneficiary or Heir*
- If an Heir or Beneficiary **DISCLAIMS**, then the Estate Passes AS THOUGH the Disclaimant **Pre-deceased the DECEDENT**
- However, Disclaimers CANNOT be used to defeat the claims of a creditor if a Disclaimant is INSOLVENT (though it is perfectly valid to disclaim for tax purposes)

I. Non-probate Assets

- Non-probate Assets are interests in Property that DO NOT PASS under the decedent's will or intestacy and are NOT part of the Probate Estate. Major types of non-probate, non-testamentary assets are as follows:
 1. **Property Passing by Right of Survivorship** (joint bank accounts, joint tenancy, tenancy by the entirety, etc.)
 2. **Property Passing by Contract** (Life Insurance, employee retirement benefits paid to beneficiary other than insured's executor or estate)
 3. **Property Held in Trust** (including a revocable trust, where the trust governs the distribution of the assets)
 4. **Property over which the Decedent held a POWER of Appointment**
Note; if have an insurance contract naming Beneficiary₁ and a Will naming that Beneficiary₂ should receive the proceeds from the insurance, the Insurance Contract will govern the change of beneficiary over the change in the will, i.e., can't change an insurance beneficiary by will (since it is a valid non-probate asset). The only way to change it is through the terms of the contract.

II. EXECUTION OF WILLS

A. Requirements for a Validly Executed Will

1. **Testator is at least 18 years old**
 2. **Will is Signed by the Testator** (or by someone at T's Discretion and in her presence – a *proxy* signature)
 3. **Two Attesting Witnesses**
 4. **Testator must SIGN will in Each Witness's Presence**
 5. **Each Witness must Sign & Attest in Testator's Presence**
- Unlike Some States, MA DOES NOT Require the following:
 - T sign at 'foot' or end of will (in MA, signature can be anywhere)
 - Witness KNOWLEDGE that they are witnessing a will as opposed to any other legal document (MA has NO Will publication requirement)
 - Witnesses sign in EACH other's presence (MA, witnesses Need only sign in the Presence of the Testator, can be separate)
 - As long as Testator makes a **volitional act** in signing the will, it is irrelevant that somebody helped her with the pen. If proxy, require AT her Direction and In her presence
 - Signature need not be legible, just a Present intention to manifest a signature
 - MA **strictly construes** requirement that the Testator sign the will before the Witnesses attest to the execution of a valid will (1910 & 1911 cases), MA has not quite reached the point of saying a **contemporaneous transaction** is sufficient (like some other states) which hold that the precise ordering of signature (T -> W or W -> T) does not matter so long as Contemporaneous transaction

B. "Presence" in front of a Testator

- In MA each testator must sign his will (or **acknowledge an earlier signature**) in the **presence** of each witness; and Each Witness must attest & sign the will in the **presence** of the testator. **What is presence**
 - Many other States: **Conscious Presence Test**: not necessary for the testator to actually be able to see the witnesses when they sign. Presence occurs whenever the testator is so near to the witnesses that he is Conscious of where they are and what they are doing as if he could see them if he looked
 - MA has adopted the **Line of Sight (Scope of Vision) Test** meaning that the Witnesses **MUST BE IN THE TESTATOR'S LINE OF SIGHT**. However, the Testator Need not Actually View them (i.e., testator can look away). Just require that there be **NO impediment to visual contact**

C. Interested Witness Statute

- An INTERESTED Witness (both a beneficiary and an attesting witness) NEVER affects the **validity** of the will (i.e., it can still be admitted to probate), however the BENEFICIARY will lose his **legacy unless** there were **2** dis-interested attesting witnesses (the *supernumerary rule*)
- If the interested beneficiary loses his legacy, that money becomes part of the **residuary clause gift**
- If a **Spouse** of a Beneficiary is an (Interested) Witness, that legacy will be **purged**
- **Interest is Determined at TIME the Will is signed** (so if spouse to a beneficiary divorces beneficiary a year later, still an interested witness at time attested)
- Interested Witness Statute Applies **ONLY** to Beneficial Gifts, NOT Earned Compensation (somebody named to be an executor who also is a witness is NOT an interested witness because that compensation from serving as an executor must be earned)
- The Interested Witness Statute Does **NOT** apply if the interested witness was only a **Contingent Beneficiary** (i.e., some event outside of the will needed to occur before the contingent beneficiary could take). Thus **ONLY vested pecuniary benefits** trigger the Interested Witness Statute

D. Holographic Wills, Oral Wills

- **MA** Does NOT Recognize Holographic Wills (wills in the handwriting of the testator and signed, but not witnessed by any attesting witnesses)
- **MA** Does, though, Recognize **ORAL (non-cupative)** wills under VERY LIMITED Circumstances. Only valid for *soldiers in active military service & mariners at sea*; APPLIES ONLY to **personal property** (NOT Real Property)
- Under the **Uniform Execution of Foreign Wills Act**, a will executed in another state is admissible to probate in MA if it was Executed in ACCORDANCE with:
 - Massachusetts Law*
 - Execution Law* (valid under the law of the jurisdiction where executed)
 - Domicile Law* (valid under the law where the testator was domiciled either at time of execution or time of death)ERGO, under this statute, a HOLOGRAPHIC will written in TEXAS would be admissible to probate in MASSACHUSETTS because Texas Recognizes Holographic Wills

III. REVOCAION OF WILLS

A. Valid Revocation

- Wills may be Revoked ONLY by
 - (1) *later testamentary instruments* which are executed with proper formalities
 - (2) *Physical acts of destruction*, (a mere intent to revoke or destroy is insufficient, require actual destruction), (anything re: signature is a valid act of destruction to revoke a will) (To be a Valid Revocation by Physical act by Proxy, like having your attorney destroy it, must be at Testator's Direction and in Testator's Presence—like executing a will)OR
 - (3) *Operation of law*
- If Will Destroyed, but NOT VALIDLY REVOKED, then proof of the destroyed will is required. *Proof of the Lost Wills Rule*. May introduce extrinsic evidence to establish
 - **Proof of Due Execution** (via testimony of attending witnesses)
 - **Cause of Will's Non-production** (must OVERCOME the presumption of Revocation)
 - **CONTENTS** (proved by secondary evidence, like a XEROX, or TESTIMONY but the testimony must be *strong, positive and free from doubt* before it is admitted)

B. Presumptions as to Revocation

1. Where a Will, last seen in Testator's Possession or control is NOT FOUND after death, presume Testator REVOKED IT by PHYSICAL ACT
 2. Where a Will, last seen in Testator's Possession or Control, is found MUTILATED after testator's death, presume that Testator Did the Mutilating (i.e., Revocation by Physical Act)
 3. *NEITHER* presumption arises if the Will was LAST seen in the possession of someone Adversely Affected by its contents
 4. *Extrinsic Evidence is Admissible* to REBUT the presumption of Revocation where the Will cannot be found or is found in damaged condition (like if the will is destroyed along with the testator in a house fire)
- Note: If a Testator executes 2 last wills, and in the 2nd Last will, there is no express revocation of the 1st will, then the 2nd Last will acts as a *Codicil* to the first will and revokes only to the extent of inconsistent provisions from the first will. If the 2nd will is *wholly inconsistent* with the 1st will, then the 1st will is *revoked by implication*. Revocation of a Codicil to a Will does not Revoke the Will, the part of the will that was modified or revoked by the codicil is Restored and takes affect as though the codicil had never been written.

C. Revival of Revoked Wills

Common Law; There is NO Revival of Revoked Wills. Once Testator executes a 2nd will containing a clause revoking earlier wills, all earlier wills are legally dead. No revival unless either (1) re-executed or (2) the doctrine of *republication of codicil applies* (testator validly executes a codicil to Will 1 that makes various changes?)

MA: A Revoked Will is NOT *revived* unless

- (1) *the will is still in existence* (not physically destroyed) AND
- (2) *there is evidence that the testator intended to revive the earlier will*

D. Dependent Relative Revocation

- Dependent Relative Revocation Permits a Revocation to be **disregarded** when the act of revocation was **premised** upon, conditioned upon, dependent upon a **Mistake of Law as to the Validity of another Disposition**. Effect is to Disregard the mistaken revocation of a prior will and admit is to Probate.
- Dependent Relative Revocation is sometimes referred to as **the Second Best Solution Doctrine** (the best solution, which would admit to probate the full intent of the testator of a validly executed 2nd will is impossible since it is defective in some way; ergo the 2nd best is to admit the revoked will, because it is closer in intent than a mere intestacy, probably)
- Dependent Relative Revocation should NOT be applied **unless** the distribution that results from disregarding the revocation comes closer to doing what the testator tried (but failed) to do than an intestate distribution
- If a Will was revoked, based on a mistake of law as to the validity of another disposition, by PHYSICAL DESTRUCTION, and want to used Dependent Relative Revocation to admit it to probate, may also Require the **Proof of Lost Wills Rule**

E. Changes on the Face of a Will After it has been Signed & Witnessed

- *Partial Revocations by Physical Act are VALID in MA*
- Words ADDED to a Will after it has been Signed & Witnessed are DISREGARDED.
- However, say a Testator strikes out a \$2,000 and inserts a \$5,000. That \$5,000 is not valid and is to be disregarded since it was added after the will was signed and witnessed. However, by striking out that \$2,000, it was a partial revocation and could shut out the beneficiary. However, the beneficiary will not be left out, but rather will get the original \$2,000 under the *Dependent Relative Revocation Rule*.
- But, when the GIFT is REDUCED, it is CLEAR EVIDENCE of INTENT that the Testator did not want the Beneficiary to receive the \$2,000. Thus, this means that the Dependent Relative Revocation Rule is INAPPLICABLE. So, if the gift is reduced, it acts as a PARTIAL REVOCATION, but rather than getting \$500 instead of \$2,000, since it was not a Relative Revocation Rule applicable, the Beneficiary will get NOTHING

IV. **BENEFICIARY DIES DURING TESTATOR'S LIFETIME**

A. **Anti-Lapse Statute**

- When a Will Beneficiary PRE-DECEASES the Testator, the GIFT LAPSES (cannot make a gift to a dead person) **unless** the gift is saved by the State's **Anti-Lapse Statute**
- The MA Anti-Lapse Statute applies if the PRE-DECEASING Beneficiary was a **Child OR Other Relative by Blood or Adoption** of the **Testator** **AND** the pre-deceasing beneficiary left ISSUE who survived the Testator
- The Statute defines the Substitute Takers, regardless of the express intent in the Pre-deceased will
- If the Bequest Lapses and the Anti-lapse Statute does not apply (because the pre-deceased beneficiary left no issue) then the lapsed gift **falls into the residuary estate** and passes under the will's residuary clause
- Do Not Confuse Anti-lapse statute with Failed Conditional Gifts "if he survives me" type gifts are not the same as pre-deceased lapsed gifts saved by the anti-lapse statute

B. **Lapse in the Residuary Estate – Surviving Residuary Beneficiary Rule**

- The Anti-Lapse Statute applies to RELATIVES ONLY, and not to FRIENDS
- If a Residual Beneficiary, who is not related to the testator, pre-deceases the testator, then his share is split amongst the other residual beneficiaries
- If a Residuary Estate is DEvised to **2 or more** persons and a gift to one of them lapses, the **surviving residuary beneficiaries** take the ENTIRE Residuary estate, in proportion to their interests in the residue (absent contrary will provision)
- The ANTI-LAPSE Statute **Overrides** the **Surviving Residuary Beneficiary Rule** if a Residual Beneficiary was related to the Testator and Leaves Surviving Issue

C. **Class Gifts**

- In a Gift by WILL to a CLASS of persons ('children', 'brothers & sisters', etc.) if a Member of the Class PRE-DECEASES the Testator, **class members who survive** the testator TAKE (absent contrary provision) (and anti-lapse statute does NOT apply)
- Note, the CLASS CLOSES at the date of Testator's Death (**convenience rule exception**)
- **Rule of convenience:** (Class Closing Rule) A Rule of Construction used to Define Takers of a Class of gift. The Class is CLOSED When some Class member is Entitled to a distribution. This is done to determine the minimum share of each class member so a distribution can be made without the necessity of rebate. If it is an OUTRIGHT gift by will, the class will close at testator's death. However, this is **subject to the gestation principal** wherein there is a presumption of 280 days of gestation, so the class won't really close until 280 days after testator's death if the class is children.

V. CHANGES IN FAMILY RELATIONS AFTER WILL'S EXECUTION

A. Testator Marries After the Will is Executed

- Marriage following the Execution of a Will REVOKES the ENTIRE WILL (except for an exercise of a Power of Appointment) **unless** it appears from the **face of the will** (no extrinsic evidence) that the will was **made in contemplation of marriage**
- Under the **Republication by Codicil**, the will SPEAKS on the date of the last codicil thereto. If get married between the time of will execution and republication by codicil without making any changes to the will (due to the marriage) then the WILL IS NOT REVOKED (in fact the will is executed as of the date of the codicil and no revocation due to MARRIAGE) and the spouse is left out of the will (Although she still has an Elective Share)

B. Testator is Divorced After the Will is Executed

- Divorce or Annulment REVOKES all Gifts and Fiduciary Appointments (like executor) in favor of testator's Former Spouse. ESTATE is Distributed and Fiduciaries are Named As though the **former spouse pre-deceased the testator**
- Since a SPOUSE is a Relation by AFFINITY, the ANTI-LAPSE statute DOES NOT APPLY (anti-lapse is applicable to blood or adoptive relations ONLY)
- Legal Separation ≠ divorce or annulment, ergo Divorce Revokes Rules inapplicable
- The Divorce Revokes Rule Does NOT Apply to Life Insurance Beneficiaries (only way to change life insurance beneficiaries is through the contractual method)
- The Divorce Revokes Rule does NOT apply to INTER VIVOS Trusts (Divorce Revokes applies to WILLS ONLY).. HOWEVER, if the Revocable TRUST was to be funded from insurance proceeds from a life insurance contract + any pourover gifts, then the Divorce Revokes rule is applicable
- If spouses owned property as Tenants by the Entirety before the divorce, if no property division occurs between divorce and death, then the property is Tenancy in Common (by Operation of Law, a Tenancy by the Entirety becomes a Tenancy in Common post-divorce)

C. Omitted Child Statute

- **MA** the Omitted Child Statute Applies to ALL children (and the issue of deceased children), whether alive when the will was executed or Born or Adopted thereafter (≠ other states Pre-terminated Child statute which applies ONLY to children born or adopted after the will was executed)
- **The Omitted child** Takes his **Intestate Share** and then the Will applies to the remaining assets, **unless**:
 1. Evidence shows that the **OMISSION** was **INTENTIONAL** and not occasioned by a mistake in drafting the Will **OR**
 2. The Child was provided for during Testator lifetime (inter vivos trust or gifts)
 3. **AS TO REAL PROPERTY**, claim on behalf of an omitted child **MUST** be filed with the Registry of PROBATE within **1 year** after approval Executor's bond
- Thus, if the child received another gift, he is NOT within the Scope of the Omitted Child Statute
- The Omitted Child Statute Applies ONLY to the Probate Estate, not to any non-probate transfers (such as revocable trusts or assets over which the testator had a power of appointment)
- If the Child was born OUT-of-WEDLOCK, OCS is probably applicable

VI. PROBLEMS ASSOCIATED WITH TESTAMENTARY GIFTS

Specific Devise = Gift of Specifically Described Property “I devise Blackacre to John”

Demonstrative Legacy = A general Amount from a Specific Source “I bequeath the sum of \$5,000 to be paid from the proceeds of the sale of my Shell Oil Stock to Sally

General Legacy = “I bequeath the sum of \$10,000 to my nephew Ted”

Residuary Gift = “I give all the rest and residue of my estate to Betty”

Intestate property = If the will, poorly drafted, does not contain a residuary clause resulting in a partial intestacy, then the residue passes under intestacy

At Common Law, one **devised real property, bequeathed personal property**. Now, **give, devise, & bequeath** are used interchangeably and mean the same thing

A. Abatement of Legacies to Pay Debts, Expenses

- If there are so many claims against the estate that there aren't enough assets to cover all of the gifts made by the will (Abatement problem). ABSENT CONTRARY PROVISION, debts & expenses are 1st paid out of (sequentially)
 1. *Intestate Property* (if partial intestacy for some reason)
 2. *Residuary Assets*
 3. *General & Demonstrative Legacies*
 4. *Specific Bequests*
- Within EACH category, there is NO Distinction between Personal & Real Property (MA has abolished the common law rule under which personal property was to be sold off before any Real Property was touched) Exception: Gifts to Spouse & Minor Children are the **last to abate** – even if it is a RESIDUARY GIFT

B. Specifically Devised Property Not in Estate at Death – Ademption by Extinction

- Where a WILL makes a Specific Gift of Property, and the property is NOT Owned by the Testator at Death (for whatever reason), there is **ademption by extinction** and the beneficiary does not Take
- Exception: if the will was Executed BEFORE the Testator became Incapacitated and the specifically devised property is SOLD by a Guardian or Conservator, then the BENEFICIARY IS ENTITLED to the Proceeds of the SALE unless the proceeds were used to Care for the Testator
- Ademption by Extinction DOES NOT Apply to Demonstrative or General Legacies (ONLY to SPECIFIC GIFTS)

C. Bequests of Stock or Other Securities

- If Legacy states, “**my 5,000 shares of A stock**”, ademption by extinction applies because it is a **SPECIFIC BEQUEST**, and IF the Stock is Not amongst the Decedent's Assets, then the Beneficiary Will Get NOTHING due to Ademption
- If the Legacy states “**5,000 shares of A stock**”, then it is **not a specific bequest for ademption purposes, instead it is a GENERAL LEGACY** (and somehow, the executor MUST get the 5,000 Shares of A stock to the Beneficiary or the Date of Death Value of the 5,000 Shares of A stock to the Beneficiary)
- HOWEVER, in the CASE OF A **STOCK SPLIT**, the bequest will be **Specific** (which includes any stock split, dividend, re-organization, takeover, merger after the will was executed) for “5,000 Shares of A” and the Beneficiary will get the resulting 10,000 Stock Split Shares of A Corp. This is due to the fact a **bequest** may be a **GENERAL LEGACY** for ADEPTION PURPOSES and a **SPECIFIC BEQUEST** for STOCK-SPLIT or Corporate RE-organization purposes

D. Specific Gifts of Property Subject to Lien: is the Lien EXONERATED?

- Common Law: Absent Contrary Provisions, LIENS on Specifically Devised Property are *Exonerated* from the Residuary Estate and the Executor MUST pay any debt on specifically devised property from the residuary estate so Title Can pass un-encumbered
- MA: **Abolished the Exoneration** of Liens Doctrine. In MA, a Beneficiary TAKES EXACTLY what the Testator owned, and if T had Title Subject to a Lien, so does the Beneficiary (of course, the beneficiary May Disclaim)

VII. REFERENCE TO FACTS/EVENTS OUTSIDE THE WILL

A. Incorporation by Reference Doctrine

- MA Applies the *Incorporation by Reference Doctrine*
- An Extrinsic Document, not present when the will was executed (and thus not part of the duly executed will) can be *incorporated by reference* into the Will IF:
 1. **the writing was in existence at the time the will was executed**
 2. **the will shows an intent to incorporate the writing**
 3. **will sufficiently describes the writing so as to permit its identification** (so there can be NO mistake as to the identity of the writing referred to)
- Limited Exception: May Incorporate by Reference an EXISTING Document that makes gifts of Tangible Personal Property (but not money or intangibles) which has its CONTENTS altered or revised at ANY TIME

B. Acts of Independent Significance Doctrine

- “I give the car which I own at death to Joe”. If at the time wrote the will drove a Pinto and time of death drove a Mercedes, then *it is an Act of independent significance* (buying a Mercedes rather than a Pinto – a lifetime act with a lifetime purpose) **and the court will give it full effect in the will**
- if say, “Contents of My Desk”, again, court will give it full effect except for TITLE DOCUMENTS (like deeds, bank passbooks & stock certificates)

VIII. OTHER WILL DOCTRINES

A. Mistakes or Ambiguities in the Will

- Plain Meaning Rule: There being NO ambiguity, extrinsic evidence is NOT admissible to reverse the plain meaning of the words in the will. *Absent SUSPICIOUS Circumstances* it is **conclusively presumed** that the Testator READ the Will and INTENDED its Contents
- Latent Ambiguity: when there is a *Mis-description* (if 2 nephews, James Peter or Harold Paul, but the Will refers only to John Paul), **extrinsic evidence will be admissible** to Cure the Latent Ambiguity. However, if the Extrinsic Evidence fails to resolve the Latent Ambiguity, then the GIFT FAILS FOR NO ASCERTAINABLE Beneficiary (and reverts to the residual estate)
- Patent Ambiguity: the mistake appears on the FACE of a Will (I bequeath twenty-five dollars (\$25,000) to Bill), **extrinsic evidence** is NOT Admissible to cure the Patent ambiguity (according to OLD MA Cases). However, the trend in other jurisdictions is to ALLOW Extrinsic Evidence in to cure the patent ambiguity (otherwise, beneficiary gets the lesser of the gift)

- Missing Terms: Courts will NOT add missing terms. Missing terms are NOT ambiguous, any testimony about them would add terms rather than cure an ambiguity, therefore, courts will not allow evidence in to fill in the missing terms.
- Mistake in the Inducement: if believe that somebody got a BIG WINDFALL from another will and then eliminate that person from your own will (but really the other person got nothing), then that was a MISTAKE in the inducement and nothing can be done to cure that eliminated beneficiary's share. The DEPENDENT RELATIVE REVOCATION Doctrine is inapplicable here since it relates ONLY to the VALIDITY of another Disposition and not the SIZE of its CONTENTS
- Fraud in the Inducement: if somebody tells the Testator that a Beneficiary is So rich (if false) that she doesn't need any legacy and instead her legacy should go to the instigator of the lie, then the Court will IMPOSE a constructive trust on that gift in favor of the Eliminated Beneficiary

B. Contracts Relating to Wills

- Arises in JOINT Wills. 1st Spouse dies and estate is devised as planned. Then the surviving spouse REVOKES her earlier will and creates a new will which omits the beneficiaries which the 2 joint will writers had intended to benefit following both their deaths. Usually, its tough shit for the beneficiaries.
- A joint will, by itself, is NOT enough to establish a contract (need another contract, not oral, since the Statute of Frauds applies and it Must be in writing and signed by obligor...testimony from Rabbi, Priest & Minister is NOT enough)

C. Words of Disinheritance in Will are Ineffective

- When a Will does not Make a complete disposition of the estate (partial intestacy due to divorce revokes rule or something like that), then the Words of DISINHERITANCE are ineffective and the estate passes through INTESTACY Rules. *Rationale*: When property passes by intestacy, it passes pursuant to statute, not Testator Will.

D. Attorney Liability for Negligence

- A will trustee in charge of assets wants to invest at the Board of Trade. He hires a lawyer and the fund loses all of its assets. Is the attorney liable to the trust beneficiaries?
- No, the Attorney-Client relationship exists between the attorney and the executor or trustee who retained him, and NOT to any beneficiary. To find that a duty existed between an attorney and a beneficiary would CONFLICT with his duty to the Trustee/Executor who hired him. (Spinner v Nutt)
- Intended Beneficiary of a Will Cause of Action v. Negligent Attorney. Common Law & Minority say there is no Cause of Action because there is NO Privity. Under this rule, the lawyer's duty is to the client (now dead) who contracted for his services and not the intended beneficiaries. However, the emerging trend finds that a lawyer owes a duty to intended beneficiaries as well as the client contracting for his services (i.e., relax the privity requirement). MA has no case law on point. Could go both ways, ergo argue both ways. (Above trustee case was about Conflicting Duties, hard to find conflicting duties between a testator and intended beneficiary)

IX. ELECTIVE SHARE STATUTE

A. Amount of Elective Share

- If Decedent was NOT Survived by ISSUE or OTHER KINDRED (rare)
 - Spouse gets 1st \$25,000 of Personal Property + ½ Balance Outright
- If Decedent Survived by KINDRED but NOT by Issue
 - Spouse gets 1st \$25,000 of Personal Property Outright + Life Estate in ½ Balance (if life estate involves personal property, it is Held in Trust)
- If Decedent Survived by ISSUE (whether of this marriage or an earlier marriage)
 - Spouse gets 1st \$25,000 of Personal Property Outright + Life Estate in 1/3 the Balance (if life estate involves personal property, it is Held in Trust)

<u>Decedent Survived by:</u>	<u>Spouse Gets Elective Share of:</u>
Neither Issue Nor Kindred	1 st \$25,000 of Personal Property + ½ the Balance Outright
Kindred but NOT Issue	1 st \$25,000 of Personal Property Outright + a Life Estate in ½ the Balance (where life estate involves Personal Property, it is held in trust)
Issue (of either this or earlier marriage)	1 st \$25,000 of Personal Property Outright + a Life Estate in 1/3 the Balance (where life estate involves Personal Property, it is held in trust)

- REVOCABLE TRUST ASSETS are includible in the NET PROBATE ASSETS to which the Elective Share Statute Applies **IF** the revocable trust was created **AFTER 1/23/84 (January 23, 1984)**
- Revocable Trusts are the ONLY Non-probate Assets which are Includible in the Net Probate Assets to which the Elective Share Statute Applies (i.e., CDs, life insurance are not includible in the Net Probate Assets)

B. Key Points about Elective Share

1. The Right of Election is Available ONLY if the Decedent was a **MA Domiciliary** and the Elective Share applies to **personal property wherever located** and to **MA real property** but NOT to Real Property located outside Commonwealth of MA
2. *The Spouse MUST file her election WITHIN 6 months after the Will is Admitted to Probate.* If fail to file for election within that period, it is conclusively presumed that the spouse elects to take under the will (unless the time for making the election was extended by the court upon motion)
3. *Who May Make the Election?* Election can be made on BEHALF of an *incapacitated* spouse by his guardian or conservator, BUT ONLY WITH COURT APPROVAL. If the Spouse dies before election is made, Election CANNOT be made by the spouse's personal representative (Purpose of Elective Share is to Protect the SPOUSE (not heirs) from dis-inheritance)
4. *In Satisfying the Elective Share, ABATEMENT rules Apply.* Property devised outright to spouse by will is 1st applied, & then residuary, etc.
5. *Right to an Elective Share May be WAIVED in a WRITTEN CONTRACT after Full NOTICE of the extent of the right to be made, provided the contract is supported by ADEQUATE Consideration*
6. *Surviving Spouse is DISQUALIFIED from the right to an Elective share if he DESERTED the Decedent OR if the Couple has been living apart for justifiable cause.*

C. Dower

- Instead of Taking under the Will, an Elective Share, or by Intestacy, a Spouse MAY elect to Take DOWER which is a **life estate in decedent's real property owned at death**. Since this is usually less than the amount the spouse could take under the elective share, this choice is rarely made. Attractive ONLY if decedent's estate is insolvent (only DOWER takes precedence OVER Creditor's Claims. By contrast, property passing by WILL, INTESTACY, or ELECTIVE SHARE is the NET ESTATE – after payment of Claims)
- MA Dower (≠ Common Law) Applies ONLY TO LANDS owned at death and NEVER to property transferred during lifetime.
- Election of Dower must be made within **6 months** post-approval of executor bond

X. WILL CONTESTS

- Only **INTERESTED Parties** can bring a will contest; those with an Economic Interest that would be Adversely Affected by the will's probate (Heirs or Legatees named in an earlier will)

A. Lack of Testamentary Capacity

- Burden of Proof is ON CONTESTANTS. Standard: Did the TESTATOR have **Sufficient Capacity** to:
 1. **Understand the Nature of the Act he was Doing (writing a will)**
 2. **Know the NATURE and Approximate VALUE of his Property**
 3. **Know the Natural Object of his Bounty (KIDS)**
 4. **Understand the Disposition he was making**
- Evidence of Capacity or lack thereof must relate to Circumstances AT THE TIME THE WILL WAS EXECUTED or Shortly Before or Shortly thereafter
- The more distant the fact from the date of execution, the less significance it has on the issue of capacity
- Old Age, Physical Frailty, Sickness, Failing Memory, or Vacillating Judgement ARE NOT inconsistent with Testamentary Capacity if the 4 part test above was met
 - Adjudication of Incapacity involves a Different Legal Test than Capacity to Execute a Will. A jury could find that the will was executed during a **lucid interval** between time adjudged incapacitated and death.

B. Undue Influence

- Undue Influence is the Existence of a Testamentary Capacity SUBJECTED TO and CONTROLLED BY a **Dominant Influence or Power**. Influence is NOT Undue UNLESS the FREE Agency of the Testator was Destroyed and a Will produced that expresses the will, not of the testator, but of the one exerting the influence (mental duress)
- Burden of Proof is on the CONTESTANTS to SHOW:
 1. **Existence and Exertion of the Influence**
 2. **Effect of the Influence is to Overpower the Mind & Will of Testator**
 3. **Product is a Will (or gift therein) that would not have been made BUT FOR the Influence**
- Nearly 60% of Jury Findings of Undue Influence are Reversed on Appeal.

- While Evidence of Undue Influence is usually circumstantial, the following are NEVER Sufficient to show that a will was the Product of Undue Influence
 1. *Mere opportunity to exert influence.* The mere fact that one child (who received a major share of the estate) lived with the decedent, wrote checks for an managed the affairs of the decedent is not evidence that the opportunity was taken advantage of
 2. *Mere susceptibility to influence due to illness or age.* The Fact that the decedent was very old and physically infirm when executed the will is not sufficient evidence of undue influence
 3. *Mere fact of unnatural disposition* – fact that some kids got larger shares than others is insufficient to prove undue influence.
- Surmise, Conjecture, & Suspicion are NOT evidence. Require some actual evidence of exertion of the influence
- Where an **Attorney** drafts a will for an **elderly client who is unrelated to him**, and the client has **no independent legal advice** and the **attorney substantially benefits from the will**, although there is NO PRESUMPTION of Undue Influence, in MA a finding of undue influence will be FOUND if there is Additional Evidence showing that the client was **susceptible to influence** OR the client was **dominated by the attorney**
- In MA, **No-Contest Clauses** (in terrorem clauses) are given FULL EFFECT, regardless of whether the Contest was Filed with PROBABLE CAUSE (ergo, if will has a clause stating that any beneficiary who contests the will shall forfeit his bequest, then if he does contest and LOSE, he will forfeit)
 - Note: a Will CONSTRUCTION SUIT does NOT Trigger a Forfeiture (does not challenge the validity of a will, just want to know what interests are created by it)

XI. ESTATE ADMINISTRATION

- MA has a special SHORT statute of limitations that applies to decedent's estates. ALL Claims must be filed **within 1 year of decedent's death**
- Exceptions:
 1. *NEW ASSETS Discovered* (creditor failed to file due to futility)
 2. *Action on the Claim ACCRUED more than 1 year post-death*
 3. *Claim was Covered by Insurance* – but only to the extent of the liability insurance coverage
 4. *Where Justice & Equity Require*
- **Court Approval Required for Sale of Estate Real Property by Administrator of INTESTATE estate**
- **Court Approval Required for Sale of Estate Real Property by Executor or Trustee named in Decedent's Will unless the power of sale was EXPRESSLY Granted in the Will**

TRUSTS

- TRUSTS are arrangements for making GIFTS of Property and for the MANAGEMENT of Assets, under which the TRUSTEE holds **legal title** to the trust assets *for the benefit* of the Beneficiaries, who hold **equitable title**
- Trustees have the Burdens of Ownership (duty to manage, safeguard, invest) while the Beneficiaries have the equitable title & benefits of Ownership

I. REQUIREMENTS FOR A VALID TRUST

- To have a valid Trust; the **Settlor delivers** the **res** to the **trustee** for the benefit of the **beneficiaries** with an **intent to create a trust**
- The trust must have a **lawful purpose**
- No Consideration is Required (like a gift)

A. Settlor

- must have **legal capacity** (Age 18 or older, capacity to convey title to the trustee, higher test for capacity than wills)

B. Delivery

- For an INTER VIVOS TRUST that names a 3rd Party as trustee, the mere INTENT to create a trust or a gratuitous promise to create a Trust is **INSUFFICIENT: MUST BE Delivery of the Subject Matter** with the Intent to Convey Legal Title to the Trustee
- Does NOT APPLY TO TESTAMENTARY TRUSTS or self-declaration trusts

C. Res

- Also known as the Corpus, the Principal or the Subject Matter of the Trust
- To have a trust, **LEGAL TITLE** to a **specific interest in property** must be **CONVEYED** to the Trustee
- The subject matter of the trust must be **CERTAIN & IDENTIFIABLE**
- Expectancies of Property cannot be the RES of a Trust
- Where a **promise to create a trust** (of property to be acquired in the future) or self-declaration of trust was **gratuitous** (not supported by consideration), but **NO TRUST ARISES** because there was no property, a **TRUST ARISES when the property is Later Received IF & ONLY IF** the settlor *then manifests an intention to create the trust* (at the time the property is received). If by his conduct the promisor acts consistent with the existence of a trust, a **TRUST AUTOMATICALLY ARISES AT THAT TIME**. However, if he acts differently and there was **NO** consideration, the promisor is Free to change his mind.
- However, where the Promise to Create a trust is **SUPPORTED** by Consideration, A **TRUST AUTOMATICALLY ARISES** when the property is received
- If promise to make trustee pay a beneficiary \$X per month, and do not set aside **CERTAIN & IDENTIFIABLE** property, it is merely an unenforceable promise and not a trust

D. Trustee

- Must have LEGAL CAPACITY to deal with the property (over 18 and capacity to contract & execute a Deed)
- NO TRUST CAN FAIL for LACK of NAMING A TRUSTEE. As Long as the INTENT to create a Trust is *clearly manifested* but no trustee is named or if the trustee named dies or resigns with NO provision for a successor trustee, the COURT WILL APPOINT a Suitable Successor to carry out the trust
- A TRUST office **cannot be delegated**
- A *Successor Trustee* can ONLY be appointed *pursuant to a trust instrument OR by Court Order*
- If a NAMED TRUSTEE has **no active duties to perform** then NO TRUST ARISES (i.e. this is a Passive Trust). A trust pre-supposes fiduciary duties are owed to someone. If a Passive trust is created, i.e., no real trust is created, the TITLE vests in the Beneficiary who HOLD FREE OF THE TRUST
- To have *Valid Spendthrift Clause* in an instrument, must have a TRUST, ergo, if a Passive Trust is created with a Spendthrift Clause, the Spendthrift Clause is Void, since no valid trust was created, and Creditor's can claim the Beneficiary's interest in the property

E. Beneficiaries

- In a **PRIVATE, non-charitable, TRUST**, the Beneficiaries must be *Definite & Ascertainable* and the interests must **Vest within the period of the Rule Against Perpetuities** (Rule for Charitable Trusts is Opposite)
 - If name "Best Friend": that is an Indefinite & Unascertainable Beneficiary and the trust will FAIL FOR VAGUENESS & parol testimony is NOT Admissible to Identify the Party (i.e., the Beneficiary MUST be Identifiable, Definite, & Ascertainable on the FACE of the trust instrument)
 - If the Trust Fails for Vagueness, then a **Resulting Trust is Created** and the trust assets, if part of a testamentary trust, result back to the RESIDUARY ESTATE
 - If name "my family", then that is a CLASS GIFT and the Beneficiaries are Definite & Ascertainable. Payment is then made by analogy to the INTESTACY rules
 - If name "to train spiritualistic mediums" Argue Both Ways: Fail for Vagueness (Indefinite or Unascertainable) OR Succeeds as a Charitable Trust
 - **CHARITABLE TRUSTS** do NOT need to name definite or ascertainable beneficiaries, only needs a **Charitable Purpose**. To figure out who gets the money, must have a *Cy Pres* Hearing
- **RULE AGAINST PERPETUITIES:**
 - No Interest is Good unless it Must VEST, if at all, no later than **21 years** (+ gestation) after some *life in being* at the creation of the trust
 - Step 1: What Interests are Created in the Instrument? (without regard to RAP)
 - Step 2: Apply the RAP (do a What If Analysis) – Property Outline is Better for this (so is PMBR)
 - MA has enacted the **Uniform Statutory Rule Against Perpetuities Act.** - *Alternative Vesting Period is 90 years after creation*

F. Intent to Create a Trust (Precatory v Enforceable Obligation)

- if language = “I would Like him to”, or “request”, or ”wish & desire” or “hope”, that is PRECATORY and it is non-binding & un-enforceable
- NO PARTICULAR WORDS are needed to Create a Trust (just a manifestation of intent to create a trust)

G. Lawful Purpose

- Trusts to further the *Commission of a Crime* or Calling for the *Destruction of Property* are INVALID as Against Public Policy
- **Unlawful conditions** are also unenforceable
 1. **Encourage Divorce**
 2. **TOTAL restraint on Marriage**
 3. **Discourage Having Children**
- When a Trust has an UNLAWFUL CONDITION, the Beneficiary takes the Property Immediately, free of Trust
- Note: Partial Restraints on Marriage are Valid (i.e., Trust f.b.o. Jim, provided he marry a Jew within 7 years of death, else to Israel)
- If motive is to provide support for widow (i.e., income to Widow for life or remarriage, else to daughter), then if widow remarries, it is not a Total Restraint on Marriage, i.e., it was a Valid Purpose

H. Oral Trusts

- ALL Trusts of **real estate** MUST be evidenced by a writing that Satisfies the Statute of Frauds
- ORAL trusts of Land are unenforceable
- However, ORAL trusts of *personal property* are valid
- ALL MA Trusts are **irrevocable & unamendable UNLESS** power to revoke or amend is **expressly retained by the settlor** (exception: **Totten trusts**, not really a trust, but a bank account)

II. REVOCABLE TRUSTS: BANK ACCOUNT ARRANGEMENTS

- Under a *Self-Declaration of Trust*, the SETTLOR names himself as Trustee
- Usually, in such a trust, the Settlor retains an INCOME interest for LIFE and the POWER to REVOKE the trust and further provides that if the settlor does not revoke the trust, on the settlor's death or incapacity a designated successor trustee shall be appointed
- A **testamentary gift** to a **inter vivos trust** is called a **Pourover Gift**. It provides a means for adding testamentary assets to a trust created by the testator during his lifetime. By Statute, a TESTAMENTARY GIFT to an INTER VIVOS TRUST is Valid:
 - EVEN if the trust is Subject to Revocation or amendment and is later amended
 - EVEN if the trust is UNFUNDED by the settlor during lifetime
 - RECENT STATUTE: The Trust NEED NOT BE in **existence** before or executed concurrently with the will, it MAY be created after the will is executed
- Creditors may reach Assets in an Insolvent's **Revocable Trusts ONLY AFTER** Exhausting the Probate Estate (ergo, the creditor must 1st file suit against the executor of the probate estate before filing suit against the trustee)
- Totten Trusts; are Bank Accounts and NOT trusts. Characteristics include:
 - *Depositor Continues to have ALL RIGHTS over funds on deposit* (Totten trusts are partially revoked whenever depositor makes withdrawals, the beneficiary succeeds ONLY to the amount on deposit at depositor's death)
 - *If Beneficiary Pre-Deceases the Depositor, the Totten Trust is **automatically revoked*** (Does not pass through deceased beneficiary's estate. Funds are the depositor's free & clear)
 - *If Beneficiary Survives the Depositor, the amount on Deposit Belongs to the BENEFCIARY subject to the Claims of the Depositor's Creditors*
 - If Depositor Makes a specific bequest of the Bank Account to a Legatee ≠ Beneficiary, then the Legatee's claims defeat the Beneficiary's.
- Uniform Transfer to Minor's Act
 - A convenient way to make gifts to minor's that AVOID the need for appointing a guardian to manage the property and Qualify for the \$10,000 annual gift exclusion. Custodianship of the assets TERMINATE when the Child reaches **21** (regardless of what the trust document says). To create a trust that won't let the kid touch the money til 35, must create a Trust Outside the UTMA

III. CHARITABLE TRUSTS, HONORARY GIFTS

- Distinctive Features of Charitable Trusts:
 1. **NOT subject to the Rule Against Perpetuities** (trust may pay the income to University forever)
 2. **Must be for CHARITABLE PURPOSE** (must confer a SUBSTANTIAL amount of Social Benefit: education, religion, health, relief of poverty, research, governmental purpose)
 3. **Must be IN FAVOR of a REASONABLY LARGE NUMBER of UNIDENTIFIABLE members of the Public At-large** ('my poor relatives' is NOT a charitable trust)
 4. **When Stated Charitable Purpose can no longer be achieved, Must be REFORMED under the judicial proceeding of the Doctrine of CY PRES** (i.e., if formed trust to fund research to find polio vaccine, as soon as Salk found it, need a Cy Pres proceeding to figure out what to do with the money)
- **For Example:** A trust created by will stating that on the Monday before Christmas each year, income was to be paid to the town's 1st graders for Educational purposes.
 - Trust Fails because violate RAP
 - Once income distributed to children, they could spend it on educational purposes or pinball, so trust fails charitable purpose
 - But, under the Uniform Statutory Rule Against Perpetuities with the Alternative Vesting Period, the trust could succeed, even without the non-charitable purpose
- For A CHARITABLE TRUST, the **Attorney General** may enforce the trust as it is he who is charged with the supervision & enforcement of all charitable trusts
- For **Cy Pres** to apply, require:
 - **General Charitable Intent can Still be Given Effect** (in MA, there is a Conclusive Presumption that the settler had a general charitable intent)
 - **Specific Direction that can no Longer Be Accomplished** (trust funded polio vaccine research, found the vaccine. Now the court will REFORM the trust to Carry Out Specific Instructions AS NEAR AS POSSIBLE to the Settlor's specific intent while giving effect to the GENERAL CHARITABLE INTENT)
 - **If Cy Pres Involved: Court will instruct trustee to pay a Charity as near as possible to the specific direction while still giving effect to the general charitable intent**
- DOCTRINE of **Modification of Trust Administrative Terms because of Changed Circumstances**. Look at the Primary Purpose of the Direction in the trust (i.e., support descendants) and then allow the trustee to make some modifications if the Specific Directions in the trust would **frustrate the primary purpose of the trust**
- To have a trust, the trustee must owe duties to SOMEONE (a human being) ergo, a trust creating a beneficiary in a DOG is Not a VALID CHARITABLE TRUST. Instead, it may be deemed to be an **Honorary Trust** Gift wherein the Trustee is on her honor to follow the wishes of the settlor, but doesn't have to. If the honorary trustee fails to perform, a **resulting trust is created** and it is usually in favor of the **residual beneficiary**. Also, creating a dog as a beneficiary creates RAP problems since animals cannot be used as measuring lives.

IV. CONSTRUCTIVE TRUSTS

- A Constructive Trust is NOT A trust. Rather it is the name given to the **Equitable Remedy** designed to *disgorge unjust enrichment*. 2 Pre-requisites to a Constructive Trust **1. Wrongful Conduct, 2. Unjust Enrichment**
- Step 1: Apply the Law (i.e., a valid will was not created because two people physically interfered with the Testator being able to sign the document)
- Step 2: Apply Equity (WRONGFUL CONDUCT + UNJUST ENRICHMENT = CONSTRUCTIVE TRUST)
- Although MA has NO **Slayer Statute**, a constructive trust will nonetheless be imposed on someone who kills a testator. When that happens, the estate is distributed as though the KILLER pre-deceased the Testator.
- Even if somebody is ACQUITTED in a criminal trial, a constructive trust may nonetheless be imposed in a Civil Trial due to the different standards.
- If somebody is JOINT TENANTS and kills the other joint tenant, then he forfeits the right of survivorship in the land, but does NOT forfeit his interest (i.e., H & W own property as Tenants by the Entirety, Wife Kills Husband, Wife maintains ½ interest in the property, but does NOT take the other ½ by right of survivorship)
- Although an **ORAL trust of Land is unenforceable** due to the Statute of Frauds, A **Constructive Trust** May be imposed if:
 - *There was FRAUD in the Inducement*
 - *Grantee-trustee was in a CONFIDENTIAL Relationship with Grantor-Settlor*
 - *If the ORAL Promise can be PROVED by Clear & convincing Evidence, a Constructive Trust may be imposed*
 - Clear & convincing evidence may be Extrinsic. EQUITY IS only concerned with ALLEGED Wrongful Conduct, if there is no wrongful conduct and just a mistake or omission, it is not for equitable relief
- **Purchase Money Resulting Trust**: A pays the purchase price for land, but Title is in B's name. A and B are NOT Related. Presumption that A did NOT intend for title to be in B's name and unless the presumption is rebutted, A can bring suit to impose a RESULTING TRUST in Favor of A. Evidence admissible to Rebut the Presumption includes evidence showing **GIFT** or **Loan of purchase price**. Where A & B are related, the presumption is that it was a GIFT (though rebuttable the other way)

V. CREDITORS' CLAIMS & SPENDTHRIFT TRUSTS

- in MA, Spendthrift Clauses are VALID **except as to**
 1. *Contracts for necessities*
 2. *Alimony, Child Support*
 3. *Any Interest Retained by Seller (not limited to Revocable Trusts)*
 4. *Federal Tax Liens*
- For any Beneficiary who participates in the breach of trust, Estoppel applies and he will be estopped from complaining about an Invalid Assignment (when violate trust and assign the part of the trust that the spendthrift clause forbade)
- If Creditor sues a Settlor-guarantor to settle a claim of a beneficiary-guaranteed's invalid assignment, then as to the INCOME interest, the Creditor may be able to recover, but not as to the PRINCIPLE which was transferred to a 3rd party
- Exception: *Fraudulent Conveyances* (intent to DEFEAT, Defraud, or Delay creditors)

VI. SELF-DEALING BY FIDUCIARY

- A Trustee **CANNOT Buy or Sell Trust Assets to himself (or a relative)**
- A Trustee **CANNOT Borrow Trust Funds** (though a bank acting as trustee may deposit trust funds into savings accounts at the bank)
- A Trustee **CANNOT Loan funds to the trust, and any interest earned on such a loan must be returned to the trust. Also ANY security interest received in connection with such a loan is invalid.**
- **Indirect Self-dealing if Relative of Trustee is involved, or a corporation wherein the trustee serves as an officer, partner, employee or principal shareholder**
- A Trustee **CANNOT Profit from serving as trustee (except for compensation), as by taking advantage of CONFIDENTIAL information received in Capacity as Trustee**
- A Corporate Trustee **CANNOT Buy its Own Stock as a Trust Investment** (though it may retain its own stock if part of the estate received by it was its own stock, so long as it is a PERMISSIBLE investment – i.e., **meets the reasonably prudent investor standard**)
- A Trustee has a **Duty to Segregate (earmark)**. A trustee cannot commingle trust funds with own funds. If commingled funds are used to purchase assets that decrease in value, it is conclusively presumed that the personal funds were used for the dogs. If the investment goes up, it is conclusively presumed that the trust's assets were used.
- STATUTE of LIMITATIONS does NOT begin to run on any action against a Fiduciary unless & until the trustee **repudiates the trust or dies/resigns or gives an accounting**
- When a Trustee Breaches ANY duty, in addition to ACTIONS TO REMOVE HIM AS TRUSTEE, the Beneficiary May;
 - RATIFY THE TRANSACTION & WAIVE THE BREACH
 - BRING A SURCHARGE ACTION FOR THE RESULTING LOSS (if the case involves self-dealing, there is the **no further inquiry rule** meaning that reasonable investment is NO DEFENSE and the only issue is the degree of damages)
- Note; if trustee breaches and sells trust property improperly, if the 3rd party who buys it was a **bona fide purchaser**, she will own the property and the beneficiaries have NO action against her; the conveyance to a bona fide purchaser cuts off equitable title; however there is NO Bona Fide Purchaser if the 3rd party was a sister or employee of trustee (indirect self-dealing)

VII. TRUST ADMINISTRATION PROBLEMS

- Investments
 - MA has Adopted the **reasonable prudent investor rule**. The Trustee has the power and duty to make such investments as a person of prudence would make of his own property, having in mind a reasonable income as well as the safety & preservation of principal.
 - **Clearly permissible & prudent**: Securities listed on a national or regional exchange or regularly traded OTC
 - **Clearly non permissible**: commodity futures & options
 - Investment in Treasure-hunting co. is too speculative to be permissible
 - Investment in NEW Co is imprudent because no track record
 - Investment in 1 business only violates duty to diversify
 - Note; a settlor may allow the trustee to make imprudent investments if he so drafts is trust agreement to expressly permit certain types of speculative investments
- Principal & Income Issues
 - How to classify a Payment as Principal or Income
 - Cash Dividends are ALWAYS income
 - Stock Dividends are Principal
 - Capital Gain is Principal
 - Payment for Eminent Domain or as Insurance proceeds (post catastrophe affecting real property) will be treated as Principal
- Torts
 - Trustee is NOT personally liable for torts of himself or his agents UNLESS he was PERSONALLY at fault. Unless the Trustee is Personally liable, the tort claimant must sue the trustee in his representative, and not his personal, capacity
- Contracts
 - Trustee is NOT personally liable on contracts UNLESS the contract imposes personal liability OR the trustee Fails to DISCLOSE hie representative capacity and identify the trust in the contract (i.e., the other party is unaware that he was dealing with a trustee of a trust)

VIII. EARLY TERMINATION OF TRUSTS

- BENEFICIARIES may terminate the trust prior to the time fixed for its termination **if**:
 - **ALL Beneficiaries, all of whom are SUI JURIS (over 18 & sound mind), CONSENT, and**
 - **There is NO Further TRUST PURPOSE of the Settlor to be Served**
 - Trustee need not consent (i.e., there is no requirement that the trustee consent to early termination)
 - However, very few trusts can actually terminate early because the Beneficiaries RARELY ALL AGREE – Also, **1 minor beneficiary** queers the deal
 - Also, cannot early terminate the trust if early termination defeats a MATERIAL PURPOSE of the SETTLOR (i.e., making sure the beneficiary didn't piss it away before he was 35)
- A **Spendthrift Clause** makes the trust **indestructible** (beneficiary cannot terminate without settlor's consent). Premised on the notion that there is a further TRUST PURPOSE of the settlor (i.e., keep the money away from creditors)
- Settlor's may TERMINATE an **Irrevocable trust** (including a spendthrift trust) if ALL Beneficiaries Consent (Again, Require SUI JURIS, 1 minor beneficiary queers the deal)

IX. POWERS OF APPOINTMENT

- **Donor**: person who creates a power of appointment, and who donates the property over which the **donee** may exercise her power of appointment
- **General P/A**: not limited in the class of beneficiaries over whom may appoint; i.e., could exercise the power in favor of **self, own estate, own creditors**.
- **Special P/A**: Limited in the class of persons over whom may exercise
- Unless a Will or other instrument EXPRESSLY Exercise the power of appointment, it is Not Exercised and the Default provision will govern, else reverts back to residuary estate of donor
- If a DONEE Exercise her **general power of appointment**, the creditors may reach the appointive assets, however, if the Donee Does NOT exercise the general power of appointment, the creditors may not reach the appointive assets. Also, if DONEE exercises a **Special Power of Appointment**, the creditors may not reach the appointive assets
- If a Donee has a Testamentary Power of Appointment, and then enters into a contract with someone to exercise that power in favor of that someone, it cannot be a valid power of appointment as it transforms a testamentary p/a into an inter vivos p/a..