**WILLS　 ~Ca Probate Code**

If there is 1) **testamentary capacity,** 2) testamentary **intent,** and 3) **formalities,** → a will is valid.

**Capacity 1) capacity 2) insane delusion**

Capacity

An individual 18 or more years of age who is of sound mind may make a will. §6110

At the time of Execution, Testator

① must be at least **18** years of age

② should know **the nature and extent of his property**

③ should know **the natural objects of his bounty** (understanding relationship) bounty=博愛

1) Spouse or domestic partner 2) Issue 3) Parents 4) Those **whose interests are affected** by the will

④ must know **the nature of his act** (making a will and understand the disposition you are making)

※ Must know he is **executing a will**.

Does NOT have to know all the **legal technicalities** of the will.

**Consequences of NO capacity**

Entire will is invalid, and Property will **pass by intestate succession.**

※　T had a valid prior will that would have been revoked by the second will, then the

first will be probated, because the second could not revoke the first without capacity.

**essay tip: ① lack of capacity ② insane delusion ③ fraud ④ undue influence ⑤ mistake**

**は基本セット。常に全部を論じるか検討**

Insane Delusion

The testator was suffering from an insane delusion if

at the time of execution:

1) T had a **false belief** that was a product of a **sick mind**,

2) there is NO evidence to support the belief (Not even a little bit), and

3) **delusion** have affected T's will.

If testator was suffering from an insane delusion

**Only that part of the will affected** by the delusion is invalid.

The part affected → will go to the residuary devisee, or

if none, by intestate succession

例：実の子を自分の子でないと言って，同子に何も与えない遺言をのこす。

　　　　　　　 → 明らかな妄想ならinsane delusionとして実子が救済され。

　　　　　　　　 そう考える理由が少しでもあればMistake of factでありcourtは修正不可，

**Intent 1) fraud 2) undue influence 3) mistake**

**Present intent is required**

× I am going to make a will for you.

× Ineffective deed ∵ lack of testamentary intent

Conditional Wills is **valid.**

The will is to be probated only if the condition is satisfied.

Conditional wills can be formal (attested) or holographic.

　　 “If I don’t return from a journey I leave this to you”

　　→一般的には条件ではなく旅行から帰ってすぐ死んでも遺言有効

∵死ぬ方法が条件というのも不合理

※ Conditional codicils: Even if the condition does not occur, it may republish the will.

**FRAUD** (Lie)

Elements – scienter ＆ intent ＆ Actual Reliance (and Justifiable Reliance)

1) **misrepresentation** of Material Fact

2) **known to be false** by the wrongdoer when made : scienter

3) for the **purpose** of inducing action or inaction, : intent

4) in fact induces the action or inaction desired : actual Reliance

①Fraud in the Execution – Someone forges T's signature to a will or

T is given a document that purportedly is non-testamentary

in nature, but in fact is, and testator signs it.

⇒**Entire will is invalid.**

Property passes by intestate succession, unless a prior validly executed will

②Fraud in the Inducement – Wrongdoers representation affects the contents of T's will.

⇒**Only part of will affected is invalid**.

Property passes to the residuary, if no residue, then by intestate succession, or by Constructive trust. ※効果はundue influenceも同じ

※ Constructive Trust; the court make someone a constructive trustee who has sole duty,

to transfer the property to the intended beneficiary (as determined

by the court)

※ Distinguish

Fraud in the Execution – T does not intent the document to be his will

Fraud in the Inducement　　　　– T intends the document to be his will

③Fraud in Preventing T from revoking the will

⇒Court will NOT probate the will and thus property will go to the heirs.

Simultaneously, the court will decree the heir is a constructive trustee.

　　※ 第三者詐欺は本項に該当しない ⇒ mistakeなどの問題

**UNDUE INFLUENCE**

January 1, 2014, the California Legislature has introduced a new standard for proving undue influence (found at Welfare and Institutions Code [Section 15610.70](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC&sectionNum=15610.70.); and made applicable to the Probate Code by Probate Code [Section 86](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PROB&sectionNum=86.))

“Undue influence” means **excessive persuasion** that 1) causes another person to act or

refrain from acting by overcoming that person’s free will and 2) results in inequity.

In determining whether a result was produced by undue influence, all of the following shall be considered:

**1) The vulnerability of the victim,**

Evidence of vulnerability may include, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim’s vulnerability.

**2) The influencer’s apparent authority, ~the relationship he had to the victim**

Evidence of apparent authority may include status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification. one person relied heavily on antherかが重要

**3) The actions or tactics used by the influencer**

Evidence of actions or tactics used may include

a) Controlling necessaries of life, medication, the victim’s interactions with others,

b) Use of affection, intimidation, or coercion.

c)  Initiation of changes in personal or property rights, use of haste or secrecy in effecting

those changes, effecting changes at inappropriate times and places, and claims of

expertise in effecting changes.

・Use of force ・Threat of force, Blackmail, ・Dragging elderly T to attorneyが典型

例：Husband tells wife that she must leave him her entire estate or else will divorce them.

例：Child tells sick parent who they have been taking care of to execute a will leaving the

child their entire estate or else they will put parent in a nursing home.

**4) The equity of the result**

The economic consequences to the victim, any divergence from the victim’s prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

Statutory Presumption of Undue Influence 　**Probate Code:21380**

A provision of an instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence:

1) The person who **drafted** the instrument. (反証不可)

2) A person who is **closely related to the drafter** (spouse, employee, partner…)作成者の家族

3) A person who is in a **fiduciary relationship** with the transferor;

4) A **"care custodian" of a "dependent adult"** who is the transferor, where will executed

during care or within 90 days before or after that period.

Exception: presumption inapplicable to

a) transfer to relatives or cohabitant (even if person was the drafter), or 　　　**§ 21382**

21382. Section 21380 does not apply to any of the following instruments or transfers:

(a) A donative transfer to a person who is related by blood or affinity, **within the**

**fourth degree**, to the transferor or is the cohabitant of the transferor.

b) any transfer if reviewed by independent attorney.　　　　　　　　 　**§ 21384**

Widely used four factor test　コモンロー

　There is undue influence if

1) the testator is **Susceptible**

2) the alleged influencer had **Opportunity** to exercise it

Typically, this opportunity arises through a confidential relationship such as between [Husband and Wife](https://legal-dictionary.thefreedictionary.com/Husband+and+Wife), [Parent and Child](https://legal-dictionary.thefreedictionary.com/Parent+and+Child), trustee and beneficiary, [Guardian and Ward](https://legal-dictionary.thefreedictionary.com/Guardian+and+Ward), attorney and client.

3) the influencer had a **Disposition** or a motive to exert undue influence

4) the provision of the will appear to be **Unnatural**

※ Presumption of 1)＆2) are created, if confidential relationship exists between T and wrongdoer

such as, a) attorney-client b) doctor-patient c) clergy-penitent d) trustee-beneficiary e) guardian-ward

**MISTAKE**

①　Mistake in Execution – Testator signs the wrong document (two situations).

1) T mistakenly signs his will believing it is a non-testamentary instrument.

→ NOT probated because T did not intend the document to be a will.

2) Reciprocal wills or mutual wills – when you have 2 testators that each leave everything to

one another and they accidentally sign one another's wills,

→ the court may reform the wills in this unique situation,

especially if the testators are husband and wife or domestic partners. (equitable)

②　Mistake in Inducement – A particular gift is made or not made on the basis of testator's erroneous beliefs. (Ex: believes X is dead, otherwise he would leave a gift)

→ **No relief** is given, unless the **mistake appears on the face** of the will.

　後者の例外の例外：「(実際にはない)以前の1000＄の贈与を踏まえ・・・」

　　 → mistakeとして無効にならない ＝ something peculiarly within T’s knowledge例外

③　Mistake in Content

– 1) wrong beneficiary is named or 2) the wrong gift is made

Mistake in Omission: Name left out of the will or items left out

An **unambiguous** will may be reformed if **clear and convincing evidence**

1) establishes that the will contains a mistake in the expression of the testator’s intent at the

time the will was drafted and

2) also establishes the testator’s actual specific intent at the time the will was drafted.

**Estate of Duke (2015) ：上記規範を明示**

Fact: Duke wrote a holographic will in 1984, providing that all of his property was to be given to his wife, but if he and his wife died in a common disaster, his property was to go to named charities. Duke’s wife died in 1997, but Duke never revised his will after her death. When Duke died in 2007, the charities petitioned the court to admit the will to probate as the beneficiaries of the will.

**※ 判例変更以前: 以前は**unambiguous will**は修正不能**

Only latent or patent ambiguities are errors the court may remedy.

Latent ambiguity: 例To cousin John, 2 cousins named John

Patent ambiguity: 例To UCLA, AKA USC

**※ 伝統的には**only patent ambiguities are errors the court may remedy.

④　Mistake in Validity of a Subsequent Testamentary Instrument (“DRR”)

**Dependent Relative Revocation**

If T revoke all or part of his will with a mistaken belief that

1) the later substantially identical will or codicil would be effective and

2) but for the mistake T would not have revoked the will,

→ the court disregard the revocation caused by mistake.

※ generally the wills must be very similar, so that we know that T would prefer Will 1 to be

probated instead of intestacy.

　 　　例Testator mistakenly revokes WiII-1 by physical act. (by destroying it)

First will can be probated if at least one witness (e.g., attorney) testifies as to contents.

Need not have been one of the attesting witnesses.

　　　 例 1000＄*1500＄*:1000$あげるという印刷された遺言を1500$に手書きで直してサイン

　　　　 → holographic will / valid codicilにはならない∵material provisions must all be in handwriting

→ 1000$はrevokeされ1500$は無効になるのが原則だが, DRRの適用で1000＄になる。

　 （本来はサインの上，二人の証人を立てvalid codicilにして修正する）

※ 通常は物理的なrevocationで問題だが無効な第2遺言でも生じ得る

　　1) revocationの意図なしとして第1遺言の効力認める

　　2) DRRによりrevocationは無視されるとして第1遺言の効力を認める

　 かはともかくDRRについて論じる必要はある。

　　If the second will is invalid due to fraud, duress or undue influence, the revocation is

invalid and DRR is not applicableが通常の考え方

Wehrheim v. Golden Pond (Fla. 2005)

　　　　第1遺言は友人に全財産をあげる，第2遺言は少し修正。子供がundue influence主張

　　　　　　　1) undue influenceで第2遺言が無効になるか認められるか

　　　　　　　2) 第2遺言によるrevocationも無効か

3) 有効だとするとDRRで第1遺言が復活するか　　　の順番で検討を認めた

**Formalities**

原則のまとめ～Execution of Wills

Attested Wills: 1) in **writing** 2) **signed** by T 3) in presence of 2 **witnesses** 4) who also **sign.**

Holographic Wills: 1) **signed** by T, 2) material provisions in T’s own **handwriting.**

・Extrinsic evidence is admissible to determine T’s intent.

**ATTESTED WILLS**: an attested will is a will that was “attested to” by a witness.

–**§6110** In general, an attested will MUST be:

(a) …a will shall be in writing and satisfy the requirements of this section.

(b) The will shall be signed by one of the following:

(1) By the testator.

(2) In the testator’s name by some other person in the testator’s presence and

by the testator’s direction.

(c) …the will shall be witnessed by being signed, **during the testator’s lifetime**,

by **at least two** persons each of whom (A) **being present at the same time**,

witnessed either i) the signing of the will or ii) the testator’s acknowledgment of

the signature or of the will and (B) understand that the instrument they sign is

the testator’s will.

=1) in **writing**, (Oral wills are not recognized in CA)

2) **signed** by T (Nicknames are okay, “X” is okay if T is illiterate. “Mother” in a letterでも)

or by a third person in T's presence and at T's direction

3) **signed** by at least two persons who witnesses a) the signing of the will or b) the testator’s

acknowledgment (“this is my signature”)

The witnesses i) must be **present at the same time** when they witnessed and

ii) must **understand** that the instrument that they signed is **T’s will**

**※** unaware as to specific bequests → There's no requirement that the

witness be aware of the specific details of a will.

iii) must sign the will **during the testator’s lifetime**

※ Can sign anywhere in the will.

※ CA statute is ambiguous as to whether the T must sign before witnesses.

※ If no fraud or mistake, it will generally be deemed valid (barexam).

例・ Aの前でＴが遺言を示し，翌日Ｂに示すは× ∵not present at the same time when they witnessed

・ AＢの前でＴが遺言を示し，翌日ＡＢ署名〇 → Ｔの前で署名する必要なし。但しＴ死後は×

・署名をしたのがwillかdeedか分からなければダメ

大例外 **Substantial Compliance January 1, 2009**

If a will was not executed in compliance with the requirements above

1) if T dies on or after 2009, and

2) if the proponent of the will can establish by **clear and convincing evidence** that, at the time

the testator singed the will, the testator **intended the will to constitute the testator’s will**,

→ the document is admitted into probate.

**§6110**(2)

If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator’s will.

・条文上はattested willだけに適用だがcodicilやholographic willにも適用が裁判例

例: 公証人に交渉してもらったが証人が一人であった

　　自筆証書遺言を作成したが重要部分が手書きでなかった

　　二人の証人が同時に存在していなかった

Interested Witnesses

When a witness is a beneficiary under the will,

→ the will is **NOT facially invalid** just because the will was signed by an interested witness.

　→ BUT,

　1) Unless there are two other disinterested witnesses, **a presumption arises** that the

witness-beneficiary secured the gift by wrongdoing.

2) If witness-beneficiary cannot rebut the presumption of wrongdoing,

⇒ He takes an amount that does not exceed his intestate share.

※ Fiduciary Capacity – Presumption of wrongdoing is inapplicable

if witness-beneficiary is taking only in a fiduciary capacity

(as trustee for child, etc.)

**HOLOGRAPHIC WILLS**:

Requirements

1) **Signature**, 2) **Material Provisions** must be in the Testators **Handwriting.**

Material provisions: (1) Gifts made, (2) Beneficiaries names

Testamentary Intent – need not be on the face of the will or in the T’s handwriting.

　Issues – list or series of letters can constitute a will under integration.

　 Date – A date is NOT required.

Inconsistency Issues

1) If undated holograph is **inconsistent with the provisions of another will**,

⇒ the undated holograph’s provisions are **invalid to the extent they conflict** with a later will.

2) If there are **2 undated holographic** wills and it can’t be established which one came last

⇒ neither will be probated to extent of inconsistency.

※ ‟I, Kiyotaka Uchida, do hereby declare…”でも署名要件を満たしうる

※ future writing is contemplatedならintentなし（これからあなたに1,000＄遺贈するために

弁護士のところに行く）

Majority = Holographic wills give effect to hand written change.

**遺言以外の書面/事柄が遺言解釈に使えるか**

**1. Integration ～**遺言時存在文書と同文書を遺言の一部にする意思が必要（物理的・論理的連続性で証明）

① Elements ：1) Intent and 2) Presence

Papers constitutes a will or part of a will if

　　 1) T **intended** the papers **to be part of the will**,

and 2) Paper was **present** at the time of execution.

② Proving integration (2 ways)

1) Establish a physical connection among all the pages. (i.e. Stapled together)

2) Establish a logical connection. (i.e. last word on page 1 flows into page 2)

**2. Incorporation by Reference** **～**遺言時存在文書が遺言で明確に参照されている必要

**A writing in existence is incorporated into a will by reference when the will manifests**

**this intent and the writing is clearly identified in the will.**

Non integrating writing is given testamentary effect and becomes part of a will.

6130: A writing in existence when a will is executed may be incorporated by reference if

the language of the will manifests this intent and describes the writing sufficiently

to permit its identification.

Elements

　　　　1) Will must **manifest intent** to incorporate,

2) Document must be **clearly identified in the will**, AND

3) Document incorporated must **exist** at the execution of the will.

※ Document incorporated does not have to be valid (i.e. invalid deed)

**3. The doctrine of Acts of Independent Significance** 要式なしに遺言内容が実質的に代わる

Blanks in a will can be filled by reference to acts or events that have **significance independent of the will**, using trustworthy parol evidence.

6191: A will may dispose of property by reference to acts and events that have significance apart

from their effect upon the dispositions made by the will, whether the acts and events occur

before or after the execution of the will or before or after the testator’s death. The execution

or revocation of a will of another person is such an event.

※ permits a [testator](https://en.wikipedia.org/wiki/Testator) to effectively change the disposition of his property without changing a [will](https://en.wikipedia.org/wiki/Will_and_testament).

Ex: "I leave all my property to the people who I employ at the time of my death."

⇒OK ∵Even without the will, these people would exist because people have employees

for a variety of reasons. People don’t hire workers just to validate a devise.

Ex. - "I leave stock to people listed on the envelope in which the stock may be found on my desk"

⇒× 　　　　　∵without the will, names means nothing. ⇒ not independent of the will

Ex. - In '94 will devises residue to any charitable trust established by the last will of my brother. '96 brother's will executed establishing a charitable trust. '97 brother dies, '00 sister dies.

⇒OK ∵a will other than testator's will is itself an act of independent significance.

※ cannot apply incorporation by reference

∵1) not in existence 2) document not sufficiently identified to be incorporated.

**4. Codicil ～** 遺言と同じ要式性が必要 (遺言作成後の補足ができる)

1. 定義

Testamentary instrument that supplements (revokes or modifies) an earlier will.

It must be executed **with the same formalities required for the will**.

(i.e. Must be a valid holographic or attested will)

2 . Republication

A codicil republishes a will. This means that when a testator executes a codicil, we can treat the date of the will as being the date of the codicil. (“down-dating”).

∵testator likely reviewed will and not totally replacing but rather confirming.

※ integrationにおける文書の同時存在の要件などで重要な意義

3. Two requirements for this doctrine

1) Only apply in a case in which there is a prior validly executed will.

2) Only apply if by doing so we will give effect to the testator's intent.

※: What looks like codicil can serve as a will

“This is a codicil to my first will. I will give 1000＄to X”

→第1遺言が無効ならcodicilとしては無効だが，別のwillとして有効の可能性はある.

4 . Revocation of Codicils

If T executes a will, then executes a codicil,

1) and subsequently revokes the codicil,

→ there is a rebuttable presumption that T intended to revoke only the codicil.

2) and subsequently revokes the will,

→ there is a rebuttable presumption that T intended to revoke the will and the codicil.

※ Look at the testator’s intent

**5. Pour-over wills**  Bar Tip: discuss all three methods for a pour-over will

※ trust作成後の取得財産がintestateで相続されないために通常利用される。ただし, probateは避

けられないため, あくまでも予備的なものであるのが通常

1. UTATA: the Uniform Testamentary Additions to Trusts Acts

permits a pour-over provision in a will to devise property to a trust,

if 1) the will indicates the intent to incorporate the trust, and

2) the **trust document is executed** prior to or contemporaneous with the will

OK ① Unfunded trust = trust that is initially funded by the bequest from the will

② all amendments to the trust are valid even if executed after the will

After-death amendment

妻をtrustee,子供をbeneficiaryとするtrustを作成し, left testator’s entire estate to

the trust by will. その後, 妻がbeneficiaryを彼氏に変更.

→UTATA provides the poured property is governed by all amendment, even made

after the testator’s death⇒変更は有効

2. Incorporation by Reference

上記②は適用外　∵Document incorporated must exist at the execution of the will

⇒修正された書面は遺言作成時に存在しない。

(そもそも常にmanifest intent to incorporate があるかも疑問the language referring

to the trust was for the purpose of identification not incorporationといわれる)

3. Acts of Independent Significance

上記①は適用外 ∵空っぽtrustは無効でありfact of independent significanceといえるか疑問

　　　遺産が注ぎ込まれるだけのtrustにindependent significanceはない

**遺言の解釈方法**

1 Intent of Transferor Controls

– The intent of the transferor controls. Extrinsic evidence can be brought in to establish intent.

2 Interpretation

– There is a presumption that all language in a testamentary instrument has some meaning (there

is no superfluous language), AND against intestacy or failure of the transfer.

3 Document understood as a whole

– ALL PARTS of the testamentary document are to be construed in relation to each other to form

a consistent whole.

**REVOCATION**

**① by physical act ② by later testamentary instrument (will or codicil) ③ by operation of law**

6120.　A will or any part thereof is revoked by any of the following:

(a) A subsequent will which revokes the prior will or part expressly or by inconsistency.

(b) Being burned, torn, canceled, obliterated, or destroyed, with the intent and for the

purpose of revoking it,

by either (1) the testator or

(2) another person in the testator’s presence and by the testator’s direction.

**1. by Physical Act** (capacity, intent, formality)

1) Act – Will must be burned, torn, cancelled, destroyed or obliterated (i.e. erasing).

2) Simultaneous Intent – Act and intent must coincide.

　　※うっかり破いて, その後, revocationの意思で放置してもnot revoked.

(なお黙示のratificationを認める州もある)

3) Act must be done either by T or by someone in T's presence and at his direction.

4) Majority rule = must touch the word of will (must occur on a material part)

×to write the cancellation on another piece of paper is not OK.(subsequent will になる可能性はある)

問題：typewritten willの余白に「void」と記載

　1) revocation by physical act ?　 → 無効 ∵must touch the word

2)　　全体をintegrated instrumentとみる? 　　　　→ 無理 ∵重要部分が手書きでない

3) “void”部分だけをholographic willとして有効と考えincorporation by referenceの余地あり

Cancellations – crossing out or lining through

Increase by physical act– Not permitted.

You cannot increase a co-beneficiaries gift by cancellation.

Ex: I leave my farm to X and Y. T subsequently crosses out Y.

X still only gets ½, Other half goes to residuary or by intestacy.

※　　　Look to DDR for cancelations.

※ A residuary gift can be increased.

Interlineations – writing between the lines

– A handwritten addition to a typed will that does NOT qualify as

a holographic codicil may nonetheless be a revocation.（０になる）

– When the interlineations is less than the cancelled provision,

DRR will not be used and the beneficiary will take nothing.

　　例１ 1000＄*1500＄* → 1000＄(DDRが適用なら)

例２ 1000＄*500＄* → 0＄ (no DDR)

※ interlineation of holographic wills

→valid ∵the prior signature is adopted when the interlineation is made.

Duplicate Wills – If T or someone in T's presence and at his direction revokes by physical act

one of the duplicate originals (Not photo copy), then the other duplicate is

also revoked as a matter of law. ※コピーを破ってもrevocationにならない。

Mutilated Wills – If a will is found in a mutilated condition at T's death and when last seen it

was in T's possession, then there is a rebuttable presumption that T mutilated

the will with the intent to revoke the will.

Unfound Wills 　– revokeされたと推定される。推定を反駁すればextrinsic evidenceでprobate OK

**2. by Later Testamentary Instrument**

Manner of Revoking

①Express – W1 can be expressly revoked by W2 (I revoke all previously wills)

②Implied　　　– W1 can be revoked by W2 if impliedly, when W2 disposes of T's entire estate, there

is nothing for W1 to act upon.

**Revival** ①遺言１撤回後, 遺言２撤回 **6123** ※ common lawでは自動復活

If a subsequent will revokes a previous will and then that the subsequent will is

revoked, → that first revoked will is NOT automatically revived. (remains revoked)

It will be revived if it is clear that the testator **intended** to revive it.

6123. (a) If a second will which…would have revoked the first is thereafter revoked by acts…, the first will is revoked …unless it is evident from the circumstances of the revocation of the second will or from the testator's contemporary or subsequent

declarations that the testator intended the first will to take effect as executed.

②Re-execution T has 2 witnesses sign original will and it becomes valid again

条文に見当たらず，詳細要件不明T can acknowledge his signatureとbarbri

③Codicil to earlier will republishes it on date codicil is executed.

(first will is not validなら無理。ただしincorporation by referenceはあり得るのは上述)

**3. by Operation of law**

**Divorce / Remarriage**

– Unless the will expressly provides otherwise, divorce, dissolution, or annulment **revokes**

**disposition to the former spouse**.

・If divorced and then remarried to same person, the original will is revived.

・Does not get rid of former in-laws, step-children, etc. (Just spouse)

・Does not apply to legal separations. (only divorce, etc)

・Automatic Revocation. No action needed.

**Omitted spouse/child**

Pretermitted spouse:

A will **executed prior to marriage** which **omits the surviving spouse** is revoked as to that spouse, and she/he will receive her intestate share of assets (her share of CP plus up to ½ of T’s SP).

Unless: (1) **Intention:** Omission was intentional as shown in will,

(2) **代償贈与 :** T provided for spouse by other transfer,

or (3)**合意 :** Spouse made valid agreement waiving right to share in T’s estate.

(by prenuptial or postnuptial agreement)

21611. The spouse shall not receive a share of the estate under Section 21610 if any of the

following is established:

(a) The decedent’s failure to provide for the spouse in the decedent’s testamentary

instruments was intentional and that intention appears from the testamentary

instruments.

(b) The decedent provided for the spouse by transfer outside of the estate passing by

the decedent’s testamentary instruments and the intention that the transfer be in

lieu of a provision in said instruments is shown by statements of the decedent or

from the amount of the transfer or by other evidence.  
 (c) The spouse made a valid agreement waiving the right to share in the decedent’s estate.

Pretermitted child:

A will executed **prior to birth or adoption** of a child which **omits that child** is revoked as to that child, and she/he will receive her intestate share of assets.

Unless (1) **Intention** (2) **代償贈与**

or (3) **配偶者代理受贈:** T devised or transferred **substantially all** of his estate to the

other parent of the omitted child

※ Republication of a will by codicil without mentioning the pretermitted child can destroy

a child’s pretermitted status and can treat him as being intentionally excluded.

※Children born before – disinherited

※ Unknown children – if decedent has children they do not know about (believed to be dead or did not know were born),

→ they are deemed to be pretermitted.

\*Unknown children = omitted child, 上記 = pretermitted childと使い分ける人もいる

　　　Abatement

1) the share is taken fist from the decedent’s estate not passing by will.

2) If not sufficient, share is satisfied by taking pro rata from all of the beneficiaries.

**（**pretermitted child’s shareもpretermitted spouse’s shareも同じ）

例: 妻が2分の1，子2名が4分の1ずつ相続する状況でomitted childが出現

　 　　 → 3人とも割合に応じて取り分が減らされる. (子3名が6分の1になるわけではない)

**ADEMPTION** (**Revocation by change in property)＝遺贈撤回**

前提: Classification

**Specific devise** – Gift of a particular item Ex: Real estate, Antique automobile

**General devise** – Payable out of the general assets of the estate (i.e. $100, publicly traded stock)

**Demonstrative devise** – Hybrid between A general and specific gift

It is a gift from a particular fund, but if that is not enough, the executor

can resort to general property. Ademptionの適用なし

Ex: "To John I leave $1000 from my account at ●." only $900 in the account.

→ The balance will come from general assets.

**Residuary devise** – All other property not expressly disposed of in the will

１. ADEMPTION by EXTINCTION

**Applies only to specific gifts**  adempiton < adeem =「遺贈を撤回する」の名詞形

**Ademption by extinction may occur when the item of a specific gift is no longer in the**

**testator’s possession.**

In CA, ademption depends on whether the testator intended to adeem the gift when he disposed of property. **= intent theory**

Mild presumption against ademption, so the person against gift will have burden to show

intent to adeem.

(Common Law – specific gift failed if testator did not own the property at T's death **= identity theory)**

No Ademption by Extinction in CA ∵No intent

・遺贈対象自動車運転中事故で遺言者死亡, 車もdestroyed

・gift that merely changed form

・proceeds of sale of the property that is traceable

① Securities changing form

T did not change the form, another entity did, so gift still valid.

– mergers, stock splits, stock dividends, or reorganization of corporations with stock re-issue.

② Conservator Sells the Property

– If conservator is appointed and sells property with court approval, there is no

ademption by extinction in CA, the beneficiary takes the net sales price.

∵ T did not sell the property, therefore did not intend gift to fail. i.e. foreclosure sale

③ 1) Eminent domain award, (eminent domain = 土地収用) 2) Casualty award, or

3) an Installment sale of property in which T holds the deed of trust as security for the sale.

a) Paid After T’s Death – No ademption by extinction

b) Paid During T’s Life – Proceeds paid during T's life

- see if you can trace

i ) If traceable then argue NO ademption by extinction

ii) If NOT traceable then likely ademption by extinction

２. ADEMPTION BY SATISFACTION

**Property given by a transferor during his or her lifetime to a person is treated as a satisfaction of an at-death transfer if the:**

1) a) the will itself or

b) contemporaneous writing signed by either i) testator or ii) beneficiary

states satisfaction, or

2) specific gift is given (this is both extinction and satisfaction).

= Property given in the satisfaction is the same property that is the subject of a specific

gift to the beneficiary.

※ How to value the satisfaction if not made in cash？

a) If the value of the satisfaction **is expressed** in a contemporaneous writing of T or

the beneficiary, that value is conclusive.

b) In all other cases, the property is valued at its FMV measured **at the time the transferee came into possession.**

Predecease Rule – if beneficiary receives a satisfaction, but predeceases the T, the issue

of the beneficiary are treated as if they received the satisfaction.

**その他**

**1. Contracts to make or not to make a will遺言に関する契約**

General Rule –  Wills can be freely changed or revoked. But if there is a contract, between T and

a beneficiary providing that T will not revoke, T is in breach if he does, and upon

T’s death, the beneficiary may sue T’s estate for breach of contract.

– A contract can be enforced IF: (4 Ways) (Contract law governs.)

1) **The will itself** states the material provisions of the contract.

※ other instrument (e.g. trust)もOK

Ex: T's will states "In consideration of the $5k A gave me, I have promised to

devise Blackacre to A and I hereby do devise"

2) Contract **referenced in will**

※ other instrument (e.g. trust)もOK

※ in such case the terms of the contract can be established by extrinsic evidence.

3) A **writing signed** by the decedent evidencing the contract.

4) Clear and convincing evidence of an agreement (with the beneficiary or third

party) for the benefit of the claimant that is enforceable in EQUITY. (**Estoppel**)

NOTE

1. Joint wills won’t create a presumption of a contract not to make or revoke a will.

2. Cause of action accrues when decedent dies,

unless decedent is engaging in conduct which would be a fraud on the promise.

3. Remedies Available to Promisee

1) Damages

2) Specific Performance

3) Constructive Trust – the court can probate the will as it is, giving the property to the

devisee, and make the devisee a constructive trustee, who must

transfer the property to the promisee of the contract.

**2. Bars to succession**

Homicide　　　 : a person who intentionally kills decedent is not entitled to any benefit from

D’s estate by will, trust, intestacy, life insurance, joint tenancy, etc.

Elder Abuse : a person who is found liable of abuse will be treated as he predeceased

decedent. Includes physical abuse, neglect or fiduciary abuse.

※ undue influenceとセットで通常問題。こちらは全面的に相続権はく奪

No contest clause 　　 　: will be enforced unless B, with reasonable cause, brings contest on grounds

　　　　　　　 forgery, revocation or invalid transfer to person who drafted instrument.

**3. Choice of law**

The will Can be admitted to probate in CA if the will:

1) complies with the formalities of **CA law**

2) complies with the formalities of **the place executed**

3) complies with the formalities of the place of **T's domicile at execution**

**4. Lapse and Anti-Lapse**

Beneficiary must survive T in order to take a devise.

Applies to wills and revocable trusts.

**Lapse Rule**:

If the beneficiary does not survive the T, the beneficiary’s gift lapses (=fails).

If the gift lapses, unless a contrary intent is expressed in the will, the gift falls into the

residue; otherwise intestacy.

**Anti-Lapse Statute =CA**

If the predeceased beneficiary is **“kindred” of T** or of T’s spouse or former spouse, and

the beneficiary leaves issue, the issue will step into the shoes of the predeceased

beneficiary.

**21110** (a) if a transferee is dead when the instrument is executed, or fails …tosurvive

the transferor…**the issue of the deceased transferee take in the**

**transferee’s place.**

(c) As used in this section, transferee means a person who is kindred of the

transferor or kindred of a surviving, deceased, or former spouse of the transferor.

※ kindred = a group of related individuals including **blood** relations.

※ Applies to Revocable Trusts, Class Gifts

　 例: “my brother’s issue”へ遺贈。兄弟がABでAが先に死ねば，Bが2分の1，Aの子らが均等割りで相続

遺言作成時点で兄弟の一人死亡 → 死亡を知っていれば，同兄弟の子にはいかない

(a) …A transferee under a class gift shall be a transferee for the purpose of this subdivision unless the transferee’s death occurred before the execution of the instrument and that fact was known to the transferor when the instrument was executed.

※ 意思推定規定 → 逆の意思明らかなら不適用:“I bequeath 1000＄to my daughter if she survives me”

(b) The issue of a deceased transferee do not take in the transferee’s place if the instrument

expresses a contrary intention or a substitute disposition.

A requirement that the initial transferee survive the transferor or survive for a specified

period of time after the death of the transferor constitutes a contrary intention.

問：死後, 妻をbeneficiaryとするtrustを作成。妻が死亡し, その後に夫が死亡

1. If a trust fails lack of a beneficiary, a resulting trust in favor of the settler or his successor is presumed → 夫の相続人にいく

2. Anti lapse is applied to kindred of settler or of the settler’s surviving spouse

→ 妻はkindredでないので適用ない。妻への遺贈は，妻死亡でlapse.

(兄弟はkindred of T, 兄弟への遺贈は先に兄弟が死ねば，その子らが引き継ぐ)

**5. Abatement**

普通はarises when there are insufficient funds to pay debts and devises in a will.

1. Reduction of a testamentary gift in order to pay some other gift that has some higher

priority or obligation.

2. Creditors generally get paid first before others, so after you pay them, then you give

everyone entitled to take less.

3. Testator is free to vary default rules. Can change order of abatement.

4. Probate Code § 21402. It lists the order of abatement as follows:   
(1) Property not disposed of by the instrument.  
(2) Residuary gifts.  
(3) General gifts to persons other than the transferor’s relatives.  
(4) General gifts to the transferor’s relatives.  
(5) Specific gifts to persons other than the transferor’s relatives.  
(6) Specific gifts to the transferor’s relatives.

**6. Exoneration**

CA view: Devisee takes property subject to the encumbrance. unless T’s will states specific gift is

to be exonerated. (コモンローでは遺言執行者が借金を支払う)

**Interstate Succession**

**1 SHARE**

**Share of surviving spouse:** (1) all CP, (2) all quasi-CP, (3) ⅓ ~ALL of SP

**① No other heirs 　　　 →all of SP**

**② One child, or if parents →1/2 of SP** (or issue of one dead child, or issue of parent = sibling)

**③ more than one child →1/3 of SP** (or one child and issue of one or more dead child)

例: 夫死亡，相続人妻と子が2人。

Husband’s SP was worth $90,000, and his share of CP was worth $100,000.

**→10万は妻にいく（妻は自己分のCP＋夫分CPを獲得 ＝ CPはすべて生存配偶者取得）**

**9万は妻＆子2人が3分の1ずつ取得　\*$90,000等3で割れる数字は妻3分の1のケースが多い.**

**Share of all others =** Remainder

**① Property will be divided in this order**

**1) issue, 2) parents, 3) issue of parents (siblings), 4) grandparents・・・**

1) Issue of the decedent (Children, Grandchildren, or great-grandchildren)

2) Decedent’s Parents (1 parent then all, 2 parents then split 50/50)

3) Decedent’s Siblings or their issue (Brother & Sisters / Niece & Nephew)

4) Grandparents →or issue of grandparents (Aunts, Uncles, Cousins)

5) Issue of a predeceased spouse (Step Kids)

6) Next of kin (3rd cousins, a person’s closest living blood relatives)

7) Parents of a predeceased spouse→ or their issue

→Escheat – If no one can take, then the deceased’s intestate estate escheats to the state.

② **Property Distribution for Unequal Kinship**  under section 240

**Whenever issue take by intestacy,** or if testamentary instrument does not specify how taken, **issue of Same Degree take per capita, issue of More Remote Degree take “per capita with representation.”**

the property shall be divided into as many equal shares as there are

1) living members of the nearest generation of issue then living,

and 2) deceased members of that generation who leave issue then living,

→① each living member of the nearest generation of issue then living receiving one share

and ② the share of each deceased member of that generation who leaves issue then living

being divided in the same manner among his or her then living issue.

　 A→子B→孫B1＆B2

　 　 →子C→孫C１　　⇒BCがAより先に死んでいれば1)の通りB1B2C1で３等分

Cだけ生きていれば1)2)①適用しＣが2分の1，②適用でB1B2が4分の1

※ If testamentary instrument does not specify how takenなら適用

　　　遺言が“I leave the house to A’s issue”でAの子が甲と乙で，乙が死亡と乙1, 乙2であれば，

per capita distributionを論じる。

**※ Half Bloods**

– Relatives who have only 1 common parent inherit the same as the whole blood.

ABが父母共通の兄弟，Cが母だけ共通の兄妹。A死亡時にBCが相続人であれば，相続分は同じ

**2 Advancements　＝特別受益 (intestate successionのみ，遺贈には適用無し)**

If a person dies intestate, gift to an heir by the decedent during his life time is treated as an

**advancement against that heir’s share,**

if there is a contemporaneous **writing** by the decedent or by the heir **indicating such intent,**

※ 日本法とは逆に書面で持戻しの意思表示がなされた場合のみに適用

Value – property is valued at the **FMV at the time the transferee came into possession.**

※ If the value is listed in the writing it is conclusive.

Survive – If beneficiary does not survive the decedent, the advancement will not be counted

against beneficiaries’ issues share.

※ In California, **there is a presumption against advancements.**

**3 相続人の確定**

**①Adoption** – Treated the same as natural children of the adopting parents.

Severs – Adoption severs the link between the natural parent and the child, UNLESS:

1) The adopted child and natural parent lived together at any time as

parent and child,

or 2) The adoption was by the spouse of the natural parent (stepmom) OR

after the death of either natural parent.

Equitable Adoption – Arises when the parties hold themselves out as parent and child.

Foster or Step Children

– In order for a person to inherit through or from a foster or step-parent, they

have to:

1) **Live with** that person throughout their life as a child

and 2) It is established by clear and convincing evidence that the stepparent or

foster parent **would have adopted but for a legal barrier.**

Ex: biological parent does not give consent to the adoption

※ A misunderstanding (thinking there was a legal barrier when there was not) is

not enough; there must be an actual legal barrier.

**②Non-Marital Children**

During – Child born during the domestic partnership is presumed to be the child of the non-

birthing domestic partner

Before – A parent child relationship is presumed to be established if a:

1) Domestic partnership is formed (or attempted to be form) in a lawful manner after

the child’s birth, and

2) i) The non-birthing domestic partner is named on the birth certificate; OR

ii) The non-birthing domestic partner makes a voluntary promise to pay child

support or is ordered to by a court.

**③Posthumous Children**

**=** A child **conceived during the lifetime of intestate or T**, but born after his death.

**⇒** Posthumous kids are deemed heirs of the intestate and beneficiary’s of T’s will.

　　 ※ intestate=名詞：無遺言死亡者

**Intestate Succession＆Willの共通規定**

**1. Simultaneous Death**: whether the beneficiary survived the decedent.

Uniform Simultaneous Death Act

　 – If the distribution of property is dependent on one person surviving another, and it

cannot be determined by clear and convincing evidence who survived whom, then

it is deemed the one did not survive the other.

例：Ａが友人に全財産を遺贈するとの遺言。Ａと友人が同時死亡 ⇒Ａの相続人にすべてが行く

1) Joint Tenants – If Joint Tenants die simultaneously, the tenancy is severed,

½ goes to A's estate and ½ goes to B's estate.

2) Community Property – If H & W die simultaneously, ½ of that property is distributed as if

the husband survived the wife, and the other ½ is distributed as if

the wife had survived the husband.

3) Life insurance policy – If insured and beneficiary die simultaneously the proceeds go to

alternative beneficiary. If not, proceeds are paid to insured's estate.

Intestate Successionだけの例外

– Where there’s no will as to the property, a person must prove 1) by clear and convincing

evidence 2) heir (or beneficiary) survived decedent by 120 hours

or, the heir is treated as though he predeceased the deceased (he gets skipped).

※ This section will not apply if the deceased’s property would escheat to the state.

**2. Disclaimer : 相続放棄**

**自由にできるのが原則**valid against creditors

※ must be filed within 9 months

※　　　estoppel if any benefit accepted

**Valid Trust**

**For a valid trust, there must be**

**1) a settlor with intent**

**2) a trust res**

**3) a trustee with duties**

**4) a definite beneficiary**

**5) a legal purpose**

3)→A court will not allow trust to fail solely because of the absence of trustee, and can appoint

trustee.

4)→OK, when the purpose of the trust is to serve a public benefit, even if the beneficiaries are

indefinite class of persons or the public in general.

**UTC 402. Requirements for creation.**

(1) A trust is created only if all of the following requirements are met:

(a) The settlor has capacity to create a trust.

(b) The settlor indicates an intention to create the trust.

  (c) The trust has a definite beneficiary or is:

      (A) A charitable trust; …(C) Honorable trust

(d) The trustee has duties to perform.

(e) The same person is not the sole trustee and sole beneficiary.

**UTC 404. Trust purposes.**

A trust may be created only to the extent the purposes of the trust are lawful, not contrary to

public policy and possible to achieve. A trust and its terms must be for the benefit of the

trust’s beneficiaries.

**Creation of Trust**

An express trust is created with the present manifestation of intent to create trust:

by (1) inter vivos transfer, (2) inter vivos declaration of trust, or (3) will (testamentary trust).

Express trusts can be either private or charitable.

**UTC 401. Methods of creating trust.**

(1) A trust may be created:

      (a) By transfer of property to another person as trustee during the settlor’s lifetime or by will …or

      (b) By declaration by the owner of property that the owner holds identifiable property as trustee;

**Private Express Trust**

A private express trust is created for the benefit of ascertainable beneficiaries.

**Charitable Trust**

A charitable trust is created for the benefit of an indefinite class of persons or the public in

general. There must be a charitable purpose.

種類 express trust = 普通のtrust

resulting trust = arises from presumed intention

constructive trust = do not depend on intention, equitable remedy

# 1. Private Express Trusts

**Private Express Trust**

=A **fiduciary relationship**

1) with respect to **property**

2) a) whereby one person, the **trustee**, holds **legal title** for the **benefit of another**,

b) **beneficiary**, who holds an **equitable interest**,

3) which arises out of a **manifestation of intent** to create it 4) for a **legal purpose**.

**1) Settlor Intent** 　　　　– There must be a **present manifestation of intent** to trust

(=to **convey property** for the **use and benefit of someone else**)

No magic words are necessary.

※Precatory words : precatory=嘆願の

Must use mandatory words, not precatory words (hope and desire).

But, precatory words + parol evidence may be sufficient.

Otherwise, “trustee” owns in fee simple.

※ 1000ドルを回収したらtrustにするはnot presentだからtrustにならない

**2) Property of the Trust**

– any **presently existing** interest in property that can be transferred can be

the corpus of a trust **※ illusory interests** cannot be the property of a trust 　×Future Profits / Expectancy / Debts (そもそも借金はnot property)

　future interestでも確定していてassignableであればOK

**Creation** **2 time frames – death and settlor’s lifetime**

**①**Testamentary Trust**Trust to take effect at settlor’s death**:

Must comply with probate code, i.e., be in will.

※ incorporated by reference or UTATAがよく適用

**②**Inter Vivos Trust **Trust to take effect during settlor’s lifetime**:

**1) Transfer in Trust**: a 3rd party is trustee.

For real property, S must **execute and deliver a deed** to trustee.

(actual, symbolic, or constructive; promise to deliver insufficient).

For personal property, S must **deliver property**(actual, symbolic, or constructive) to trustee.

**2) Declaration in Trust**: S is trustee.

For real property, there **must be a writing** satisfying SOF indicating S is trustee.

For personal property, **must be present manifestation** of intent.

※evidence that the settlor segregated the property and kept separate account

books may establish the manifestation of intent.

**3)Trustee 　　　　　　–** A trust must have a trustee, but court can appoint trustee.

**(**court will not allow trust to **fail** solely because there was no trustee or the

trustee refuses to serve.)

・Until trustee is appointed → settlor will hold legal title

・Trustee Cannot be the sole Beneficiary.

**∵** There trustee owes fiduciary duties to someone other than themselves.

**※** 辞任は裁判所の許可が必要とするのがコモンロー（UTCは通知でOK）

**※** 就任拒絶は自由 (放棄＝disclaimerできる)

夫婦をtrusteeとして指名し, 離婚により妻だけが財産を管理すれば, 夫は

fiduciary dutyを負わない

But a trustee’s acceptance of a trust is presumed. Once accepted, the trustee

can no longer disclaim. 離婚しても責任を逃れられない

**–** A trustee must have duties, a passive trust where the trustee has no duties

will fail and the beneficiaries will take legal title immediately.

(the court will imply the duties)

・未成年者は義務を負えないのでなれない。その場合も裁判所が代わりを選任。

**4) Beneficiary** – Any **ascertainable person** or **group** of people can be a beneficiary of a

private express trust. (Corporations ok)

例外: charitable trust, honorable trust

**※ Unincorporated** associations – CL (No) ∵no capacity to hold title

**※ Class gifts** are valid

– but watch out for a class gift that is **too big or vague** that **can’t be**

**administered**. (i.e. to all residents of the state of CA)

→However, it may be a charitable trust. Also be aware of RAP problems.

　 UTC：受益者特定までの期間が21年を超えることはできない。

違反すれば → resulting trust is decreed

例:「病気になった時に一番親切だった人」を受益者にするtrust

→ charitableでないので無効, resulting trust is decreed.

**5)Legal Purpose**–Trust may be established for **ANY legal purpose** that is NOT against

**public policy.**

**Illegality at creation**

– The court will try to excise illicit condition (excise the bad from the

good).

If you can → the trust will stand,

if not　 → the court will either

1) **Invalidate** the trust at its **inception**, or

(settlor remains owner of property)

2) Allow **trustee** to keep property for **himself**.

(as punishment to settlor, unclean hands.)

例：離婚条件信託なら条件無しに，執行逃れ目的信託なら無効とする。

**Illegality after creation**

– a resulting trust is decreed (trustee must transfer the property back to

the S if alive, if not, to the S’s estate.).

**その他の信託**

Semi-Secret Trust – Trustee named but beneficiaries are secret.

: when will makes a gift to a person to hold as trustee but does not name the beneficiary.

→ **Invalid:** These trusts are **unenforceable** and property is returned to settlor via

**resulting trust**. **(**for the benefit of testaor’s interest**)**

※ Secret Trust : will makes a gift absolute on face, but was in fact made in reliance on the beneficiary’s promise

to hold the property in trust for another.

→**Valid:** Trust is **enforceable** by **constructive** trust for the beneficiary.

Parol evidence is admissible.

∵ そう考えないとgiftになりtrusteeが不当に利得する

Revocable Trust – Settlor retains the right to amend or revoke during his lifetime.

# 2. Various Trusts

**1. Charitable Trusts**

Trust 1) for a **charitable purpose** 2) that benefits an indefinite class of persons or the public in

general.

1) Charitable Purposes – Must serve a **public benefit** (i.e. medicine, education, science, research)

2) Beneficiary – Beneficiary must be indefinite.

An individual may receive incidental benefit but the focus is on society.

Indefiniteは受益者の問題，受託者ではない

　　　　　　To Zoo for care for elephantsであれば動物園が受託者, 象は受益者ではなく受益者はい

なく，あえていうならthe public in generalが受益者。

　　　　　例：×目的限定せず政党を受益者　 ○ 特定の政治目標実現

　　　　　　　× A学校のchildrenを受益者 ○ A学校のneedy children

Creation – same way as a private express trust

(1) manifestation of trust intent, which can be done

(a) at T’s death by will

or (b) during settlor’s lifetime a) by declaration of trust or b) by transfer in trust,

(2) of a presently existing interest in property that can be transferred

(3) for **a legal charitable purpose**.

Effect– can endure forever ∵RAP doesn’t apply to charitable trusts

**Cy pre Doctrine** – (“as close as possible”)

1) when the charitable purpose becomes **impracticable (unlawful, wasteful)**

2) if the settlor has a **general charitable purpose ×specific charitable purpose**

　→ the **court** will select an alternative under the Cy pre Doctrine,

which means, **as nearly as possible.**

例 (save extinct birds > save the dodo bird),

・Only the court can invoke Cy Pre – trustee may petition the court.

・If court finds that the settlor had a **specific intent** – the property goes back to settlor.

**2. Honorary trusts**

A trust that has no ascertainable beneficiary and confers no substantial benefit to society.

例: to care for my animals, to maintain his grave.

→ Courts uphold honorary trust so long as Trustee is willing to carry out settlor’s wishes

if he refuses, then trust fails and resulting trust is imposed. (back to settlor or settlor’s estate.)

RAP – Because there is no measuring life, they always violate RAP.

Courts have 2 options – 1) strike at inception (CL) or 2) allow for 21 years (UTC).

3.**Totten Trust** – Bank account where the beneficiary takes whatever is left at settlor’s death.

・Basically just a will substitute – no fiduciary duty, can withdraw or changing name.

・Can become a private express trust if depositor tells beneficiary that they have

created “**this trust for you**” or something to that effect.

**特殊なトラスト**

**A. Resulting Trusts**

定義: A **resulting trust** is **implied in fact** trust based upon the **presumed intent of**

**parties** when a **trust fails**.

効果: Returned to Settlor

–When resulting trust is **decreed by the court**, the resulting trustee will transfer the property 1) to **settlor** if the settlor is alive, 2) and if he is not, then to the **settlor’s estate**.

Arises when

(1) Private Express Trust ends by its own terms, and no provision for aftermath,

(2) Private Express Trust fails for lack of beneficiary or illegality;

(3) there is excess corpus (more than enough money to achieve purpose) in private express trust,

(4) Charitable Trust ends because of impossibility/impracticability, and cy pres unavailable,

(5) purchase money resulting trust,

or (6) semi-secret trust.

Purchase Money Resulting Trust

: A pays B to transfer title to C, C is presumed to be trustee for A, unless C is closely related to A, in which gift is presumed. ※ 典型はＣからお金を借りたＡが土地購入

when a person purchases property, but instructs the seller to transfer the title to a different person. It generally arises as a matter of course when an item of property is purchased using the money of another person. As a trust, the buyer becomes the beneficiary, while the person holding the title is considered the trustee. The trustee will eventually transfer title to the buyer, after some time or after the fulfillment of specified conditions.

**B. Constructive Trusts**: – Not really a trust but a **remedy** to **prevent fraud** or **unjust enrichment**

Rule – When court decrees a **constructive trust**, the trustee (i.e. wrongdoer) must transfer the

property to the intended beneficiary as determined by the court. (i.e. **disgorge** wrongdoer)

Arises in 4 situations

1. When trustee of a trust makes a profit because of **self-dealing**

2. There is **fraud in the inducement** or **undue influence** (Wills or Trusts)

3. **Secret trusts** – will on its face makes a gift outright to A, but gift is given on basis

of an oral promise to use property for benefit of B

4. **Oral real estate trust** – secret trust for real property.

SOF is a defense unless:

a) **Fiduciary relationship** exists between settlor and trustee, or

b) There was **detrimental reliance** by the intended beneficiary.

# 3. Restrictive Trust Provisions

**Spendthrift Provision:** Provision that prevents beneficiary from transferring, and creditors

from attaching, his right to future payments.

UTC:§502 spendthrift provision is valid only if it restrains both voluntary and involuntary transfer

of the beneficiary’s interest. A word of “spendthrift trust” is sufficient to restrain both.

**前提：Voluntary Alienation** : Absent restrictions by statute or by the trust, a beneficiary may

freely transfer his interest in the trust.

**Involuntary Alienation**: Absent restrictions by statute or by the trust, an insolvent trust

beneficiary’s creditors may attach his right to future payments.

×involuntary alienationだけ禁止するprovisionは無効

**※ Settlor creating for himself**

**As to involuntary alienation –** no jurisdiction recognizes self-settled spendthrift trust

so settlor can’t insulate himself from his own creditors.

**As to voluntary alienation –** split of authority.

**1. Support Provision　 :** Provision that allows trustee to pay to beneficiary

only as necessary for his health, support, maintenance, or education.

→ Same rules as Spendthrift Provision.

**2.　　　Discretionary Provision　　　:** Provision that gives trustee sole and absolute discretion to

determine when and what, if ever and anything, to give to beneficiary.

**Voluntary Alienation:** Beneficiary cannot transfer right because he may not get anything. However, if he does, transferee steps into beneficiary’s shoes, and if trustee decides to pay, he must pay transferee**.**

**Involuntary Alienation:** Creditors can’t attach beneficiary’s right, because there might not

be any. But, if trustee has notice of debt and creditor’s judgment

against beneficiary, and decides to pay, he must pay the creditors.

# 4. Trustee Powers and Duties

**1. Trustee powers :** Trustee has 1) enumerated powers and

2) implied powers – anything helpful to carry out the trust.

**2. Trustee duties owed to beneficiaries**

**Trustee has the fiduciary duties (以下は必要に応じて論じる)**

①Duty of loyalty ②to invest ③to earmark ④to segregate,

⑤not to delegate ⑥to account ⑦of due care

※　　　　　beneficiaryが2名以上いれば**duty to act impartially between beneficiaries**も負う

**UTC 803. Impartiality.** If a trust has two or more beneficiaries, the trustee shall act

impartially in investing, managing and distributing the trust property, giving due

regard to the beneficiaries’ respective interests.

※ 妻の生存中に収益を妻に配分し, 妻の死亡後は残余権をすべて子孫に引き渡す信託で特

に問題に（incomeとremainderの配分）

※ **duty to administer the trust in accordance with terms**は当然にある

**UTC 801. Duty to administer trust.** (1) Upon acceptance of a trusteeship, the

trustee shall administer the trust in good faith, in accordance with its terms and

purposes and the interests of the beneficiaries,

※ revocable trustではsettlerにdutyを負う

**Duty of Loyalty**

– Trustee owes a fiduciary duty to administer the trust **solely** in the **interest of the**

**beneficiaries**, having no other consideration in mind.

**UTC 802. Duty of loyalty.** (1) A trustee shall administer the trust solely in the interests of

the beneficiaries.

**1) Self-dealing** –Trustee cannot deal with the trust as or on behalf of an adverse party

= cannot buy or sell trust assets for the trustee or the trustee’s

spouse. A trustee must also not borrow trust funds.

Consequences

1) Ratify the Transaction – Waive the breach if there is a gain.

2) Surcharge the Trustee – If there is a **loss** the trustee is surcharged

3) Trace and Recover Property

– If trustee makes **personal profit,** you can get a

**constructive trust** unless there is a BFP without notice.

**2) Conflict of Interest** – Not acting in the best interest of the beneficiaries.

Consequences – **Ratification** and **Surcharge**.

**Duty of Care** – trustee must act as a **reasonably prudent person** dealing with his own affairs.

**Duty to Invest** – SPLIT of authority – 3 rules of the duty to invest – discuss all 3

**① State Statutory Lists** = legal list rule

– Some states have lists which trustee must follow in the absence of directions.

Trustee cannot blindly follow the list to avoid liability he must exercise reasonable care, skill, and caution in investing. 　EX. First mortgages, government securities.

**② Common Law Prudent Person Test** ＝ court list rule

– requires trustee to act as **reasonably prudent person** investing his own

property, trying to maximize income while preserving corpus.

(If trustee holds himself out as having greater skill, he is held to a higher standard.)

・Each **individual investment is scrutinized**

・Good investments – state list, blue chip stocks, mutual funds might be ok.

**③ Uniform Prudent Investor Act** – trustee must invest as a **“prudent investor”**

・Each individual investment is NOT scrutinized, instead performance is measured

in the **context of the entire trust portfolio**.

・May invest in ANY type of investment as long as it is reasonably prudent and prudence is determined at the time of the trustee’s decision.

   UTC 755 **Prudent investor rule.**

(1) A trustee shall invest and manage trust assets as a prudent investor

would…. In satisfying this standard, the trustee shall exercise

reasonable care, skill and caution.

(2) A trustee’s investment and management decisions respecting

individual assets are not evaluated in isolation, but in the context of the

trust portfolio….

GENERAL rules regarding duty to invest

Diversify – Under any standard, trustee has **a duty to diversify the investment**.

**Duty to Earmark** – trustee must **label trust property** as trust property.

CL – trustee is personally liable.

ML– trustee is only personally liable if loss was **caused by failure to earmark**.

**Duty to segregate (Not to Commingle)**

Trustee may NOT **Comingle** personal funds with trust funds.

→ If breach, then trustee held liable for the loss.

**Duty Not to Delegate**

– Trustee may **only** delegate acts that would be **unreasonable** to require her to perform personally. She may never delegate the **entire administration** of the trust.

CL　　　　　– trustee **cannot delegate decision** making authority to advisors.

ML – May delegate investment and managements decisions but must act prudently in (1) **selecting** the agent, (2) establishing the **scope and terms** of the delegation, and (3) **periodically reviewing** the agents actions.

UTC 807. Delegation by trustee.

(1) A trustee may delegate duties and powers that a prudent trustee of

comparable skills could properly delegate under the circumstances.

The trustee shall exercise reasonable care…

(a) Selecting an agent;

(b) Establishing the scope and terms of the delegation…

(c) Periodically reviewing the agent’s actions…

Co-trustee: 基本的に片方に職務をdelegateできない

コモンロー unanimous decisionが必要

　 UTC§703 Co-trustees who are unable to reach a unanimous decision may act by majority decision.

**Duty to Account** – requires trustee on a **regular basis** to give beneficiaries a statement

of income and expenses of the trust.

→ If breach, Beneficiaries can file an action for **accounting**.

※ 第三者: 原則責任を負わない。ただし

The person who knowingly participated in a breach of trust is liable for a resulting loss.

**２ Remedies of beneficiaries for breach of duty or duties**

**A trustee is liable to the trust estate for losses resulting from the breach and for any profit that would have accrued but for the breach, as well as any profit made by the trustee as a result of the breach.**

1) Surcharge (Damagesのエクイティー上の表現)

2) Constructive trust

3) Tracing and Equitable Lien / Constructive Trust on property

4) Ratify the transaction (if good for beneficiary) or

5) Remove the trustee

※ equityなのでpunitive damagesは不可がコモンロー

**３ Liability of Trustee to 3rd persons** (liability in contract and tort)

　CL – **受託者が責任**

受託者は代理人でない以上受託者が責任を負い，信託財産は引き当てにならない。

受託者として行為していることの明示だけでは受託者が責任を逃れるのに足りない。

　UTC – **信託財産が責任**

受託者は権限内でした契約の契約責任，行為の不法行為責任を負わない。

一方で信託財産が引き当てになる。(信託であることを開示していれば)

　　　　 撤回可能信託ではsettlor’s creditorは信託財産を引き当てにできる。

**Liability in Contract**

CL – trustee is **sued in his personal capacity** and trustee can get **indemnification** from

trust assets if trustee acted **within his powers** and was **not personally at fault**.

ML– Unless otherwise provided for in the contract, a trustee is NOT **personally liable** for

contracts entered into in a fiduciary capacity **unless** the trustee did not disclose that

they are entering into a contract in a fiduciary capacity.

**Liability in Tort**

CL – Trustee is sued in his **personal capacity** and trustee can seek **indemnification** from

trust assets if trustee was **without personal fault**.

ML – Trustee is sued in his **individual capacity** and is **personally liable** for torts ONLY IF

trustee is **personally at fault**.

# 5. Modification and Termination of Trusts

1. **Modification by settlor**majority**は３項と同様に規律**

1) S can modify trust if S expressly reserves the power. (コモンロー，除くtotten trust）

2) S also has power to modify if S has power to revoke. (UTC, CA)

1. **Modification by the court**

1) Court can modify for charitable trusts using cy pres.

2) Court can modify for charitable or private express trusts using its deviation power.

**Deviation power**: Court changes administrative or management provisions.

(cannot change the beneficiaries)

When 1) Unforeseen circumstances on the part of the settlor AND

2) Necessity to preserve the trust. (i.e. trust will go broke without deviation)

1. **Termination of revocable trusts**

Majority – To retain power to revoke, settlor must **expressly reserve** **power** in the trust

Minority – Settlor has power to revoke **unless** trust is **expressly made irrevocable.**

**※ revocable trusts**は遺言代用信託としてよく利用 (様式性・probateが不要)

**※** In Ca, a revocable inter vivos trust becomes irrevocable when a settlor dies.

1. **Termination of irrevocable trusts** 3 ways to terminate a trust prematurely

(before times set for termination in the trust instrument).

**1) Settlor and ALL beneficiaries agree to terminate.** (Including contingent remainders)

**2) All beneficiaries** agree to terminate or modify and it would NOT be contrary to a

**material purpose** of the settlor. 例:受益者を財産から遠ざける目的，長期的扶養目的

　 ※ potential beneficiariesの同意も必要, anti-lapse statuteなら受益者のunborn childrenまで含む

**3) Changed Circumstances** ※ UTCルール。コモンローは要件がそれより厳しい

– The court may modify or terminate a trust (upon petition by the trustee or beneficiary)

if (1) **circumstances not anticipated by Settlor** occurred, and

(2) modification and termination will further the purpose of trust.

例：株を売ってはいけないと規定，株が大暴落を始めた(N.Y. 1931)

**4) Operation of Law** –completed, impossible, illegal purpose.

Statute of Uses – Trustee has no active duty, and just holds title. Thus, beneficiaries

get legal title by operation of law and the trust terminates. (not all

jurisdiction) 例:To A to the use of B⇒単にBに贈与とする。

# 6. Income and Principal

The **Uniform Principal and Income Act** (**UPAIA**)

信託におけるthose that have an interest in the entity's income (income beneficiaries) and those having an interest in the principal (principal beneficiaries).とのallocation

Life Tenant = income beneficiary

Life Tenant Gets – Cash Dividends, Interest Income, Net Business Income.

Life Tenant’s Pays for 　　　 – Interest on Loan indebtedness, Taxes, Minor Repairs.

Remaindermen = principal beneficiary

Remaindermen Gets 　　– Stock Dividends / Splits, Net proceeds on Sale of Trust Asset.

Remaindermen Pays for – Principal on Loan, Major Repairs or Improvements.

**Adjustment Power of Trustee**

–　　　　Trustee can **disregard** above stated rules regarding allocation if a different allocation is

**necessary** to administer trust fairly.

※　妻の生存中に収益を妻に配分し，妻の死亡後は残余権をすべて子孫に引き渡す信託はよ

くあるが，incomeとremainderの配分が問題になる。伝統的信託では. 土地の果実だけが

収益と考えれば問題はないが，金融資産が信託財産であると社内留保と配当をどう配分す

るかなどが悩ましい。UPAIAは諸般の事情を考慮して，受託者の調整権限を認める。