

## FREEDOM OF DISPOSITION

- I. Restrictions on Freedom of Disposition
  - a. Must be reasonable
    - i. Not impossible
    - ii. Not Unconstitutional
      - 1. Racial clauses (Shelley v. Kramer - very narrow)
    - iii. Not against Public Policy
      - 1. Can't destroy property
      - 2. Can't do something illegal
      - 3. Force someone to practice a certain religion
      - 4. Spouse rights
      - 5. Can't prevent marriage
  - b. When a condition violates one these, the court will waive the condition
  - c. Right to descend property
    - i. Very important stick
    - ii. Cannot be abolished, but it can be limited
    - iii. Not about the rights of the heir - rights of the testator

## PROBATE

- I. Functions of Probate
  - a. Pass title - judge issues deed making it marketable
  - b. Protection of creditors (or bar creditors from submitting claims years after death)
    - i. Negligible debt (can be paid by wife, etc.) does not need to go through probate, but future creditors will not be bared from bringing suit
  - c. Distribution of property
- II. Choice of Law
  - a. Domicile - governs personal property
  - b. Location - real
- III. Duties of executor
  - a. Inventory, collect
  - b. Maintain the property during the administration of the estate
  - c. Determine extent of debts and pay creditors
  - d. Distribute property
  - e. **Bonds**
    - i. Insures the estate against the malfeasance of the administrator
    - ii. The will can waive the bond; the bond is paid for out of the estate
- IV. Probate property
  - a. Non-probate
    - i. Insurance policies
    - ii. Trusts
    - iii. Anything where interest extinguishes on death
      - 1. Joint tenancy

- 2. Joint bank account
- b. Probate
  - i. Land
  - ii. Money
  - iii. stuff

## INTESTACY

- I. Intestacy Chart/Diagram
- II. Representation of Descendants
  - a. *If you are dead and left no descendants we don't give a fuck about you*
  - b. *In-laws don't matter either*
  - c. *Can't double inherit - choose the largest (when cousins mate)*
  - d. **English Per Stripes**
    - i. divided equally among first generation (children) even if they are all dead, then representation descends
  - e. **Modern Per Stripe**
    - i. divided equally among the first generation that has someone left living in it, and then descends the same as above
  - f. **Per Capita at Each Generation (1990 UPC)**
    - i. in each generation, starting with the first surviving descendent, we divide equally among those alive; then we bundle the remaining (what would have gone to the dead people in the previous generation) and distribute it equally across the next generation
- III. **Simultaneous death (UPC rule)**
  - a. Presumed to pre-deceased unless proved by clear and convincing evidence that she survived by 120 hours.
  - b. Became a public policy concern with the rise of public transportation
- IV. Children
  - a. **Adoption**
    - i. Inheritance rights of an adopted child vary from state to state
      - 1. Adopted child inherits only from adopted parents/adopted child inherits from both adopted and bio parents/adopted child inherits from adopted parents and bio parents if adopted by a stepparent
    - ii. **2008 §UPC**: when there is a *parent-child relationship*, the parent and child are treated as such for intestate reasons
      - 1. A parent-child relationship exists between the adoptive parents and child, but not between the bio parents and child, UNLESS
        - a. STEPPARENT ADOPTION: The child is adopted by a bio parent's spouse.
          - i. Then there is a parent-child relationship between the bio parent whose spouse adopted the child; AND
        - ii. The stepparent that did the adopting

**Commented [GF1]:** Do we divide by the number of people with issue? Or just those alive

- iii. And the other biological parent (i.e. “the deadbeat dad”)
      - 1. But **ONLY** for the purposes of the child inheriting from the parent (not vise versa)
    - b. **BIO RELATIVES**: a parent child relationship exists between the bio parents and the child if the child is adopted by a relative of the genetic parent, or by the spouse or surviving spouse of a relative of the bio parent
      - i. **ONLY** for the purposes of the child inheriting from the parent (not vise versa)
  - b. **Posthumous Child**
    - i. Born alive within 280 days there is a rebuttable presumption that it should inherit
    - ii. Post-death conceived child - court does balancing test (best interest of child, state interest in devising the estate in a timely manner)
  - c. **Stepchildren**
    - i. Don’t inherit until it is the last resort
    - ii. There are some equitable remedies - becoming more common
- V. **Advancements** (like satisfaction in wills)
  - a. In regards to a *intervivos gift*
  - b. Modern law - not considered an advancement unless there is a writing indicating it’s an advancement (UPC 1990)
  - c. Common law - rebuttable presumption that it counted at an advancement
- VI. **Disclaimer**
  - a. Can disclaim a gift and you are treated as predeceased
  - b. IRS leans/federal leans are still taken from disclaimed gifts
  - c. Cannot disclaim a gift in order to avoid a creditor - if there is a bankruptcy petition filed before the disclaimer, disclaimer does not apply
- VII. **Slayer Rule**
  - a. Someone who is legally responsible for another’s death cannot benefit (either through will or intestacy) from that death.
  - b. UPC - The slayer would be treated as pre-deceased in intestacy
  - c. Common law - creates a constructive trusts

## WILLS

### I. IS THERE A WILL?

- a. Formalities \*use these to support Harmless Error Argument
  - i. Evidence
  - ii. Protect
  - iii. Rituality Function
    1. Importance/permanent of what they are doing
    2. Channeling function - probate court recognize it
- b. Elements of a Will
  - i. Intent to create a testamentary document
    1. **Capacity**
      - a. Capable of Knowing and Understanding:
        - i. Nature and extent of one's property
        - ii. Natural objects of one's bounty
        - iii. The disposition one is making
        - iv. How these elements relate - orderly plan
      - b. In order for an **insane delusion** to cause a lack of testamentary capacity, the insane delusion must materially affect the disposition in the will
        - i. Only void the material provision effected by insane delusion
    2. **Undue Influence**
      - a. Proponent always has the first burden of showing the will is valid, but presenting the will is often enough (presumed valid).
      - b. *If* the contestant shows that:
        - i. There was a **confidential relationship**; AND
          1. Fiduciary relationship
          2. Reliant relationship
          3. Dom/subservient relationship
        - ii. **Suspicious circumstances**
        - iii. *then* the burden shift to the proponent to prove there was no undue influence. The court looks at:
          1. Susceptibility caused by isolation etc.
          2. Did the benefiter have the opportunity to unduly influence?
          3. Mental capacity
          4. Disposition (of undue influence)
          5. Result
            - a. was the will crazy different, someone close was cut out
            - b. did a lot/all go to the undue
  3. **Fraud**
    - a. A donative transfer is procured by fraud if:



testator sign (or acknowledge the signature) after which both sign together

- b. Alleviating doctrines (most jurisdictions)
  - i. **Line of sight:** witness *could have* seen the testator's acknowledgement
  - ii. **Conscious presence:** witnesses were in the "conscious presence" of the testator and other witness when the will was signed/acknowledged (i.e. the testator and one witness go into another room)
  - iii. **UPC §2-502:** the witnesses do not have to be in each other's presences, they can independently see the testator's signature or acknowledgement of signature.
    - 1. Notarization is ok

c. **Holographic Will**

- i. Intent
- ii. Material portions in the testator's handwriting
  - 1. Traditionally: Began as entirely in testator's handwriting - two typed words could be too many
  - 2. **1969 UPC:** material provisions only - *surplusage theory* that the handwritten portion of the instrument should be given effect as a holographic will if it makes sense without the text not written by testator
  - 3. **UPC §2-502(b):** Material portions, allows extrinsic evidence to establish testamentary intent - most common among holographic will states
- iii. Needs no attestation
- iv. Michigan requires a date

d. Problems in **execution**

- i. **Strict compliance rule**
  - 1. Under traditional law for a will to be admitted to probate it must be in strict compliance with the formal requirements of the Wills Act
- ii. **Substantial Compliance Doctrine**
  - 1. pretty much a dead letter now - movement towards Harmless Error Rule
  - 2. Testamentary INTENT + Idea that if the manner in which the instrument was executed satisfies the purposes of the Wills Act, it should be deemed in substantial compliance.
- iii. **Harmless Error Rule (UPC §2-503)**
  - 1. If the proponent of the document establishes by *clear and convincing evidence* that the decedent intended the document to be:
    - a. His will
    - b. Partial or complete revocation of the will
    - c. Addition or alteration to the will

- d. A partial or complete revival of his formerly revoked will
  - 2. Adopted in some form in 10 states
- iv. Switched Wills Problem
  - 1. Classic problem of a husband and wife signing each other's wills.  
Court has two options:
    - a. Probate the will that the decedent intended to sign but did not, as his will with no signature - **harmless error rule**
    - b. Probate the will that the decedent did sign, but has incorrect language and **reform** the document to match what the testator intended (which is easily found in the unsigned will).

## II. IS THERE MORE THAN ONE COMPETING DOCUMENT?

- a. **Revocation (§2-507(a))**
  - i. **Revocation by subsequent writing** (*writing*)
    - 1. revoke the entire will **expressly**
    - 2. if it is **inconsistent**, the court has some construction to figure out what is inconsistent and how to interpret both
  - ii. by performing a **revocatory act** on the will, if the testator performed the act with the **intent** and for the purpose of revoking the will or part...
    - 1. requires an actual ACT and then the INTENT to revoke
- b. **Partial Revocation**
  - i. All jurisdictions agree that on partial revocation by subsequent document
  - ii. Partial revocation by physical act allowed by some jurisdictions
    - 1. Crossing out and writing something new in - revocation would be valid, but the new gift would not be so DRR might come into play
- c. **Traced to Testator**
  - i. there is a **presumption of revocation** if possession of the will can be traced to the descendant clear and convincing evidence, but it cannot be found the presumption arises that the decedent destroyed it.
  - ii. The challenger then has the burden of proof to prove it was not revoked
- d. **Dependent Relative Revocation**
  - i. Elements
    - 1. Requires a **valid revocation** that is
      - a. e.g., a new will, codicil, or act (tearing/cancelling)
    - 2. Premised on a **condition**
      - a. E.g., that a new will is be valid; that a previous will will be revived; that a person is no longer able to take
    - 3. but the condition is not realized, so the revocation is **ignored**.
      - a. e.g., old will is not revived (not technically revived, the old will is just now the acting will); new will is not valid or not valid to accomplish testator's purpose; or mistake of fact such as friend not having pre-deceased
  - ii. DRR is limited to situation in which there is proof that the revocation was *conditioned* on what was ultimately a mistake of law or fact
- e. **Revival**

- i. Two wills; second is completely physically revoked (**UPC 2-509(a)**)
    - 1. The first will is **presumed NOT to be revived** unless evidence of testator's intent to the contrary.
  - ii. One will is partially revoked by a codicil; codicil is then physically revoked (**UPC 2-509(b)**)
    - 1. The first will **IS presumed to be revived** unless evidence of testator's intent to the contrary.
  - iii. **UPC 2-509(c)**
    - 1. 2000 will leaves all to A.
    - 2. 2010 will leaves all (or car) to B. (That is, the 2000 will is **either** completely or partially revoked.)
    - 3. Testator revokes 2010 will by written instrument (will), dated 2015.
    - 4. Result: 2000 will is **not revived, except** to the extent it appears **from the terms of the 2015** instrument that the testator intended otherwise.
- f. **Integration**
- i. In existence at the time of the will
  - ii. Clearly intended to be part of the will (staples, binding, numbering)
- g. **Republication by codicil**
- i. If you have a codicil with a will, the will is "republished" and is it as if they published that will then W1 ---- W2 ----- codicil refereeing to W1 (it is as if the W1 was published again)
- h. Additional Documents/Acts
- i. **Incorporation by Reference**
    - 1. a writing in existence when the will was executed
    - 2. language of the will manifest this intent in the will; AND
    - 3. describes the other writing in the will
  - ii. **Separate Writing (UPC)**
    - 1. UPC allows that the writing can be made after the will
    - 2. Separate writing has to be signed
    - 3. Describe the property with reasonable certainty
    - 4. only personal property
  - iii. **Acts of Independent Significance**
    - 1. A will may dispose of property by reference to acts and events that have significance apart from their effect upon the disposition made by the will
    - 2. Before or after will does not matter
    - 3. before or after testator's death does not matter
    - 4. The execution or revocation of another individual's will is such an event.

### III. HOW TO INTERPRET THE WILL

- a. **Construction** *determining the meaning of the will*
  - i. **Plain Meaning Rule:** where the evidence does not alter, but merely explains, the dispositive language of the will, it is not in conflict with

Plain Meaning Rule and can be admitted; e.g.:

- a. absence of testamentary intent; fraud, duress, undue influence; invalidates the entire will
  - b. circumstances of the will; background information on law, family structure, etc.
  - c. acts of independent significance
  - d. resolving latent ambiguities
    - i. **Patent:** on the face of the will, obvious ambiguity
    - ii. **Latent:** not ambiguous when only looking at will, outside evidence would show that it is ambiguous.
      1. Equivocation - two or more person or things exactly fit
      2. No exact fit - description for which no person exactly fits
    - iii. Used to only allow evidence for latent ambiguities, but distinction between patent/latent ambiguities has been largely abolished
- ii. *Ad hoc* relief (like with strict compliance)
    1. no longer distinguishing between latent and patent ambiguity
    2. *falsa demonstratio non nocet*; remove mis-description and see if remaining language fulfills the testators needs
    3. details not construed in a way that frustrated clear intent
  - iii. **Reformation (UPC §2-805)**
    1. explicitly permits reformation to cure mistake in expression when it can be shown by *clear and convincing evidence*.

IV. STALE WILLS: at the time the will is executed, the executor has not anticipated what the circumstances would be at the time of death

- a. **Omitted Spouse:** A spouse married subsequent the will (**UPC §2-301(a)**)
  - i. Omitted Spouse can take a intestate share, but s/he cannot invade anything bequeathed to children of the testator
  - ii. If a dead guy give all is shit to his other kids, there is nothing for the spouse to take so she can go to the **elective/forced share** (which can take from kids of the dead guy) (note: everyone will be married for 15 years, she can take half of the marital estate)
- b. **Omitted Child (§2-302)**(Pretermitted Child)
  - i. If the testator omits an after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate
    1. The omitted child receives what would have been an equal share of *only* the portion of the estate that was given to the children
    2. The kids living at the time of the will's share is reduced *pro rata*
  - ii. UNLESS the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.
- c. **Lapsed Gifts**

i. **Anti-Lapse Statutes**

1. Traditionally - dead beneficiary's share would lapse into the residue
2. Anti-lapse statutes allow dead beneficiaries' issue to take by representation

ii. **Lapsed Gifts and Class Gifts**

1. \$100,000 to A, B, C (named, no group orientation)
  - a. assume each takes equally
  - b. if A is dead, A's share lapses into residue
  - c. Anti-lapse statute applies - issue takes by representation
2. \$100,000 to "my college roommates" (class gift, we can use extrinsic evidence to identify who they are)
  - a. assume each takes equally
  - b. if A is dead, gift is distributed among the members of the class
3. \$100,000 to "my cousins"
  - a. assume each takes equally
  - b. if A is dead, an anti-lapse statute will apply (descended from a common grandparent) and it will go to A's issue or it is treated like any other class (if A has no issues)
  - c. the class-ness of the gift takes precedent - does not lapse into residue
4. lapses in the residue (and the rest to A, B, C)
  - a. Traditionally: intestacy (no residue of a residue)
  - b. Now: anti-lapse statute applies and A left living issue - they get it
  - c. Without anti-lapse situation - the effect the survivors get to split whatever is left, whether or not it is a class gift
    - i. Because it lapses into residue, which goes to B and C

d. **Divorce**

- i. §2-804: revokes any provision for the divorced spouse - goes to residuary, unless that is to spouse, then to intestacy
- ii. does not revoke other non-probate transfers (life insurance)

V. **WHO GETS WHAT**

a. **Forced/Elective Share** (only need to know **UPC §2-202**)

- i. A spouse can take one half of the marital property of the **augmented estate** minus what they already have
- ii. **Augmented Estate**

b. **Satisfaction**

- i. Occurs if there is a *inter vivos* gift given by the testator as an "advance" to a beneficiary, *after* executing a will that makes the beneficiary a beneficiary, and the gift is similar nature to that devised by the will

1. most states have statutes that require this intent to be in writing (**UPC §2-609**)
  2. presumption against satisfaction or advancements
- c. **Exoneration of Liens**
- i. Common Law: if a beneficiary receives a devise (such as a house) with a lien on it (such as a mortgage), the estate pays the debt
  - ii. UPC §2-607: reverses common law, take subject to liens so as to not drain the estate paying off liens.
- d. **Abatement**
- i. Estate lacks sufficient assets to pay the decedent's debts as well as the devises
  - ii. In the absence of instructions on how to abate in the will, the devises abate in the following order
    1. Residuary devises are reduced first
    2. General devises are reduced second
    3. Specific and demonstrative devises are the last to abate and are reduced *pro rata*.
- e. **Ademption by extinction**
- i. General Principal
    1. Will includes a specific devise, but the testator sells or gives away before death.
      - a. Traditionally: adeemed, the testator has no claim to give over that property anymore
        - i. **Does not apply to:**
          1. **general devises** such as an amount of money. Even if the cash is not in the estate, something will be sold.
          2. **Demonstrative devises:** general devises payable from a specific source, such as 100K from selling my stock. Even if the stock is no longer worth 100K, the executor will sell stock and other property to meet the 100K
          3. **Residuary devises:** whatever is left cannot be adeemed
  - ii. Developing Theories
    1. **identity theory** (traditional):
      - a. ademption applies if a specifically devised item is not in the testator's estate. Some states developed "escape hatches" to better effectuate intent:
        - i. **1969 UPC §2-608(a)** any condemnation award for devised property, or insurance settlement
    2. **intent theory** (newer)
      - a. Adopts exceptions from above and adds:
      - b. **1990 UPC §2-606(a)(6):** monetary value of specific devises "but only to the extent that it is established that

ademption would be inconsistent with testator's manifested plan..."

- f. **Simultaneous death** (UPC rule)
  - i. Presumed to pre-deceased unless proved by clear and convincing evidence that she survived by 120 hours.
  - ii. Became a public policy concern with the rise of public transportation
- g. **Disclaimer**
  - i. You can disclaim anything (treated as predeceased)
  - ii. IRS can still attach it
  - iii. Bankruptcy action filed before disclaimer can reach it 12

*Cannot change life insurance beneficiary with you will - private contract with the company*

## TRUSTS

### I. IS THERE A TRUST?

a. *A trust is not a legal entity, it is a relationship between parties*

#### b. Elements

##### i. Capacity

1. Capable of Knowing and Understanding:
  - a. Nature and extent of one's property
  - b. Natural objects of one's bounty
  - c. The disposition one is making
  - d. How these elements relate - orderly plan

##### ii. Intent to create a trust

1. *Clear and convincing evidence*

##### iii. Ascertainable beneficiaries

##### iv. Res: something tangible in the trust

1. Exception: pour over wills

##### v. Bifurcated interests

1. Trustee and the beneficiary cannot be the same person
2. You can't be your own trustee

#### c. Other considerations

##### i. Writing

1. Not necessary unless required for the *res* (i.e. real-estate)

##### ii. Rule against Perpetuities violations

##### iii. A trust does not fail for want of trustee, court will appoint one`

##### iv. Illegal?

##### v. Pets

1. UPC 2-907, UTC 408-409: creation of trust allowed for dogs/pets as long as the amount is reasonable and it can't be capricious - "honorary trusts" can also be set up for plot maintained - but cannot exceed 21 years - RoP

### II. TYPE OF TRUST

#### a. Testamentary Trust

- i. Created in testators will to avoid probate
- ii. Pour over will
- iii. No trust language "shall be maintained" "shall not be sold"

#### b. *Inter vivos* - generally

- i. Created by deed of trust or oral declaration during lifetime
- ii. **Common law - presumed to be irrevocable**
- iii. **UTC (either) - presumed to be revocable**
- iv. Trustee subject to control of settlor and only the settlor can enforce the duties of the trustee (not the beneficiaries)
  1. If the settlor is the trustee, anything that diminishes the rights of the beneficiaries is seen as a revocation not a breach of duty
- v. *Inter vivos* trust seen to satisfy the functions of protections and evidence

- vi. Revocation by divorce applies, is rebuttable by clear and convincing evidence
- vii. Settlor's creditors can reach the trust before and after his death (even if it is ST)
  - 1. Unsettled question: do we access probate property first?

c. **Spendthrift Trusts (UTC §502)**

- i. Spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest (writing that it is subject to a "spendthrift trust" or something similar is sufficient)
- ii. A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.
  - 1. Creditor exceptions (**UTC §503**) *Hamilton* orders available
    - a. Child, spouse or former spouse who has a judgment or court order against the beneficiary for support
    - b. Creditor who has provided services for the protection of a beneficiary's interest in the trust
    - c. Claim of this State or the United State (IRS)
    - d. A claimant against which a spendthrift provision cannot be enforced *may* obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.
- iii. Spendthrift trusts v. discretionary trusts
  - 1. Spendthrift - creditor cannot attach anything (*Hamilton* orders not available, some exceptions) up to creditor to get money from individual after it has been
  - 2. UTC §501 - (common law rule)
    - a. any right to property is attachable (present or future) without ST language, *Hamilton* orders available
    - b. creditor cannot compel any discretionary payouts by trustee, even if trustee is violating his duty in the process of withholding

d. **Charitable Trusts**

- i. **Charitable purpose** instead of ascertainable beneficiaries
  - 1. **Poverty, education, religion, health, government or municipal, beneficial to the community**
  - 2. Rule of Perpetuities does not apply

III. DUTIES OF A TRUSTEE

a. **Loyalty**

- i. No self-dealing or commingling of funds

- ii. Analysis: **No Further Inquiry Rule**
  - 1. trustee cannot engage as an individual with trust property.  
Permissible IF AN ONLY IF
    - a. The court approves it
    - b. All the beneficiaries approve
    - c. Terms of the trust dictate it is permissible
    - d. (Some statutory exceptions, but in the absence of these, it is more or less an absolute rule)
- iii. damages: transaction is violable, or disgorge himself of any benefits of the transaction

b. **Prudence**

- i. Distribution - collect and protect (e.g., bring claims)
  - 1. **Mandatory:** on a schedule etc.
  - 2. **Discretionary**
    - a. purposes (support, education) often combined with discretionary
    - b. Inquiry
      - i. Trustee must inquire as to the status of the beneficiaries, see if they need more money ect. (Cappie couldn't handle his own shit)

ii. **Prudent Investor Rule**

- 1. Standard of Prudence is applied to the whole portfolio, not just individual assets
  - a. Diversification
- 2. No categorical restrictions but they have to take in to account the nature of the interest, purpose etc.
- 3. Tolerance for risk will depend on the circumstances of the beneficiaries
  - a. Small trust to support an old guy -- less risk
  - b. Trust established to accumulate money over a long period of time (college fund) - more risk, but less as the child gets older

c. **Impartiality**

- i. Towards the two or more beneficiaries

d. **Inform and account**

- i. Inform: provide information about proposed significant changes, respond promptly to beneficiaries
- ii. Account: keep records, especially of non-routine transactions, significant transaction

e. **Removal of Trustee**

- i. Traditionally - only for cause
- ii. UTC - removed for breach of trust, lack of cooperation among of trustees, unfitness, unwillingness, persistent failure to administer effectively
  - 1. Disagreement among B not enough

#### IV. ALTERING TRUSTS

##### a. General

##### i. **Equitable Deviation**

1. Equitable Deviation traditionally
2. There must be:
  - a. Change circumstances (**UTC 412**)
    - i. Change in circumstances cannot be that you want your money early
  - b. Not anticipated by the settlor
  - c. That would defeat or substantial impair the purposes of the trust
  - d. UTC is more liberal for modification and termination
    - i. Under the common law you couldn't modify it unless the change in circumstances were hindering; under UTC you can modify if it would further the purposes of the trust.

##### ii. **The Clafin Doctrine (UTC 411)**

1. looks back to when the settlor owned the property and holds that the trustee and the beneficiaries take title to the property subject to conditions of the settlor. To change the trust:
  - a. The change does not conflict with the intent of settlor
  - b. All interested parties, beneficiaries must sign off on it
2. ST provisions are not a material purpose unless there is an explanation as to why

##### iii. **Merger**

1. If all interest in the trust merge into one party, there can be an argument for termination of the trust, still has to effectuate the testators intent

##### b. Charitable Trusts

- i. **Cy Pres**: modification in the absence of the ability to effectuate the purpose of the trust
  1. First Question: Has the purpose of the trust because **illegal impossible or impracticable**
  2. Second Question: is it a specific or general charitable intent?
    - a. General - can apply *cy pres* (**UTC §413**)
      - i. Courts tend to find general
      - ii. UTC/Minority of jurisdiction say there is a presumption for general
      - iii. Traditionally - look of totality of circumstances
    - b. Specific (would be if we found that testator *specifically* wanted a certain named purpose) cannot apply *cy pres*
    - c. Presence of remainder makes the first gift specific, and the remainder can take (within 21 years, different time frames in different places).
      - i. After a certain amount of time, the gift-over fails and the court can find a general intent if they want