

**I. Intestate Succession**

**A. Descent & Distribution Rules** (apply when)

1. Decedent **left no will** (or left a will that wasn't properly executed) (i.e. *died intestate*);
2. Will does not make a complete disposition of the estate ("**partial intestacy**"); OR
3. Heir ("**distributee**") successfully contests the will, & **the will is denied probate**

**B. Intestate Decedent Survived by Spouse**

1. *Spouse and one or more children (issue)*
  - a. Spouse takes = \$50K off the top + ½ of the balance
  - b. Remaining ½ = passes to children (issue per capita at each generation)
    - NOTE: regardless of whether kids came from that marriage or an earlier one
2. *Spouse & NO issue* = spouse takes entire estate
3. NOTE: if intestate survived by spouse, *parents & collateral can NEVER take*

**C. Issue Take "Per Capita At Each Generation"**

**1. Rule of per capita at each generation**

- a. *Step 1* – make the initial division of shares (*with one share for each line of issue*) at **1<sup>st</sup> generational level at which there are living takers**
- b. *Step 2* – all living persons at that generational level take a share
- c. *Step 3* – the shares of *deceased persons at that generational level are combined &* then divided equally among the takers at the next generational level in the same way

**2. Result – issues in the same degree of kinship to the decedent always take equal shares**

- a. NOTE: *in-laws are NOT issue*, so they don't get anything (i.e., Issue's surviving wife gets nothing)
- b. NOTE: Issue, who predeceased mother, had left a will leaving "all my property, including any interest I have in my mother's estate, to my wife" – wife can NOT take because he had no interest to leave his wife (only had an *expectancy* in his mother's estate)

\* **Gift in a WILL or TRUST to someone's issue** – also distributed *per capita at each generation*

- E.g.: A's will that bequeaths \$\$ "*to the issue of brother B*" & the rest of the estate to sister S

**D. Intestate Decedent Not Survived by Spouse or Issue**

1. *All to parents or surviving parent*
2. If not survived by Parents – *Issue of parents* (siblings or their issue); *per capita at each generation*
3. If not survived by Issue of Parents:
  - a. ½ to *Maternal grandparents* or their issue (limited to 4촌); AND
  - b. ½ to *Paternal grandparents* or their issue (limited to 4촌)
4. If none of the above – great-grandchildren of grandparents (5촌조카); *per capita at each generation*
5. No inheritance beyond great-grandchildren of grandparents – estate **escheats** to state of NY.

**E. Inheritance Rights of Adopted Children**

1. Adopted children & their issue
  - a. *Adopting family – full inheritance* (& vice versa)
  - b. *Natural parent or their kin – NO inheritance rights*
    - BUT, if child is *adopted by the spouse of a natural parent*, the child & his issue can inherit from
      - (i) adopting parent, and (ii) **either** natural parent
2. **If child is adopted by a relative** (e.g., aunt or uncle)
  - a. Decedent is adopting parent (e.g. adopting aunt dies intestate) – inherits *under the adoptive relationship*
  - b. Decedent is related by both a natural relationship & adoption (e.g. grandmother dies intestate) – inherits *under the natural relationship*
3. Stepchild or Foster Child – NO inheritance rights

**F. Inheritance Rights of Nonmarital Child** (born out of wedlock)

1. Natural Mother (& kin) – *full inheritance rights* (& vice versa)
2. Natural Father (& kin) – inherits ONLY IF:
  - a. *Legitimated by marriage*: father marries the mother after child's birth; OR
  - b. *Order of filiation*: entered during father's lifetime, adjudicating the man to the child's father; OR
  - c. Father files an *affidavit of paternity* with the *Putative Father Registry*; OR
  - d. Paternity established in probate proceeding by **clear & convincing evidence** AND **openly acknowledges child as his own**, OR
  - e. *Blood genetic marker test*(DNA) "*plus other evidence*" – proves paternity by clear & convincing evidence

**II. Succession Problems Common to Inheritance & Wills**

**A. Lifetime Gifts to Intestate Distributee – Advancements** (*in Intestate*)

1. Common law – lifetime gift to a child was presumptively an *advancement* (i.e., an advance payment) of his intestate share, to

be taken into account in distributing the estate at death

2. **NY – rejects “advancement”** presumption by statute
  - a. UNLESS proved by **contemporaneous writing, signed** by donor or donee
  - b. Advancement arithmetic – (i) add advancement & estate value, (ii) calculate shares, (iii) subtract advancement from the donee’s share

**B. Lifetime Gift by Testator to Beneficiary – “Satisfaction of Legacies” (in Wills)**

1. Common law – lifetime gift to a beneficiary named in a donor’s will (executed before the gift was made) was presumptively in partial (or total) *satisfaction of the legacy*, to be applied against the amount to which the beneficiary was entitled under the will
2. **NY – rejects “satisfaction of legacies”** presumption by statute
  - UNLESS proved by **contemporaneous writing, signed** by donor

**C. Disclaimer (“Renunciation”) by Intestate Distributee or Beneficiary**

1. Will beneficiary or Intestate heir can *disclaim* or renounce (in whole or part) his interest in decedent’s estate
2. Requirements
  - a. **In writing, signed & acknowledged** (before a notary public)
  - b. *Accompanied by separate sworn affidavit that he received no consideration for making the disclaimer*
  - c. **Irrevocable, & must be filed with Surrogate within 9 months after decedent’s death**
3. *Results* – disclaimant is *treated as if pre-deceased the decedent*
4. What can you disclaim – (i) life insurance, (ii) employee benefit plans, (iii) trusts, (iv) other non-testamentary transfer, (v) surviving joint tenor or (v) tenant by entireties (to extent decedent furnished consideration for tenancy’s acquisition)
5. With court approval – disclaimer can be made by guardian, holder of POA, or decedent’s personal rep.
6. Rationale for disclaiming – avoid (i) gift taxes & (ii) creditors’ claims (except fed tax liens)
  - NOTE: can NOT disclaim to remain eligible for Medicaid

**D. Simultaneous Death**

1. **Uniform Simultaneous Death Act (USDA)** – if 2 persons die under circumstances such that there is *no sufficient evidence* that they have died otherwise than simultaneously, *the property of each is distributed as though T survived* (NOT simultaneous death if died 10 minutes later)
  - a. Step 1 – apply *USDA* and *consider as beneficiary / heir predeceased him* (BOTH will & intestate)
  - b. Step 2 – apply *Anti-Lapse Statute* for beneficiaries who are brother/sister/issue (ONLY wills)
2. USDA applies to *distributions of property by any means* – intestacy, will, joint tenancy, life insurance contract
  - *Tenancy by the entirety* – USDA prevents the operation of the right of survivorship; in effect the property is converted into *tenancies in common*, & each half passes as though 1 party survived

**III. Execution of Wills**

**A. Probate**

1. Refers to Surrogate’s Court proceeding in which
  - a. It is judicially determined that the decedent left a validly executed will (or that he died w/out a will & his intestate distributees are determined), &
  - b. A *personal representative* (*executor* if named in a will, *administrator* if appointed by the ct) is appointed to administer the decedent’s estate
2. Order of priority for appointment as administrator – (i) surviving spouse, (ii) children; (iii) grandchildren; (iv) mother or father; (v) any other distributee

**B. Requirements for Validly Executed Wills**

- Capacity to make a will – the testator (T) must be 18 years old (& 6 requirements)
- 1. **Signed by T** (or someone at T’s direction & in his presence)
  - a. Signature need not be legible – marking an ‘x’ would work, or writing ‘mother’
  - b. Guiding T’s hand for signature is allowed – as long as it was T’s volitional act
  - c. *Proxy signature* allowed – such person (i) must also sign her name; (ii) *cannot* be counted as one of the two needed attesting witnesses
- 2. **T’s signature must be at the end thereof**
  - a. Words following the signature are ignored – BUT the entire will is invalid if the matter below T’s signature is so material that it is necessary to complete the dispositive plan
  - b. NOTE: exact order of signing between testator & witness is *not critical* when will execution ceremony is *contemporaneous transaction*
- 3. **T must sign will in presence of each W**
  - a. BUT W need not sign in presence of W
  - b. If T signs before or in presence of only one W – T must acknowledge signature before the other witness
- 4. **Will publication** – T must communicate to W’s that they’re witnessing a will
- 5. **2 attesting W’s** – NO need to sign in each other’s presence; need only sign *within 30 days of each other*; AND
- 6. **Execution ceremony must be completed within 30 days** – starts to run when 1<sup>st</sup> W signs (NOT when T signs)
- \* **Codicil** (a later amendment or supplement to a will) – must be executed with same formalities as a will
  - In NY, there are 2 formalities not required for codicil:

- (i) *W's need not sign in each other's presence*, & (ii) *W's need not sign in the T's presence*

### C. Proof of Wills in Probate

1. **Burden of Proof** – as to due execution is on *will proponent*
  - a. If will not self-proved – *both attesting witnesses must testify* as to facts necessary to show due execution
  - b. If one witness is dead, incompetent or cannot be found – testimony of other witness suffices
  - c. If *none of the witnesses* is able to testify – *proof of signature* of testator & one witness
2. **Attestation clause**
  - a. Appears below T's signature line & above W's signature line – recites all the elements of due execution
  - b. NOT legally required but valuable because it's *prima facie evidence of facts recited*
  - c. Helpful when – (i) W has a bad memory, or (ii) to rebut hostile W
3. **Self-proving affidavit**
  - a. W's sign sworn affidavit that recites all statements they would make if called to testify in court
    - (i) Usually signed at the same time as the will
    - (ii) A substitute for W's live testimony – unlike an *attestation clause*, which is merely corroborative of W's testimony, & in which you have to call the W's to testify, or else prove their signature)
  - b. *Affidavit serves the same function as a deposition or interrogatory*
  - c. Will is admissible to probate on strength of the sworn recitals in affidavit *unless an interested party* (i.e., heir or legatee under earlier will) *objects*, in which case the formal rules of proof of due execution apply

### D. Other Issues

1. **Interested Witness Statute**
  - a. Fact that a will beneficiary is an attesting W *never affects the validity of the will*
  - b. **BUT, bequest to the Beneficiary-W is void UNLESS:**
    - (i) *Supernumerary rule* – there were 3 witnesses, & the other 2 were disinterested, OR
    - (ii) *Witness would be a distributee if T had died without a will* – “*whichever is least rule* applies – W-beneficiary takes the *lesser* of – (i) the amount given by will, & (ii) the intestate share
  - c. NOTE: W is qualified to serve (& be compensated) as executor, because only *beneficial* gifts trigger the interested witness rule, NOT earned compensation
2. **Foreign Wills Act**
  - a. Will is admissible to probate if validly executed under – (i) NY law, (ii) law of the state where it was *executed*, regardless of T's domicile at that time, OR (iii) law of the state where T was *domiciled*, either when the will was executed or at death
  - b. Once will is admitted to probate, *NY law governs construction and application of its provisions*
3. **Holographic Will**
  - a. **Handwritten, signed but not-witnessed wills** – NOT valid in NY, except for
    - (i) *armed forces* during declared or undeclared war (expires 1 year after discharge); OR
    - (ii) *mariners at sea* (expires after 3 years)
  - b. NOTE: under the Foreign Wills Act, holographic wills written in (e.g.) NJ *will be valid* in NY
4. **Lawyer's Liability**
  - a. If lawyer prepares a will for T & supervises its execution, BUT does not have T declare document is a will, the will is denied probate, & T's estate passes by intestacy
  - b. Intended beneficiaries do NOT cannot sue lawyer for negligence, because of lack of *privity of K*
  - c. Lawyer's duty – *only with the party who contracted for his services* (only T can sue for negligence)

## IV. Revocation of Wills

### A. What Constitutes a Valid Revocation

1. Methods of revocation – can be only revoked by
  - a. *Subsequent testamentary instrument* (executed with appropriate formalities), OR
  - b. *Physical act*
2. Revocation of will revokes all *codicils* thereto (revocation of a codicil does not revoke the original will)
3. Burden of Proof – *on the party contending that the will was revoked*

### B. Revocation by Implication – *inconsistent provisions*

- T executes 2 wills – *to the extent possible, read the 2 instruments together*
- a. 2<sup>nd</sup> will treated as a *codicil* – 1<sup>st</sup> will revoked only to the *extent of inconsistent provisions*
  - b. BUT, if 2<sup>nd</sup> will wholly inconsistent – 1<sup>st</sup> will is *revoked by implication*

### C. Revocation by Physical Act

1. Act by Testator
  - a. Physical acts – such as burning, tearing, cutting, or other act of mutilation
  - b. *Writing of revocation & intent to revoke*
    - (i) Writing alone NOT enough (e.g. “this will is void” or “I cancel this will”)
    - (ii) Intent to revoke
      - (a) By testimony of witness that saw the writing; or
      - (b) Anything done to T's signature (e.g., cross it out with big X)
2. Act by another person (*revocation by proxy*)

- a. T must have *requested* it,
  - b. Physical act must take place *in T's presence*, &
  - c. There must be 2 *witnesses* to the act
- NOTE: revocation by proxy requires 4 people – T, 2 Ws, person conducting physical act

### 3. Presumptions Regarding Revocation of Wills

- a. Presumption that T revoked the will by physical act IF:
  - (i) Will was last seen in T's possession or control & is *not found* after T's death
  - (ii) Will was last seen in T's possession or control & is *found mutilated* after T's death
- b. These presumptions of revocation can be *rebutted* by evidence that
  - (i) Will was *not in testator's possession* (e.g., the will was left with attorney for safekeeping); or
  - (ii) Will was *destroyed by accident* (e.g. T told W that destruction of will was accidental)
- c. Neither presumption arises if will was last seen in possession of *someone adversely affected by its contents*

### 4. Changes on Face of Will After It Has Been Executed

- a. Partial revocation by physical act – NOT recognized in NY
  - (i) Words added to a will *after it is signed & witnessed* – NO effect on will
  - (ii) Disregarded as unattested words & will read as originally written

– NOTE: if changes made *immediately before T signed the will and attested* – changes valid because they would be part of duly executed will
- b. Only method T can make changes in his will are – (i) making a new will, or (ii) *codicil*

### 5. No Revival of Revoked Wills; Dependent Relative Revocation

- a. **NO revival of revoked wills** when later (2<sup>nd</sup>) will was revoked by physical act
  - (i) Once a 2<sup>nd</sup> will contains language revoking earlier wills, the earlier will is *legally dead* & cannot be revived simply by destroying the later will
  - (ii) Earlier will can only be revived in 1 of 2 ways:
    - (a) 1<sup>st</sup> will is *re-executed* – signed again by T & 2 W's; or
    - (b) Doctrine of "*republication by codicil*" – execution of a codicil that incorporates by reference the prior will or one or more of its provisions
  - (iii) NY – "*no revival*" rule also applies to *codicils* (i.e. codicil revoked by physical act) – if a testator revokes a gift by codicil and then destroys the codicil, the original gift in the will is not revived
- b. **Dependent Relative Revocation (DRR)** – permits a revocation to be disregarded when premised, conditioned, dependent upon, a *mistake of law as to the validity of another disposition*
  - (i) Effect would be to *disregard the revocation of the 2<sup>nd</sup> will* (the one that was revoked because of a mistake of law), & permit its probate – courts are DIVIDED on doctrine
  - (ii) Disposition that results from disregarding the revocation must come closer to effectuating what the testator (but failed) to do than would an intestate distribution – should not be applied to defeat testator's intent
- c. **Proof of Lost Wills Statute** – 3 requirements:
  - (i) *Due execution must be proved*
  - (ii) *Must be established that the will was not revoked* (the "lost will" proponent must overcome (i) the presumption of revocation that arises from the will's nonproduction, or (ii) the presumption that the revocation should be disregarded because of DRR)
  - (iii) *All provisions of the will must be clearly & distinctly proved* by each of at least
    - (a) 2 credible W's, or
    - (b) By a copy or draft of the will *proved to be true & complete*

## V. Changed Circumstances (in Testator's Family After Will Is Signed)

### A. Testator Marries After Will Is Executed

- Marriage following execution of will has NO effect on the will, because of the *elective share statute*

### B. Testator Is Divorced After Will Is Executed

1. If T is divorced (or marriage is annulled) after execution of the will
  - a. All **gifts & fiduciary appointments** in favor of the former spouse are *revoked by operation of law* – effect as though *former spouse predeceased T*
  - b. BUT, gifts to former spouse's relatives are NOT revoked by the divorce
2. Exceptions:
  - a. Decrees of separation don't trigger the statute – ONLY divorce or annulment (need final decree)
  - b. Statute NOT applicable if couple reconcile and remarry, as all provisions are restored
  - c. Statute does **NOT affect guardianships** of children by divorced spouses
  - d. Statute does NOT applicable to other vehicle (e.g. life insurance) – ONLY wills

### C. Pretermitted Child Statute – Child Born or Adopted After Will Is Executed

1. No protection to children alive when will was executed – applies ONLY to *afterborn* or *after-adopted child*
2. Requirements for being "pretermitted" under the statute
  - a. **Child is born or adopted after will is executed**, AND
  - b. *Child is "unprovided for by any settlement,"* (e.g., a life insurance policy); AND

- c. *Child is not provided for or mentioned in the will*
- 3. *Testator had other children when the will was executed*
  - a. Takes nothing – if the existing children were not provided
  - b. **Takes same share as siblings** – if substantial gifts were provided (**comes out of the gifts to other children ONLY**)
  - c. Takes *intestate share* – if only a *limited provision* (give \$1) was provided to existing children
- 4. *Testator had NO other children when will executed*
  - Takes *intestate share* (consider estate as intestate and subtract perpermitted child’s intestate share, then apply the will)

## VI. Reference to Facts And Events Outside the Will

### A. Incorporation by Reference – Extrinsic Document

- 1. Common law – the terms of an *extrinsic document*, not present when the will is signed, can be incorporated by reference, if:
  - a. The document was in existence when the will was signed,
  - b. The will shows an intent to incorporate the document’s terms, &
  - c. The extrinsic document is clearly identified by language in the will
- 2. **NY – NOT recognize “incorporation by reference”**
  - a. All wills must be signed by T & witnessed by 2 W’s (except armed forces & mariners)
  - b. Exception for “pourover” gifts by will to a lifetime trust

### B. Acts of Independent Significance (“Nontestamentary Acts”)

- Lifetime acts with a lifetime motive or purpose – have no effects on T’s will
  - a. E.g. T’s will that bequeaths “the automobile that I own at death” to A; shortly before death, T trades his Chevy for a Mercedes – A takes the Mercedes
  - b. Same result for a gift of “the contents of my chest?”
    - (i) Except for (1) title documents, (2) deeds, (3) stock certificates, & (4) bank passbooks
    - (ii) For contents – ONLY tangible property & cash

### C. Nonprobate Assets

- 1. Only property owned by the decedent at death can be disposed by a will
- 2. Nonprobate assets – interests in property that are NOT subject to disposition by will or inheritance, & are NOT part of the probate estate for purposes of administration – major types:
  - a. *Property passing by right of survivorship* (e.g., joint bank account, etc.)
  - b. *Property passing by K* – here K governs, not the will
    - (i) Life insurance, or
    - (ii) Employee death benefits paid to beneficiary other than insured’s executor or estate
  - c. *Property held in trust*, including revocable trusts
  - d. *Property over which decedent held a power of appointment*

## VII. Death of Beneficiary During Testator’s Lifetime

### A. NY Anti-Lapse Statute

- 1. When a will beneficiary predeceases T, the gift *lapses* – cannot make a gift to a dead person UNLESS the gift is saved by the state’s *anti-lapse statute*
- 2. **Anti-lapse statute applies ONLY when:**
  - a. **Deceased beneficiary was – (i) issue; (ii) brother, or (iii) sister; AND**
  - b. **Leaves issue who survive T**
- 3. NOTE: *the deceased beneficiary’s will is irrelevant* because the statute names the substitute taker
- 4. NOTE: *gift conditioned on survival precludes* application of the Anti-Lapse Statute

### B. Lapse in Residuary Gift

- 1. **Surviving Residuary Beneficiaries Rule** – if T’s residuary estate is devised to 2 or more persons, & the gift to 1 of them lapses, *the other residuary devisees take the entire residuary estate, in proportion to their interests in the residue* (absent contrary will provisions)
- 2. NOTE: the *Anti-Lapse Statute trumps* the *Surviving Residuary Beneficiaries Rule* (subject to possible application of *Anti-Lapse Statute*)

## VIII. Class Gifts

### A. Class Gift Rule

- 1. Rule of construction (based on presumed intent) – if a will makes a gift to a group of persons generically described as a *class* (e.g., “children,” “brother & sisters,” etc.), & some class member predeceases T, *the class members who survive T take* (absent contrary provision)
  - a. *Rationale* – T was “group-minded” in making the gift, & wanted the class of persons, & no one else, to share ownership of the property
  - b. *Determining the takers of a class gift* – read the will *as of T’s death*
  - c. *Only surviving members take gift to class*

2. BY CONTRAST – when the beneficiaries are *named individuals* rather than a class (e.g. “I devise Blackacre to A, B, & C, the children of my brother”), the will makes gifts of 1/3 shares to 3 individuals; if A predeceases T, his 1/3 share lapses, falling into the residuary estate
3. NOTE: the *Anti-Lapse Statute trumps* the *Class Gift Rule* (subject to possible application of *Anti-Lapse Statute*)

#### B. Rule of Convenience – class closing rules

1. Rule of construction used to determine the takers of a class gift
  - a. **Class is closed** (i.e., *later-born class members are excluded*) – *at the time a distribution to the class must be made* – BASICALLY, we close the class in order to determine the minimum share of each class member, so a distribution can be made without the necessity of asking for a rebate or refund later on
  - b. Any other solution would be inconvenient & disruptive of property ownership
2. **Outright gift by will – the class closes at T’s death**
  - Subject to “*gestation*” principle – a child in gestation at time of T’s death is treated as if alive (common law presumption of 280 days from conception to birth)

#### C. Construction of Class Gifts – the “Adopted Out” Child

1. Child placed for adoption & is adopted by a new family – the “adopted out” child does NOT take as *beneficiary of a class gift made in the will* of a member of the child’s *natural* family
2. *Rationale* – (i) against NY policy because adoption records are sealed, & (ii) the “adopted out” child should not get ‘2 bites from the same apple’ (let the new, adopted family take care of the child)

### IX. Problems Associated with Testamentary Gifts

#### A. Classification of Gifts that Can Be Made By a Will

1. *Specific gift* – “I devise Blackacre/my computer to my son John”
  - a. *Possessive pronouns* must be present,
  - b. UNLESS, it’s (i) stock of a closely held corporation, or (ii) a stock split occurred
2. *Demonstrative legacy* – “I bequeath 5K to be paid from the proceeds of sale of my IBM stock, to D” (a general amount from a specific source)
3. *General legacy* – “I give the sum of 5K to D”
4. *Residuary disposition* – “I give all the rest, residue & remainder of my estate to my brother A”
5. *Intestate property* – if a partial intestacy because will, poorly drafted, has no residuary clause
  - NOTE: *ademption* only applies to *specific gifts*

#### B. Abatement of Legacies (if not enough assets for all claims)

1. *Abatement* – the process of reducing testamentary gifts in cases where the estate assets are insufficient to pay all claims against the estate and satisfy all bequests and devises
2. *Order of abatement* (absent provision in the will)
  - a. Debts & expenses are paid out of *intestate property*, then out of *residuary estate*
  - b. If there are still debts, *general legacies* are sacrificed first (on a pro rata basis)
  - c. Then *demonstrative & specific gifts* are abated
  - d. The last to be abated: dispositions that qualify for the *estate tax marital deduction*

#### C. Apportionment of Estate Taxes (PRO RATA)

1. *Death taxes are apportioned pro rata* (absent contrary provision) – among all persons interested in the estate (beneficiaries of both probate & non-probate transfers)
  - EXCEPTION – interest that qualify for *charitable* or *marital* deduction do not have to contribute pro rata
2. *Formula* – basically, each beneficiary must pay death taxes based on his share of the total estate
  - Value of the non/testamentary gift ÷ Total value of taxable estate
3. Example: T has \$1M estate, including life insurance – T’s will bequeaths: (i) Blackacre (200K) to son A, (ii) 100K to church, & (iii) residuary estate (600K) in trust (T’s daughter B for life, remainder to B’s children), & (iv) proceeds of 100K life insurance policy are to be paid in a lump sum to T’s sister C – allowing for a 100K charitable deduction (because of church donation), T’s taxable estate was 900K, & estate taxes total 108K
  - a. A (Blackacre 200K):  $200K/900K$  (his share) x 108K (total death tax owed) = 24K
  - b. Church (100K cash legacy): not subject to apportionment
  - c. *Residuary trust* (to B for life, remainder to B’s children):  $600K/900K$  x 108K = 72K
  - d. C (100K life insurance proceeds):  $100K/900K$  x 108K = 12K

#### D. Non-Exoneration of Liens (Specific Gift of Encumbered Property)

1. In NY – *liens on specifically devised property are NOT exonerated UNLESS the will directs exoneration*
  - a. Absent such a specific clause, the beneficiary would take title *subject to a lien*
  - b. NOTE: a *general provision* in the will for the payment of debts is *NOT such an indication* that liens are to be exonerated

#### E. Ademption (T no longer owns property)

1. If a will makes a specific gift of property, & the *property is not owned by T at his death*, the gift fails under the doctrine of *ademption*.
  - a. The beneficiary of the adeemed gift gets nothing (& any proceeds from any sale of the gifts goes into the residuary estate)

- b. Applies ONLY to specific gifts (NOT *general* or *demonstrative* gifts)
- 2. **Statutory Exceptions to the Ademption Doctrine**
  - a. **Casualty insurance proceeds** for lost, damaged, or destroyed *property* – beneficiary takes insurance proceeds to the *extent paid after death of testator*
    - BUT, if insurance paid *before* T’s death, ademption applies & beneficiary gets nothing
  - b. **Executory K** (K not fully performed) – beneficiary gets sale proceeds *paid after death of testator*
    - (i) BUT, if the K were fully performed *before* T died, ademption applies & beneficiary gets nothing
    - (ii) NOTE: if land taken by *eminent domain*, ademption applies & beneficiary gets nothing
  - c. **Sale by guardian or conservator** (if person executing the will becomes incapacitate) of specifically bequeathed property
    - Beneficiary gets the proceeds to the *extent the remaining sale proceeds can be traced & haven’t been expended* for T’s care

#### F. Bequests of Shares of Stock and Other Securities

- 1. Ademption does not apply to *demonstrative* (or *general*) legacies → it only applies to specific gifts
  - a. “5K to A, paid from proceeds of Beta Stock” – ademption NOT apply because *demonstrative legacy*
    - A gets 5K, & *other assets must be sold to raise that money*
  - b. “My 100 shares of IBM Stock to A” – **ademption applies** because *specific bequest* (A gets nothing)
  - c. “100 shares of Kodak Stock to A” – ademption NOT apply because
    - (i) Unlike (ii), there is no *possessive pronoun* (“my”), &
    - (ii) Since Kodak is a *regularly traded security*, it’s treated as a *general legacy*
      - A gets *DOD* (*date of death*) value of 100 shares of Kodak
- 2. **Closely held corporation stock** – treated as *specific bequest* & ademption applies (regardless of “my”)
- 3. NOTE: *Change in Form but NOT Substance* – ademption NOT apply (e.g. A stock converted to B stock)
- 4. NOTE: **Stock splits** (*NOT stock dividends*) – beneficiary TAKES additional shares because treated as *specific bequests* regardless of whether *possessive pronoun used* & regardless of whether publicly traded

#### G. Mistake, Ambiguity

- 1. **Mistake as to Contents of Will** – apply *Plain Meaning Rule* (e.g. “200 shares” but intended 300 shares)
  - a. There being no ambiguity, extrinsic evidence is NOT admissible to overrule the plain meaning of will;
  - b. Conclusively presumed that testator read the will and intended all of its contents
- 2. **Latent ambiguity** – language which is *misdescription* (e.g. 2 or more fits the description)
  - All forms of extrinsic evidence are admissible to cure a latent ambiguity, including:
    - (i) “*facts & circumstances*” evidence
    - (ii) *T’s declarations of intent to 3<sup>rd</sup> party*
    - (iii) *T’s statements to attorney who prepared the will*
- 3. **Patent ambiguity** – mistake appears on face of the will (e.g. “twenty-five dollar (\$25,000) to A”)
  - Extrinsic evidence is admitted, BUT NOT evidence about *T’s declarations of intent to 3<sup>rd</sup> person*

#### H. Conditional Wills – if the condition doesn’t occur, probate should be denied (courts unpredictable)

- 1. Is it a *conditional will* (i.e., probate denied), or
- 2. Is will *merely reflect the motive or inducement for making the will?* (e.g. if something happens on trip)

#### I. Contracts Relating to Wills

- 1. K to make a will or not to revoke a will can be established *only by an express statement in the will* that its provisions are intended to constitute a *K between the parties*
- 2. If a will is contractual & the survivor breaches the k by writing a will w/inconsistent provisions:
  - a. Probate the new will, even though it was written in breach of K; and
  - b. Impose *constructive trust* in favor of the intended beneficiaries of K
- 3. A contractual will can be revoked by agreement of the parties

#### J. New York’s “Negative Bequest” Statute (words of disinheritance given full effect)

- 1. Common law (rejected by NY) – when a will doesn’t make a complete disposition of the estate (resulting in *partial intestacy*), *words of disinheritance in the will are ineffective*
- 2. NY – “*Negative bequest*” Statute says that *words of disinheritance in the will are given full effect* – treat the disinherited person as if they predeceased T

#### X. Elective Share Statute (*protecting surviving spouses against disinheritance*)

##### A. Basic Features

- 1. Purpose of the *Elective Share Statute* – protect surviving spouses against disinheritance, by giving them entitlement to minimum share of decedent’s estate
  - Surviving spouse has a right of election even if the decedent *died intestate*
- 2. Amount of the elective share – *the greater of 50K or 1/3 of the net estate* (PLUS 6% interest beginning 7 months after issuance of the Letters Testamentary to the executor / administrator)
  - a. Elective shares apply to **net estate after payment of debts**, but *before* payment of estate taxes
  - b. **Actual amount entitle** = **elective share amount minus value of outright dispositions passing to spouse under the will**



- |        |   |                |  |
|--------|---|----------------|--|
| (ii)   | + | 30,000         | W-H account (½ testamentary substitute)          |
| (iii)  | + | <u>150,000</u> | W-S joint tenancy (testamentary substitute)      |
| (iv)   | = | 480,000        | <i>Augmented Estate</i>                          |
| (v)    |   | 160,000        | Elective share amount (1/3 of augmented estate)  |
| (vi)   | - | 75,000         | Amount passing to H under will                   |
| (vii)  | - | <u>30,000</u>  | Amount passing to H as testamentary estate       |
| (viii) | = | <u>55,000</u>  | <i>Net elective share to which H is entitled</i> |
- b. **Case2:** H cannot prove that any of the funds used to buy joint tenancy property were contributed by W
- W-S joint tenancy (testamentary substitute) = 0
  - Augmented Estate = 330,000
  - Elective share amount = 110,000
  - Net elective share = 5,000
7. NOTE: in making up the net elective share, *all other beneficiaries contribute pro rata* (that includes (i) beneficiaries under the will, (ii) beneficiaries of testamentary substitutes, & (iii) intestate distributees)

#### D. Procedural Rules Governing Election

- Must be filed within 6 months after Letter (Letters Testamentary or Letters of Administration) are issued by Surrogate at start of probate proceedings, BUT NOT more than 2 YEARS after decedent's death
- Right of election *personal to surviving spouse* (& if she dies, right of election dies) – rationale is that the elective share is to protect the spouse, NOT her heirs; but, the guardian or committee of an incapacitated spouse may elect with court approval
- May *waive* – with or without consideration, before or after marriage, as to a particular will or testamentary substitute, or as to all wills & testamentary substitutes generally
  - Must be in *writing, signed & acknowledged before a notary public*
  - General waiver* of all rights in spouse's estate waives the right to elective share or intestate share
    - BUT *does NOT waive right to gifts made by spouse's will (unless explicit waiver)*

#### E. When Spouse Disqualified From Taking Elective Share

- Disqualification of a surviving spouse from taking right of election, inheritance, wrongful death action recovery, & exempt personal property set-aside – remember **DISMAL**:
  - Divorce** – final decree of divorce or annulment valid under NY law
  - Invalid divorce** – *surviving spouse* procured, outside of NY, a divorce or annulment not recognized as valid in NY law (NOT by deceasing spouse)
  - Separation decree** – final decree of separation rendered *against* surviving spouse (if H & W enter into a separation agreement, live apart from each other, *but there's no decree* of separation, the surviving spouse is NOT disqualified from filing for an elective share)
  - Marriage void** as incestuous or bigamous
  - Abandonment, Lack of support** – surviving spouse abandoned or refused to support deceased spouse (surviving spouse openly & notoriously cohabited with another)
- NOTE: whereas a *decree of separation* disqualifies the surviving spouse from *filing for an elective share*, it does *NOT disqualify* the spouse from *taking under the decedent's will*

### XI. Will Contests

#### A. Testamentary Capacity

- Did T have sufficient capacity to:
  - Understand the nature of the act he was doing* (i.e., that he was signing a will)
  - Know the nature & approximate value of his property*
  - Know the natural objects of his bounty*
  - Understand the disposition he was making*
- NOTE: takes less capacity to write a will than to write a K; *adjudication of incapacity* involves a different legal test than *capacity to make a will* – jury could find that T signed the will during a *lucid interval* (question of fact for the jury to decide)

#### B. Undue Influence

- Existence of a testamentary capacity subjected to & controlled by a dominant influence or power (burden of proof is on contestant to prove):
  - Existence* & exertion of an influence
  - Effect* of such influence was to overpower T's mind & will
  - Product* is a will (or a gift in the will) that would not have been executed BUT FOR such influence
- Evidence of undue influence is usually circumstantial, the following is NOT enough:
  - Opportunity* to exert influence (e.g. not enough that a child lived with his mother, and acted for her)
  - Susceptibility* to influence due to illness or age (e.g. not enough that mother was old)
  - Unnatural disposition* (i.e. that some children take less than others or are excluded entirely)
- Inference of undue influence** – where a will makes a gift to one in a *confidential relationship* (e.g., attorney-client, financial adviser, child who held power of attorney), & that person was *active in procuring the will, there is an inference of undue influence which, if not rebutted, satisfies the contestant's burden of proof*

- If a will makes a bequest to the *drafting attorney*, the Surrogate makes a **PUTNAM SCRUTINY**, even if no objection is filed (i.e., an *automatic inquiry*) to determine *whether the gift was voluntarily made*
- 4. **Drafting attorney is also the executor** – attorney *must give written disclosure to the client* that:
  - a. Any person, not just attorneys, can be named executor;
  - b. Executors receive statutory commissions;
  - c. Attorney will also be entitled to legal fees for representing the estate
  - NOTE: client must sign the acknowledgment with 2 witnesses (effect of failure to comply with the statute is reduction of executor's commission by 50%)

### C. No-Contest (“In Terrorem”) Clauses

1. “In terrorem” (no-contest) clauses – say that if any beneficiary contests the will or any of its provisions, he shall forfeit his legacy
2. **NY Rule** – **fully enforceable**, regardless of whether contest was filed with probable cause
  - a. Rationale is that T should be permitted to protect his testamentary plan, & his reputation (which are often damaged in contests), against post-death attack
  - b. EXCEPTIONS that do not result in forfeiture under the NY rule:
    - (i) Ground of contest is *forgery*, or that the will was *revoked by a later will*, IF the Surrogate finds that there was probable cause for the contest
      - NOTE: NOT apply on grounds that will was revoked by physical act
    - (ii) Contest is filed on *behalf of an infant or incompetent* – actions taken by a 3<sup>rd</sup> party (guardian) should not work a forfeiture
    - (iii) *Construction suit* to construe the will's terms (such action does not challenge will's basic validity)
    - (iv) *Objection to jurisdiction of court* (not challenging the will, but argue will should be probated in NY)

## XII. Powers of Appointment

### A. Basic Definition – power of appointment permits an income beneficiary to designate the remaindermen

1. Donor & donee
  - a. Donor – the creator of power of appointment
  - b. Donee – the person who has the authority under power of appointment
  - c. *Takers in default of appointment* – persons designated to take the property if the *donee fails to effectively exercise his power*
2. General v. Special
  - a. *General power of appointment* (unlimited) – one exercisable in favor of the donee herself, her estate, her creditors, creditors of her estate
  - b. *Special power of appointment* (limited) – one exercisable in favor of a specified class of persons (NOT include the donee, her estate, her creditors, creditors of her estate)

### B. Exercise of powers of appointment

1. In NY – a will exercises all powers of appointment held by T (both *special & general* powers) UNLESS the instrument creating the power called for its exercise by a *specific reference* to the power
2. Presently Exercisable v. Testamentary Power
  - a. *Presently exercisable power* – one exercisable by the donee during her lifetime (but this **can also be exercised by the donee's will** UNLESS such an exercise is expressly prohibited)
  - b. *Testamentary power* – exercisable only by the donee's will

### C. Testamentary Substitute – for elective share purposes

1. *General presently exercisable power of appointment* (“during her lifetime D can appoint the trust property to anyone including herself”) – YES
2. *General testamentary power of appointment* (“& on D's death the trust principal shall be distributed to such persons, including D's estate, as she appoints by her will”) – NO
3. *Special power of appointment* (“during her lifetime D can appoint the trust property to any one or more of her descendants by a written instrument delivered to the trustee”) – NO

### D. Creditors' Reach – against donee's power

1. *General presently exercisable power of appointment* (even if power not exercised) – YES (can reach)
2. *General testamentary power of appointment* – NO
3. *Special power of appointment* – NO

**A. The Federal Estate Tax \$1M Exemption**

1. Federal estate tax grants **\$1.5M** exemption for estate of decedents dying in 2004 & 2005
2. For an estate under that size, no estate tax is due & no estate tax return has to be filed

**B. What Interests Are Includible in the “Gross Estate”?**

1. Gross Estate – the date-of-death value of all assets owned or passing at death made subject to tax by statute
2. Life Insurance Proceeds – includible if:
  - a. Insured held at death *‘incidents of ownership’* over the policy; and
  - b. Proceeds of life insurance policies transferred **within 3 years of death**
 – NOTE: compare that life insurance proceeds are not included for gross income calculations

	<i>Gross Estate</i>	<i>Testamentary Substitute (TS LEGUP)</i>
<i>Revocable trust</i>	YES	YES (L)
<i>Totten trust bank account</i>	YES	YES (T)
<i>Qualified pension plan benefits</i>	YES	1/2 (named/changed beneficiary after 9/1/92)
<i>Joint tenancy between W &amp; H</i>	1/2 (without regard to consideration)	1/2 (without regard to consideration)
<i>Joint tenancy between W &amp; 3<sup>rd</sup> party</i>	YES (consideration furnished test applies)	YES (consideration furnished test applies)
<i>Irrevocable trust with retained life estate</i>	YES	YES (created during marriage 9/1/92)
<i>Life insurance proceeds</i>	YES	<b>NO</b> (‘L’ in LOGPIT)

**C. Bypass Trust**

1. Bypass Trust – a beneficiary can be given a *life income interest & limited* powers over trust principal, all without causing the property to be taxed in the beneficiary’s estate on her death
  - a. Trust “bypasses” the beneficiary’s estate for estate tax purposes
  - b. Trust *won’t* be taxed in the beneficiary’s estate *as long as NOT given a general power of appointment*
2. **HEMS Ascertainable Standard** (*health, education, maintenance & support*) – NOT considered a *general power of appointment* that will cause the trust to be includible in a beneficiary’s gross estate
  - a. *Not* include – “comfort,” “benefit,” “welfare,” “well-being”
  - b. BUT, “*comfortable health*” is okay because it’s an *adjective* that modifies the permissible standard
3. **Example:** C will creates a trust: “Income to daughter S for life. And trustee shall distribute to S, on her demand, so much of the trust principal as is needed for S’s *health, education, maintenance & support*. On S’s death, trustee shall distribute the principal to such 1 or more of S’s descendants as she appoints by will. If S not exercise power of appointment, on her death trustee shall distribute the principal to her children” – S dies:
  - a. S’s power to appoint among her descendents is – *special testamentary power of appointment* (cannot appoint to herself, or her estate, or her creditors)
  - b. Is the value of the trust corpus (500K at S’s death) includible in S’s gross estate for estate tax purposes?
    - NO: it’s a valid bypass trust because she only got a life estate with limited invasion powers
  - c. Trust gave S life income interest – Is trust taxed in S’s gross estate as transfer with a *retained* life estate?
    - NO: because S was *given* a life estate by her father’s will (S did NOT give)
  - d. As beneficiary, S can invade the trust & appoint principal to herself as needed for HEMS – Is this invasion power a general power of appointment that will cause trust to be includible in S’s gross estate?
    - NO: it’s within the HEMS ascertainable standard
  - e. SUPPOSE the trust gives S as beneficiary the power to invade the trust “for her health, support, maintenance and *comfort*” – Is the value of the trust corpus includible in S’s gross estate
    - YES: *comfort* is not on the HEMS list
  - f. SUPPOSE that S isn’t given a beneficial invasion power tied to a “comfort” standard; instead, the Bank as trustee has the power to distribute principal to S for her “comfort” – Is this value of the trust corpus includible in S’s gross estate?
    - NO: because the Bank has the power to invade, *not* S
  - g. SUPPOSE that S is named as a trustee of the trust, & S *as trustee* has the power to distribute to herself for “comfort” – can S make distributions of principal to herself?
    - NO: because of the *NY Disabling Statute*, which prevents S from distributing to herself

**D. Estate Tax Charitable Deduction**

1. For a *remainder interest* passing to charity, there is *no charitable deduction* under the income tax, gift tax, or estate tax, UNLESS the gift takes the form of
  - a. *Annuity trust* – under which a *stated dollar amount*, (no less than 5% of the initial trust corpus), is payable to the

- individual beneficiary for life
  - b. *Unitrust* – under which a *stated percentage*, (no less than 5% of the trust corpus, valued annually), is payable to the individual beneficiary for life
2. Example: gifts such as “income to A for life, remainder to the American Red Cross” does NOT qualify for a charitable deduction (because not in the form of *annuity trust* or *unitrust*)

#### E. The Marital Deduction

1. Federal estate tax grants an *unlimited marital deduction* under both the gift tax & the estate tax for qualifying gifts to a spouse AS LONG AS the property is left in a form that will cause it to be *taxed in the surviving spouse's estate at his or her death* (marital deduction doesn't necessarily *save* taxes, it simply *defers* taxes until the surviving spouse's death)
  - a. General Test – transfer must be an interest that will be includible in the surviving spouse's gross estate on her subsequent death (i.e., not given away, consumed or disposed of during surviving spouse's lifetime)
  - b. *Unlimited marital deduction* was enacted in 1982 – if T died before 1982, can not qualify
2. 3 dispositions qualify for the marital deduction:
  - a. ***Outright dispositions*** – by will, intestacy, elective share, life insurance in lump sum, etc.
  - b. *Marital deduction power of appointment trust*
  - c. ***QTIP trusts & the QTIP (Qualified Terminable Interest Property) election***:
    - (i) Qualifies for the marital deduction *if* the decedent's personal representative makes QTIP election
    - (ii) Eligibility requirements:
      - (a) ***Annual payments to spouse for life*** – if the income interest terminates on the spouse's remarriage, the trust is not eligible for QTIP treatment;
      - (b) ***No other beneficiaries during spouse's life*** – neither surviving spouse nor trustee can have power to distribute trust property to anyone other than the spouse; AND
      - (c) ***Explicit Election*** – by executor (not automatic)

– NOTE: in deciding to qualify for a terminable interest for the marital deduction, the spouse basically has to decide if she wants to pay estate taxes at the *front end of the life estate*, or at the *back end*
3. Gift-tax exclusion
  - a. *11K per donee annual* exclusion
  - b. Available for present interests, but NOT future interests
  - c. Gift is *incomplete* for gift tax purposes if the transferor retains either the power to revoke or the power to change the beneficiaries
4. Unlimited exclusion for tuition and medical payments (ONLY IF made directly to service provider)

#### F. New Basis at Death Rule

1. *Lifetime gifts – carryover basis rule* (donor takes donee's basis)
2. BUT, for interests includible in the gross estate – *New basis at death rule* (take the date-of-death value; thus unrealized gain wiped out)
3. Example: X buys 100 shares of Acme stock for \$40 per share (*basis*); X sells the stock for \$100 per share (10K) – *capital gains* of 6K subject to income tax
  - a. X gives the 100 shares of stock to his son Y (lifetime gift) – *carryover basis* 6K of capital gains
  - b. X doesn't dispose of the Acme stock during his lifetime but his will bequeaths the 100 shares of stock to his son Y; at the time of X's death, the stock is worth \$100 per share – *new basis at death rule* 10K of capital gains

**I. QUESTION – 55**

- A. Issues are whether there were enough witnesses available to prove the will was properly executed and whether an interested witness may testify as to the proper execution of the will.
- B. Issue whether under what circumstances NY recognizes revocation by physical act
- C. Issue on how to determine who died first
- D. Issue whether gift is considered an advancement
- E. Issue how tenancy by the entirety property is divided upon the simultaneous death of the tenants

**II. QUESTION – 16**

- A. Whether objection to probate of the will may bring **the no-contest (*in terrorem*) clause** into play
  - 1. NY – such clauses are given full effect (no exceptions apply here – challenges based upon improper execution are not excepted from the operation of the clause)
- B. Whether money given by decedent prior to death will reduce a bequest under the will
  - 1. Advancement may reduce the gift to donee, but only where the advancement can be proven by a **contemporaneous writing signed** by donor, which demonstrates donor’s intent
- C. Whether a donee’s status is affected by her status as a witness to the will
  - 1. While an interested witness does not invalidate the will, a disposition to an interested witness may be void
  - 2. BUT if witness also an intestate distributee, she will take the **lessor of her legacy and her intestate share**

**III. QUESTION – 26**

- A. Issue is the effect of an attestation clause in proving will
  - 1. Attestation clause, recites facts of due execution, establishes prima facie evidence of valid execution of will
  - 2. BUT unlike self-proving affidavit, proponent of the will **MUST** bring witnesses to prove the signatures
- B. Will was properly proved
  - 1. Combination of proof of signatures + attestation clause is sufficient
- C. Whether handwritten additions appearing after the testator’s signature in a will are valid
  - 1. Holographic will are not valid in NY (thus addition will be disregarded)
- D. Whether codicil was validly revoked when testator crossed out her signature
  - 1. This is a valid revocation by physical act
- E. Issue is the effect of revocation of a codicil partially revoking an existing will
  - 1. NO revival of revoked wills doctrine – subsequent cancellation of the codicil does not revive revoked clause
- F. Status of specific devise if the subject matter no longer exists
  - 1. Ademption applies – casualty insurance proceeds paid **after** the death of the testator can be paid to a specific devisee in spite of the redemption
- G. Issue is the effect of a beneficiary of the residuary estate predeceasing the testator and leaving issue
  - 1. Generally, residue will pass to the surviving residual beneficiaries
  - 2. However, residual beneficiaries give way to “anti-lapse” statute applies if an issue

**IV. QUESTION – 48 (& TORTS)**

- A. Whether the fact that A is attorney, executor, and attesting witness defeats the will or interferes with its admission to probate
  - 1. No rule prohibits the same individual from acting as attorney, executor, and attesting witness
  - 2. If an attorney drafts a will that names the attorney as executor – there are 3 requirements (any person can be executor, entitled to statutory commission, entitled to legal fees rendered), client must sign a written acknowledgment of disclosure – absent compliance commission shall be ½ of statutory commission
- B. Who is entitled to *wrongful death proceeds*
  - 1. Recovery is pecuniary lost – this NOT included as party of the decedent’s estate
- C. Who is entitled to *personal injury action*
  - 1. damages recovered in action for pain & suffering are included in the estate

**V. QUESTION – 62 (& TRUSTS)**

- A. What constitutes adequate proof of due execution of a will
  - 1. Elements for due execution / burden of proof is on the proponent
  - 2. Ordinarily the testimony of at least one attesting witness is required, may be probate even though neither witness can remember the circumstances (if the court is satisfied with all evidence that properly executed)
- B. Whether testator may give a gift to former spouse
  - 1. Divorce automatically revokes all dispositions to divorced spouse UNLESS will expressly provides to contrary
- C. Whether separation agreement terminates election rights
  - 1. Not disqualified by virtue of separation agreement – because the agreement was neither a final decree of divorce; nor a decree of separation; nor constitute a waiver of the right to elect
  - 2. Must exercise within 6 months

**VI. QUESTION – 71 (& TRUSTS)**

- A. Whether gift deemed by destruction or lapsed by sister’s death

1. Insurance proceeds subject to specific bequest paid *after* the death of testator are payable
  2. Legacy to a person who predeceases the testator lapses, BUT anti-lapse statute applies to disposition does not lapse but vests in the beneficiary issue
- B. Issue whether child was “provided for” as a pretermitted child
1. If will made no provision to other children, after-born child would not share in the estate
  2. BUT if other were provided (and after-born not provided), then after-born child entitle to share equally with child that is provided
  3. If after-born provided, regardless of whether other children provided for, after-born takes only that is provided

**VII. QUESTION – R-2 (& PROFESSIONAL RESPONSIBILITY)**

- A. Whether a valid will and codicil have been executed
1. Definition, requirements of will & codicil
- B. Whether the attorney general has standing to raise an objection in a Surrogate’s Court’s Proceeding
1. AG us to represent the beneficiaries of dispositions for *religious, charitable, educational, or benevolent* purposes
- C. Distribution method (per stirpes)
1. Default is distribution by representation (per capita at each generation)
  2. BUT is a testator provides, distribution may be made per stirpes

**VIII. QUESTION – 98 (& TORTS & NY PRACTICE)**

- A. NY does not recognize *holographic wills* – except for sea mariners or armed forces during war

**IX. QUESTION – 14**

- A. Whether 1<sup>st</sup> will was revoked by 2<sup>nd</sup> will or codicil
1. Will may be revoked, by a writing of the testator clearly indicating an intention to effect the revocation, or by an alteration executed with the formalities prescribed for the execution and attestation of a will
  2. NY – incorporation by reference is NOT allowed
- B. Issue of effect of *renunciation*
1. Need to (i) file an irrevocable renunciation, (ii) which is notarized, (iii) within 9 months of the death of T
  2. Must also consider Anti-lapse statute
- C. Issue whether testamentary gifts to charity will be limited
1. Limitation on testamentary gifts to charity has long been Abolished
- D. Whether a potential will beneficiary can recover for an attorney’s negligence in drafting a will
1. Though T’s executor will be able to maintain a suit against the negligent attorney – damages will probably be non-existent
  2. NY follows privity of contract doctrine – a lawyer’s duty runs ONLY to the client

**X. QUESTION – 50**

- A. Whether Spouse has a right to take an elective share
1. Spouse has a right to an elective share to protect him/her from being disinherited unless the absolute dispositions to the spouse are equal to or more than the elective share amount (1/3 of net estate)
  2. Include all (i) probate assets & (ii) testamentary substitutes (e.g. Totten trusts & joint bank accounts)
- B. Which assets can be disposed of by a will
1. Non-probate assets (cannot be disposed by will) – *life insurance proceeds, joint bank accounts with right of survivorship, tenancy in the entirety*
  2. However, a Totten trust can be revoked, modified, or altered by a will if the will refers to the particular trust account as being in trust for a named beneficiary in the named financial institution
- C. Incorporation by reference – NOT recognized in NY

**XI. QUESTION – 57**

- A. Whether a copy of a will can be probated when the original will has been lost
1. Allowed ONLY if – (i) it is established that it was not revoked, (ii) execution of the will is proved in a manner required for the probate of an existing will, (iii) all of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses OR by a copy or draft of the will proved to be true and complete
  2. Proof must be sufficient to overcome the presumption that the reason the will cannot be found is that the testator destroyed the will with intent to revoke
- B. Whether a spouse is disqualified from exercising the elective shares when the spouses are not divorced but living separate and apart from each other at the time of the decedent’s death
1. ***Elective share is reduced by any outright gifts***
  2. ***Terminable interests, such as life estates, do not constitute outright gifts and their value is not applied to reduce the elective share – IF spouse elects to take elective share, she will forfeit the entitlement to terminable interests (she will be treated as if she predeceased the decedent)***
  3. Right of election is void if
    - (i) Final decree of divorce or annulment recognized as valid in NY has been issued;
    - (ii) Marriage void; (iii) surviving spouse procured invalid divorce or annulment;
    - (iv) final decree of separation was rendered; (v) surviving spouse abandoned
    - (vi) surviving spouse refused support; (vii) surviving spouse openly/notoriously cohabited with another
- C. Whether *negative bequest* is recognized – a parent is NOT compelled to leave property to his children (absent any proof of lack of

capacity, fraud, or undue influence, the disinheritance is valid and enforceable)

- D. Once a will is revoked, it cannot be revived unless it is re-executed with testamentary capacity – merely revoking a later will does not revive the earlier will (then laws of intestacy will apply)

## XII. QUESTION – 96

- A. 6 requirements of valid execution of will
- (i) Must be signed by the testator; (ii) testator's sign must be at the end of the will;
  - (iii) testator must sign in the presence of each witness, or acknowledge his previous signature
  - (iv) testator must publish the will by declaring to the witnessed
  - (v) there must be 2 attesting witnesses who sign at the testator's request
  - (vi) witnesses must sign their names within 30 days of each other
- B. Intestate succession – spouse takes first \$50,000 and ½ of the rest (if no issue, spouse takes all)
- C. Whether will is revoked by being found in half – presumption that the testator destroyed the will with the intent to revoke it (presumption may be overcome)
- D. **Putnam Scrutiny** – even if there are no will contest, a bequest to a person in a confidential relationship (e.g. lawyer, executor) with the testator triggers an automatic inquiry into whether the gift was freely made
- E. Proving undue influence
1. The existence and exertion of influence
  2. The effect of the influence was to overpower the mind of the testator at the time of the execution of the will
  3. The will or the particular gift would not have been made but for the influence
- F. Disposition to an attesting witness – VOID, unless there are, at the time of execution of an attestation, at least 2 other attesting witnesses to the will who receives no beneficial disposition
- G. If a will nominates the drafting attorney as a fiduciary – a disclosure statement must have been signed by testator acknowledging
1. any person, not just attorney, can be named executor
  2. executors are entitled to statutory commissions
  3. the attorney also will be entitled to attorney's fees for any legal services rendered to the estate
- H. A non-marital child has no inheritance rights in the natural father's estate UNLESS paternity is established
1. Can be established at a probate proceeding if there is (i) clear and convincing evidence, & (ii) father openly and notoriously acknowledged the child
  2. If able to establish paternity – child can take under the permitted child statute

## XIII. QUESTION – R-3 (& PROFESSIONAL RESPONSIBILITY)

- A. Whether separated spouse has any rights in the estate of a deceased spouse (*see above*)

## XIV. QUESTION – 68 (& TRUSTS)

- A. **Trust created by another is NOT a testamentary substitute unless the trust gives the decedent a presently exercisable general power of appointment**
1. **Income interests are NOT outright gifts – they are not set off against the elective share amount**
  2. **BUT, as result of the election, spouse must forfeit her interest in the trust – the trust is then read as if the spouse predeceased the testator**

## XV. QUESTION – 91

- A. Whether **Totten trust** was effectively devised by the will
1. To revoke, modify, alter a Totten Trust by will, the will must refer to the particular trust account as being in trust for a named beneficiary in the named financial institution
  2. There requirements are strictly construed and the courts require full compliance
- B. Whether a valid **inter vivos gift** of chattel was made
1. In NY, a life estate and a remainder can be created in a chattel the same as in real property
  2. A valid inter vivos gift is made when
    - a. The donor manifests an intent to make an immediate gift (not a gift to take effect upon donor's death);
    - b. The gift was actually or *constructively* delivered to the donee (e.g. when a donor retains a life estate and is parting only with title, and instrument of gift, such as a letter, is sufficient delivery); AND
    - c. Donee accepted the gift
- C. Effects of a stock split and stock dividend on stock given as general legacy
1. Absent language indicating a contrary intention, a gift of stock of a traded corporation is classified as a general legacy
  2. BUT such gift is treated as a specific bequest (regardless of whether the possessive pronoun “my” is used) in the case of **stock splits**
  3. Contracts stock dividends – a bequest of stock as general legacy does not include stock acquired through stock dividends absent evidence of testamentary intent
- D. Whether the subsequent divorce of a beneficiary who is related to the testator only through marriage affects the gift to the beneficiary under the will
1. After executing a will, if the testator “is divorced, marriage annulled, or dissolved” any testamentary disposition to the former spouse is revoked
  2. BUT a bequest to a sibling, or offspring is NOT revoked if after execution of the will the sibling or offspring and spouse divorce

